IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 29790

MANEGABE CHEBEA ALLY

Petitioner and Appellee,

v.

DARIN YOUNG, Warden, South Dakota State Penitentiary,

Respondent and Appellant.

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

THE HONORABLE DOUGLAS E. HOFFMAN
Circuit Court Judge

APPELLANT'S BRIEF

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Notice of Appeal filed October 14, 2021

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PRELIMINARY STATEMENT

A jury found Manegabe Chebea Ally guilty on four counts of First-Degree Manslaughter. Ally sought habeas corpus relief, which was granted. Respondent now appeals.

The State of South Dakota is referred to as "the State." The Honorable Mark E. Salter presided over Ally's criminal trial and is referred to as "the criminal court." The Honorable Douglas E. Hoffman presided over Ally's habeas proceedings and is referred to as "the habeas court." All other individuals are referred to by name or initials. Relevant documents are referred to as follows:

Settled Record (Minnehaha County Civil File No. 16-824) . SR

Minnehaha County Criminal File No. 12-8143[1]..... CF

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[1] This file is Ally's underlying criminal case. The habeas court took judicial notice of that criminal file. Appendix:025.

Trial Transcript Volume 1 (February 18, 2014) JT1

Trial Transcript Volume 3 (February 20, 2014) JT3

Trial Transcript Volume 4 (February 21, 2014) JT4

Trial Transcript Volume 5 (February 24, 2014) JT5

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JURISDICTIONAL STATEMENT

The habeas court entered an Amended Judgment and Order Granting Habeas Corpus Relief on September 9, 2021. SR:1186-87. Respondent timely filed a Motion for Certificate of Probable Cause on September 13, 2021. SR:1188-90; SDCL 21-27-18.1. On September 17, 2021, the habeas court granted a certificate of probable cause on whether Ally received ineffective assistance of counsel from his trial

attorneys. SR:1206-07. Respondent timely filed his Notice of Appeal on October 14, 2021. SR:1210-11; SDCL 21-27-18.1. Thus, this Court has jurisdiction to hear this appeal under SDCL 21-27-18.1.

STATEMENT OF LEGAL ISSUE AND AUTHORITIES

WHETHER THE HABEAS COURT ERRED WHEN IT DETERMINED ALLY RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL?

The habeas court determined that Ally's attorneys provided ineffective assistance because of their opening statement, their failure to play Ally's interview videos for the jury, their handling of the defense's medical expert's testimony, and when they did not disclose a video shared with the defense's biomedical engineering expert.

Hopfinger v. Leapley, 511 N.W.2d 845 (S.D. 1994)

Jameson v. State, 125 S.W.3d 885 (Mo. Ct. App. 2004)

Randall v. Weber, 2002 S.D. 149, 655 N.W.2d 92(per curiam)

Smith v. Spisak, 558 U.S. 139 (2010)

STATEMENT OF THE CASE

A. Ally's criminal proceedings.

Ally was indicted for First-Degree Murder, Second-Degree Murder, and First-Degree Manslaughter in the death of sixteen-month-old M.K. CF:14-16.

Ally's attorneys, Traci Smith and Kenny Jacobs, tried to suppress his interviews with law enforcement, arguing Ally wasn't properly Mirandized and his statements were involuntary. CF:79-80. They recognized that Ally consistently denied hurting M.K. CF:328-29.

Yet they wanted to suppress the entire interviews—even the exculpatory portions—because the State "will try to make it out to be inconsistent. And it's one more person with a badge for them to present to the jury and one more time with our client sitting in an interrogation room being questioned by authorities." CF:329. Smith and Jacobs also wanted the interviews suppressed because they wanted the jury to hear from Ally about what happened to M.K., not Detective Jon Carda. CF:329. The criminal court denied the suppression motion. CF:628.

Smith and Jacobs then moved to keep parts of Ally's interviews from being played for the jury. CF:135-37. They wanted to keep the State from referencing Detective Carda's questions about Ally being a refugee, leaving family in the Congo, and the "tenets of the Muslim religion about living with an unmarried woman." CF:135-37, 268. They also wanted certain medical information redacted because Detective Carda wasn't qualified to testify about that information. CF:629-54. Some of their requested redactions were granted, others were denied. *See* CF:629-54.

At trial, the defense's theory and themes were:

- M.K. died from an accidental fall (EH1:29);
- Ally consistently told the police what happened (JT8:45, 55);
- The State tried "to make inconsistences where there aren't any." (JT8:45, 55);
- The police conducted a sloppy investigation (JT8:49-50, 60); and
- The State blamed Ally just because he was the last person with M.K. before he died (JT8:67).

The jury found Ally guilty on four counts of First-Degree Manslaughter, but not guilty on First- and Second-Degree Murder. CF:448-50.

Ally appealed. CF:710. Smith represented Ally and alleged three errors:

- The criminal court inappropriately denied Ally's motion to suppress;
- The criminal court inappropriately denied Ally's motion for judgment of acquittal; and
- The criminal court denied Ally a fair trial by excluding his biomechanical engineering expert from the courtroom during medical testimony.

Appendix:156-57. Relevant here, Smith challenged the criminal court's refusal to suppress Ally's interviews by claiming they "were highly prejudicial and formed the crux of the investigation that would eventually lead to his arrest." Appendix:178. Smith also reiterated the trial theme that law enforcement conducted a sloppy investigation and jumped to conclusions to blame Ally for M.K.'s death. Appendix:258.

This Court summarily affirmed Ally's convictions.

B. Ally's habeas proceedings.

Ally sought habeas relief alleging Smith and Jacobs provided ineffective assistance of counsel during trial and Smith provided ineffective assistance on appeal. SR:5-13.

Mark Kadi was appointed to represent Ally. SR:14-16. Mr. Kadi filed an Amended Application for Writ of Habeas Corpus that alleged Ally received ineffective assistance from Smith and Jacobs. SR:27-39.

After four evidentiary hearings, Ally moved to amend his application again, this time to add a claim that Smith and Jacobs were ineffective because they didn't play his full interview videos for the jury. SR:848-56. Not surprisingly, the habeas court granted Ally's motion to amend because it raised the video claim sua sponte while reviewing Ally's underlying criminal file. Appendix:052-061; MH:4-8; SR:890. Indeed, the court directed Mr. Kadi "to evaluate whether . . . defense counsel's decision to exclude [the videos] . . . should be included . . . in the claim of ineffective assistance. . . ." Appendix:053.

Ultimately, the habeas court determined Ally received ineffective assistance in four respects:

- Jacobs oversold the defense's theory during his opening statement;
- Smith and Jacobs failed to play Ally's full interviews for the jury;
- Smith and Jacobs didn't give the defense's medical expert the opportunity "she needed to neutralize [the State's medical expert's] rebuttal testimony[;]" and
- Smith and Jacobs failed to disclose a video shared with the defense's biomedical engineering expert.

Appendix:040-046.

STATEMENT OF FACTS

A. "When I left him, he was all right"

Ally fled the war-torn Democratic Republic of Congo when he was twelve. JT7:49. He lived in a Tanzanian refugee camp for ten years before immigrating to America in 2010. JT7:49-50. Ally moved to Sioux Falls after he met K.K. JT7:50-51. He moved in with K.K. and

her five-year-old daughter, M.C.K., and sixteen-month-old son, M.K. CF:661; JT4:26; JT7:51-52. Ally took care of the children while K.K. worked. JT4:28; JT7:52.

On Christmas Eve 2012, M.K. "was all right" when K.K. left for work. JT4:29. But things took a drastic turn that afternoon.

The children napped after Ally made lunch. JT7:56-57. Ally told law enforcement that while the children slept, he did dishes and cleaned the kitchen. JT4:151. Ally claimed that while he was doing dishes, he heard M.K. cry and went to check on him. JT4:151; JT7:58-59. According to Ally, he found M.K. on the bedroom floor with blood coming out of his mouth and he wasn't breathing. JT4:151; JT7:61.

B. "There was something wrong with the baby"

As Nicole McKenzie, K.K. and Ally's neighbor, headed back to work, she saw Ally pacing the hallway before going into his apartment. JT4:44-46, 51. She thought he looked panicked, and went to see if he needed help. JT4:46.

When McKenzie entered the apartment, Ally told her "there was something wrong with the baby." JT4:47. McKenzie found M.K. lying on the bedroom floor "a couple of feet from the bed[,]" with his head "near the rug." JT4:48-49, 52. She also figured out that Ally was on the phone with 911, so she grabbed it and talked to the dispatcher. JT4:47. The dispatcher asked McKenzie to check for vomit in M.K.'s

mouth; she saw neither vomit nor blood. JT4:47. McKenzie also performed CPR on M.K. JT4:47.

C. "It didn't look like anything was in the process of being cleaned"

Because of Ally's 911 call, firefighters, police officers, and paramedics responded to his apartment for a child that fell out of bed. JT4:58, 106, 125. When they got to the apartment, M.K. had no pulse and he wasn't breathing. JT4:97. Firefighter Michael Wilson did CPR for over a minute before M.K. "regained a pulse. . . ." JT4:97.

Paramedic Katie Kruger intubated M.K., but she had to suction out his airway first because it was filled with vomit. JT4:113. Kruger didn't see any blood around M.K.'s mouth. JT4:114.

Firefighters and police officers noticed Ally was acting odd: He didn't show "the typical anxiety that follows having a child hurt" and he was "very calm, emotionless." JT4:60, 152. Ally told Officer Benjamin Statema that he was doing dishes when he heard M.K. cry and he found M.K. on the bedroom floor. JT4:151. Officer Statema questioned this story because "[e]verything was very clean and orderly. It didn't look like anything was in the process of being cleaned in the kitchen at that time." JT4:151; CFEx:14.

D. "He was . . . brain dead when he arrived to us"

When M.K. got to the Emergency Room, doctors took a CT scan. JT6:20. It revealed that M.K. had "a large, depressed skull fracture on

the left side" of his head. JT6:20. He also had "severe . . . swelling of the brain." JT6:21.

Dr. Mina Hafzalah determined M.K. was brain dead. JT6:21-23. She also determined M.K.'s head injury caused a blood clotting disorder, he had internal bleeding, and his lungs were full of fluid. JT6:38-39.

Despite M.K.'s dire condition, doctors tried to give him "a chance. . . ." JT6:22. They used an "Epinephrine drip to help support his heart rate and blood pressure." JT6:20. They also gave him drugs that were the equivalent of receiving twenty-four hours of CPR. JT6:25. But M.K. lost his pulse eight times. JT6:20. He fought for over twenty-four hours, but "his heart decided to give up on its own." JT6:24-25.

Sixteen-month-old M.K. died on Christmas. JT6:24.

As doctors treated M.K., they questioned Ally's story that M.K. fell out of bed. JT6:26-28. For example, Dr. Hafzalah believed M.K.'s injuries were "100 percent" inconsistent with a fall from a bed. JT6:26-28. She believed M.K. suffered "[s]ignificant nonaccidental trauma to the head. . . ." JT6:28.

E. "I don't understand how this accident could happen, but it did"

Dr. Hafzalah reported her concerns about M.K.'s injuries to the police officers at the ER. JT6:26-27.

Detective Carda spoke with Dr. Hafzalah, Dr. Nancy Free, and the officers that responded to Ally's 911 call. JT5:24. Detective Carda also

asked the crime lab to document Ally's apartment. JT5:24. They took photos and measurements and created a crime scene drawing. JT4:169-70; JT5:4, 8; CFEx:12.

Detective Carda interviewed Ally at the police department. JT5:25-27. Ally confirmed he watched the children while K.K. worked. JT5:28-29. He said the children napped after he made them lunch. JT5:29. And when he went to wake up M.C.K., he heard M.K. cry and found him on the bedroom floor. JT5:29. After the interview, an officer gave Ally a ride to his apartment. JT4:135.

Two days later, after Ally left a message saying he wanted to talk, Detective Carda interviewed him a second time. JT5:30-31. Ally said M.K. must have fell out of bed. JT5:35. He also said, "I don't know how this accident could happen, but it did. The baby fall down. I just don't understand it." CF:632. After the interview, Ally left the police department. JT5:36.

Detective Carda interviewed Ally a third time after Ally was arrested for killing M.K. JT5:36-37. Ally again said he didn't know how M.K. had been hurt. JT5:38. He also rejected all of Detective Carda's alternative theories of what happened. JT5:54.[2]

[2] Translators helped with all three interviews because English is not Ally's native language. CF:237, 246, 249, 280.

F. "This is not a simple fall from a bed on to the floor"

Dr. Kenneth Snell performed M.K.'s autopsy. JT5:78. Dr. Snell determined there were at least *four* impact points on M.K.'s head:

- M.K.'s left eye was bruised and his right eye was swollen (CFEx:23);
- M.K. had three abrasions above his right ear (CFEx:24);
- M.K. had a large bruise on the back of his head (CFEx:26); and
- M.K. had a bruise behind his left ear and an abrasion above that ear (CFEx:25).

JT5:86-88, 138.

Dr. Snell found a separate subgaleal hemorrhage[3] for each of the external injuries he observed. JT5:89; CFEx:27-30. Underneath the hemorrhage behind M.K.'s left ear was a depressed skull fracture that "crosse[d] three bones, two sets of sutures."[4] JT5:103-05; CFEx:31, 32. A depressed skull fracture is caused by a strike from an object—like a fist—or a strike on a point—like the corner of a table. JT5:106, 128-29. A fall onto a flat floor couldn't have caused a depressed skull fracture, that would cause a linear skull fracture. JT5:108, 110.

Dr. Snell also found subdural and subarachnoid hemorrhaging on both sides of M.K.'s brain.[5] JT5:110-11; CFEx:33. But these hemorrhages "do not represent points of impact." JT5:111.

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[3] A subgaleal hemorrhage is a hemorrhage below the scalp. JT5:89.
[4] "A suture is where two bones come together." JT5:104.
[5] A subdural hemorrhage is bleeding under the membrane that covers the brain. JT5:110. A subarachnoid hemorrhage is bleeding that fills the valleys in the brain. JT5:111.

Based on M.K.'s separate subgaleal hemorrhages and skull fracture, Dr. Snell determined his cause of death was "blunt force injury to the head consistent with an assault." JT5:127.

G. "That's defying gravity"

Ally's medical expert, Dr. Janice Ophoven, disagreed with Dr. Snell. Dr. Ophoven stated that M.K.'s subgaleal hemorrhages were caused by his clotting disorder and the continued bleeding of his skull fracture. JT6:76, 87. She said gravity caused the blood to spread throughout his scalp. JT6:76-79. She also said the swelling and bruising to M.K.'s eyes were caused by fluid buildup, not a separate impact. JT6:79.

Ultimately, Dr. Ophoven "would have diagnosed the manner of death as undetermined, meaning [she didn't] have sufficient information to exclude accident as the manner or circumstance of death." JT6:90.

On rebuttal, Dr. Snell agreed that if a person's ability to clot is impaired, a subgaleal hemorrhage can expand. JT7:90. But he disagreed that the subgaleal hemorrhages all over M.K.'s head were because of his skull fracture. JT7:90. If gravity caused that hemorrhage to expand, it would pool at the back of the head, which M.K. had. JT7:90. But that blood would have to "defy[] gravity" to expand to the front and sides of the head, where M.K. also had hemorrhages. JT7:90. Dr. Snell also said the bruising to M.K.'s left eye wasn't caused by gravity forcing an expanding hemorrhage into those

tissues. JT7:92-93. If gravity caused that blood to expand into those tissues, "it would seep into both eyes equally, not just one eye." JT7:93.

ARGUMENT

THE HABEAS COURT ERRED WHEN IT DETERMINED ALLY RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of review.

Ineffective assistance of counsel presents a mixed question of law and facts. *Reay v. Young*, 2019 S.D. 63, ¶13, 936 N.W.2d 117, 120. This Court reviews the habeas court's "decision on the constitutional issue de novo and its findings of fact for clear error." *Id.* And it "'may substitute its own judgment for that of the [habeas] court as to whether defense counsel's actions or inactions constituted ineffective assistance of counsel.'" *Engesser v. Dooley*, 2008 S.D. 124, ¶10, 759 N.W.2d 309, 313(quoting *Baldridge v. Weber*, 2008 S.D. 14, ¶21, 746 N.W.2d 12, 17).

B. The well-settled law of ineffective assistance.

To prevail on his claims of ineffective assistance, Ally must show Smith and Jacobs provided deficient performance. *Reay*, 2019 S.D. 63, ¶13(quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). He must also show that those "'errors were so serious'" that he was deprived of a *fair trial*. *Id.*

Yet important limits exist because a habeas action is a collateral attack on a criminal judgment. *Piper v. Young*, 2019 S.D. 65, ¶21, 936

N.W.2d 793, 803. The five most important limits are:

- Counsel is presumed to be competent (*Reay*, 2019 S.D. 63, ¶14);
- Counsel is presumed to have "'made all significant decisions in the exercise of reasonable professional judgment.'" (*Engesser*, 2008 S.D. 124, ¶11(quoting *Strickland*, 466 U.S. at 690));
- It's presumed that counsel's "'challenged action might be considered sound trial strategy.'" (*State v. Chipps*, 2016 S.D. 8, ¶17, 874 N.W.2d 475, 482(quoting *McDonough v. Weber*, 2015 S.D. 1, ¶22, 859 N.W.2d 26, 37));
- Counsel's performance must be viewed "'from counsel's perspective at the time [of trial].'" (*Reay*, 2019 S.D. 63, ¶14(quoting *Strickland*, 466 U.S. at 689)); and
- The courts cannot play "Monday morning quarterback" when reviewing counsel's performance (*Engesser*, 2008 S.D. 124, ¶14).

These limitations must be respected because it's "'all too tempting for a defendant to second-guess counsel's assistance after conviction . . . and it is all too easy for a court . . . to conclude that a particular act or omission of counsel was unreasonable.'" *Engesser*, 2008 S.D. 124, ¶14(quoting *Conaty v. Solem*, 422 N.W.2d 102, 103 (S.D. 1988)).

C. The habeas court ignored the well-settled law of ineffective assistance to grant Ally habeas relief.

The habeas court determined Ally received ineffective assistance in four instances that warranted granting him relief:

- Jacobs oversold the defense's theory of the case in opening statements;
- Smith and Jacobs were ineffective for not playing the complete videos of Ally's interviews for the jury;
- Smith and Jacobs were ineffective for how they handled Dr. Ophoven's testimony and by not calling her in sur-rebuttal; and
- Smith and Jacobs were ineffective for failing to disclose a video shared with Dr. Chris Van Ee, their engineering expert.

Appendix:040-045. Yet a review of the criminal record, the habeas record, and the law reveals the habeas court erroneously determined Ally received ineffective assistance of counsel.

1. Jacobs didn't oversell the defense's theory of the case.

The habeas court determined Jacobs "incompetently prejudiced [the defense's] case by overselling the defense to the jury in opening statement." Appendix:044. According to the court, Jacobs told the jury that defense experts "would show that the injury was accidental" even though that "was not the expected testimony." Appendix:044.

In his opening statement, Jacobs told the jury that the defense's experts "came to the conclusion that this was an accident just as Manegabe explained it was." Appendix:068. Sure, *on its own* this statement seems to suggest that the experts would definitively say what happened was an accident. But this hard stance doesn't exist when that statement is read in the context of the final paragraph of Jacob's opening statement:

> It cannot be said that these injuries represent an inconsistent outcome. At most, all that can be said is that this is an unexpected accident or infrequent outcome and because of that, myself and co-counsel are going to stand up here when everything is said and done and based on that evidence ask that you find Manegabe Ally not guilty.

Appendix:068.

There are five manner of death designations: natural, suicide, homicide, accident, and undetermined. Amy Hawes and Darinka Mileusnic-Polchan, *Medical Examiners and 'Manner of Death,' How is a*

Suicide Determination Made?, 55 Tenn. B.J. 20, 21 (February 2019). A death is a "homicide" if it "[r]esults from a volitional act by another person, including legal determination of acts of 'self-defense.'" *Id.* A death is an "accident" if an "[i]njury or poisoning caused or contributed to death with little to no evidence that it was intentional (blunt trauma from a car crash, hip fracture from a fall, drug overdose from recreational drug use, drowning, etc.)." *Id.* A death is "undetermined" when there's "insufficient information available to choose one of the above manners of death, or there are equally compelling arguments to be made for two or more manners of death." *Id.*

Dr. Snell determined M.K.'s cause of death was "blunt force injury to the head consistent with an assault." JT5:127. This necessarily means he determined the manner of death to be homicide, even though he didn't tell the jury that manner of death. *See* Hawes, 55 Tenn. B.J. at 21.

The defense had several theories it could raise to challenge the charges against Ally. It could've acknowledged M.K.'s death and that Ally caused it, but claimed it stemmed from self-defense. *See State v. Stone*, 2019 S.D. 18, ¶8, 925 N.W.2d 488, 493-94. Or it could have acknowledged M.K.'s death but claimed some third-party caused it. *See State v. Patterson*, 2017 S.D. 64, ¶¶25-26, 904 N.W.2d 43, 51.

But these defenses would be incredible. Ally would've had to claim he used self-defense against a toddler. And a third-party

perpetrator defense would have required Ally to blame five-year-old M.C.K. because Ally and the two children were the only ones in the apartment at the time. JT5:25-29. That left one viable option: M.K. died because of a "sad tragedy[.]" JT3:42. In other words, M.K.'s death was accidental and Dr. Snell erroneously labeled it a homicide. That's exactly how the defense tried to persuade the jury with its witnesses and its cross-examination of the State's witnesses.

Ally told officers on scene that M.K. fell out of bed. JT7:63. He told Detective Carda that M.K.'s death was an accident. CF:631-32. He also told the jury that M.K.'s death was an accident because he must've fell out of bed. JT7:63. Smith also got Detective Carda to admit that Ally consistently said M.K.'s injuries and death were accidental and must've happened because he fell out of bed. JT5:54, 68.

Dr. Ophoven's testimony aligned with Ally's accident story. She said: "In a case like this . . . the differential diagnosis comes down to whether or not this was *a tragic accident* . . . or whether or not there was evidence or concern from the analysis that raised the possibility that the injury *was not an accident*." JT6:71 (emphasis added). She also said, "the possibility of an *accidental fall*" couldn't be "ruled out[.]" JT6:89 (emphasis added). And: "I would have diagnosed the manner of death as undetermined, meaning I don't have sufficient information to *exclude accident* as the manner or circumstance of death." JT6:90 (emphasis added).

Dr. Van Ee's testimony also supported Ally and Dr. Ophoven. His job was to see if a fall out of bed could have caused M.K.'s injuries. JT6:125-26. He stated that a fall couldn't be ruled out as the cause of M.K.'s injuries. JT6:145. To reach that opinion he relied on studies involving babies that suffered skull fractures from falling off changing tables. JT6:137-39.

All this evidence lines up with Jacobs's opening statement *and* Smith's closing argument that M.K.'s death was an accident. JT4:24; JT8:39. It also tied into the defense's themes that law enforcement conducted a sloppy investigation, jumped to conclusions, and wanted to pin a murder on Ally. JT8:49-50, 60, 63-69. This is an accepted *strategy* for sowing doubt. *Reay*, 2019 S.D. 63, ¶16.

It doesn't matter that Jacobs testified that his claimed oversell "was a mistake and not a trial strategy."[6] Appendix:045. Nor does it matter that Smith testified that Jacobs oversold the expert testimony. EH3:44. Because "[e]ven the most experienced counsel may . . . magnify their own responsibility for an unfavorable outcome." *Harrington v. Richter*, 562 U.S. 86, 109-10 (2011). That's why the deficient performance analysis is objective and focuses on the reasonableness of counsel's performance, not counsel's subjective

[6] Yet Jacobs's testimony that led the habeas court to this determination is contradicted by his testimony that he had no "independent recollection as to why [he] did or didn't say anything specific in [his] opening statement[.]" EH1:108.

opinion. *Id.* And that's why the analysis comes down to whether counsel "took an approach that *no competent lawyer* would have chosen." *Dunn v. Reeves*, 141 S.Ct. 2405, 2410 (2021)(per curiam)(emphasis added).

Ultimately, Jacobs's opening statement was merely "an outline of what [he thought] the facts to be. . . ." Appendix:079 (Jury Instruction No. 9). But more than just presenting an outline, the defense wanted to plant the seed in the jurors' minds, early on, that M.K.'s death was caused by "an accidental fall[.]" EH4:29.

Because Jacobs's opening statement tracked the testimony presented and the defense's closing argument, as well as the limited viable defensive options, which mirrored an accepted technique for sowing doubt, Ally cannot show that Jacobs provided deficient performance.

Even if Jacobs's performance were deficient, Ally cannot establish that "but for the deficient [opening], 'the results of the proceeding would have been different.'" *Smith v. Spisak*, 558 U.S. 139, 154 (2010)(quoting *Strickland*, 466 U.S. at 694).

Jacobs's opening statement came before *any evidence* was presented. The jury was instructed that it must reach its verdict based solely on the *evidence* presented. Appendix:071 (Jury Instruction No. 3). And it was instructed that the statements and arguments of counsel *aren't evidence*. Appendix:072, 108 (Jury Instruction Nos. 4,

36). Because we must presume the jury followed these instructions, *Stone*, 2019 S.D. 18, ¶20, Ally cannot show his trial was fundamentally unfair. *Strickland*, 466 U.S. at 687.

Spisak is also instructive on why Ally cannot establish prejudice. Spisak claimed his attorney was ineffective during *closing argument* because he "overly emphasized the gruesome nature of [Spisak's] killings [and] . . . threats to continue his crimes." *Spisak*, 558 U.S. at 151. Spisak also claimed his attorney was ineffective because he "understated the facts upon which [defense] experts based their mental illness conclusions[,] . . . said little or nothing about any other possible mitigating circumstance[,] and . . . made no explicit request that the jury return a verdict against death." *Id.* The Court rejected this claim, and no prejudice existed, because counsel's closing came when the jurors had all the evidence "fresh in their minds. . . ." *Id.* at 154-55.

If a closing argument, after *all* the evidence had been presented didn't cause prejudice, then an opening statement before *any* evidence was presented cannot cause prejudice. Thus, Ally cannot satisfy the second element of ineffective assistance.

2. Smith and Jacobs reasonably decided to limit the use of Ally's interview videos.

Smith and Jacobs, while recognizing Ally's interviews contained some exculpatory evidence, wanted the interviews suppressed because they believed Ally wasn't properly Mirandized and his statements were

involuntary. CF:79-80. They also feared the State could use them to undercut Ally's accident story. CF:328-29. Smith argued for suppression because the State "will try to make it out to be inconsistent. And it's one more person with a badge for [the State] to present to the jury and one more time with our client sitting in an interrogation room being questioned by authorities." CF:329. They wanted the jury to hear from Ally directly about what happened to M.K. CF:329. They also tried to prohibit the State from using the interviews under SDCL 19-19-403. *See* CF:268.

When those motions failed, Smith and Jacobs tried to limit the parts of Ally's interviews that the State could play for the jury. CF:135-37. For example, they wanted to keep the State from using or referencing Detective Carda's questions about Ally being a refugee that left family in Africa and the "tenets of the Muslim religion. . . ." CF:135-36; CF:267-68.

The habeas court determined Smith and Jacobs were ineffective for keeping the jury from seeing Ally's full interview videos. Appendix:040-041. But to reach this decision it used hindsight and second-guessed Smith and Jacobs's trial strategy. *Reay*, 2019 S.D. 63, ¶14. Yet "'[a] difference in trial tactics *does not* amount to ineffective assistance of counsel.'" *Piper*, 2019 S.D. 65, ¶67(quoting *Brakeall v. Weber*, 2003 S.D. 90, ¶16, 668 N.W.2d 79, 85). And just because a

chosen strategy doesn't succeed, that doesn't mean counsel was ineffective. *Davi v. Class*, 2000 S.D. 30, ¶17, 609 N.W.2d 107, 112.

What's more troubling is that the court recognized it couldn't second-guess Smith and Jacobs's strategy decisions, but then ignored this limitation to grant Ally relief. MH:18-19; Appendix:040-041. The court said it couldn't "Monday morning quarterback" Smith and Jacobs's strategic decisions, but then discussed how different attorneys might have called "different plays" during the trial. MH:13-25. It then determined that Smith and Jacobs should've called a "different play" for Ally's interview videos. Appendix:040-041. The court also questioned why Smith and Jacobs would rely on Ally's testimony, instead of his interviews, which the court believed were the best evidence. MH:21.

This questioning of Smith and Jacobs's decisions ignores that "[t]here are countless ways to provide effective assistance" and "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689-90. It ignores that defense attorneys "must choose from among 'countless' strategic options." *Dunn*, 141 S.Ct. at 2410(quoting *Richter*, 562 U.S. at 106-07). And it ignores that "[d]ifferent lawyers have different gifts; this fact, as well as differing circumstances from case to case, means the range of what might be a reasonable approach at trial must be broad." *Chandler v. United States*, 218 F.3d 1305, 1313 (11th Cir. 2000). That's why "even if there is reason to think that counsel's conduct 'was far from

exemplary,' a court cannot grant relief if 'the record does not reveal' that counsel took an approach that *no competent lawyer* would have chosen." *Dunn*, 141 S.Ct. at 2410(quoting *Burt v. Titlow*, 571 U.S. 12, 23-24 (2013))(emphasis added).

The habeas court's determination that Smith and Jacobs should have played all of Ally's interviews for the jury is much like the claim rejected in *Randall v. Weber*, 2002 S.D. 149, 655 N.W.2d 92(per curiam). Randall and two co-defendants were charged with attacking Leighton Rich with a baseball bat and a tire iron. *Id.* ¶¶1-2. Before trial, Randall's attorney, Tim Rensch, learned one co-defendant bragged about hitting Rich with the bat. *Id.* ¶2. Rensch tried to introduce this statement at trial but it was considered inadmissible hearsay. *Id.* That trial ended in a hung jury; Randall was retried with a co-defendant. *Id.* ¶3.

On retrial, Rensch didn't try to introduce the hearsay statement from the first trial. *Id.* Randall claimed Rensch was ineffective for not introducing the hearsay statement into evidence. *Id*

This Court rejected Randall's claim because Rensch's decision was a strategic one. *Id.* ¶12. Rensch tried to use the statement at the first trial to paint a co-defendant as the one that hit Rich with the bat. *Id.* ¶9. But at the second trial, Rensch decided not to use the statement because it would've weakened his "strongest argument" that "you don't know really what happened here, you don't know who did it." *Id.*

Smith and Jacobs—like Rensch—were aware of Ally's interview videos and their contents. But they—like Rensch—decided the full videos didn't support their trial strategy. They wanted the jury to hear what happened straight from Ally on the witness stand. They followed through with this strategy when Ally testified about his version of what happened to M.K. and what happened during his interviews with Detective Carda. JT7:49-76.

And rather than show the interview videos, Smith and Jacobs elicited helpful testimony from Detective Carda. He admitted Ally consistently denied hurting M.K., as well as his alternative theories about what happened to M.K. JT5:54, 68.

Smith and Jacobs's strategy to elicit helpful testimony is identical to the strategy blessed by the court in *Ervin v. Delo*, 194 F.3d 908 (8th Cir. 1999). Ervin's co-defendant, Hunter, confessed that he and Ervin killed Richard Hodges and his mother, Mildred. *Id.* at 911. When Hunter pled guilty, his plea was videotaped; Hunter admitted that he and another man killed the Hodgeses and "gave a detailed account of the murders, but refused to say who the man was and specifically denied the man was Ervin." *Id.* At trial Hunter testified about the murders and named Ervin as the other man involved in the killings. *Id.* at 911-12.

Ervin claimed his attorney was ineffective for not using Hunter's guilty plea video to impeach him. *Id.* at 913. Ervin's attorney decided

not to play the video "because he wanted to avoid a rehash of the killings' grisly details, which might be the last thing the jury would hear." *Id.* Instead, he cross-examined Hunter and police officers about Hunter's inconsistent statements and his prior statement exonerating Ervin. *Id.* He also elicited helpful testimony from Hunter's parole officer, who said: "Hunter had expressly denied that Ervin was his accomplice." *Id.* at 913-14. The Eighth Circuit determined Ervin couldn't "overcome the presumption that defense counsel used a sound trial strategy." *Id.* at 914.

Ultimately, deciding what evidence to present to support a chosen defense theory is a strategic decision that cannot be second-guessed on collateral review. *See Steichen v. Weber*, 2009 S.D. 4, ¶¶27-28, 760 N.W.2d 381, 393.[7] Because Smith and Jacobs made the strategic decision to show the jury as little as possible from Ally's interview videos, this Court—like the *Randall* and *Ervin* courts—should reject the notion that Smith and Jacobs were ineffective for not using the full videos. *See Morris v. State,* 317 So.3d 1054, 1068 (Fla. 2021)(per curiam)("Trial counsel is not deficient for failing to present evidence where he reasonably concludes that evidence may ultimately be more

[7] Other courts agree. *E.g.*, *Myers v. State*, 33 N.E.3d 1077, 1110 (Ind. Ct. App. 2015); *State v. Bobo*, 770 N.W.2d 129, 138 (Minn. 2009); *People v. Horn*, 755 N.W.2d 212, 219 (Mich. Ct. App. 2008); *State v. Williams*, 794 N.E.2d 27, 49 (Ohio 2003); *Foster v. State*, 687 So.2d 1124, 1132 (Miss. 1996)(en banc); *Kenley v. State*, 759 S.W.2d 340, 348 (Mo. Ct. App. 1988)(per curiam).

prejudicial."); *State v. Pacheco*, 851 P.2d 734, 743 (Wash. Ct. App. 1993) *reversed in part on other grounds by State v. Pacheco*, 882 P.2d 183 (Wash. 1994)(en banc)(no ineffective assistance for not presenting police officer's deposition testimony when it "contained both exculpatory and inculpatory evidence. . .").

Even if the decision to not play the full interviews for the jury could be second-guessed, the full videos wouldn't be admissible. Statements by Detective Carda about M.K.'s injuries would have to be redacted because the criminal court limited who could testify about M.K.'s injuries. CF:839-41, 844-55; JT1:3-38, 159-61.

References to Ally's life in Africa would have to be redacted because they are irrelevant, a waste of time, and impermissibly create a mini trial about Ally's reasons for fleeing the war-torn continent. SDCL 19-19-402; SDCL 19-19-403.

References to Ally's Muslim faith are also irrelevant and could impermissibly prejudice Ally and waste time and judicial resources. SDCL 19-19-402; SDCL 19-19-403. *See also* SDCL 19-19-610 and FED. R. EVID. 610; *United States v. Sampol*, 636 F.2d 621, 666 (D.C. Cir. 1980)(per curiam)(Rule 610 is designed "to guard against the prejudice which may result from disclosure of a witness's faith."). This isn't a case in which a crime was committed because of, or motivated by, religious beliefs. *Davis v. State*, 329 S.W.3d 798, 805-06 (Tex. Crim. App. 2010)(Davis's membership in a Satanic religion was admissible to

prove "future dangerousness" in penalty phase of his capital case); *People v. Nicolaus*, 817 P.2d 893, 906-07 (Cal. 1991)(in bank)(Nicolaus's "extreme dislike of religion, and in particular, Christianity" was admissible to establish Nicolaus's motive to kill his ex-wife).

References to polygraph tests would have to be redacted. Polygraph results are inadmissible. *State v. Bertram*, 2018 S.D. 4, ¶14, 906 N.W.2d 418, 423-24. And Ally's willingness to take a polygraph is also most likely inadmissible. *United States v. Cardarell*, 570 F.2d 264, 266-67 (8th Cir. 1978).

Because portions of Ally's interviews are inadmissible, Smith and Jacobs didn't provide deficient performance by not presenting that inadmissible evidence. *E.g.*, *Stevens v. State*, 847 S.E.2d 649, 654 (Ga. Ct. App 2020); *Bowling v. Commonwealth*, 80 S.W.3d 405, 481 (Ky. 2002); *State v. Twenter*, 818 S.W.2d 628, 638 (Mo. 1991)(en banc); *Sealey v. Warden, Georgia Diagnostic Prison*, 954 F.3d 1338, 1362 (11th Cir. 2020); *Kavanagh v. Berge*, 73 F.3d 733, 736 (7th Cir. 1996); *Hoots v. Allsbrook*, 785 F.2d 1214, 1222 (4th Cir. 1986).

Even if Smith and Jacobs provided deficient performance, Ally cannot show prejudice under *Strickland*. Without the full videos, the jury still heard Ally's version of what happened. JT7:49-76. It heard Detective Carda's admission that Ally remained consistent across his interviews about what he claimed happened to M.K. JT5:54. And it heard the statements that Detective Carda admitted were consistent

when the State played the redacted video from Ally's second interview. CFEx:15.

This Court should determine there was no prejudice from not playing Ally's full interview videos because the jury still heard about the information in those videos from other sources. *Ervin*, 194 F.3d at 914 (no prejudice from not playing Hunter's taped exoneration of Ervin because the jury heard from several witnesses that Hunter exonerated Ervin in prior statements).[8] Thus, Ally cannot prove his trial was fundamentally unfair.

3. Smith and Jacobs weren't ineffective for how they handled Dr. Ophoven's testimony and not recalling her to testify in sur-rebuttal.

The habeas court determined Smith and Jacobs provided ineffective assistance because of how they handled Dr. Ophoven's testimony and because they didn't recall her in sur-rebuttal. Appendix:041-044. This determination is erroneous.

First, the court labeled Smith and Jacobs as ineffective because they let Dr. Ophoven leave the state, rather than call her in sur-rebuttal to "neutralize" Dr. Snell's rebuttal testimony. Appendix:041. Yet this ignores that Dr. Ophoven was only available to testify on February 25, 2014, because she was also scheduled to testify at another trial. CF:856-57. It also ignores that Smith told the criminal court and the

[8] Other courts agree. *E.g.*, *Gregory v. State*, 224 So.3d 719, 731 (Fla. 2017)(per curiam); *Myers*, 33 N.E.3d at 1089-90.

State of Dr. Ophoven's limited availability so they could take her testimony out of order, if necessary.[9] CF:856-57.

Second, even if Dr. Ophoven were available to testify in sur-rebuttal, deciding what witnesses to call is a strategy decision that cannot be second-guessed. *E.g.*, *Johnson v. Lockhart*, 921 F.2d 796, 799 (8th Cir. 1990); *State v. Bobo*, 770 N.W.2d 129, 138 (Minn. 2009); *People v. Dixon*, 688 N.W.2d 308, 311-12 (Mich. Ct. App. 2004).

Smith didn't ask Dr. Ophoven to stay another day, despite her unavailability, because Smith thought the defense got all the helpful testimony from Dr. Ophoven that it needed. EH2:114. Also, in Smith's experience it doesn't play well with a jury to repeatedly plow the same ground with expert witnesses, including calling and recalling experts whose opinions conflict. EH3:78-79.

And while Dr. Ophoven's opinion was important to the case, it wasn't the most important. In Smith's eyes, Dr. Van Ee's opinion that a fall out of bed could have caused M.K.'s fatal injuries was the most important. EH2:114-15. Thus, the case came down to whether the jury believed Dr. Van Ee or Dr. Snell, not whether it believed Dr. Ophoven or Dr. Snell, as the habeas court said. EH2:116; Appendix:041.

Third, Dr. Ophoven, and the habeas court, fault Smith for how she handled Dr. Ophoven's testimony by not responding to certain

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[9] The limited availability of a medical witness wasn't unique to the defense: the State had to deal with Dr. Hafzalah's limited availability as well. CF:857.

things that Dr. Snell testified about. For example, Dr. Ophoven faults Smith for not asking her about a hypothetical that Dr. Snell provided, where he used himself as the subject of the hypothetical. EH2:46. Dr. Ophoven also faulted Smith for not asking questions to help clarify her answer on cross-examination that M.K. suffered only one impact to the head. EH2:51-53.

Dr. Ophoven and the habeas court's problems with Smith's questioning ignores that "trial lawyers, in every case, could have done something more or something different. So omissions are inevitable." *Chandler*, 218 F.3d at 1313. It also ignores that decisions about what questions to ask a witness are "matters of trial strategy, which [a post-conviction review court] will not second-guess with the benefit of hindsight." *Dixon*, 688 N.W.2d at 311-12 (footnotes omitted).[10]

This case is like *Jameson v. State*, 125 S.W.3d. 885 (Mo. Ct. App. 2004). Jameson was convicted of killing a seventeen-month-old by striking her in the stomach. *Id.* at 887. At trial Jameson claimed her fatal injuries were accidental because, as they were playing, he tripped over a dog leash and fell on the toddler. *Id.* In his post-conviction action, Jameson claimed his trial attorney was ineffective for how he handled the testimony of the defense's medical expert. *Id.* at 890.

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[10] Other courts agree. *See E.g.*, *Chance v. State*, 728 S.E.2d 635, 642 (Ga. 2012); *Antonio A. v. Comm'r of Corr.*, 87 A.3d 600, 605 (Conn. Ct. App. 2014); *McGarvey v. State*, 329 P.3d 576, 586-87 (Mont. 2014); *Bennett v. State*, 933 So.2d 930, 943 (Miss. 2006); *State v. Elmore*, 857 N.E.2d 547, 567 (Ohio 2006).

The court rejected Jameson's claim because trial counsel "successfully elicited testimony from [the defense's expert] that contradicted the testimony of the State's witness. . . ." *Id.* This contradictory testimony included "problems and oversights" with the autopsy and that the toddler's death "could have been accidental." *Id.*

Ally's case is also like *Walker v. State*, 194 So.3d 253 (Ala. Crim. Ct. App. 2015). Walker faulted his attorney for not getting more details from three of his mitigation witnesses. *Id.* at 292. But the court determined that "counsel's failure to elicit more-detailed testimony did not constitute ineffective assistance of counsel." *Id.* at 292. This is especially true when a witness's more-detailed habeas testimony aligns with his or her trial testimony. *See id.* That's because more-detailed testimony is simply cumulative of testimony already presented. *Darling v. State*, 966 So.2d 366, 377 (Fla. 2007)(per curiam). And failure to present cumulative testimony cannot amount to ineffective assistance. *Id.*

Smith successfully elicited testimony from Dr. Ophoven that contradicted Dr. Snell's testimony. While that testimony might not be as detailed as Ally, Dr. Ophoven, or the habeas court would've liked, it tracks Dr. Ophoven's habeas testimony:

Testimony	Trial Citation	Habeas Citation
The hemorrhaging in M.K.'s face was from his skull fracture	JT6:76-77, 80-81, 83	EH2:21
The swelling in M.K.'s eye was not present when he came to the ER, so it was caused by blood leaking from the skull fracture and other fluid, not a separate impact	JT6:79-81, 83	EH2:24
M.K.'s clotting disorder is an alternative explanation for his subgaleal hemorrhages, instead of separate impacts	JT6:76-77, 85-87	EH2:27-28
M.K.'s subgaleal hemorrhages and the swelling around his head were caused by the continued leaking of blood from his skull fracture, not separate impacts	JT6:76-79, 100	EH2:29-30
Blood and fluids in the body follow the "path of least resistance," and the forces of gravity	JT6:79	EH2:32
There was only one fatal impact to M.K.'s head: the skull fracture	JT6:75-76, 89, 93	EH2:50-51
M.K.'s manner of death should have been listed as "undetermined" because there was no way to distinguish between an	JT6:90	EH2:67

accidental and inflicted injury		
Cannot rule out "accident" as M.K.'s manner of death	JT6:89	EH2:90

Finally, even if Smith and Jacobs's handling of Dr. Ophoven's testimony were deficient performance, Ally cannot establish prejudice. Because Dr. Ophoven's habeas testimony tracked her trial testimony, Ally cannot show the results of his trial were unreliable without that added testimony. Because Ally cannot satisfy the two elements of *Strickland*, the habeas court erroneously determined that Smith and Jacobs's handling of Dr. Ophoven's testimony was ineffective assistance.

4. Smith and Jacobs didn't provide ineffective assistance by not disclosing the video shared with Dr. Van Ee.

The habeas court determined that Smith and Jacobs "blunder[ed]" the defense's case because they didn't disclose a video of Ally explaining M.K.'s position near the bed when he found him. Appendix:046. That video was sent to Dr. Van Ee so he could run his experiments on whether a fall out of bed could have caused M.K.'s injuries. JT7:13; EH1:83-84. The court determined this amounted to ineffective assistance because the State used it to argue, in closing argument, that the defense was hiding something. Appendix:046; JT8:26-27. But this determination is erroneous.

It is well-taken that a failure to comply with discovery rules or a court's discovery orders may be deficient performance. *E.g.*, *Commonwealth v. McClellan*, 887 A.2d 291, 302 (Pa. Super. Ct. 2005)(deliberate failure to comply with discovery requirements is deficient performance); *People v. Burns*, 709 N.E.2d 672, 680 (Ill. Ct. App. 1999)(same). This is especially true when non-compliance results in sanctions, like exclusion of the non-disclosed evidence or striking a witness's testimony altogether. *McClellan*, 887 A.2d at 302; *Gibbs v. State*, 606 S.E.2d 83, 86 (Ga. Ct. App. 2004). But Smith and Jacobs didn't disclose the video because they thought it was a work product protected from disclosure. EH3:97-98; SDCL 23A-13-14 (listing what is considered defense work product). In fact, Smith believed the video was protected from disclosure, just like an in-person conversation between Ally and Dr. Van Ee would have been protected. EH4:54-53.[11] No matter if this privilege position was incorrect, and even if Smith and Jacobs's actions were deficient, Ally cannot show prejudice under *Strickland*.

This isn't a case in which, because of discovery violations, counsel was prohibited from using undisclosed evidence. *McClellan*, 887 A.2d at 302; *Gibbs*, 606 S.E.2d at 86. The criminal court denied

[11] Smith and Jacobs decided to save Minnehaha County "thousands and thousands" of dollars by sending the video to Dr. Van Ee, rather than fly him to Sioux Falls to have a short conversation with Ally. EH4:50-51.

the State's request to strike Dr. Van Ee's testimony. JT7:37. Dr. Van Ee testified about his work on the case, including the work that relied on the undisclosed video. JT6:127-28; JT7:11-13. He also testified that while he relied on that video, his experiments and research were largely driven by Dr. Ophoven's opinion that M.K. had suffered only one impact. JT6:127; JT7:7. And according to Smith, Ally's trial testimony about how he found M.K. was identical to what he said in the video sent to Dr. Van Ee. EH3:103.

Likewise, the prosecutor's closing argument that the defense perhaps had something to hide couldn't have denied Ally a fair trial for three reasons. First, that argument encompasses only three paragraphs of the State's closing and rebuttal arguments, which span about twenty-six pages of the transcript. JT8:12-33, 69-73.

Second, the jury was repeatedly instructed that the State had the burden of proof in the case. Appendix:070, 085, 092, 095, 099-102 (Jury Instruction Nos. 2, 13, 20, 23, 27-30). The jury was also instructed that it had to base its verdicts on the evidence, which didn't include the arguments of counsel. Appendix:072, 076-079, 108 (Jury Instruction Nos. 4, 8, 9, 36). We must presume the jury followed these instructions. *Stone*, 2019 S.D. 18, ¶20.

Third, the jury's verdicts negate any claim that the prosecutor's closing argument created a prejudice that denied Ally a fair trial. *State v. Smith*, 1999 S.D. 83, ¶44, 599 N.W.2d 344, 354. The jury found Ally

guilty on the four counts of First-Degree Manslaughter, but not guilty on the First- and Second-Degree murder charges. It's split verdicts "supports the conclusion that the jury was not influenced by" the challenged comments. *State v. Pursley*, 2016 S.D. 41, ¶11, 879 N.W.2d 757, 761.

5. The habeas court's analysis is inappropriately outcome determinative.

Not only did the habeas court erroneously determine that Smith and Jacobs provided deficient performance, its prejudice analysis is also inappropriately outcome determinative. Throughout its analysis the habeas court repeatedly states that had Smith and Jacobs handled Ally's case differently, the outcome would have been different. *See* Appendix:044. But that isn't the test for prejudice under *Strickland.*

Prejudice means "counsel's errors were so serious as *to deprive the defendant of a fair trial*, a trial whose result is reliable." *Strickland*, 466 U.S. at 687(emphasis added). To this Court that means:

> [A]n analysis focusing solely on the mere outcome determination, without attention to whether the result of the proceeding was *fundamentally unfair* or unreliable, is defective. To set aside a conviction or sentence *solely because the outcome would have been different but for the counsel's error may grant the defendant a windfall to which the law does not entitle him*.

Hopfinger v. Leapley, 511 N.W.2d 845, 847 (S.D. 1994)(quoting *Lockhart v. Fretwell*, 506 U.S. 364, 369-70 (1993))(emphasis added).

By focusing on how the outcome of the trial could have been different, the habeas court ignores that the Constitution mandates fair trials, not perfect ones, because "'there are no perfect trials.'" *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553 (1984)(quoting *Brown v. United States*, 411 U.S. 223, 231-32 (1973)). Also, by focusing on the outcome, the habeas court ignores the principle that ineffective assistance claims must be evaluated in the context of *the entire criminal record*.[12] *Dillon v. Weber*, 2007 S.D. 81, ¶11, 737 N.W.2d 420, 425. An unfair trial results only when there is "a breakdown in the adversary process that renders the result unreliable." *Strickland*, 466 U.S. at 687.

Ally's case isn't one where the adversarial process broke down. Smith and Jacobs vigorously defended Ally and put up as many roadblocks to the State's case as possible. These are just some of those roadblocks:

- Hired expert witnesses to undermine the State's position that M.K.'s death was a homicide (JT6:61-148; JT7:6-33);
- Tried to suppress Ally's interviews because of a claimed *Miranda* rights issue (CF:79-80, 328-29, 334-40);
- Successfully limited what parts of Ally's interviews the State could show the jury (CF:837-38);
- Sought a mistrial because of a perceived redaction issue involving Ally's interview played for the jury (JT5:44-50);

[12] Despite a full record review, each ineffective assistance claim must stand on its own. They cannot be compounded, especially when, as shown above, each individual claim fails. To conclude otherwise "would recognize a degree of error that is greater than the sum of its parts." *Reay*, 2019 S.D. 63, ¶26 n.7.

- Successfully prevented the State from presenting testimony that M.K. suffered "abusive head trauma" (CF:839-41, 844-55; JT1:3-38, 159-61);
- Successfully limited who could testify about the cause of M.K.'s injuries and the timing of those injuries (CF:839-41, 844-55; JT1:3-38, 159-61);
- Successfully prevented Captain Gramlick from testifying about his disbelief that M.K.'s injures could have been caused by a fall out of bed (JT4:69-80); and
- Tried to prevent Dr. Snell from providing examples of how a depressed skull fracture is caused (JT4:105).

Smith and Jacobs also got several prosecution witnesses to provide testimony that was helpful to the defense:

- Captain Gramlick admitted he looks for signs of abuse when dealing with injured children but didn't notice any of those signs with M.K. (JT:69);
- Dr. Snell testified about the characteristics of abused children and that M.K. didn't have many of the injuries consistent with those characteristics (JT5:129-33);
- Officer McMahon admitted that Ally called 911 once he noticed M.K. wasn't breathing (JT4:142);
- Officer Statema admitted that when firefighters arrived it was possible Ally was calm because they were helping M.K. (JT4:162);
- Forensic Specialist Johnson admitted he didn't test to see what injuries could happen when a child falls out of bed (JT5:16-17);
- Forensic Specialist Johnson admitted law enforcement didn't take photos of Ally's hands, even though it was their theory that Ally intentionally injured M.K. (JT5:18);
- Dr. Snell admitted he didn't visit the apartment to see where M.K. was injured, which can give a different perspective than just talking to investigating officers (JT5:135-37);
- Detective Carda admitted Ally's claims of what happened stayed consistent across his three interviews (JT5:54);
- Detective Carda admitted that he lied to Ally by saying M.K. had bruises that Ally caused (JT5:66-68; 132-33); and
- Dr. Hafzalah admitted M.K. had uncontrolled internal bleeding, which could corroborate Dr. Ophoven's opinion that all the blood found under M.K.'s scalp came from his skull fracture (JT6:38-39).

In the end, Smith and Jacobs secured acquittals on the two murder charges Ally faced. Appendix:120-22. But just because they failed to secure an acquittal on all charges, that doesn't mean they provided ineffective assistance. *Randall*, 2002 S.D. 149, ¶6.

The habeas court's outcome determinative analysis also caused it to make determinations internally inconsistent with the rest of its decision and reach conclusions at odds with the criminal and habeas records.

First, the court's determination that Jacobs's opening statement oversold the defense's experts' testimony ignores Smith's closing argument. Smith said: "All of us are thankful that *this tragic accident* that led to [M.K.'s] untimely death are rare and infrequent." JT8:39 (emphasis added). This language came directly from Dr. Van Ee's testimony that while rare, short falls can be fatal. JT7:33.

Second, the court faults Smith and Jacobs for not recalling Dr. Ophoven in sur-rebuttal. Appendix:041-042. This ignores that Dr. Ophoven was available to testify only on February 25, 2014, because of her testimony in another trial. CF:856-57. Thus, even if Smith and Jacobs wanted to recall Dr. Ophoven, they couldn't.

Third, the court faults Smith and Jacobs for not playing the full interview videos for the jury. Appendix:040. But in the next breath it recognizes that the full videos couldn't be shown because redactions would need to be made. Appendix:040.

Fourth, the court faults Smith and Jacobs because, according to the court, they "offered no rational justification for" not playing the full interview videos for the jury. Appendix:040-041. This ignores that Smith explicitly said why the defense didn't want to play the full videos:

> [T]he detective questioning him was so awful. Detective Carda was just disgusting, and was so rude to him, and we, we wanted to keep out, um, all the things he said to him, like insinuating because he was Muslim, and trying to say he had kids, and trying to say, how dare you be with another woman . . . .

EH4:47. It also ignores that the court raised that issue sua sponte *after* the evidentiary hearings had concluded. Appendix:053-055.

In that same vein, raising that issue sua sponte was inappropriate. Our courts operate as "neutral arbiter[s]" and "rely on the parties to frame the issues for decision. . . ." *United States v. Sineneng-Smith*, 140 S.Ct. 1575, 1579 (2020). Indeed, "[j]udges exist to resolve controversies . . . not to wage battles as contestants in the parties' litigation." *Whole Woman's Health v. Jackson*, 142 S.Ct. 522, 532 (2021).

That is why this Court counseled against sua sponte raising of issues. *Ibrahim v. Dep't of Pub. Safety*, 2021 S.D. 17, ¶22, 956 N.W.2d 799, 804-05. And that is why in habeas cases, especially in the ineffective assistance context, it's an inmate's responsibility to "'identify the acts or omissions of counsel that are alleged not to have been the

result of reasonable professional judgment.'" *Engesser*, 2008 S.D. 124, ¶11(quoting *Strickland*, 466 U.S. at 690).

But by raising the interview video issue sua sponte, the habeas court abandoned its role as a neutral arbiter and negated Respondent's right to have a neutral third-party rule on the *issues presented*. It also ignored "'the well-tested principle' that party presentation is the most effective method for reaching the best outcome in each case." *United States v. Oliver*, 878 F.3d 120, 126 (4th Cir. 2017).

Fifth, the court determined that without the full interview videos, the jury only saw a "sterilized" version of Ally. Appendix:033. It's no surprise that Ally's testimony seemed "sterilized" when compared to his interview videos: the court read that testimony from a transcript. But the jury saw Ally testify in person, the jury saw his reactions to the questions asked, and the jury saw whatever emotion he conveyed while testifying. That's why "'it is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial.'" *Coleman v. Johnson*, 566 U.S. 650, 651 (2012)(per curiam)(quoting *Cavazos v. Smith*, 565 U.S. 1, 2 (2011)(per curiam)). That's also why it was the jury's job to determine the credibility of the witnesses and decide what weight to give evidence, not a reviewing court. *State v. Mos*s, 2008 S.D. 64, ¶9, 754 N.W.2d 626, 629(quoting *State v. Bordeaux*, 2006 S.D. 12, ¶6, 710 N.W.2d 169, 127(per curiam)); Appendix:111-13 (Jury Instruction Nos. 39, 40, 41).

Sixth, when the court determined that Ally's testimony was a "sterilized" version of himself, it did so partly because a translator was needed as English isn't Ally's native language. Appendix:048. This ignores that a translator was also needed during the interviews because English isn't Ally's native language. CF:308-09.

Seventh, the habeas court seems to believe the State's charging decisions and defense counsels' strategic decisions are subject to heightened scrutiny because the evidence in the case is mostly circumstantial. Appendix:030, 039-041. This belief ignores that direct and circumstantial evidence have the same evidentiary value and sometimes circumstantial evidence "is more reliable than direct evidence." *State v. Falkenberg*, 2021 S.D. 59, ¶39, 965 N.W.2d 580, 591(quoting *State v. Riley*, 2013 S.D. 95, ¶18, 841 N.W.2d 431, 437).

Likewise, the court's focus on the evidence being circumstantial ignores that only two people truly know what happened on Christmas Eve 2012, and only one is alive to talk about it.

Eighth, the fact that the State didn't directly say what action Ally took that killed M.K. doesn't matter. MH:14-15. The State didn't have to "'exclude every hypothesis of innocence. . . .'" *State v. Carter*, 2009 S.D. 65, ¶45, 771 N.W.2d 329, 342(quoting *State v. Shaw*, 2005 S.D. 105, ¶45, 705 N.W.2d 620, 633). Instead, the question is: Does the totality of the evidence "'rule out any *reasonable* hypothesis of innocence[?]'" *Id.*(quoting *Shaw*, 2005 S.D. 105, ¶45)(emphasis added).

The following is just some of the evidence that undercut Ally's accident defense:

- Nicole McKenzie heard no crying from Ally's apartment, even though Ally said M.K. cried when he fell (JT4:50-51);
- M.K. had no external bleeding even though Ally said blood came out of M.K.'s mouth (JT4:47, 113, 167; JT5:13);
- Ally's story changed about what happened before M.K. was hurt (JT4:151; JT5:54);
- Dr. Snell stated that an impact with a flat floor couldn't cause a depressed skull fracture (JT5:108, 110);
- Dr. Ophoven agreed that if there is more than one impact point, she would rule out "accident" as the manner of death (JT6:101); and
- Dr. Van Ee agreed that fatal short falls are extremely rare (JT7:33).

Finally, the court credits Ally's allegations of ineffective assistance because of budgetary and caseload issues. Appendix:046-049. While the court didn't explicitly determine that these issues amounted to ineffective assistance, it did factor them into its determination that Smith and Jacobs inadequately prepared for trial. Appendix:046-048. Yet this ignores that this same habeas court has rejected identical claims in other habeas cases. Appendix:123-50.[13] Indeed, the habeas court determined such arguments are "a red herring and not a basis for a finding of ineffective assistance of counsel" because the records established counsel "spent a substantial amount of time" on the case.

[13] Respondent requests that this Court take judicial notice of these orders under SDCL 19-19-201. These are public records filed in habeas corpus proceedings and their accuracy "cannot reasonably be questioned." SDCL 19-19-201(b)(2); *Nauman v. Nauman*, 336 N.W.2d 662, 664-65 (S.D. 1983)(court may take judicial notice of public or official records).

Appendix:135-36. These inconsistent positions by the same court reflect that its decision here was skewed toward freeing Ally from his convictions, rather than respecting the verdicts entered by the jury *after a fair trial.*

The habeas court also ignores that Jacobs and Smith "spent many months preparing for trial[.]" EH1:106. In fact, because of the extensive amount of time Jacobs had to devote to Ally's case, he was taken out of the case assignment rotation for February 2014. EH1:23, 106. The court also ignores that Smith, "an ethical, competent and zealous advocate[,]" flat out rejected that staffing issues had any negative effect on her and Jacobs's representation of Ally. Appendix:046; EH3:38. It ignores Smith's testimony that the Public Defender's Office spends more time working on homicide cases than ABA guidelines recommend. EH4:25-26. And it ignores that Smith and Jacobs—with help from a paralegal that spent 471 hours on the case—spent over 550 hours working on Ally's case by the time the trial was over. EH4:20-21; HEx:A.

CONCLUSION

"Because rational people can sometimes disagree, the inevitable consequence . . . is that judges will sometimes encounter convictions that they believe to be mistaken, but that they must nonetheless uphold." *Cavazos*, 565 U.S. at 2. While the habeas court might disagree with the State's charging decisions, defense counsels' strategic

decisions, and the jury's verdicts, it doesn't get to cast them aside and substitute its own judgment for that of those three indispensable parts of our justice system.

Respondent requests that this Court reverse the habeas court's determinations that Ally received ineffective assistance of counsel. Respondent also requests that this Court remand this matter with specific instructions to deny Ally's request for habeas relief in *all respects*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellant's Brief contains 9,955 words.

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

Dated this 2nd day of June 2022.

/s/ *Matthew W. Templar*
Matthew W. Templar
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 2nd day of June 2022, a true and correct copy of Appellant's Brief in the matter of *Manegabe Chebaea Ally v. Darin Young* was served via electronic mail upon Mark Kadi, mkadi@minnehahacounty.org.

/s/ *Matthew W. Templar*
Matthew W. Templar
Assistant Attorney General

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STATE OF SOUTH DAKOTA) :SS COUNTY OF MINNEHAHA)		IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
MANAGABE CHEBEA ALLY, Petitioner, vs. DARIN YOUNG, Warden of the South Dakota State Penitentiary, Respondent.	* * * * * * * * * * * * *	CIV. 16-824 AMENDED JUDGMENT AND ORDER FOR HABEAS CORPUS RELIEF

The above-entitled action having come on for evidentiary hearings before the Court on February 11, 2020, February 12, 2020, March 5, 2020 and March 19, 2020, at Sioux Falls, South Dakota, the Honorable Douglas Hoffman, Judge presiding; the Respondent not being personally present, but being represented previously by Donna Kelly and presently by Drew DeGroot, of the Minnehaha County State's Attorneys Office, the Petitioner, Managabe Chebea Ally, being present and represented by Mark Kadi of the Minnehaha County Public Advocate's Office; and the Court, having heard testimony and argument of counsel, and having issued its Memorandum Decision herein, and having made and entered Findings of Fact and Conclusions of Law, it is hereby:

ORDERED, ADJUDGED AND DECREED that Habeas Corpus relief is granted to Petitioner, and it if further,

ORDERED, ADJUDGED AND DECREED that Petitioner Managabe Chebea Ally is discharged from the custody of the Respondent Darin Young, Warden of the South Dakota State Penitentiary, and it is further,

ORDERED, ADJUDGED AND DECREED that Petitioner's convictions in Minnehaha County Criminal File 12-8143 are declared null and void, and it is further,

ORDERED, ADJUDGED AND DECREED that the Managabe Chebea Ally is remanded to the custody of the Minnehaha County Sheriff's Office for further proceeding in Minnehaha County Cr. 12-8143, and it is further,

ORDERED, ADJUDGED AND DECREED that the bail for the Petitioner pending appellate review of this Judgment and Order, pursuant to SDCL 21-27-22, shall be heard on the __17__ day of September, 2021 at __1:30_____ o'clock, __m. at the Minnehaha County Courthouse in Sioux Falls, Courtroom 4C.

Dated this ___9__ day of September, 2021.

BY THE HABEAS CORPUS ACT:

Hon. Douglas E. Hoffman
Circuit Court Judge

ATTEST: ANGELIA M. GRIES
Clerk of Courts/Deputy

(SEAL)

FILED
SEP 09 2021
Minnehaha County, S.D.
Clerk Circuit Court

STATE OF SOUTH DAKOTA) :SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
MANEGABE CHEBEA ALLY, Petitioner, vs. **DARIN YOUNG, Warden, South Dakota State Penitentiary,** Respondent.	CIV 16-824 **MEMORANDUM DECISION GRANTING HABEAS CORPUS RELIEF**

This matter came before the Court for an evidentiary hearing on February 11 and 12, 2020, March 5, 2020, and March 19, 2020, along with subsequent hearings on November 30, 2020 and March 12, 2021. Petitioner appeared personally throughout with his attorney, Mark Kadi. Minnehaha County Deputy State's Attorneys Donna Kelly or Drew DeGroot appeared on behalf of Respondent at the various hearings. At the conclusion of the last hearing, the Court took the matter under advisement. Having reviewed the record and considered the arguments and briefs of counsel, the Court grants habeas relief.

FACTUAL AND PROCEDURAL BACKGROUND

Petitioner Manegabe Ally (Petitioner) was charged by indictment in CRI 12-8143 with Count 1: First Degree Murder; Count 2: Second Degree Murder; and Counts 3 through 6: First Degree Manslaughter. Petitioner was represented by Attorneys Traci Smith and Kenny Jacobs. The State was represented by Deputy State's Attorneys Donald Hanson and Tara Palmiotto. A jury trial commenced on February 18, 2014. On February 27, 2014, the jury returned a verdict of

not guilty as to Counts 1 and 2, but it found Petitioner guilty of First Degree Manslaughter as charged in Counts 3 through 6.

The following is a summary of the underlying facts and procedure in this case. In October 2012 Petitioner moved to Sioux Falls to reside in an apartment with his girlfriend (Mother) and her two children, C.K., age 5 and M.K., age 16 months. Petitioner cared for the two children while Mother worked. Prior to December 24, 2012, there was no record of any prior disturbances; no reports of noise, fights, children crying, or other indicia of violence or abuse in the household. On the morning of December 24, Mother and Petitioner had disassembled M.K.'s crib, intending to shop for a replacement toddler bed after Mother was finished with her shift at Smithfield that day. After dropping Mother off at work, Petitioner had visited the doctor's office to complete vaccines he needed to obtain employment, with the children in tow, and all appeared well. Thereafter, Petitioner and the children returned to the apartment. Defendant testified that they watched cartoons on TV, then he fed the children and put them down for naps in separate bedrooms. M.K. was placed in an adult bed, because his crib was put away. M.K. had never slept in an adult bed before.

According to Petitioner, approximately an hour later, as he was waking M.K.'s sibling from her nap, Defendant heard M.K. cry out from the other bedroom. He then found M.K. laying at the foot of the bed with his head against the footboard, unconscious. After attempting to revive the child, Petitioner frantically called 911 and reported that M.K. had fallen and was not breathing. Petitioner had language difficulties communicating with the 911 operator and eventually a neighbor assisted him. The neighbor began CPR at the instruction of dispatch. M.K. was unresponsive when first responders arrived. He was transported to the hospital. At the emergency room, it was discovered that M.K. had a massive skull fracture. M.K. was intubated

and infused with blood. M.K. never regained brain activity and died from his injuries the next day.

M.K.'s treating Emergency Room physician testified that she did not believe M.K.'s injuries appeared to be consistent with a mere fall from a bed. Law enforcement accordingly was notified and responded to the hospital to investigate. Petitioner was interrogated by police that evening (December 24) as well as on December 26 and 27. At all times he steadfastly and consistently denied doing any harm to M.K. Petitioner stated his belief that the child must have fallen from the bed and struck his head. This Court reviewed the hours of interrogation video and finds that Petitioner gave consistent narratives throughout his interrogations, all in the face of withering questioning by law enforcement, and never made any incriminating statement or admission. Petitioner was arrested for the death of M.K. on December 27, 2012, at the beginning of his third interrogation session.

An autopsy of M.K.'s body revealed a large depressed skull fracture to the left rear of his skull. Dr. Snell testified at trial that there were two to four other points of impact on M.K.'s head, which were, in his opinion, inconsistent with Petitioner's story that the child was fatally injured by an accidental fall. According to Dr. Snell, M.K. had an impact to his left eye, which was bruised and swollen. There was a subgaleal hemorrhage beneath the sealp indicating a second impact, according to Dr. Snell's testimony. Dr. Snell testified that there was also a hemorrhage beneath M.K.'s forehead to the crown of his head, indicating a third possible impact to the front of his head. A fourth impact was located at the back of M.K.'s head, according to Dr. Snell, with a large bruise all the way across the back of the head, measuring 3 ¼ inches long, with a subgaleal hemorrhage beneath the scalp. In Dr. Snell's opinion, the final, and ultimately fatal, impact was the aforementioned large depressed skull fracture on the left side of M.K.'s

head above and behind his ear. It was 8 cm in length, crossed three bones and two sets of sutures in the skull. The bone in this area was pressed down and pushed into the brain. Dr. Snell testified that a large object struck M.K.'s head in that area, such as a fist, a baseball bat, or his head striking something with an edge. Dr. Snell testified that a fall from the bed to a carpeted floor would not result in the multiple impacts and the extent of injuries sustained by M.K.

At trial, Petitioner offered the testimony of Dr. Ophoven,[1] who asserted that M.K. suffered only one point of impact, and that impact caused the fatal skull fracture. She attributed the other hemorrhaging noted by Dr. Snell, and characterized by him as other impact sites, as all resulting from the coagulopathy (DIC)[2] that M. K. developed because of the skull fracture, which caused his uncoagulated blood to spread throughout the entire head. As M.K. lay in the Emergency Room unconscious, with unrestrained bleeding from the fracture site which was under his intact scalp, he was administered massive blood transfusions that continued to exit his circulatory system through the fractured skull bone and accumulate under the skin in his head. The defense theory, as presented through Dr. Ophoven, was that the lesions that Dr. Snell attributed to multiple blows were in fact sequelae of a single head injury.

Petitioner also offered testimony at trial from Dr. Van Ee, a biomedical engineer with a PhD from Duke University. Dr. Van Ee testified as to the amount of force necessary to cause M.K.'s skull fracture. Dr. Van Ee opined that M.K.'s skull fracture could have been caused by M.K.'s falling from the bed and hitting his skull on the edge of the footboard. Dr. Van Ee's confirmation of the bioengineering potentiality of sufficient force from an accidental fall from

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[1] Dr. Ophoven is a forensic pediatric pathologist with over 40 years of experience in the field, having extensive experience in autopsies involving children. She graduated from the University of Minnesota Medical School and completed fellowships in both pediatric pathology and forensic pathology.

[2] Coagulopathy is a condition, which may be caused by shock, in which the blood's ability to coagulate is impaired, and results in prolonged and/or excessive bleeding.

the bed causing the depressed skull fracture that killed M.K. was never contested at trial, and his qualifications to render this opinion were sound.

Given the uncontradicted evidence at trial that a fall from the bed could have caused the fatal skull fracture, the absence of any direct evidence of guilt, and the lack of any circumstantial evidence except Dr. Snell's assertions of multiple contemporaneous but distinct serious head injuries[3], the case boiled down to two issues- whether Dr. Ophoven's one blow theory was plausible, and whether the Defendant's protestations of innocence seemed genuine. In this Court's view, defense counsel made tactical errors in addressing these two critical issues of such magnitude that they failed to provide him with effective assistance at trial as guaranteed by the Sixth Amendment and due process of law.

Petitioner's lead counsel was Attorney Traci Smith (Smith), the Director of the Minnehaha County Public Defender's Office (PDO), who had both litigation and administrative duties. Her second chair was Kenny Jacobs, who at the time was a relatively inexperienced junior staff lawyer at the PDO. During the time of its representation of Petitioner, the PDO's own official reporting to the Minnehaha County Commission indicated that the office was understaffed, and Smith warned them of potential consequences for her ability to provide effective legal assistance to indigent clients. Apropos, while representing Petitioner, Smith was simultaneously preparing for the penalty phase of a capital murder trial scheduled to begin one month after the end of Petitioner's trial. [4]

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[3] The State's case essentially presented nothing except Dr. Snell's theory that M.K. suffered multiple contemporaneous blows to head that could not be consistent with accident. The treating physician, Dr. Hafzalah, vouched for this theory but she had no forensic or pathological credentials, rendering her opinion of little probative value. In sum, the State's case was based entirely upon circumstantial evidence drawn from the head injury and its sequalae.

[4] State v. McVay, 49C11-3840AO

As will be more thoroughly discussed below, this Court finds several errors by Petitioner's counsel, including defense counsel's failure to present, and indeed, pretrial motion to exclude, the exculpatory tapes of his withstanding intense interrogation, and counsel's pretrial failure to disclose to the State a doll video made by the defense and provided to Dr. Van Ee for his consideration in developing his expert opinion in this case. The errors continued at trial, where Jacobs oversold the theory of the case in opening statement by telling the jury that Petitioner's expert witnesses would show that M.K.'s injury was accidental, rather than that accidental injury was scientifically possible.

Petitioner's counsel allowed only heavily redacted video of Petitioner's interrogations to be shown. That excerpt was used by the State to show that Petitioner admitted to being the only adult present at time of fatal injury. This Court has viewed the interrogation videos in their entirety. It is the view of this Court that an ordinary juror with common experience would be, as this Court was, deeply affected by the demeanor of the Defendant as he maintained a consistent narrative of his innocence while being subjected to various psychological interrogation techniques conducted with the specific purpose of tripping him up or causing him to succumb and confess.[5] While Petitioner did testify in own defense, this was hampered by a language

[5] In each of the three interrogations, Defendant is left alone for approximately thirty minutes in the interrogation room before questioning begins. Questioning by the armed detective vacillates between browbeating and then understanding. Examples of questions, throughout the six hours of video, over the course of three separate days, include: "The doctor told me that the baby did not receive this injury by falling off the bed. It is not possible. When you tell me that, you are lying." Interrogation Video, 12/26/12 at 19:48:43; "Don't tell me lies about falling off the bed because I know it's not true, you know it's not true, and the doctor knows it's not true." Interrogation Video, 12/26/12 at 19:52:32. On December 27, 2012, Defendant is in the interrogation room for approximately thirty-five minutes alone awaiting questioning. Then the detective trips the fire alarm which sounds in the room for about 15 seconds. Then the questioning begins. On numerous occasions the detective interrupts Petitioner or his interpreter, cutting off the answer to berate him with more accusations. Aggressive tactics are employed, like confronting Petitioner with an autopsy photo and saying "these are [M.K.'s] brains coming out of his skull." Interrogation video 12/27/12 at 12:15:40. The detective also resorts to challenging Petitioner's faith, with questions such as "What does your religion say about telling the truth?" Interrogation Video 12/27/12 at 13:35:00. In response, Defendant made comments such as, "An accident happened, I didn't cause any murder." Interrogation Video, 12/27/12 at 12:13:00; "This is my first time to be arrested." Interrogation Video 12/27/12 at 13:34:35; and "All that I am saying has been the truth." Interrogation Video, 12/27/12 at 13:35:30.

barrier, testifying through an interpreter. The trial testimony was a sterilized version of the Defendant. The interrogation videos show his authentic, raw testimony near the time of the events. This was profoundly exculpatory in the Court's view, and should have been presented to the jury for consideration. Failure to recognize this was ineffective lawyering.

Dr. Van Ee testified to the biomechanical possibility that an accidental fall in this scenario could have caused the skull fracture, and this was highly exculpatory. However, Dr. Van Ee admitted during cross-examination by the State that his opinion was hypothetical, and he had no opinion whether this case was in fact an accident. He conceded that if Dr. Ophoven's criticisms of Dr. Snell's opinion were incorrect, and that there were other contemporaneous, serious injuries that contradicted the single blow theory, then Dr. Van Ee's theory was irrelevant to the case. In this way the State neutralized Dr. Van Ee, and focused the jury's attention upon its upcoming, anticipated rebuttal testimony from Dr. Snell, which would attack and cast aspersion upon Dr. Ophoven's prior testimony, clearing the way for conviction.

The defense's forensic case depended upon the probative force of Dr. Ophoven's testimony. Dr. Ophoven testified that there was only one fatal impact, and that all the other significant findings by Dr. Snell were secondary to DIC and massive blood transfusions. As noted above, Dr. Ophoven's education, training, and experience as a forensic pediatric pathologist are impressive. She further opined that other minor abrasions behind M.K.'s ear, and on his lip, and nose were old, not suspicious, and therefore not relevant to the fatal incident. This, in combination with Dr. Van Ee's uncontested biomedical engineering analysis established reasonable doubt whether this incident was a homicide or a tragic accident. But, following skillful cross examination by the State, Petitioner's counsel chose not to follow up with re-direct questioning to clarify any ambiguities, as is routinely done with expert witnesses, presumably

feeling confident of a lead in the battle. But, Counsel inexplicably then sent Dr. Ophoven home on plane to Ohio, even though it was virtually certain that Dr. Snell would retake the stand on rebuttal to attack her testimony, and put her client back in great peril of conviction. That was an unacceptable error in a case of this magnitude, and under these critical circumstances.

Predictably, the State did recall Dr. Snell in rebuttal, and with his adversary safely hundreds of miles away he was free to attack Dr. Ophoven's methodology knowing his criticisms would be the last word. Accordingly, Dr. Snell told the jury that Dr. Ophoven was quite mistaken, and had erroneously based her conclusions on the patently absurd premise of liquid (blood) flowing uphill, in full defiance of the ineluctable law of gravity. Dr. Snell then pointed out that, because blood could not flow up from the back of the head to the front while M.K. lay on the hospital gurney, the fact that there were hematomas or apparent bruising in areas of the head forward of the fracture site, proved that M.K was beaten and didn't merely fall off the bed. At this point it was critical to recall Dr. Ophoven to address Dr. Snell's challenges, and re-establish doubt, if she were capable of so testifying. Because Petitioner's counsel had not requested Dr. Ophoven to remain or return, no such sur-rebuttal could be offered. The critical battle for reasonable doubt ended with Dr. Snell's systematic rebuttal of Dr. Ophoven's key points. There was no strategic justification for allowing the State to have the last word in this debate between the experts. Competent defense requires that, in these circumstances, Dr. Ophoven be recalled for equal time before the jury, assuming she had compelling responses to Dr. Snell's criticism. The habeas testimony of Dr. Ophoven provided to this Court amply demonstrated that she was in fact prepared to do so, and that her sur-rebuttal testimony would have been powerful.

In its closing argument, the State capitalized on the discovery error regarding the video provided to Dr. Van Ee, to make Petitioner's counsel look dishonest. The prosecutor inferred that the State shared everything and Petitioner hid evidence. The State spring-boarded off this to characterize Petitioner's experts as hired guns coming in from distant lands, while the local coroner's testimony was not so tainted; rather, he was just a local official doing his honest best for the community. In this way the State implied that Petitioner's entire case was manufactured and inconsistent with any reasonable interpretation of the evidence, and that the only rational conclusion was guilt of murder or manslaughter. That is what the jury heard for summation after Dr. Snell's unchallenged rebuttal testimony.

Following his conviction, Judge Mark Salter sentenced Petitioner on May 29, 2014, as to Count 3 First Degree Manslaughter[6] to forty-five (45) years in the state penitentiary with credit for 518 days previously served and twenty (20) years suspended. Petitioner filed a direct appeal to the South Dakota Supreme Court. The primary topic on direct appeal was sufficiency of the evidence, with the following issues raised:

1) Whether Petitioner was constitutional denied his right to counsel during questioning.
2) Whether there was sufficient evidence to support the jury verdict finding Petitioner guilty of First Degree Manslaughter.
3) Whether the sequestration of Petitioner's biomechanical engineer from the courtroom during the "medical testimony" resulted in a violation of his right to a fair trial.

The Supreme Court summarily affirmed the judgment and sentence on January 19, 2016.

ANALYSIS

This is Petitioner's first application for writ of habeas corpus. He raises a claim of ineffective assistance of counsel. Petitioner alleges that his trial counsel was ineffective in

[6] Count 3 alleged that Petitioner did, without any design to effect death and while engaged in the commission of a felony, abuse or cruelty to a minor, kill a human being, namely, M.K., DOB 6-27-11.

violation of the United States and South Dakota Constitutions because of, among other things, (1) the PDO's overloaded caseload; (2) inadequate trial preparation; (3) failure to elicit critical exculpatory opinions from their retained expert pathologist, Dr. Ophoven, to contradict the County Coroner Dr. Snell's inculpatory opinions, particularly through redirect examination and sur-rebuttal testimony; (4) failure to disclose information to the prosecution that was presented to another defense expert witness, Dr. Van Ee, in violation of the Rules of Criminal Procedure, resulting in an inference that defense counsel was hiding evidence and not credible; (5) failure to offer into evidence the videotapes of Defendant's entire custodial interrogations, which this Court finds were highly exculpatory and probative of innocence; and (6) improper opening statement which inaccurately summarized the defense theory of the case and anticipated evidence. Petitioner alleges that each of these errors constitutes ineffective assistance of counsel, and that the cumulative effect of these errors undermines the reliability of the guilty verdict, meeting the Strickland v. Washington prejudice standard. This Court agrees.

STANDARD OF REVIEW

The history of habeas corpus can be traced to the Habeas Corpus Act of 1679, which has been described as the "stable bulwark of our liberties" and was the model upon which the habeas statutes of the thirteen original American colonies were based. See Boumediene v. Bush, 553 U.S. 723, 742, 128 S.Ct. 2229, 2245-2246, 171 L.Ed.2d 41 (2008) (citing 1 W. Blackstone, Commentaries). SDCL 21-27-1 states, "Any person committed or detained, imprisoned or restrained of his liberty, under any color or pretense whatever, civil or criminal, except as provided herein, may apply to the Supreme or circuit court, or any justice or judge thereof, for a writ of habeas corpus." However, habeas corpus is not a substitute for direct review and the scope of habeas review is limited. "'Habeas corpus can be used only to review (1) whether the

court had jurisdiction of the crime and the person of the defendant; (2) whether the sentence was authorized by law; and (3) in certain cases whether an incarcerated defendant has been deprived of basic constitutional rights.'" Loderman v. Class, 1996 SD 134, ¶3, 555 N.W.2d 618, 622 (quoting Loop v. Class, 1996 SD 107, ¶11, 554 N.W.2d 189, 191 (citations omitted)). "The habeas applicant has the initial burden of proving entitlement to relief by a preponderance of the evidence." Hays v. Weber, 2002 SD 59, ¶11, 645 N.W.2d 591, 595 (citing New v. Weber, 1999 SD 125, ¶5, 600 N.W.2d 568, 572 (citing Lien v. Class, 1998 SD 7, ¶11, 574 N.W.2d 601, 607)).

A two-prong test is applied to determine ineffective assistance of counsel claims. "In order to meet the burden of proof for a claim of ineffective assistance of counsel, a defendant must prove (1) that counsel's representation fell below an objective standard of reasonableness, and (2) that such deficiency prejudiced the defendant." Rhines v. Weber, 2000 SD 19, ¶13, 608 N.W.2d 303, 307 (citing Siers v. Class, 1998 SD 77, ¶12, 581 N.W.2d 491, 495; Sprik v. Class, 1994 SD 134, ¶22, 572 N.W.2d 824, 829; Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2065, 80 L.Ed2d 674, 693 (1984)).

First, counsel's performance must be shown to be deficient. Mitchell v. Class, 524 N.W.2d 860, 862 (SD 1994) (citations omitted). In order to the meet the first prong, the defendant must show that the counsel's errors were "'so serious that counsel was not functioning as the 'counsel' guaranteed ... by the Sixth Amendment.'" Mitchell, 524 N.W.2d at 862 (citations omitted). '"Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]'" Hofer, 1998 SD 58, ¶10, 578 N.W.2d at 586.

Second, "Applicants must prove that the outcome was prejudiced by inferior performance of counsel." Ramos v. Weber, 2000 S.D. 111, ¶12, 616 N.W.2d 88, 92 (citing Hofer, 1998 SD

58, ¶9, 578 N.W.2d at 585). "Prejudice means 'a reasonable probability that, but for the unprofessional errors of counsel, the result of the proceeding would have been different.'" Ramos, 200 S.D. 111, ¶12, 616 N.W.2d at 92 (citing Phyle v. Leapley, 491 N.W.2d 429, 432 (S.D. 1992), as modified by Hopfinger v. Leapley, 511 N.W.2d 845, 846-47 (S.D. 1994)). "A 'reasonable probability' is said to exist when there is proof sufficient to 'undermine confidence in the outcome.'" Ramos, 2000 S.D. 111, ¶12, 616 N.W.2d at 93 (citing Phyle, 491 N.W.2d at 432).

LAW AND REASONING

The case against Petitioner rested entirely upon inferences drawn from the circumstances of M.K.'s death and the opinion of Dr. Snell that, in addition to the fatal skull fracture, there was evidence of other contemporaneous blows to the head. Therefore, according to the State, the evidence proved, beyond a reasonable doubt, that the skull fracture did not result from an accidental fall. The State conceded that, although unlikely, a fall from the bed could have cause the severe skull fracture. But the State maintained that, beyond a reasonable doubt, a single blow to the head could not have caused the other multiple contemporaneous head injuries allegedly disclosed by the autopsy. Petitioner was the only adult present in the apartment at the time of injury. The five-year-old sibling was not capable of causing the injuries sustained. Therefore, the conclusion was logically unavoidable that Petitioner was guilty of causing the fatal abusive trauma.

In juxtaposition to this, there was no other evidence suggesting that Petitioner had ever been violent with the deceased child or any other person, or even that he was capable of such an offense. The family lived in an apartment complex, and there had never been any indication emanating from their abode of violence, upset or disturbance. The children were never reported

to have been abused in any way, and the children's mother denied that Petitioner was violent, and believed in his innocence even at the time of sentencing. The apartment at the time of the injury was neat and tidy, and there was no evidence of any disturbance even in the bedroom where the child was found unresponsive on the floor. Indeed, the morning of the injury Petitioner and the children had been to the doctor's office together for Petitioner's inoculations, and all appeared to be well. The Court notes as significant the absence of any evidence of an assault other that Dr. Snell's claim of multiple contemporaneous head wounds. No evidence was offered identifying any weapon or even pointing to a probable source of the alleged blunt force assault. There was no object identified as the potential bludgeon and Petitioner had no marks, bruises, or swelling on either of his hands. There was a dearth of any incriminating evidence other than the severity of the injury itself, and Dr. Snell's opinion interpreting the same.

The matter came to the attention of a neighbor as Petitioner was in the hallway of the apartment building, frantically trying to explain to the 911 dispatcher that the child had fallen and was unconscious. Nothing about his reactions in this regard were inconsistent with his version of the event, which was that when he went to wake the child from his nap, Petitioner found the boy unresponsive on the floor by the bed. Particularly probative of innocence, in this Court's view, are the three interrogation videos where Petitioner was subjected to withering and abusive questioning by a very skillful police detective, all without counsel, and with a separate interpreter for each interrogation, all the while steadfastly maintaining his innocence, and, moreover, maintaining the same, consistent narrative of the events. It is inconceivable to the Court why the defense chose to withhold that compelling, critical evidence of innocence from the jury. At the habeas evidentiary hearing, trial defense counsel offered no rational justification

for this. The Court can find no possible strategic purpose to keeping that powerful evidence from the jury.

Given the dearth of any incriminating statements, or other corroboration, the entire case came down to interpretation of the child's injurics, and from there, to the competing opinions of the two forensic pathologists who investigated the incident, were qualified to render opinions as to manner of death, and testified at the trial. The County Coroner, Dr. Snell, said that certain lesions on the child's head were sequelae of multiple contemporaneous blows to the head occurring at the time of the fatal skull fracture. The defensc expert, Dr. Ophoven, a pediatric pathologist with impressive forensic credentials, contradicted the multiple blow theory and argued that the lesions Dr. Snell attributed to other blows were in fact the result of the massive bleeding under thc child's scalp from the facture site, fueled by massive blood transfusions and the lack of clotting caused by DIC, the condition where anticoagulants are formed in the bloodstream due to shock. The defense's attempt to carry the day in this titanic battle of experts was undermined by multiple errors committed by defense counsel which prejudiced the defense and, in this Court's view, likely affected the outcome of the trial.

The most critical error in the case was the failure of dcfense counsel to allow Dr. Ophoven the opportunity she needed to neutralize Dr. Snell's rebuttal testimony. Defense counsel did a decent job on direct exam with Dr. Ophoven, but following a skillful cross, there was need of re-direct to reinforce her theory of the case. Defense counsel's excuse for waiving redirect was that she did not want to annoy the jury by being too picky. She also indicated a belief that Dr. Ophoven's testimony was not critical to the defense. These comments evince a staggering failure to understand the theory of the defense. It should have been obvious to competently prepared counsel in the heat of this litigation that the fate of the case hinged upon

carrying the day in the contest between Drs. Snell and Ophoven. It also revealed a fundamental miscalculation of her opponent, as it should have been foreseen that the prosecution would have Dr. Snell retake the stand for rebuttal, as is standard procedure in any trial involving experts with opposing views critical to the outcome of the case.

Predictably, the failure to redirect Dr. Ophoven allowed the prosecution to follow its cross of the defense's key expert witness with the return of Dr. Snell for rebuttal, to cast further doubt upon the credibility of Dr. Ophoven's testimony with a one-two punch series that was the final salvo in the case. As defense counsel testified at length at the habeas hearing, Dr. Snell is a formidable witness and that effective cross examination is very elusive with him on the witness stand. The superior strategy, in her view, was to avoid arguing with him and instead focus on allowing the defense's expert witness to contradict him with superior forensic reasoning and analysis.

Unfortunately for Petitioner, his defense counsel failed to follow through with this strategy. Rather, Dr. Snell's forceful rebuttal of Dr. Ophoven was the last word on the subject, as defense counsel inexplicably failed to exercise the procedural right to recall Dr. Ophoven to the stand for sur-rebuttal. In this Court's view, that decision was fatal to the defense, and unjustifiable by any rational strategy. At the habeas evidentiary hearing in this case, Dr. Ophoven was called to the stand by Petitioner to testify to what she would have said to the jury, had she been allowed to provide them with her testimony on redirect and sur-rebuttal. In this Court's view, that testimony, which responded forcefully and persuasively to all of Dr. Snell's criticisms, was of critical importance to the jury's understanding and appreciation of the theory of the defense, that there was, indeed, reasonable doubt whether this was a case of abuse or

merely a tragic accident. Failure to do this undermines the Court's confidence in the verdict, and therefore was error of constitutional magnitude.

Dr. Snell's main criticism of Dr. Ophoven's analysis was that she erred in attributing the apparent bruising at the front area of M.K.'s head and face to the excessive bleeding from the fracture site, caused by massive blood transfusions combined with the DIC anti-coagulation effect. Dr. Snell testified that this theory was implausible, because it required M.K.'s blood to flow uphill, against gravity, which doesn't occur. He further admonished the jury that an apparent bruise along the back of the child's scalp couldn't be attributable to the excessive bleeding, nor tied to the blow that caused the depressed fracture, because that bruise and the fracture were not in close enough proximity. At the habeas hearing, Petitioner called Dr. Ophoven to the stand to testify to what she would have said to rebut Dr. Snell's criticisms, if asked. That testimony explained that in the environment of a child's tissues surrounding the skull bone, blood under pressure of transfusion follows the path of least resistance, which in this case would allow migration of blood all around the head and face, including the area of the child's left eye, which developed apparent bruising after death. Dr. Ophoven further pointed out the lack of any damage to the paper-thin eye socket structure of such a young child, which is inconsistent with Dr. Snell's claim that a serious blow to the eye occurred. She also, among other things, explained how the elastic qualities of a small child's skull bones allow for very significant deformation under pressure, explaining how surface bruising and boney fracture sites may not always appear to line up exactly as Dr. Snell asserted. Overall, in the Court's view, Dr. Ophoven's habeas testimony shows that the absent sur-rebuttal testimony, if offered, would have been compelling, and likely would have cast reasonable doubt upon the theory of the State's case. Had the jury heard this critical evidence, the Court has grave doubt whether the jury could

have found the Petitioner guilty of any of the crimes charged. Presenting such evidence, when it exists, is necessary to a competent defense. This is the type of representation that the Sixth Amendment's right to counsel requires. Allowing the retained expert to leave the state and not stay to complete her testimony in this way is deficient advocacy.

Defense counsel also incompetently prejudiced their own case by overselling the defense to the jury in opening statement. Defense counsel asserted that the Defense experts would show that the injury was accidental. That was never anticipated by counsel and was not the expected testimony. Dr. Ophoven's testimony was that there was only one fresh injury to the head and that was the skull fracture. Dr. Van Ee's opinion was that a hypothetical fall from the bed to the footboard of the bed was of sufficient height to create enough force to cause a fracture of the severity that was shown to exist by the autopsy. The anticipated expert testimony, as such, established the scientific possibility of an accident. It would not prove the injury was accidental. But, of course, the defense need not prove innocence. It need only be able to convince the jury that there is a reasonable possibility of innocence. Given the lack of other circumstantial evidence of guilt, a credible forensic hypothesis for innocence would be sufficient to reveal the reasonable doubt existing under the circumstances. By overselling their expert's testimony in the opening statement, defense counsel set themselves up for failure, as the evidence failed to meet the standard that they promised to establish for the jury. This spoiled the proper presentation of the case as scientific possibility of innocence, when combined with all the circumstantial evidence being consistent with innocence, creating reasonable doubt.

The credibility of the defense was further impeached by a blunder where the defense failed to disclose to the prosecution that it had provided Dr. Van Ee with a videotaped statement from Petitioner explaining, and a drawing Petitioner utilized to show, where he found the injured

child by the bed. While there was nothing wrong with the defense making the video or providing it to their expert, this data was subject to discovery. See SDCL 23A-13-12; SDCL 23A-13-13; SDCL 19-19-705. Predictably, while on the stand in cross examination, Dr. Van Ee was asked what information was provided for his review in preparation of his opinions and testimony. When he revealed the video that the prosecution had no knowledge of, the withholding of that information was pounced upon by the State in front of the jury and the defense was put in the position of attempting to explain the nondisclosure. This error was capitalized upon by the prosecutor in closing argument, where he presented himself as the fair truth seeker providing all evidence to the jury, while defense counsel attempted to hide evidence. At the habeas hearing Ms. Smith acknowledged that her assumption that this data was privileged work product was unsupportable.

The lead attorney for the defense is known to this Court to be an ethical, competent and zealous advocate. But the evidence presented at the habeas hearing demonstrated that her office at the time of this trial was understaffed, overworked, and inadequately equipped to handle its burdensome caseload. To that point, counsel presented documentation to the County Commission in her budget presentation the prior year warning that her office was at the risk of being unable to provide adequate representation to its clients under the current staffing shortages. See Habeas Ex. 12 and 13. Those documents, provided by an attorney to a government agency for an official purpose, by law are required to be true subject to legal penalties. See State v. Bosworth, 2017 S.D. 43, 899 N.W.2d 691; Reaser v. Reaser, 2004 S.D. 116, ¶21, 688 N.W.2d 429, 436. While defense counsel sought to downplay the significance of that report in her testimony during the habeas evidentiary hearing as merely for budget advocacy, the Court finds that the budget and staffing constraints are consistent with the errors herein. Specifically, Smith

was scheduled to commence the penalty phase of a death penalty jury trial one month following Petitioner's trial. Her second chair in Petitioner's case was an inexperienced young lawyer. The Public Defender's Office was stretched too thin do provide effective advocacy in all its serious matters and that weakness manifested itself in this case to the Petitioner's prejudice.

The ABA has promulgated very rigorous standards for death cases. See American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003). Petitioner's case was not a death penalty case. But it was a murder case, and Petitioner was facing life in prison without parole, arguably the functional equivalent of a death sentence. High standards for preparation, strategy, and execution of the defense ought to apply in such cases as well, and that expectation must prevail in courts of justice in an advanced and free society. Having two cases of such magnitude with one month in between, and with only a young and inexperienced co-counsel, is not prudent, and resulted in prejudicial errors in this case, which seems to be explained by the fact that this defender office was being asked to do too much with too little for too long. To be sure, staffing shortages alone do not create ineffective assistance per se, but they do appear to explain why the assistance in this case fell short of the requisite standard.

Another point needs to be mentioned. The defendant in this case was a legal immigrant who did not speak English and had only been in the country for two years. These circumstances put him at a very appreciable disadvantage vis-à-vis a native South Dakotan who may have found himself in similar circumstances. Unlike most defendants, who exercise their rights to remain silent and to counsel at an early stage, Petitioner submitted to six hours of custodial interrogation without counsel and then testified at trial. However, he had to testify through an interpreter, so that the jury never really had an opportunity to evaluate the credibility of his

testimony in court the same way it would if a native speaker were at the witness stand conversing directly with them. The transcripts show that the interpreter struggled to understand legal terms while Petitioner was on the witness stand and the flow of his testimony was subject to interruptions as the interpreter asked for clarifications or restatements. Accordingly, it was even more important, in the interests of equal justice, for this disadvantaged individual to be provided with competent representation in the presentation of his defense. In this case counsel fell short in multiple domains, comprising several individual instances of ineffective assistance of counsel, the cumulative effect of which, in this Court's view, prejudiced his defense and undermines the Court's confidence in the justness of the verdict.

CONCLUSION

When the State marshals it resources to accuse a person of murder and seeks to take his liberty away potentially for life, the fundamental principles of due process of law that separate this free society from other, oppressive forms of government require that, among other things, the accused be provided effective assistance of counsel.

> The United States Supreme Court has stated that the principles announced in Strickland "do not establish mechanical rules." Strickland, 466 U.S. at 696, 104 S.Ct. at 2069. The Supreme Court continued:
>
> > Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

Dillon v. Weber, 2007 S.D. 81, ¶ 29, 737 N.W.2d 420, 430. Felony crimes of this magnitude require that the defense bring its "A game" to the courtroom. Here that was not done. Critical expert testimony was omitted, and compelling exculpatory interrogation videos were withheld from evidence. A major pretrial discovery blunder detonated in the defense's face before the

jury and was capitalized upon by an opportunistic prosecution in closing. Opening statement was bungled with a fundamental error. This very outcome was foreshadowed by the PDO's own budget presentation to the County Commission and was foreseeable. Petitioner has been prejudiced by these errors and the Court's confidence in the integrity of this verdict is compromised.

> [The South Dakota Supreme Court has] previously acknowledged that "this [C]ourt will not compare counsel's performance to that of some idealized 'super-lawyer' and will respect the integrity of counsel's decision in choosing a particular strategy, [but] these considerations must be balanced with the need to insure that counsel's performance was within the realm of competence required of members of the profession." Sprik v. Class, 1997 SD 134, ¶ 24, 572 N.W.2d 824, 829 (citations omitted).

Hofman v. Weber, 2002 S.D. 11, ¶ 18, 639 N.W.2d 523, 529. Justice requires that Petitioner receive a new, fair trial. Accordingly, the request for habeas corpus relief is granted, and Petitioner will be released from confinement unless he is retried within a reasonable time. Within thirty days, counsel for Petitioner shall prepare the appropriate Findings of Fact and Conclusions of Law incorporating this Memorandum Decision, along with a proposed Order for the Court's consideration. Respondent shall have a similar time to file his Objections and Alternative Proposed Findings of Fact and Conclusions of Law.

Dated this 1 day of July, 2021.

BY THE COURT:

Douglas E. Hoffman
Circuit Court Judge

FILED
JUL 01 2021
Minnehaha County, S.D.
Clerk Circuit Court

ATTEST: Angelia M. Gries, Clerk of Courts
By: _____ DEPUTY

UNIFIED JUDICIAL SYSTEM STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA) :SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
MANEGABE CHEBEA ALLY, Petitioner, vs. **DARIN YOUNG, Warden, South Dakota State Penitentiary,** Respondent.	CIV 16-824 **FINDINGS OF FACT AND CONCLUSIONS OF LAW GRANTING HABEAS CORPUS RELIEF**

INTRODUCTION

The Defendant filed a pro se application for habeas corpus relief on March 31, 2016. The Court appointed the Office of the Public Advocate to represent the Petitioner. An Amended Application for Habeas Relief was filed by Petitioner's counsel on September 17, 2018. The Respondent filed a Return on October 3, 2018.

This matter came before the Court for an evidentiary hearing on February 11 and 12, 2020, March 5, 2020, and March 19, 2020, along with subsequent hearings on November 30, 2020 and March 12, 2021. The Petitioner requested leave to file a second Amended Application for habeas corpus relief to conform to the evidence. This Court granted such leave over the Respondent's Objection. An Amended Application was filed on November 20, 2020. The Respondent filed a second Return. Petitioner appeared personally throughout with his attorney, Mark Kadi, via in person or ITV. Minnehaha County Deputy State's Attorneys Donna Kelly or

Drew DeGroot appeared on behalf of Respondent at the various hearings. At the conclusion of the last hearing, the Court took the matter under advisement. Having reviewed the record and considered the arguments and briefs of counsel, the Court announced in its Memorandum Decision of July 1, 2021, its decision to grant habeas relief.

FINDINGS OF FACT

1. This Court takes judicial notice of, and incorporates herein by this reference, the Circuit Court file in State v. Ally, Cr. 12-8143, Minnehaha County, and South Dakota Supreme Court file, State v. Ally, #27202. From the above-entitled CIV. #16-824, the Findings of Fact and Conclusions of Law further incorporates herein by reference, its Memorandum Decision filed on July 1, 2021, transcripts of proceedings in this file, evidentiary hearing exhibits, motions and pleadings contained therein.
2. Manegabe Ally may be referred to herein as Petitioner, Defendant or Ally.
3. Petitioner Manegabe Ally (Petitioner) was charged by indictment in CRI 12-8143 with Count 1: First Degree Murder; Count 2: Second Degree Murder; and Counts 3 through 6: First Degree Manslaughter. Petitioner was represented by Attorneys Traci Smith and Kenny Jacobs. The State was represented by Deputy State's Attorneys Donald Hanson and Tara Palmiotto. A jury trial commenced on February 18, 2014. On February 27, 2014, the jury returned a verdict of not guilty as to Counts 1 and 2, but it found Petitioner guilty of First Degree Manslaughter as charged in Counts 3 through 6.
4. In October 2012, Petitioner moved to Sioux Falls to reside in an apartment with his girlfriend (Mother) and her two children, C.K., age 5 and M.K., age 16 months. Petitioner cared for the two children while Mother worked. Prior to December 24,

2012, there was no record of any prior disturbances, no reports of noise, fights, children crying, or other indicia of violence or abuse in the household.

5. On the morning of December 24, 2012, Mother and Petitioner had disassembled M.K.'s crib, intending to shop for a replacement toddler bed after Mother was finished with her shift at Smithfield that day. After dropping Mother off at work, Petitioner had visited the doctor's office to complete vaccines he needed to obtain employment, with the children in tow, and all appeared well. Thereafter, Petitioner and the children returned to the apartment. Defendant testified that they watched cartoons on TV, then he fed the children and put them down for naps in separate bedrooms. M.K. was placed in an adult bed, because his crib was put away. M.K. had never slept in an adult bed before.

6. The Petitioner indicated that approximately an hour later, as he was waking M.K.'s sibling from her nap, Defendant heard M.K. cry out from the other bedroom. He then found M.K. laying at the foot of the bed with his head against the footboard, unconscious. After attempting to revive the child, Petitioner frantically called 911 and reported that M.K. had fallen and was not breathing. Petitioner had language difficulties communicating with the 911 operator and eventually a neighbor assisted him. The neighbor began CPR at the instruction of dispatch. M.K. was unresponsive when first responders arrived. He was transported to the hospital. At the emergency room, it was discovered that M.K. had a massive skull fracture. M.K. was intubated and infused with blood. M.K. never regained brain activity and died from his injuries the next day.

7. M.K.'s treating Emergency Room physician testified that she did not believe M.K.'s injuries appeared to be consistent with a mere fall from a bed. Law enforcement accordingly was notified and responded to the hospital to investigate.
8. Petitioner was interrogated by police that evening (December 24) as well as on December 26 and 27. At all times he steadfastly and consistently denied doing any harm to M.K. Petitioner stated his belief that the child must have fallen from the bed and struck his head. This Court reviewed the hours of interrogation video and finds that Petitioner gave consistent narratives throughout his interrogations, all in the face of withering questioning by law enforcement, and never made any incriminating statement or admission. Petitioner was arrested for the death of M.K. on December 27, 2012, at the beginning of his third interrogation session.
9. An autopsy of M.K.'s body revealed a large depressed skull fracture to the left rear of his skull. Dr. Kenneth Snell testified at trial that there were two to four other points of impact on M.K.'s head, which were, in his opinion, inconsistent with Petitioner's story that the child was fatally injured by an accidental fall. According to Dr. Snell, M.K. had an impact to his left eye, which was bruised and swollen. There was a subgaleal hemorrhage beneath the scalp indicating a second impact, according to Dr. Snell's testimony. Dr. Snell testified that there was also a hemorrhage beneath M.K.'s forehead to the crown of his head, indicating a third possible impact to the front of his head. A fourth impact was located at the back of M.K.'s head, according to Dr. Snell, with a large bruise all the way across the back of the head, measuring 3 ¼ inches long, with a subgaleal hemorrhage beneath the scalp. In Dr. Snell's opinion, the final, and ultimately fatal, impact was the aforementioned large depressed skull

fracture on the left side of M.K.'s head above and behind his ear. It was 8 cm in length, crossed three bones and two sets of sutures in the skull. The bone in this area was pressed down and pushed into the brain. Dr. Snell testified that a large object struck M.K.'s head in that area, such as a fist, a baseball bat, or his head striking something with an edge. Dr. Snell testified that a fall from the bed to a carpeted floor would not result in the multiple impacts and the extent of injuries sustained by M.K.

10. At trial, Petitioner offered the testimony of Dr. Janice Ophoven.

11. Dr. Ophoven is a forensic pediatric pathologist with over 40 years of experience in the field, having extensive experience in autopsies involving children. She graduated from the University of Minnesota Medical School and completed fellowships in both pediatric pathology and forensic pathology.

12. Dr. Ophoven testified that M.K. suffered only one point of impact, and that impact caused the fatal skull fracture. She attributed the other hemorrhaging noted by Dr. Snell, and characterized by him as other impact sites, as all resulting from the coagulopathy (DIC) that M. K. developed because of the skull fracture, which caused his uncoagulated blood to spread throughout the entire head.

13. Coagulopathy is a condition, which may be caused by shock, in which the blood's ability to coagulate is impaired, and results in prolonged and/or excessive bleeding.

14. As M.K. lay in the Emergency Room unconscious, with unrestrained bleeding from the fracture site which was under his intact scalp, he was administered massive blood transfusions that continued to exit his circulatory system through the fractured skull bone and accumulate under the skin in his head. The defense theory, as presented

through Dr. Ophoven, was that the lesions that Dr. Snell attributed to multiple blows were in fact sequelae of a single head injury.

15. Petitioner also offered testimony at trial from Dr. Van Ee, a biomedical engineer with a PhD from Duke University. Dr. Van Ee testified as to the amount of force necessary to cause M.K.'s skull fracture. Dr. Van Ee opined that M.K.'s skull fracture could have been caused by M.K.'s falling from the bed and hitting his skull on the edge of the footboard. Dr. Van Ee's confirmation of the bioengineering potentiality of sufficient force from an accidental fall from the bed causing the depressed skull fracture that killed M.K. was never contested at trial, and his qualifications to render this opinion were sound.

16. The State's case essentially presented nothing except Dr. Snell's theory that M.K. suffered multiple contemporaneous blows to head that could not be consistent with accident. The emergency room treating physician, Dr. Hafzalah, vouched for this theory but she had no forensic or pathological credentials. O'Conner v. Commonwealth Edison Co., 807 F.Supp. 1376, 1390 (C.D.Ill.1992) ("[N]o medical doctor is automatically an expert in every medical issue merely because he or she has graduated from medical school or has achieved certification in a medical specialty."); Dye v. Wayne Cty., 397 N.W.2d 188, 190–91 (1986)("While Kobe had considerable experience in counseling and suicide prevention, and considerable contact with suicidal persons, nothing in the record suggests that she was an expert in forensic pathology or other forensic sciences such that she could determine when a death was a suicide.").

17. Dr. Hafzalah did not have the further benefit of observing changes to M.K. by the time Dr. Snell performed the autopsy. The prosecutor discussed the opinions of Dr. Hafzalah and Dr. Snell at a pretrial hearing on February 13, 2014. The prosecutor conceded "[s]o as a practical matter, if the Court doesn't allow [Snell's] testimony, the State likely has no case to proceed to the jury on.". This Court finds Dr. Hafzalah's opinion to be of little probative value.

18. In sum, the State's case was based entirely upon circumstantial evidence drawn from the head injury and its sequalae. Given the uncontradicted evidence at trial that a fall from thc bed could have caused the fatal skull fracture, the absence of any direct evidence of guilt, and the lack of any circumstantial evidence except Dr. Snell's assertions of multiple contemporaneous but distinct serious head injuries, the case boiled down to two issues- whether Dr. Ophoven's one blow theory was plausible, and whether the Defendant's protestations of innocence seemed genuine. In this Court's view, defense counsel made tactical errors in addressing these two critical issues of such magnitude that they failed to provide him with effective assistance at trial as guaranteed by the Sixth Amendment and Due Process of law.

19. Petitioner's lead counsel was Attorney Traci Smith (Smith), the Director of the Minnehaha County Public Defender's Office (PDO), who had both litigation and administrative duties. Her second chair was Kenny Jacobs, who at the time was a relatively inexperienced junior staff lawyer at the PDO. During the time of its representation of Petitioner, the PDO's own official reporting to the Minnehaha County Commission indicated that the office was understaffed, and Smith warned them of potential consequences for her ability to provide effective legal assistance to

indigent clients. Apropos, while representing Petitioner, Smith was simultaneously preparing for the penalty phase of a capital murder trial (State v. McVay, 49C11-3840AO) scheduled to begin one month after the end of Petitioner's trial.

20. This Court finds several errors by Petitioner's counsel as set out further in these findings, inter alia, including defense counsel's failure to present, and indeed, pretrial motion to exclude, the exculpatory tapes of his withstanding intense interrogation, and counsel's pretrial failure to disclose to the State a doll video made by the defense and provided to Dr. Van Ee for his consideration in developing his expert opinion in this case.

21. The errors continued at trial. 2nd Chair attorney Jacobs oversold the theory of the case in opening statement by telling the jury that Petitioner's expert witnesses would show that M.K.'s injury was accidental, rather than that accidental injury was scientifically possible.

22. Petitioner's counsel allowed only heavily redacted video of Petitioner's interrogations to be shown. That excerpt was used by the State to show that Petitioner admitted to being the only adult present at time of fatal injury. This Court has viewed the interrogation videos in their entirety.

23. It is the view of this Court that an ordinary juror with common experience would be, as this Court was, deeply affected by the demeanor of the Defendant as he maintained a consistent narrative of his innocence while being subjected to various psychological interrogation techniques conducted with the specific purpose of tripping him up or causing him to succumb and confess.

24. In each of the three interrogations, Defendant is left alone for approximately thirty minutes in the interrogation room before questioning begins. Questioning by the armed detective vacillates between browbeating and then understanding. Examples of questions, throughout the six hours of video, over the course of three separate days, include: "The doctor told me that the baby did not receive this injury by falling off the bed. It is not possible. When you tell me that, you are lying." Interrogation Video, 12/26/12 at 19:48:43; "Don't tell me lies about falling off the bed because I know it's not true, you know it's not true, and the doctor knows it's not true." Interrogation Video, 12/26/12 at 19:52:32. On December 27, 2012, Defendant is in the interrogation room for approximately thirty-five minutes alone awaiting questioning. Then the detective trips the fire alarm which sounds in the room for about 15 seconds. Then the questioning begins. On numerous occasions the detective interrupts Petitioner or his interpreter, cutting off the answer to berate him with more accusations. Aggressive tactics are employed, like confronting Petitioner with an autopsy photo and saying "these are [M.K.'s] brains coming out of his skull." Interrogation video 12/27/12 at 12:15:40. The detective also resorts to challenging Petitioner's faith, with questions such as "What does your religion say about telling the truth?" Interrogation Video 12/27/12 at 13:35:00. In response, Defendant made comments such as, "An accident happened, I didn't cause any murder." Interrogation Video, 12/27/12 at 12:13:00; "This is my first time to be arrested." Interrogation Video 12/27/12 at 13:34:35; and "All that I am saying has been the truth." Interrogation Video, 12/27/12 at 13:35:30.

25. While Petitioner did testify in own defense, this was hampered by a language barrier, testifying through an interpreter. The trial testimony was a sterilized version of the Defendant. The interrogation videos show his authentic, raw testimony near the time of the events. This was profoundly exculpatory in the Court's view, and should have been presented to the jury for consideration. Failure to recognize this was ineffective lawyering.

26. Dr. Van Ee testified to the biomechanical possibility that an accidental fall in this scenario could have caused the skull fracture, and this was highly exculpatory. However, Dr. Van Ec admitted during cross-examination by the State that his opinion was hypothetical, and he had no opinion whether this case was in fact an accident. He conceded that if Dr. Ophoven's criticisms of Dr. Snell's opinion were incorrect, and that there were other contemporaneous, serious injuries that contradicted the single blow theory, then Dr. Van Ee's theory was irrelevant to the case. In this way the State neutralized Dr. Van Ee, and focused the jury's attention upon its upcoming, anticipated rebuttal testimony from Dr. Snell, which would attack and cast aspersion upon Dr. Ophoven's prior testimony, clearing the way for conviction.

27. The defense's forensic case depended upon the probative force of Dr. Ophoven's testimony. Dr. Ophoven testified that there was only one fatal impact, and that all the other significant findings by Dr. Snell were secondary to DIC and massive blood transfusions. As noted above, Dr. Ophoven's education, training, and experience as a forensic pediatric pathologist are impressive. She further opined that other minor abrasions behind M.K.'s ear, and on his lip, and nose were old, not suspicious, and therefore not relevant to the fatal incident. This, in combination with Dr. Van Ee's

uncontested biomedical engineering analysis established reasonable doubt whether this incident was a homicide or a tragic accident. But, following skillful cross examination by the State, Petitioner's counsel chose not to follow up with re-direct questioning to clarify any ambiguities, as is routinely done with expert witnesses, presumably feeling confident of a lead in the battle. But, Counsel inexplicably then sent Dr. Ophoven home on plane to Ohio, even though it was virtually certain that Dr. Snell would retake the stand on rebuttal to attack her testimony, and put her client back in great peril of conviction. That was an unacceptable error in a case of this magnitude, and under these critical circumstances.

28. Predictably, the State did recall Dr. Snell in rebuttal, and with his adversary safely hundreds of miles away, he was free to attack Dr. Ophoven's methodology knowing his criticisms would be the last word. Accordingly, Dr. Snell told the jury that Dr. Ophoven was quite mistaken, and had erroneously based her conclusions on the patently absurd premise of liquid (blood) flowing uphill, in full defiance of the ineluctable law of gravity. Dr. Snell then pointed out that, because blood could not flow up from the back of the head to the front while M.K. lay on the hospital gurney, the fact that there were hematomas or apparent bruising in areas of the head forward of the fracture site, proved that M.K was beaten and didn't merely fall off the bed. At this point it was critical to recall Dr. Ophoven to address Dr. Snell's challenges, and re-establish doubt, if she were capable of so testifying. Because Petitioner's counsel had not requested Dr. Ophoven to remain or return, no such sur-rebuttal could be offered. The critical battle for reasonable doubt ended with Dr. Snell's systematic rebuttal of Dr. Ophoven's key points. There was no strategic justification for

allowing the State to have the last word in this debate between the experts. Competent defense requires that, in these circumstances, Dr. Ophoven be recalled for equal time before the jury, assuming she had compelling responses to Dr. Snell's criticism. The habeas testimony of Dr. Ophoven provided to this Court amply demonstrated that she was in fact prepared to do so, and that her sur-rebuttal testimony would have been powerful.

29. In its closing argument, the State capitalized on the discovery error regarding the video provided to Dr. Van Ee, to make Petitioner's counsel look dishonest. The prosecutor inferred that the State shared everything and Petitioner hid evidence. The State spring-boarded off this to characterize Petitioner's experts as hired guns coming in from distant lands, while the local coroner's testimony was not so tainted; rather, he was just a local official doing his honest best for the community. In this way the State implied that Petitioner's entire case was manufactured and inconsistent with any reasonable interpretation of the evidence, and that the only rational conclusion was guilt of murder or manslaughter. That is what the jury heard for summation after Dr. Snell's unchallenged rebuttal testimony.

30. Count 3 on the Indictment alleged that Petitioner did, "without any design to effect death and while engaged in the commission of a felony, abuse or cruelty to a minor, kill a human being, namely, M.K., DOB 6-27-11". On May 29, 2014, sentenced Petitioner on May 29, 2014, as to Count 3 First Degree Manslaughter to forty-five (45) years in the state penitentiary with credit for 518 days previously served and twenty (20) years suspended.

31. Petitioner filed a direct appeal to the South Dakota Supreme Court. The primary topic on direct appeal was sufficiency of the evidence, with the following issues raised:

    1) Whether Petitioner was constitutional denied his right to counsel during questioning.
    2) Whether there was sufficient evidence to support the jury verdict finding Petitioner guilty of First Degree Manslaughter.
    3) Whether the sequestration of Petitioner's biomechanical engineer from the courtroom during the "medical testimony" resulted in a violation of his right to a fair trial.

The Supreme Court summarily affirmed the judgment and sentence on January 19, 2016.

CONCLUSIONS OF LAW

1. This is Petitioner's first application for writ of habeas corpus. He raises a claim of ineffective assistance of counsel. Petitioner alleges that his trial counsel was ineffective in violation of the United States and South Dakota Constitutions because of, among other things, (1) the PDO's overloaded caseload; (2) inadequate trial preparation; (3) failure to elicit critical exculpatory opinions from their retained expert pathologist, Dr. Ophoven, to contradict the County Coroner Dr. Snell's inculpatory opinions, particularly through redirect examination and sur-rebuttal testimony; (4) failure to disclose information to the prosecution that was presented to another defense expert witness, Dr. Van Ee, in violation of the Rules of Criminal Procedure, resulting in an inference that defense counsel was

hiding evidence and not credible; (5) failure to offer into evidence the videotapes of Defendant's entire custodial interrogations, which this Court finds were highly exculpatory and probative of innocence; and (6) improper opening statement which inaccurately summarized the defense theory of the case and anticipated evidence. Petitioner alleges that each of these errors constitutes ineffective assistance of counsel, and that the individual and cumulative effect of these errors undermines the reliability of the guilty verdict, meeting the Strickland v. Washington prejudice standard.

2. This Court agrees.

3. The history of habeas corpus can be traced to the Habeas Corpus Act of 1679, which has been described as the "stable bulwark of our liberties" and was the model upon which the habeas statutes of the thirteen original American colonies were based. See Boumediene v. Bush, 553 U.S. 723, 742, 128 S.Ct. 2229, 2245-2246, 171 L.Ed.2d 41 (2008) (citing 1 W. Blackstone, Commentaries).

4. SDCL 21-27-1 states, "Any person committed or detained, imprisoned or restrained of his liberty, under any color or pretense whatever, civil or criminal, except as provided herein, may apply to the Supreme or circuit court, or any justice or judge thereof, for a writ of habeas corpus." However, habeas corpus is not a substitute for direct review and the scope of habeas review is limited. "'Habeas corpus can be used only to review (1) whether the court had jurisdiction of the crime and the person of the defendant; (2) whether the sentence was authorized by law; and (3) in certain cases whether an incarcerated defendant has been deprived of basic constitutional rights.'" Loderman v. Class, 1996 SD 134, ¶3, 555 N.W.2d 618, 622 (quoting Loop v. Class, 1996 SD 107, ¶11, 554 N.W.2d 189, 191 (citations omitted)). "The habeas applicant has the initial burden of

proving entitlement to relief by a preponderance of the evidence." Hays v. Weber, 2002 SD 59, ¶11, 645 N.W.2d 591, 595 (citing New v. Weber, 1999 SD 125, ¶5, 600 N.W.2d 568, 572 (citing Lien v. Class, 1998 SD 7, ¶11, 574 N.W.2d 601, 607)).

5. A two-prong test is applied to determine ineffective assistance of counsel claims. "In order to meet the burden of proof for a claim of ineffective assistance of counsel, a defendant must prove (1) that counsel's representation fell below an objective standard of reasonableness, and (2) that such deficiency prejudiced the defendant." Rhines v. Weber, 2000 SD 19, ¶13, 608 N.W.2d 303, 307 (citing Siers v. Class, 1998 SD 77, ¶12, 581 N.W.2d 491, 495; Sprik v. Class, 1994 SD 134, ¶22, 572 N.W.2d 824, 829; Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2065, 80 L.Ed2d 674, 693 (1984)).

6. First, counsel's performance must be shown to be deficient. Mitchell v. Class, 524 N.W.2d 860, 862 (SD 1994) (citations omitted). In order to the meet the first prong, the defendant must show that the counsel's errors were "'so serious that counsel was not functioning as the 'counsel' guaranteed ... by the Sixth Amendment.'" Mitchell, 524 N.W.2d at 862 (citations omitted). '"Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]"' Hofer, 1998 SD 58, ¶10, 578 N.W.2d at 586.

7. Second, "Applicants must prove that the outcome was prejudiced by inferior performance of counsel." Ramos v. Weber, 2000 S.D. 111, ¶12, 616 N.W.2d 88, 92 (citing Hofer, 1998 SD 58, ¶9, 578 N.W.2d at 585). "Prejudice means 'a reasonable probability that, but for the unprofessional errors of counsel, the result of the proceeding would have been different.'" Ramos, 200 S.D. 111, ¶12, 616 N.W.2d at 92 (citing Phyle v. Leapley, 491

N.W.2d 429, 432 (S.D. 1992), as modified by Hopfinger v. Leapley, 511 N.W.2d 845, 846-47 (S.D. 1994)). "A 'reasonable probability' is said to exist when there is proof sufficient to 'undermine confidence in the outcome.'" Ramos, 2000 S.D. 111, ¶12, 616 N.W.2d at 93 (citing Phyle, 491 N.W.2d at 432).

8. The case against Petitioner rested entirely upon inferences drawn from the circumstances of M.K.'s death and the opinion of Dr. Snell that, in addition to the fatal skull fracture, there was evidence of other contemporaneous blows to the head. Therefore, according to the State, the evidence proved, beyond a reasonable doubt, that the skull fracture did not result from an accidental fall. The State conceded that, although unlikely, a fall from the bed could have caused the severe skull fracture. But the State maintained that, beyond a reasonable doubt, a single blow to the head could not have caused the other multiple contemporaneous head injuries allegedly disclosed by the autopsy. Petitioner was the only adult present in the apartment at the time of injury. The five-year-old sibling was not capable of causing the injuries sustained. Therefore, the conclusion was logically unavoidable that Petitioner was guilty of causing the fatal abusive trauma.

9. In juxtaposition to this, there was no other evidence suggesting that Petitioner had ever been violent with the deceased child or any other person, or even that he was capable of such an offense. The family lived in an apartment complex, and there had never been any indication emanating from their abode of violence, upset or disturbance. The children were never reported to have been abused in any way, and the children's mother denied that Petitioner was violent, and believed in his innocence even at the time of sentencing. The apartment at the time of the injury was neat and tidy, and there was no evidence of any disturbance even in the bedroom where the child was found unresponsive on the

floor. Indeed, the morning of the injury Petitioner and the children had been to the doctor's office together for Petitioner's inoculations, and all appeared to be well. The Court notes as significant the absence of any evidence of an assault other than Dr. Snell's claim of multiple contemporaneous head wounds. No evidence was offered identifying any weapon or even pointing to a probable source of the alleged blunt force assault. There was no object identified as the potential bludgeon and Petitioner had no marks, bruises, or swelling on either of his hands. There was a dearth of any incriminating evidence other than the severity of the injury itself, and Dr. Snell's opinion interpreting the same.

10. The matter came to the attention of a neighbor as Petitioner was in the hallway of the apartment building, frantically trying to explain to the 911 dispatcher that the child had fallen and was unconscious. Nothing about his reactions in this regard were inconsistent with his version of the event, which was that when he went to wake the child from his nap, Petitioner found the boy unresponsive on the floor by the bed. Particularly probative of innocence, in this Court's view, are the three interrogation videos where Petitioner was subjected to withering and abusive questioning by a very skillful police detective, all without counsel, and with a separate interpreter for each interrogation, all the while steadfastly maintaining his innocence, and, moreover, maintaining the same, consistent narrative of the events. Upon a new trial, however, this Court anticipates the State would be successful seeking to preclude that portion of the videos where the Petitioner accepts an offer to take a polygraph test per State v. Bertram, 2018 S.D. 4, ¶ 14, 906 N.W.2d 418, 423. Nevertheless, it is inconceivable to the Court why the defense chose to withhold that compelling, critical evidence of innocence arising from the videos from the jury. At

the habeas evidentiary hearing, trial defense counsel offered no rational justification for this. The Court can find no possible strategic purpose to keeping that powerful evidence from the jury. See State v. Tchida, 347 N.W.2d 338, 340 (S.D. 1984)("we conceive no possible defense strategy").

11. Given the dearth of any incriminating statements, or other corroboration, the entire case came down to interpretation of the child's injuries, and from there, to the competing opinions of the two forensic pathologists who investigated the incident, were qualified to render opinions as to manner of death, and testified at the trial. The County Coroner, Dr. Kenneth Snell, said that certain lesions on the child's head were sequelae of multiple contemporaneous blows to the head occurring at the time of the fatal skull fracture. The defense expert, Dr. Janice Ophoven, a pediatric pathologist with impressive forensic credentials, contradicted the multiple blow theory and argued that the lesions Dr. Snell attributed to other blows were in fact the result of the massive bleeding under the child's scalp from the facture site, fueled by massive blood transfusions and the lack of clotting caused by DIC, the condition where anticoagulants are formed in the bloodstream due to shock. The defense's attempt to carry the day in this titanic battle of experts was undermined by multiple errors committed by defense counsel which prejudiced the defense and, in this Court's view, likely affected the outcome of the trial.

12. The most critical error in the case was the failure of defense counsel to allow Dr. Ophoven the opportunity she needed to neutralize Dr. Snell's rebuttal testimony. Defense counsel did a decent job on direct exam with Dr. Ophoven, but following a skillful cross, there was need of re-direct to reinforce her theory of the case. Defense counsel's excuse for waiving redirect was that she did not want to annoy the jury by

being too picky. She also indicated a belief that Dr. Ophoven's testimony was not critical to the defense. These comments evince a staggering failure to understand the theory of the defense. See Hinton v. Alabama, 571 U.S. 263, 274, 134 S. Ct. 1081, 1089, 188 L. Ed. 2d 1 (2014).

13. It should have been obvious to competently prepared counsel in the heat of this litigation that the fate of the case hinged upon carrying the day in the contest between Drs. Snell and Ophoven. It also revealed a fundamental miscalculation of her opponent, as it should have been foreseen that the prosecution would have Dr. Snell retake the stand for rebuttal, as is standard procedure in any trial involving experts with opposing views critical to the outcome of the case. See Rompilla v. Beard, 545 U.S. 374, 394, 125 S. Ct. 2456, 2470, 162 L. Ed. 2d 360 (2005)("in order to anticipate and find ways of deflecting the prosecutor's aggravation argument",)

14. Predictably, the failure to redirect Dr. Ophoven allowed the prosecution to follow its cross of the defense's key expert witness with the return of Dr. Snell for rebuttal, to cast further doubt upon the credibility of Dr. Ophoven's testimony with a one-two punch series that was the final salvo in the case. As defense counsel testified at length at the habeas hearing, Dr. Snell is a formidable witness and that effective cross examination is very elusive with him on the witness stand. The superior strategy, in her view, was to avoid arguing with him and instead focus on allowing the defense's expert witness to contradict him with superior forensic reasoning and analysis.

15. Unfortunately for Petitioner, his defense counsel failed to follow through with this strategy. Rather, Dr. Snell's forceful rebuttal of Dr. Ophoven was the last word on the subject, as defense counsel inexplicably failed to exercise the procedural right to recall

Dr. Ophoven to the stand for sur-rebuttal. In this Court's view, that decision was fatal to the defense, and unjustifiable by any rational strategy. At the habeas evidentiary hearing in this case, Dr. Ophoven was called to the stand by Petitioner to testify to what she would have said to the jury, had she been allowed to provide them with her testimony on redirect and sur-rebuttal. In this Court's view, that testimony, which responded forcefully and persuasively to all of Dr. Snell's criticisms, was of critical importance to the jury's understanding and appreciation of the theory of the defense, that there was, indeed, reasonable doubt whether this was a case of abuse or merely a tragic accident. Failure to do this undermines the Court's confidence in the verdict, and therefore was error of constitutional magnitude.

16. Dr. Snell's main criticism of Dr. Ophoven's analysis was that she erred in attributing the apparent bruising at the front area of M.K.'s head and face to the excessive bleeding from the fracture site, caused by massive blood transfusions combined with the DIC anti-coagulation effect. Dr. Snell testified that this theory was implausible, because it required M.K.'s blood to flow uphill, against gravity, which doesn't occur. He further admonished the jury that an apparent bruise along the back of the child's scalp couldn't be attributable to the excessive bleeding, nor tied to the blow that caused the depressed fracture, because that bruise and the fracture were not in close enough proximity. At the habeas hearing, Petitioner called Dr. Ophoven to the stand to testify to what she would have said to rebut Dr. Snell's criticisms, if asked. That testimony explained that in the environment of a child's tissues surrounding the skull bone, blood under pressure of transfusion follows the path of least resistance, which in this case would allow migration of blood all around the head and face, including the area of the child's left eye, which

developed apparent bruising after death. Dr. Ophoven further pointed out the lack of any damage to the paper-thin eye socket structure of such a young child, which is inconsistent with Dr. Snell's claim that a serious blow to the eye occurred. She also, among other things, explained how the elastic qualities of a small child's skull bones allow for very significant deformation under pressure, explaining how surface bruising and boney fracture sites may not always appear to line up exactly as Dr. Snell asserted. Overall, in the Court's view, Dr. Ophoven's habeas testimony shows that the absent sur-rebuttal testimony, if offered, would have been compelling, and likely would have cast reasonable doubt upon the theory of the State's case. Had the jury heard this critical evidence, the Court has grave doubt whether the jury could have found the Petitioner guilty of any of the crimes charged. Presenting such evidence, when it exists, is necessary to a competent defense. This is the type of representation that the Sixth Amendment's right to counsel requires. Allowing the retained expert to leave the state and not stay to complete her testimony in this way is deficient advocacy. As such, this deficiency undermines the Court's confidence in the original result at trial.

17. Defense counsel also incompetently prejudiced their own case by overselling the defense to the jury in opening statement. See Gales v. State, 299 So. 3d 861, 869 (Miss.Ct.App. 2020)("State is allowed to comment on the evidence and point out that the defense's theory is unsupported by the evidence"). Defense counsel asserted that the Defense experts would show that the injury was accidental. That was never anticipated by counsel and was not the expected testimony. Dr. Ophoven's testimony was that there was only one fresh injury to the head and that was the skull fracture. Dr. Van Ee's opinion was that a hypothetical fall from the bed to the footboard of the bed was of

sufficient height to create enough force to cause a fracture of the severity that was shown to exist by the autopsy. The anticipated expert testimony, as such, established the scientific possibility of an accident. It would not prove the injury was accidental. But, of course, the defense need not prove innocence. It need only be able to convince the jury that there is a reasonable possibility of innocence. See State v. Forde, 315 P.3d 1200, 1222 (Az. 2014)("If, on the other hand, you think there is a real possibility that the defendant is not guilty, you must give her the benefit of the doubt and find her not guilty. "); Victor v. Nebraska, 511 U.S. 1, 27, 114 S. Ct. 1239, 1253, 127 L. Ed. 2d 583 (1994) ; S.D. Criminal Pattern Jury Instruction 1-6-1.

18. Given the lack of other circumstantial evidence of guilt, a credible forensic hypothesis for innocence would be sufficient to reveal the reasonable doubt existing under the circumstances. Jacobs testified that his presentation during opening argument was a mistake and not a trial strategy. By overselling their expert's testimony in the opening statement, defense counsel set themselves up for failure, as the evidence failed to meet the standard that they promised to establish for the jury. This spoiled the proper presentation of the case as scientific possibility of innocence, when combined with all the circumstantial evidence being consistent with innocence, creating reasonable doubt. As such, trial counsel's mistake in opening argument, accordingly, undermines the Court's confidence in the original result at trial as well. See also Hinds v. Comm'r of Correction, 321 Conn. 56, 95, 136 A.3d 596, 619 (2016) ("at least one of the errors was so significant as to render it highly doubtful that the defendant had received a fair trial and the remaining errors created the additional doubt necessary to establish that there was serious doubt about the fairness of the trial, which is necessary to reverse a conviction").

19. The credibility of the defense was further impeached by a blunder where the defense failed to disclose to the prosecution that it had provided Dr. Van Ee with a videotaped statement from Petitioner explaining, and a drawing Petitioner utilized to show, where he found the injured child by the bed. While there was nothing wrong with the defense making the video or providing it to their expert, this data was subject to discovery. See SDCL 23A-13-12; SDCL 23A-13-13; SDCL 19-19-705. Predictably, while on the stand in cross examination, Dr. Van Ee was asked what information was provided for his review in preparation of his opinions and testimony. When he revealed the video that the prosecution had no knowledge of, the withholding of that information was pounced upon by the State in front of the jury and the defense was put in the position of attempting to explain the nondisclosure. This error was capitalized upon by the prosecutor in closing argument, where he presented himself as the fair truth seeker providing all evidence to the jury, while defense counsel attempted to hide evidence. At the habeas hearing Ms. Smith acknowledged that her assumption that this data was privileged work product was unsupportable. As such, the presence of this discovery error also undermines the Court's confidence in the original result at trial.

20. The lead attorney for the defense is known to this Court to be an ethical, competent and zealous advocate. But the evidence presented at the habeas hearing demonstrated that her office at the time of this trial was understaffed, overworked, and inadequately equipped to handle its burdensome caseload. To that point, counsel presented documentation to the County Commission in her budget presentation the prior year warning that her office was at the risk of being unable to provide adequate representation to its clients under the current staffing shortages. See Habeas Ex. 12 and 13. Those documents, provided by an

attorney to a government agency for an official purpose, by law are required to be true subject to legal penalties. See State v. Bosworth, 2017 S.D. 43, 899 N.W.2d 691; Reaser v. Reaser, 2004 S.D. 116, ¶21, 688 N.W.2d 429, 436. While defense counsel sought to downplay the significance of that report in her testimony during the habeas evidentiary hearing as merely for budget advocacy, the Court finds that the budget and staffing constraints are consistent with the errors herein. Specifically, Smith was scheduled to commence the penalty phase of a death penalty jury trial one month following Petitioner's trial. Her second chair in Petitioner's case was an inexperienced young lawyer. The Public Defender's Office was stretched too thin do provide effective advocacy in all its serious matters, and that weakness manifested itself in this case to the Petitioner's prejudice.

21. The ABA has promulgated very rigorous standards for death cases. See American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003). While not statutorily enacted in South Dakota, Smith indicated that she looks to ABA and NLADA (National Legal Aid and Defender Association) standards in accessing the Public Defender Office's ability to meet their professional obligations to clients. She testified that the office did not meet professional standards in 2014. See Wiggins v. Smith, 539 U.S. 510, 534, 123 S. Ct. 2527, 2542, 156 L. Ed. 2d 471 (2003)(application of professional standards at the time of event).

22. Petitioner's case was not a death penalty case. But it was a murder case, and Petitioner was facing life in prison without parole, arguably the functional equivalent of a death sentence. High regard for preparation, strategy, and execution of the defense apply to all reasonable lawyers in such cases as well, and that expectation must prevail in courts of

justice in an advanced and free society. See Parker v. Bowersox, 188 F.3d 923, 929 (8th Cir. 1999)("We apply the same standard of attorney performance in both capital and noncapital cases."). Having two cases of such magnitude with one month in between, and with only a young and inexperienced co-counsel, is not prudent, and resulted in prejudicial errors in this case, which seems to be explained by the fact that the Public Defender office was being asked to do too much, with too little, for too long. To be sure, staffing shortages alone do not create ineffective assistance per se, but they do appear to explain why the assistance in this case fell short of the requisite standard.

23. Another point needs to be mentioned. The defendant in this case was a legal immigrant who did not speak English and had only been in the country for two years. These circumstances put him at a very appreciable disadvantage vis-à-vis a native South Dakotan who may have found himself in similar circumstances. Unlike most defendants, who exercise their rights to remain silent and to counsel at an early stage, Petitioner submitted to six hours of custodial interrogation without counsel and then testified at trial. However, he had to testify through an interpreter, so that the jury never really had an opportunity to evaluate the credibility of his testimony in court the same way it would if a native speaker were at the witness stand conversing directly with them. The transcripts show that the interpreter struggled to understand legal terms while Petitioner was on the witness stand and the flow of his testimony was subject to interruptions as the interpreter asked for clarifications or restatements. Accordingly, it was even more important, in the interests of equal justice, for this disadvantaged individual to be provided with competent representation in the presentation of his defense. In this case counsel fell short in multiple domains, comprising several individual instances of

ineffective assistance of counsel, the individual and cumulative effect of which, in this Court's view, prejudiced his defense and undermines the Court's confidence in the justness of the verdict.

24. When the State marshals it resources to accuse a person of murder and seeks to take his liberty away potentially for life, the fundamental principles of due process of law that separate this free society from other, oppressive forms of government require that, among other things, the accused be provided effective assistance of counsel. The United States Supreme Court has stated that the principles announced in Strickland "do not establish mechanical rules." Strickland, 466 U.S. at 696, 104 S.Ct. at 2069. The Supreme Court continued:

> Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

Dillon v. Weber, 2007 S.D. 81, ¶ 29, 737 N.W.2d 420, 430. Felony crimes of this magnitude require that the defense bring its "A-game" to the courtroom. Here that was not done. Critical expert testimony was omitted, and compelling exculpatory interrogation videos were withheld from evidence. A major pretrial discovery blunder detonated in the defense's face before the jury and was capitalized upon by an opportunistic prosecution in closing. Opening statement was bungled with a fundamental error. This very outcome was foreshadowed by the PDO's own budget presentation to

the County Commission and was foreseeable. Petitioner has been prejudiced by these errors and the Court's confidence in the integrity of this verdict is compromised.

25. [The South Dakota Supreme Court has] previously acknowledged that:

> "this [C]ourt will not compare counsel's performance to that of some idealized 'super-lawyer' and will respect the integrity of counsel's decision in choosing a particular strategy, [but] these considerations must be balanced with the need to insure that counsel's performance was within the realm of competence required of members of the profession." Sprik v. Class, 1997 SD 134, ¶ 24, 572 N.W.2d 824, 829 (citations omitted).

Hofman v. Weber, 2002 S.D. 11, ¶ 18, 639 N.W.2d 523, 529. This Court is not holding Petitioner's trial counsel to a "super-lawyer" standard, but to those of reasonable lawyers in the practice of law. See New v. Weber, 1999 S.D. 125, ¶¶ 23-25, 600 N.W.2d 568, 577; United States v. Easter, 539 F.2d 663, 665 (8th Cir. 1976) ("the degree of competence prevailing among those licensed to practice before the bar."). Justice requires that Petitioner receive a new, fair trial. Accordingly, the request for habeas corpus relief is granted, and Petitioner will be released from confinement unless he is retried within a reasonable time.

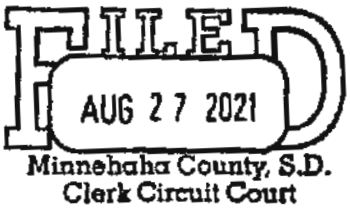
Dated this 27 day of August, 2021.

BY THE COURT:

Douglas E. Hoffman
Circuit Court Judge

ATTEST: Angelia M. Gries, Clerk of Courts

By: [signature]



Please file all of this in Kelly v. Young

DeGroot, Drew

From: Kadi, Mark
Sent: Saturday, October 10, 2020 5:49 PM
To: Hoffman, Doug (Judge)
Cc: DeGroot, Drew; jill.moraine@ujs.state.sd.us; laura.olson@ujs.state.sd.us
Subject: Re: 49 CIV 16-824

FILED
MAR 10 2021
Minnehaha County, S.D.
Clerk Circuit Court

Mr. DeGroot,

My apologies. I meant to cite 19-19-103(e) which addresses the court noting error on its own.

Sent from my iPhone

On Oct 10, 2020, at 5:31 PM, Hoffman, Judge Doug <Doug.Hoffman@ujs.state.sd.us> wrote:

Gentlemen, I can get the DVD's converted to thumb drives for you on Tuesday. Laura Olson will assist. Also, pleadings can be amended at any time, including after trial based upon the evidence submitted, which would include the entire Criminal trial court record which was judicially noticed herein. Finally, this defendant was an illiterate foreigner who likely had little meaningfully understanding of the technical legal issues and arguments in the pretrial hearings or on appeal. Watch the videos and then we will talk about whether competent counsel would have offered the same in their entirety as competent, highly exculpatory evidence that was consistent with the defense theory of the case. As you all know, the point of an ineffective case is to identify and evaluate the effect of potential errors made by defense counsel in their advising and litigating the case. By statute the Petitioner only gets one State habeas. Issues not raised here are gone forever. This was a homicide case. This Habeas case will be done correctly the first time because there is no second time. I will not allow a potentially valid Issue that the Court identifies in its review of the file to be procedurally defaulted. So let's get to work. Thank you,

Judge Doug Hoffman

Get Outlook for iOS

From: DeGroot, Drew <ddegroot@minnehahacounty.org>
Sent: Saturday, October 10, 2020 4:10:32 PM
To: Hoffman, Judge Doug <Doug.Hoffman@ujs.state.sd.us>; Kadi, Mark <mkadi@minnehahacounty.org>
Cc: Moraine, Jill <jill.moraine@ujs.state.sd.us>
Subject: RE: [EXT] 49 CIV 16-824

Your Honor,

I will consult with Mr. Kadi to see what records I can find and also which ones he needs. However, I feel it is prudent to state that I would object on two separate grounds. I realize that Mr. Kadi would have to fully advise the Petitioner to see if Petitioner would even want to raise this issue but I feel the objection is warranted.

First, after reviewing the Motion to Suppress and Appellant's Brief, Ms. Smith (at the request or approval of the Petitioner) raised the interview claims to both the trial court and the Supreme Court on the basis that they were prejudicial and violated his Constitutional rights. If Petitioner were allowed to raise this argument now, this Court would be allowing the Petitioner to take two bites at the apple by allowing him to conflict his own previously raised arguments. The Petitioner would be arguing that counsel was ineffective for failing to admit evidence he previously believed and argued was prejudicial and a violation of his Constitutional rights. Respondent argues that this would be patently frivolous or palpably incredible. *See United States v. Sanfilippo,* 564 F.2d 176 (5th Cir.1977).

Further, the habeas trial was held and no claim or evidence was submitted by the Petitioner in regards to an IAC claim as it pertains to the interview. I realize that the underlying record can be incorporated into the habeas proceedings but, based on my limited review, Ms. Smith was never asked any questions pertaining to the interview nor was any other evidence introduced on the issue. Since no additional evidence was submitted or received on an IAC claim in regards to the interview, I believe that another amendment to the pleadings would run contrary to the rules of civil procedure (15-6-15(b)).

I don't believe SDCL 19-19-103(d) (preventing the jury from hearing inadmissible evidence) is relevant to the amendment of civil pleadings.

Respectfully,

Drew DeGroot
Minnehaha County Deputy State's Attorney
Civil Division
415 North Dakota Avenue
Sioux Falls, SD 57104
P:605-367-4226

From: Hoffman, Judge Doug <Doug.Hoffman@ujs.state.sd.us>
Sent: Saturday, October 10, 2020 2:24 PM
To: Kadi, Mark <mkadi@minnehahacounty.org>
Cc: DeGroot, Drew <ddegroot@minnehahacounty.org>; Moraine, Jill <jill.moraine@ujs.state.sd.us>
Subject: Re: 49 CIV 16-824

Counsel, I reviewed the DVD of all three interviews in their entirety this week. There were three separate interviews, 12/24, 12/26 and 12/27. Each interview the defendant was left alone in the interview room for 30-45 minutes before questioning. Each interview was 1.5 to 2 hours of relentless intense interrogation. Defendant made no admissions or inconsistent statements and his demeanor was at all times true to his version of the events, his trial testimony and the theory of the defense as supported by the defense experts. Defense counsel did not offer the interviews and instead a highly redacted version of just the 12/26 interview was offered by the State and received as exhibit 15. I would like both counsel to review all three interrogations in their entirety, including the dead time then defendant is alone pre interrogation, and then watch redacted exhibit 15. When considering the tactics of the detective, the demeanor of defendant and his answers, his lack of counsel and minority immigrant status, and relative ignorance of his rights and the system, you will want to evaluate whether those interrogations, taken as a whole, were exculpatory, and if so whether defense counsel's decision to exclude them, considering all of the other relevant circumstances of the case, should be included as a contributing factor in the claim of ineffective assistance of counsel herein.

Upon completion of this task, Mr. Kadi will advise whether there will be a motion to amend the pleadings to include any additional claims. Thank you,

Judge Doug Hoffman

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From: Kadi, Mark <mkadi@minnehahacounty.org>
Sent: Saturday, October 10, 2020 12:22:15 PM
To: Hoffman, Judge Doug <Doug.Hoffman@ujs.state.sd.us>
Cc: DeGroot, Drew <ddegroot@minnehahacounty.org>; Moraine, Jill <jill.moraine@ujs.state.sd.us>
Subject: RE: [EXT] 49 CIV 16-824

Judge Hoffman,

I recall starting to review the interview cd but I know I did not review all of it. In my review of the PDO file, I noted the support staff made a word for word transcript of Ally's interview with Detective Carda complete with time signature notations. I relied on those transcripts and other references than my hearing regarding the audio. I noted there were some proper advisement issues via proper interpretation of rights were revealed as well as certain interview techniques by Carda calling attention to Ally's religion and inconsistent pre-marital impropriety, and Ally's deficient fatherhood characteristics for failing to rescue his 3 children from a war in the Congo.

In evaluating an IAC claim, I looked for issues present that were not raised by trial counsel. I saw that the PDO raised such claims through a motion to suppress, and addressed Carda's opinions about the Muslim religion etc., in a motion in limine. Constitutional issues (Due Process etc.) were raised in the motions. Ms. Smith submitted lengthy briefing and Objections to FF&CL which cited numerous portions of the interview via the transcript. The PDO had an interpreter assist them in pointing out problem areas in the interview process. Smith also presented the interview issue on direct appeal. The Supreme Court presented a summary affirmance order.

I suppose Ms. Smith might have specifically raised a Shock the Conscience argument, or perhaps could have prominently cited Escobedo v Illinois. I would not expect those arguments to succeed before the trial court or before our Supreme Court either so I do not fault her for not making them.

I believe our office received the interview on a CD/DVD which would be in my office. Unfortunately, our personal computers were replaced with new ones with no disk drives. My current laptop lacks them as well. I believe Mr. DeGroot's office might be able to insert the interview video into our Case Management System although I am not sure of the mechanics of that process. I would request him to do so.

If your review reveals that I missed something, pursuant to authority granted to you by, inter alia, SDCL 19-19-103(d), I would be happy to look into it further, and ask to amend the application if appropriate.

Thank you for your time and attention to this matter.

Mark Kadi

From: Hoffman, Judge Doug <Doug.Hoffman@ujs.state.sd.us>
Sent: Friday, October 9, 2020 2:54 PM

To: Kadi, Mark <mkadi@minnehahacounty.org>
Cc: DeGroot, Drew <ddegroot@minnehahacounty.org>; Moraine, Jill <jill.moraine@ujs.state.sd.us>
Subject: Re: 49 CIV 16-824

Mr. Kadi, did you personally view all of the video/ audio of the very lengthy interrogations of Mr. Ally in the course and scope of your review of this habeas case and your preparation of the Amended Application for Writ of Habeas Corpus? Please review and advise. Thank you,

Judge Doug Hoffman

Sent from my iPad

On Oct 5, 2020, at 3:09 PM, Kadi, Mark <mkadi@minnehahacounty.org> wrote:

> I have corresponded with opposing counsel. I wished to submit additional briefing so we agreed to ask to have the petitioner submit an additional brief by next Monday and the respondent would have a week to respond if necessary. Is that time frame satisfactory with the court?
>
> MK
>
> **From:** Hoffman, Judge Doug <Doug.Hoffman@ujs.state.sd.us>
> **Sent:** Friday, October 2, 2020 3:15 PM
> **To:** Kadi, Mark <mkadi@minnehahacounty.org>; DeGroot, Drew <ddegroot@minnehahacounty.org>
> **Cc:** Moraine, Jill <jill.moraine@ujs.state.sd.us>
> **Subject:** RE: 49 CIV 16-824
>
> Thank you. All of that is noted. I think those deficiencies may go to the weight of Hafzallah's testimony, rather than admissibility, and she could have been, and was, crossed, at least to some extent regarding those deficiencies. At any rate, if either side wants to submit supplemental briefing on the topic of whether Hafzallah's opinion on the ultimate issue ought to have been challenged, and what the likely ruling would have been, and what effect, if any that may have had on the ultimate verdict in the case, then please do so. If that is the case, please confer and agree between yourselves on the briefing schedule. My clerk staff attorney has provided me with some salient case law and, upon request, she will share those cases with counsel. I feel that I have a pretty good handle on the issue at this point but would welcome anything further counsel would like to offer for my consideration on this point. I think the 90 day rule runs in the case somewhere around November 10, and I intend to get my decision in the case out within that timeframe, so any additional authority or argument either side would like to submit should be done relatively soon. Thank you,
>
> Judge Doug Hoffman
>
> **From:** Kadi, Mark <mkadi@minnehahacounty.org>
> **Sent:** Friday, October 2, 2020 3:02 PM
> **To:** DeGroot, Drew <ddegroot@minnehahacounty.org>; Hoffman, Judge Doug <Doug.Hoffman@ujs.state.sd.us>
> **Cc:** Moraine, Jill <jill.moraine@ujs.state.sd.us>
> **Subject:** RE: [EXT] 49 CIV 16-824

I apologize for some misplaced modifiers below. Hazfulah did not review prior medical history from Central Medicine, she did not treat the decedent there.

From: DeGroot, Drew
Sent: Friday, October 2, 2020 2:48 PM
To: Kadi, Mark <mkadi@minnehahacounty.org>; Hoffman, Doug (Judge) <Doug.Hoffman@ujs.state.sd.us>
Cc: Moraine, Jill <jill.moraine@ujs.state.sd.us>
Subject: RE: 49 CIV 16-824

Your Honor,

Thank you for your response and insight into your rationale. Also, thank you Mr. Kadi for sending the Autopsy Report. At your request and for the record, I will reiterate my objection on the grounds mentioned below but understand that it has been overruled and the report has obviously been provided.

Respectfully,

Drew DeGroot
Minnehaha County Deputy State's Attorney
Civil Division

From: Kadi, Mark
Sent: Friday, October 2, 2020 11:59 AM
To: Hoffman, Doug (Judge) <Doug.Hoffman@ujs.state.sd.us>; DeGroot, Drew <ddegroot@minnehahacounty.org>
Cc: Moraine, Jill <jill.moraine@ujs.state.sd.us>
Subject: RE: 49 CIV 16-824

I have spoken with Mr. DeGroot about producing a clean copy of the autopsy report. My copy has notes written on it, which Dr. Hazfulah would not have seen. Mr. DeGroot has sent me a clean copy of which I am sending to you.

I submit it in that it is relevant to show what trial counsel was aware of regarding what were Snell's opinions and findings following the autopsy. It is objectionable on grounds of relevance and speculation regarding Hazfulah's opinion for grounds previously stated. You indicated these objections are overruled.

You will note that the decedent's pre-existing DIC condition does not appear to be explicitly mentioned in the autopsy report. Hazfulah attributes the decedent's blood disorder to the trauma and not from a pre-existing condition. T6:42. Hazfulah did not have information regarding the decedent's medical history when she treated him from Central Medicine as she "did not have time for that". T6:31. At trial, Snell and Ophoven acknowledged the pre-existence of the DIC condition although they obviously disagreed as to what it meant.

Please note that I will be in court this afternoon and may not be able to respond to emails until later today.

Mark Kadi

From: Hoffman, Judge Doug <Doug.Hoffman@ujs.state.sd.us>
Sent: Friday, October 2, 2020 11:03 AM
To: DeGroot, Drew <ddegroot@minnehahacounty.org>; Kadi, Mark <mkadi@minnehahacounty.org>
Cc: Moraine, Jill <jill.moraine@ujs.state.sd.us>
Subject: RE: 49 CIV 16-824

OK now I will address Mr. DeGroot's comments. I understand that Mr. DeGroot is playing catch up. That is particularly unfortunate given the complexity of the case and that the trial and briefing is all completed. I do not think that, if fully informed, the Respondent would have any objection to the Autopsy Report coming in and being considered, as it is in Respondent's interest to have it received. The problem with Dr. Hafzallah's opinion is that sufficient foundation was not laid. An objection on the existing record ought to have been made and would have been sustained. In order to prevent that from happening in front of the jury there should have been a *Daubert* hearing outside the presence of the jury before she was asked that ultimate issue question. The ruling after the *Daubert* hearing would depend, in my view, on what is in the Autopsy Report that Hafzallah stated she reviewed. If the autopsy report, considered in conjunction with Hafzallah's experience as the ER doc in the case, and her other education, training and experience, to the extent it is in the record, would be sufficient to allow her answer as stated to be sustained under Rule 702, then there is no prejudicial error. If not, the error may have been prejudicial, taken in the context of other problems in the case, and is grist for the overall question of a 6th Amendment violation. So the Respondent wants me to see the report as it may provide the foundation that is missing from the settled record at this point.

From Mr. Kadi's perspective, he can't really object either at this point because he has the burden of proof and if I don't see the Autopsy Report then I am likely to conclude that it the Autopsy Report is as fully developed as Snell's trial testimony, which would be sufficient to provide foundation for Hafzallah's consistent opinion that this was non-accidental trauma.

Of course you are both advocates trying to win your cases, but it is my job to consider all the material facts and apply the salient law and reach the legally correct decision. So at the end of the day I am opening up the record and directing counsel to tender the document and I will admit it into evidence and consider it for the purposes outlined in this email string. I will file that email string for the record. So I would simply ask counsel to clarify whether or not they are objecting for the record. The objections, if any, are overruled. I will mark and receive the Autopsy Report as an exhibit in the case. Mr. Kadi, please scan an email that to me at your earliest convenience. Thank you gentleman,

Douglas E. Hoffman
Circuit Court Judge
Second Judicial Circuit
425 N. Dakota Ave.
Sioux Falls, SD
doug.hoffman@ujs.state.sd.us

From: Hoffman, Judge Doug
Sent: Friday, October 2, 2020 10:44 AM
To: 'DeGroot, Drew' <ddegroot@minnehahacounty.org>; Kadi, Mark <mkadi@minnehahacounty.org>
Cc: Moraine, Jill <jill.moraine@ujs.state.sd.us>
Subject: RE: [EXT] 49 CIV 16-824

Sorry, our emails crossed and I am pasting mine here so we have a proper chronological conversation record:

Certainly Ms. Smith had the autopsy report in her file and Mr. Kadi you would have then received and reviewed that as part of your discovery in the case. And the Respondent would have gotten a copy of Ms. Smith's complete file as discovery in this habeas and also had the report from the prosecution. So everyone has seen the autopsy report except me. It was not an exhibit in the criminal trial for obvious reasons, but probably should have been made an exhibit in this habeas case. I didn't raise the issue at hearing because I wasn't aware of its materiality but now, having reviewed everything with a finer tooth comb, I have a concern that I need to see it in order to address the issue of Dr. Hafzallah's conclusion on intentionality of the victim's injury- as I think it may have been material to the *Daubert* challenge that allegedly should have been raised thereto. The reason why I think it is material is because under Rule 702 an expert's opinion may be predicated upon information that is hearsay and/or not itself admissible at trial, so long as it is reasonable and customary for such an expert to consider the same in the ordinary course. Had there been a *Daubert* hearing regarding the propriety of allowing that one word- "nonaccidental" to be uttered at trial by Dr. Hafzallah in connection with her opinion/diagnosis as to causation, I am quite sure that the fact that she did review the Autopsy report would have been discussed and would have been pertinent to the Court's ruling on whether her opinion was sufficiently grounded to meet Daubert and probative to meet 702. As this is now being proffered as ineffective to not challenge that opinion I need to see the Autopsy Report in connection with my analysis of whether the end result of the *Daubert* challenge would have been to allow or exclude that critical word as part of Dr. Hafzallah's testimony to the jury.

From: DeGroot, Drew [mailto:ddegroot@minnehahacounty.org]
Sent: Friday, October 2, 2020 9:54 AM
To: Hoffman, Judge Doug <Doug.Hoffman@ujs.state.sd.us>; Kadi, Mark <mkadi@minnehahacounty.org>
Cc: Moraine, Jill <jill.moraine@ujs.state.sd.us>
Subject: RE: [EXT] 49 CIV 16-824

Your Honor,

I apologize for the late response. I was bringing myself up to speed on the case as fast as a could so if I do not fully understand the rationale behind the request, I also apologize. I agree with Mr. Kadi's reading of testimony. Dr. Hafzullah never mentions a reliance on the autopsy report. In fact, on redirect it appears that the purpose of the questioning was to confirm that the autopsy report did not change or contribute to the opinion she expressed earlier in her testimony. She clarifies that the Autopsy Report only confirmed

the opinion she expressed earlier in her testimony. *See* Volume 6 of the Jury Trial Transcripts, pgs. 27-28.

As Mr. Kadi stated in his email, I am not in a position to object on the basis of what Your Honor deems to be important. However, I believe that I do have to object based upon a lack of foundation and because a review of whether it influenced her opinion would be speculative. Trial counsel did not allege that the Dr. Hafzullah relied on the autopsy report nor has the Petitioner made that allegation.

The question, as I understand it, is whether trial counsel erred when it failed to object to Dr. Hafzullah's opinion testimony as to the cause of death. Petitioner asserts that the error is based upon Dr. Hafzullah's credentials and not based upon how she formed her opinion. As Respondent stated in its Post Trial Brief, Dr. Hafzullah's title is irrelevant. Dr. Hafzullah's opinion was justified under established caselaw. The Supreme Court in *State v. Fisher* states that whether the testimony was admissible is governed by SDCL 19-15-2:

1. The testimony is based upon sufficient facts or data. (Dr. Hafzullah was the ER doctor that conducted the medical examination through her own observations and her examination was also aided by a CT scan of the victim's head and other medical equipment.)
2. The testimony is the product of reliable principles and methods. (No evidence has been submitted to refute the methodology used and described in the her testimony. Only the determination is refuted by the Petitioner's expert.)
3. The witness has applied the principles and methods reliably to the facts of the case. (Again, methodology was not questioned. Further, Dr. Hafzullah was so confident that the injury was nonaccidental that she spoke to the law enforcement right away in the emergency room. In her testimony it appears that the other doctor in the emergency room (Dr. Stethem) agreed with her and her independent determination was later confirmed by the pathologist.)

For the reasons stated above, a review of the Autopsy Report would lack foundation absent a further development of the record. Further, a review of how Dr. Hafzullah reached her determination would be purely speculative in nature and outside the scope of the allegation made by Petitioner.

Respectfully,

Drew DeGroot
Minnehaha County Deputy State's Attorney
Civil Division
415 North Dakota Avenue
Sioux Falls, SD 57104
P:605-367-4226

From: Kadi, Mark
Sent: Thursday, October 1, 2020 4:20 PM
To: Hoffman, Doug (Judge) <Doug.Hoffman@ujs.state.sd.us>; Kelly, Donna <dkkelly@minnehahacounty.org>; DeGroot, Drew <ddegroot@minnehahacounty.org>
Cc: Moraine, Jill <jill.moraine@ujs.state.sd.us>
Subject: RE: 49 CIV 16-824

Judge Hoffman,

I have reviewed your email regarding the autopsy report in the Ally case. Recognizing that I have the burden of proof, and this court desires additional information, I am not in a position to object outright to information this court deems important. I do have concerns about the purpose for which it would be received. This court indicates the autopsy report "could have contributed to the necessary foundation to have justified her opinion,".

Knowing that Snell would testify that his conclusion was abusive head trauma from the autopsy report, trial counsel brought a motion in limine to prevent admission of that term. As such, this "could have" been the reason that the autopsy report was not offered into evidence. "Mays" and "could haves" have been an issue in this case.

I may read the transcript slightly differently than the court.

Hazfulah's discussion of the autopsy comes at the end of her testimony. She did not testify on initial direct examination that she explicitly relied on the autopsy report for her opinions stated at trial. When the topic is brought up on redirect, she does not say that she relied on it for her stated opinions at trial. She concedes that she reviewed the autopsy report only "briefly" two weeks or so before the trial. She is then asked by the prosecutor "I am just curious if you saw anything in the autopsy results that altered your previously stated opinion?" This is arguably a different question than inquiring whether she testified in reliance on the autopsy report for her opinion. Certainly, the phrase "abusive head trauma" was not stated by Hazfulah.

I also do not believe a less qualified doctor becomes sufficiently qualified to state an opinion of a more qualified doctor simply because she read the latter's report. The opinion of the less qualified doctor still lacks relevance, not having sufficient expertise to present the opinion at all.

The autopsy report was clearly viewed by trial counsel so to that extent I would not object to its admission and relevance.

Mark Kadi

From: Hoffman, Judge Doug <Doug.Hoffman@ujs.state.sd.us>
Sent: Thursday, October 1, 2020 10:44 AM
To: Kelly, Donna <dkkelly@minnehahacounty.org>; DeGroot, Drew <ddegroot@minnehahacounty.org>
Cc: Kadi, Mark <mkadi@minnehahacounty.org>; Moraine, Jill <jill.moraine@ujs.state.sd.us>
Subject: RE: 49 CIV 16-824

Dear Counsel,

I was studying the circumstances related to Dr. Hafzallah's challenged opinion that the child's death was nonaccidental. Judge Salter ruled in the pretrial motion hearing that he wouldn't allow that absent a prior Daubert hearing, but Defense counsel didn't ask for that at trial and the opinion was stated without objection at trial. On cross defense counsel sought to impeach the opinion questioning the Dr.'s lack of foundation or process for differential diagnosis relative to that conclusion. On redirect, the State elicited that she had reviewed the Snell Autopsy Report and this could have contributed

to the necessary foundation to have justified her opinion under Rule 702/Daubert. Unfortunately, the actual Autopsy Report itself does not appear to be in the Criminal case record, nor was it introduced as an exhibit at the habeas trial. In order for me to properly review the potential error/prejudice of not challenging Hafzallah's conclusion at trial I need to see all of her predication and that includes the Autopsy Report that she reviewed pretrial. Would counsel be willing to stipulate to it being admitted as an exhibit into evidence in this case and if so, could one of you please email it to me and I will mark it and file it herein? Thank you,

Douglas E. Hoffman
Circuit Court Judge
Second Judicial Circuit
425 N. Dakota Ave.
Sioux Falls, SD
doug.hoffman@ujs.state.sd.us

From: Kelly, Donna [mailto:dkkelly@minnehahacounty.org]
Sent: Tuesday, September 29, 2020 3:56 PM
To: Hoffman, Judge Doug <Doug.Hoffman@ujs.state.sd.us>
Cc: Kadi, Mark <mkadi@minnehahacounty.org>
Subject: RE: [EXT] 49 CIV 16-824

Dear Judge Hoffman and Mr. Kadi: Attached please find a copy of a Motion to Withdraw as Counsel of Record that I have caused to be submitted for electronic filing on today's date. I have also attached a proposed Order for your consideration. Thank you.

Sincerely,

Donna Kathryn Kelly
Chief Civil Deputy State's Attorney
Minnehaha County State's Attorney's Office

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STATE OF SOUTH DAKOTA) :SS
COUNTY OF MINNEHAHA) IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

* *

STATE OF SOUTH DAKOTA,

Plaintiff,

-vs-

CR NO. 12-8143
JURY TRIAL
FEBRUARY 21, 2014

MANEGABE ALLY,

Defendant.

* *

PROCEEDINGS: The above-entitled matter commenced on the 21st day of February, 2014, at the Minnehaha County Courthouse, Sioux Falls, South Dakota.

BEFORE: The Honorable MARK E. SALTER, Circuit Court Judge, Sioux Falls, South Dakota.

* *

APPEARANCES: Donald Hanson
Tara K. Palmiotto
Minnehaha County State's Attorney's Office
415 North Dakota Avenue
Sioux Falls, South Dakota 57104

For the Plaintiff,

Traci Smith
Kenneth Jacobs
Minnehaha County Public Defender's Office
413 North Main Avenue, #300
Sioux Falls, South Dakota 57104

For the Defendant.

Filed on:12-02-2014 MINNEHAHA County, South Dakota 49CRI12-008143

him lying on the floor. He tells Detective Carda that Cecelia was in her room during this time.

An autopsy was performed on December 26, 2012 by Minnehaha County Coroner and Forensic Pathologist, Dr. Kenneth Snell. He is board certified by the American Board of Pathology and licensed in four states. Dr. Snell does an external and internal examination of Merveil. Dr. Snell observed Merveil to have subgaleal, subdural and subarachnoid hemorrhages as well as retina hemorrhages. Dr. Snell also observed Merveil to have a non-lineal depressed skull fracture with at least three points of impact.

Dr. Snell is of the opinion that a short fall off the bed is not consistent with Merveil's injuries. Dr. Snell is of the opinion that Merveil died of nonaccidental head trauma. After consulting with doctors and with Dr. Snell, Detective Carda was present at the hospital and at the autopsy, obtains a warrant for the Defendant's arrest and for the death of Merveil.

At the close of evidence, I anticipate the State will be speaking with you again and ask you to find the Defendant guilty of the crime he is charged with.

THE COURT: Thank you, Ms. Palmiotto. Mr. Jacobs.

MR. JACOBS: May it please the Court, Counsel. On December 24, 2012, at around 2:40 in the afternoon,

Metro Communications or 911 receives a frantic phone call from Manegabe Ally. Manegabe is speaking very fast and is somewhat hard to understand. You can understand he's asking for help to be sent to his apartment because, as he says, the baby fall down. As the operator is trying to get information about the patient, including age, vital signs, gender, you can hear the desperation in his voice as he begged for help.

As the call progresses a couple of minutes, the operator asks where he fell from and Manegabe responds from sleep. The operator asked a follow-up question from his sleeping to which Manegabe answers yes, yes, sleeping and then begs for help again. The panic in Manegabe's lack of ability to speak fluent English, take over the call again as you'll hear. His begs for help were partially answered in the form of a neighbor that was leaving for work. She can hear him in the hallway on the phone begging for help. She takes over the phone and explains to the operator that the baby was making a weird noise when she came in. She says like he's not breathing properly.

As Paramedics and First Responders are in route, she administers one round of CPR to the baby. After that one round of CPR is done, First Responders with the fire department arrive and you'll hear that upon their

arrival, they see Merveil lying on the floor on his back next to the foot of the bed. They start CPR, get a pulse and then do further assessment on him.

You'll hear their assessment included no obvious injuries to the neck, to the chest, to the abdomen or to the extremities, including arms and legs. You'll also hear that they note no obvious injuries to the face and that all of his teeth were intact. Rural Metro Ambulance arrived shortly thereafter. While First Responders and EMT personnel arrive and are treating Merveil, Sioux Falls police arrive and the First Responders direct Manegabe out of the bedroom to speak with the police.

While he meets with the officers, the First Responders stabilize Merveil before they load him onto an ambulance and take him to the hospital. In meeting with police officers, Officer Statema notes Manegabe speaks little English, but they have a short conversation before he allows Manegabe to leave. That conversation is the same as it was to 911 and First Responders. Merveil was placed down for a nap, Manegabe heard a cry and then he went into the bedroom and found Merveil on the floor.

After the short meeting, Manegabe leaves the apartment with Merveil's older sister to go pick up

Katoke at John Morrell. They pick up Katoke and go directly to the hospital. At the hospital, a detective with the Sioux Falls Police Department arrives and speaks with Katoke in private. He also wants to speak to Manegabe, but he wants to do so downtown. Manegabe agrees to go downtown and is taken downtown in a police car where he meets with Detective Carda. At that interview nothing changes. Manegabe placed Merveil down for a nap, he heard a distressed cry and found Merveil on the floor near the foot of the bed.

About 25 hours after the initial call for help, Merveil circums to the injuries and passes away. On December 26th, Manegabe is interviewed again at the Law Enforcement Center by Detective Carda. Again, nothing changes. He placed Merveil down for a nap, he heard a distressed cry, went into the room and found Merveil on his back at the foot of the bed on the floor.

Officers and detectives do a little follow-up investigation and find that earlier on December 24th in the morning, Manegabe took Cecelia and Merveil to the health clinic because Manegabe had to get some shots to help in his citizenship process. There was no appointment scheduled for the children, only shots for Manegabe. You'll hear from the nurse that treated or gave Manegabe the shots and she'll explain that both

children came into the appointment with him and at that time everything was normal, the kids acted normal, they played normal and there were no signs that anything was wrong with either child.

Besides the interview with Ms. Goldstine, very little else is done besides the autopsy on the 26th. The autopsy is completed by the County Coroner, Dr. Snell. He's accompanied by Detective Carda and an attorney from the State's Attorney's Office. Multiple parts of the body are looked at, but the one trauma that leads to the death of Merveil is a depressed skull fracture to the back of his head. You'll hear that Detective Carda believed there was bruising on Merveil's arms and legs that were consistent with patterns of child abuse and a grabbing of Merveil. However, Dr. Snell, during this autopsy, cut into those tissues where the supposed bruising was. There was no bleeding which means there was no bruising, just darker pigmented portions of his skin.

None the less on the 27th of December, Manegabe is arrested. After his arrest, another interview is done. Again, nothing changes. Merveil was placed down for a nap, Manegabe heard a distressed cry, went in and found Merveil on the floor of the bedroom.

You'll also hear that since this arrest on December

27th, other doctors, without law enforcement watching over them, have reviewed everything that you'll hear about in this trial; the autopsy report, the 911 call, the interviews, the hospital records. In fact, those doctors reviewed something more than Dr. Snell. They looked at past medical records of Merveil and those doctors came to the conclusion this was an accident just as Manegabe explained it was.

It cannot be said that these injuries represent an inconsistent outcome. At most, all that can be said is that this is an unexpected accident or infrequent outcome and because of that, myself and co-counsel are going to stand up here when everything is said and done and based on that evidence ask that you find Manegabe Ally not guilty. Thank you.

THE COURT: Thank you, Mr. Jacobs. State ready to proceed with its first witness?

MR. PALMIOTTO: Yes, Your Honor. State calls Katoke Kasangu.

THE COURT: Ms. Palmiotto, can you help her. Good morning, Ma'am. We're going to -- can you stand right there for a moment, please. We're going to give you an oath before you testify.

(Whereupon, the Interpreter translated all answers given by the witness, Katoke Kasangu,

STATE OF SOUTH DAKOTA) :SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, Plaintiff, vs. MANEGABE CHEBEA ALLY, Defendant.	CR. 12-8143 **JURY INSTRUCTIONS-** **PRELIMINARY INSTRUCTIONS**

Instruction No. 1

Now that you have been selected as members of the jury, I will take a few moments to give you some preliminary instructions which should help you during the trial. At the end of the trial, I shall give you further instructions. I may also give you instructions during the trial. Unless I specifically tell you otherwise, all such instructions -- those I have previously given you, those I give you now and those I give you later -- are equally binding upon you and must be followed.

Instruction No. 2

This is a criminal case, brought against Mr. Ally by the State of South Dakota. There are certain principles of law governing all criminal trials brought in this state. They are:

1. An indictment is the statutory method of accusing a defendant of a crime. It is not evidence, and does not create any presumption or permit you to form any inference of guilt.

2. It is a fundamental principle of our law that a defendant in a criminal case is presumed innocent. This presumption follows the defendant throughout the trial, and must continue unless you are satisfied from all the evidence beyond a reasonable doubt that the defendant is guilty.

3. The state has the burden of proving every element of the offenses charged beyond a reasonable doubt. The burden of proof never shifts to the defendant, but rests upon the state throughout the trial. A mere preponderance of the evidence is not enough.

4. A reasonable doubt is a doubt based upon reason and common sense -- the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt. In case of a reasonable doubt as to whether the defendant's guilt is satisfactorily proven by the evidence, a juror's verdict must be not guilty.

Instruction No. 3

It is your duty to decide from the evidence what the facts are and whether Mr. Ally is guilty or not guilty of the crimes charged. You must base that decision on the facts and the law.

First, you must determine the facts from the evidence received in the trial and not from any other source. You are entitled to consider the evidence in the light of your own observations and experiences in the affairs of life. You may use reason and common sense to draw deductions or conclusions from facts which have been established by the evidence. However, your verdict must not be based upon speculation, guess or conjecture.

Second, you must apply the law that I state to you, to the facts, as you determine them, and in this way arrive at your verdict. You must accept and follow the law as I state it to you, whether or not you agree with the law.

Instruction No. 4

I have mentioned the word "evidence." "Evidence" includes the testimony of the witnesses; documents and other things received as exhibits; any facts that have been stipulated to -- that is, formally agreed to by the parties; and, any facts that may have been judicially noticed -- that is, facts which I say you may, but are not required to, accept as true, even without evidence.

Certain things are not evidence. Statements, arguments, questions and comments made by the attorneys during the trial are not evidence. Objections are not evidence. Lawyers have a right to object when they believe something is improper. You should not be influenced by the objection. If I sustain an objection to a question, you must ignore the question, and must not try to guess what the answer might have been.

Testimony I strike from the record, or tell you to disregard, is not evidence and must not be considered. Anything you see or hear about this case outside the courtroom is not evidence.

Furthermore, a particular item of evidence is sometimes received for a limited purpose. I shall tell you when that occurs, and instruct you on the purposes for which the item can and cannot be used.

Instruction No. 5

At the end of the trial, you must make your decision based upon what you recall of the evidence. You will not have the written transcript to consult, and the court reporter will not be required to read back lengthy testimony. Therefore, you should pay close attention to the testimony as it is presented.

If you wish, however, you may take notes to help you remember what witnesses said. If you take notes, please keep them to yourself until you and your fellow jurors go to the jury room to decide the case. Do not let note taking distract you so that you do not hear other answers by the witnesses. Your notes are not evidence. Your notes should be used only as memory aids. You should not give your notes any greater weight than your independent recollection of the evidence. Notes are not entitled to any greater weight than the recollection or impression of each juror as to what the testimony might have been.

When you leave at noon or at night, your notes should be left here. They will not be shown to anyone. At the end of the trial, you may take your notes with you.

Instruction No. 6

During the trial, you will be out of the courtroom for breaks, lunch and overnight if the trial continues more than one day. We will take recesses occasionally throughout the day. You should take your recesses in the jury room.

During the trial it may be necessary for me to talk to the lawyers out of the hearing of the jury, either by having a bench conference here while the jury is present in the courtroom, or by calling a recess. Please understand that while you are waiting, we are working. The purpose of these conferences is to decide how certain evidence will be treated under the rules of evidence, to decide questions of law, and to avoid confusion and error. We will do what we can to keep the number and length of these conferences to a minimum.

Once the case is submitted to you for deliberation, you will have to remain together under the supervision of the bailiff. Necessary meals and any other accommodations will be arranged by the bailiff.

Instruction No. 7

When you are outside the courtroom, please do not discuss this case with anyone, and do not permit anyone to discuss it with you. Also, do not begin to form or express any opinion, or reach any conclusion about any issue in this case until the case is finally concluded and you start to deliberate. I intend to remind you of this admonition before each recess, but if I do not, remember this instruction.

If anyone attempts to discuss this case with you, please refuse the offer and inform me or the bailiff immediately. If family or friends ask you about the trial, please tell them that you may not discuss it until after the verdict. Do not talk to any of the attorneys, witnesses or parties in the case. Even an innocent conversation may appear to be improper to others.

Instruction No. 8

I have already instructed you that you are required to decide this case based solely on the evidence and exhibits that you see and hear in the courtroom. I will explain why. If one or more of you were to get additional information from an outside source, that information might be inaccurate or incomplete, or for some other reason not applicable to this case, and the parties would not have a chance to explain or contradict that information because they wouldn't know about it. That's why it is so important that you base your verdict only on information you receive in this courtroom.

At the end of the case, I will give you instructions about the law that you must apply, and you will be asked to use that law, together with the evidence you have heard, to reach a verdict. In order for your verdict to be fair, you must not be exposed to any other information about the case, the law, or any of the issues involved in this trial during the course of your jury duty. This is very important, and so I am taking the time to give you some very detailed explanations about what you should do and not do during your time as jurors.

First, you must not try to get information from any source other than what you see and hear in this courtroom. This means you may not speak to anyone, including your family and friends. You may not use any printed or electronic sources to get information about this case or the issues involved. This includes the internet, reference books or dictionaries, newspapers, magazines, television, radio, computers, smartphones, PDAs, or any other electronic device. You may not do any personal investigation, such as the following: visiting any of the places involved in this case, using Internet maps or Google

Earth or any other such technology, talking to any possible witnesses, or creating your own demonstrations or reenactments of the events which are the subject of this case.

Second, you must not communicate with anyone about this case or your jury service, and you must not allow anyone to communicate with you. In particular, you may not communicate about the case via emails, text messages, tweets, blogs, chat rooms, comments or other postings, social networking sites, including but not limited to Facebook, MySpace, or LinkedIn, or any other websites. This applies to communicating with your fellow jurors including your family members, your employer, and the people involved in the trial, although you may notify your family and employer that you have been seated as a juror in the case. But, if you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter and to report the contact to the court.

The court recognizes that these rules and restrictions may affect activities that you would consider to be normal and harmless, and I assure you that I am very much aware that I am asking you to refrain from activities that may be very common and very important in your daily lives. However, the law requires these restrictions to ensure the parties have a fair trial based on the evidence that each party has had an opportunity to address.

You must not engage in any activity, or be exposed to any information, that might unfairly affect the outcome of this case. Any juror who violates these restrictions I have explained to you jeopardizes the fairness of these proceedings, and a mistrial could result that would require the entire trial process to start over. As you can imagine, a mistrial is a tremendous expense and inconvenience to the parties, the court, and the taxpayers. If any

juror is exposed to any outside information, or has any difficulty whatsoever in following these instructions, please notify the court immediately. If any juror becomes aware that one of your fellow jurors has done something that violates these instructions, you are obligated to report that to the court as well.

These restrictions must remain in effect throughout this trial. Once the trial is over, you may resume your normal activities. At that point, you will be free to read or research anything you wish. You will be able to speak—or choose not to speak—about the trial to anyone you wish. You may write, or post, or tweet about the case if you choose to do so. The only limitation is that you must wait until after the verdict, when you have been discharged from your jury service.

Instruction No. 9

Now that I have given you my preliminary instructions, we are ready to begin the trial. We will proceed in the following manner: first, the attorneys for the state must make an opening statement, which is simply an outline to help you understand what the state expects to prove. Next, Mr. Ally's attorneys may make an opening statement. Opening statements are not evidence. An opening statement is an outline of what the attorney thinks the facts to be without argument.

The state will then present its evidence and counsel for Mr. Ally may cross-examine. Following the state's case, counsel for Mr. Ally may present evidence and the state may cross-examine.

After presentation of the evidence is complete, I will give you my final instructions. The attorneys will make their closing arguments to summarize and interpret the evidence for you. As with opening statements, closing arguments are not evidence. After that, you will retire to deliberate on your verdict.

Dated this 21st day of February, 2014.

Mark E. Salter
Circuit Court Judge

FILED
FEB 27 2014
Minnehaha County, S.D.
Clerk Circuit Court

STATE OF SOUTH DAKOTA) :SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, Plaintiff, vs. MANEGABE CHEBEA ALLY, Defendant.	CR. 12-8143 **JURY INSTRUCTIONS**

Instruction No. 10

In this case, the Defendant Manegabe Chebea Ally is accused by the State of South Dakota in an indictment charging that in Minnehaha County, South Dakota:

Count One: First Degree Murder

That on or about the 24th day of December, 2012, that the Defendant Manegabe Chebea Ally, then and there without the authority of the law and with a premeditated design to effect the death of M.K., DOB 6-27-2011, did kill a human being, M.K., DOB 6-27-11, and thereby did commit the offense of Murder in the 1st Degree;

Count Two: Second Degree Murder

That the Defendant, Manegabe Chebea Ally, in Minnehaha County, State of South Dakota, on or about the 24th day of December, 2012, then and there did perpetrate an act imminently dangerous to others and evincing a depraved mind, regardless of human life, and thereby did kill a human being, namely M.K., DOB 6-27-2011, without any premeditated design to effect the death of any particular person, thereby committing the offense of Murder in the 2nd Degree;

Count Three: First Degree Manslaughter

That the Defendant, Manegabe Chebea Ally, in Minnehaha county, State of South Dakota, on or about the 24th day of December, 2012, did, without any design to effect death and while engaged in the commission of a felony, abuse or cruelty to a minor, kill a human being, namely, M.K., DOB 6-27-11, and thereby did commit the offense of Manslaughter in the 1st Degree;

Count Four: First Degree Manslaughter

That the Defendant, Manegabe Chebea Ally, in Minnehaha county, State of South Dakota, on or about the 24th day of December, 2012, did, without any design to effect death and while engaged in the commission of a felony, aggravated assault, pursuant to SDCL 22-18-1.1(1), kill a human being, namely, M.K., DOB 6-27-11, and thereby did commit the offense of Manslaughter in the 1st Degree;

Count Five: First Degree Manslaughter

That the Defendant, Manegabe Chebea Ally, in Minnehaha county, State of South Dakota, on or about the 24th day of December, 2012, did, without any design to effect death and while engaged in the commission of a felony, aggravated assault, pursuant to SDCL 22-18-1.1(4), kill a human being, namely, M.K., DOB 6-27-11, and thereby did commit the offense of Manslaughter in the 1st Degree;

Count Six: First Degree Manslaughter

That the Defendant, Manegabe Chebea Ally, in Minnehaha county, State of South Dakota, on or about the 24th day of December, 2012, did, without any design to effect death and while engaged in the commission of a felony, aggravated battery of an infant, kill a human being, namely, M.K., DOB 6-27-11, and thereby did commit the offense of Manslaughter in the 1st Degree.

To each count of the indictment, Mr. Ally has entered a plea of not guilty, which plea is a denial of and puts in issue every material fact constituting the offenses charged in the indictment.

Instruction No. 11

An indictment is the statutory method of accusing a defendant of a crime. It is not evidence and does not create any presumption or permit you to form an inference of guilt.

Instruction No. 12

It is a fundamental principle of our law that a defendant in a criminal case is presumed to be innocent. This presumption follows the defendant throughout the trial and must continue unless you are satisfied from all the evidence beyond a reasonable doubt that the defendant is guilty.

Instruction No. 13

Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the state's proof must be more powerful than that. It must be beyond a reasonable doubt.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things that we know with absolute certainty. In criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced the defendant is guilty of the crime charged, you must find the defendant guilty. If, on the other hand, you think there is a real possibility the defendant is not guilty, you must give the defendant the benefit of the doubt and return a verdict of not guilty.

Instruction No. 14

The indictment charges that the offense was committed "on or about" a certain date. The proof need not establish with certainty the exact date of the offense alleged. It is sufficient if the evidence establishes beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged.

Instruction No. 15

The words 'intent' or 'intentionally' or any derivatives thereof as used in these instructions means a specific design to cause a certain result.

Instruction No. 16

The intent with which an act is done is shown by the circumstances surrounding the act, the manner in which it is done, and the means used.

Instruction No. 17

Motive is what prompts a person to act, or fail to act.

Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish guilt. Absence of motive may tend to establish innocence. You will therefore give its presence or absence, as the case may be, the weight to which you find it to be entitled.

Instruction No. 18

Homicide is the killing of one human being by another. As applied to this case, homicide is either Murder in the 1st Degree, Murder in the 2nd Degree, or Manslaughter in the 1st Degree which is a lesser degree of homicide than Murder.

Instruction No. 19

To find the defendant guilty of Murder in the 1st Degree, Murder in the 2nd Degree, or Manslaughter in the 1st Degree, you must be convinced beyond a reasonable doubt the act charged was a proximate cause of the death under such circumstances as to constitute the crime of murder or manslaughter.

"Proximate cause of the death" means that cause which, in the natural and continuous sequence, or chain of events, unbroken by any intervening cause, aids in producing the death, and without which it would not have occurred.

Instruction No. 20

The elements of the crime of Murder in the 1st Degree, as charged in Count 1 of the indictment, each of which the state must prove beyond a reasonable doubt, are that at the time and place alleged:

1. The defendant caused the death of M.K;

2. The defendant did so with a premeditated design to effect the death of the deceased.

Instruction No. 21

"Premeditated design to effect the death" means an intention, purpose or determination to kill or take the life of the person killed, distinctly formed and existing in the mind of the perpetrator before committing the act resulting in the death of the person killed.

A premeditated design to effect death sufficient to constitute murder may be formed instantly before committing the act by which it is carried into execution.

Instruction No. 22

Homicide, the killing of one human being by another, is Murder in the 2nd Degree when perpetrated by an act imminently dangerous to others and evincing a depraved mind, without regard for human life, although without any premeditated design to effect the death of any particular person.

Instruction No. 23

The elements of the crime of Murder in the 2nd Degree as charged in Count 2 of the indictment, each of which the state must prove beyond a reasonable doubt, are that at the time and place alleged:

1. The defendant caused the death of M.K.;
2. The defendant did so by an act imminently dangerous to others evincing a depraved mind, without regard for human life.
3. The defendant acted without the design to effect the death of any particular person.

Instruction No. 21

"Imminent" or any derivative thereof means near at hand; mediate rather than immediate; close rather than touching; impending; on the point of happening.

"Dangerous to others" means an act which is inherently dangerous which puts the lives of others in jeopardy.

"Evincing a depraved mind, regardless of human life" means conduct demonstrating an indifference to the life of others, that is not only disregard for the safety of another but a lack of regard for the life of another.

Instruction No. 25

Whether the conduct is imminently dangerous to others and evincing a depraved mind regardless of human life is to be determined from the conduct itself and the circumstances of its commission.

Instruction No. 26

Homicide, the killing of one human being by another, is Manslaughter in the 1st Degree if perpetrated without any design to effect death, while engaged in the commission of the felony.

Instruction No. 27

The elements of the crime of Manslaughter in the 1st Degree as charged in Count 3 of the indictment, each of which the state must prove beyond a reasonable doubt, are that at the time and place alleged:

1. The defendant caused the death of M.K;
2. The defendant caused the death of M.K. while engaged in the commission of the felony of Abuse of or Cruelty to a Minor.

Any person who abuses, exposes, tortures, torments or cruelly punishes a minor commits the felony of Abuse of or Cruelty to a Minor.

The elements of the crime of Abuse of or Cruelty to a Minor, as charged in Count 3, each of which the state must prove beyond a reasonable doubt, are that at the time and place alleged:

1. The defendant abused, exposed, tortured, tormented or cruelly punished M.K..;
2. M.K. was under the age of eighteen years

Instruction No. 28

The elements of the crime of Manslaughter in the 1st Degree as charged in Count 4 of the indictment, each of which the state must prove beyond a reasonable doubt, are that at the time and place alleged:

1. The defendant caused the death of M.K;
2. The defendant caused the death of M.K. while engaged in the commission of the felony of Aggravated Assault.

Any person who attempts to cause serious bodily injury to another, or causes such injury, under circumstances manifesting extreme indifference to the value of human life commits the felony of Aggravated Assault.

The elements of the crime of Aggravated Assault as it pertains to Count 4 of the Indictment, each of which the state must prove beyond a reasonable doubt, are that at the time and place alleged:

1. The defendant attempted to cause or caused serious bodily injury to M.K.;
2. The defendant acted under circumstances manifesting extreme indifference to the value of human life.

Instruction No 29

The elements of the crime of Manslaughter in the 1st Degree as charged in Count 5 of the indictment, each of which the state must prove beyond a reasonable doubt, are that at the time and place alleged:

1. The defendant caused the death of M.K;
2. The defendant caused the death of M.K. while engaged in the commission of the felony of Aggravated Assault.

Any person who ~~attempts to~~ assaults another with intent to commit bodily injury which results in serious bodily injury commits the felony of Aggravated Assault.

The elements of the crime of Aggravated Assault as it pertains to Count 5 of the indictment, each of which the state must prove beyond a reasonable doubt, are that at the time and place alleged:

1. The defendant assaulted M.K.;
2. The defendant did so with the intent to commit bodily injury upon M.K.;
3. The defendant's action resulted in serious bodily injury to M.K.

"Serious bodily injury" means an injury which is grave and not trivial, and which gives rise to apprehension of danger of life, health or limb.

Instruction No. 30

The elements of the crime of Manslaughter in the 1st Degree as charged in Count 6 of the indictment, each of which the state must prove beyond a reasonable doubt, are that at the time and place alleged:

1. The defendant caused the death of M.K;
2. The defendant caused the death of M.K. while engaged in the commission of the felony of Aggravated Battery of an Infant.

Any person who intentionally or recklessly causes serious bodily injury to an infant, less than three years old, by causing any intracranial or intraocular bleeding, or swelling of or damage to the brain, whether caused by blows, shaking, or causing the infant's head to impact with an object or surface commits the felony of Aggravated Battery of an Infant.

The elements of the crime of Aggravated Battery of an Infant, as charged in Count 6 of the indictment, each of which the state must prove beyond a reasonable doubt, are that at the time and place alleged:

1. The defendant intentionally or recklessly caused serious bodily injury to M.K.;
2. M.K. was less than three years old;
3. The defendant's actions caused intracranial or intraocular bleeding or swelling of or damage to the brain, whether caused by blows, shaking, or causing the infant's head to impact with any object or surface.

Instruction No. 31

The words "reckless" or "recklessly" (or any derivative thereof) mean a conscious and unjustifiable disregard of a substantial risk that one's conduct may cause a certain result or may be of a certain nature.

A person is reckless with respect to circumstances when the person consciously and unjustifiably disregards a substantial risk that such circumstances may exist.

The words 'intent' or 'intentionally' (or any derivatives thereof) as used in these instructions means a specific design to cause a certain result.

Instruction No. 32

If under the court's instructions and the evidence you find beyond a reasonable doubt that the defendant committed the acts constituting the elements of the offense charged, then it is your duty to find the defendant guilty. If you do not find that the defendant is guilty of the offense charged but find beyond a reasonable doubt that the defendant is guilty of a lesser degree of the offense charged, it is your duty to find the defendant guilty of the highest degree of the offense to which you find guilt beyond a reasonable doubt.

If any member of the jury has a reasonable doubt that the defendant committed the offense charged and any lesser degree thereof, or any reasonable doubt upon any element necessary to constitute the offense charged and any lesser degree thereof as defined for you by the court, then it is that juror's duty to give the defendant the benefit of the doubt and vote for a verdict of not guilty.

Instruction No. 33

The defendant is charged in Count 1 with the crime of Murder in the 1st Degree, in Count 2 with the crime of Murder in the 2nd Degree and in Counts 3,4,5,6 with the crime of Manslaughter in the 1st Degree. These charges are made in the alternative and, in effect, allege that the defendant committed an unlawful act which constitutes either the crime of Murder in the 1st Degree, Murder in the Second Degree, or Manslaughter in the First Degree. If you find that the defendant committed an act or acts constituting one of the crimes so charged, you then must determine which of the offenses so charged was thereby committed.

In order to find the defendant guilty, you must all agree as to the particular offense committed. If you find the defendant guilty of Count 1, you need not proceed to Counts 2, 3, 4, 5, and 6. If you find the defendant not guilty of Count 1, you must proceed to Count 2. If you find the defendant guilty of Count 2, you need not proceed to Counts 3, 4, 5, or 6. If you find the defendant not guilty of Count 2, you must proceed to Counts 3, 4, 5, and 6.

Instruction No. 34

Some of you may have heard the terms "direct evidence" and "circumstantial evidence." You are instructed that you should not be concerned with those terms. The law makes no distinction between direct and circumstantial evidence. You should give all evidence the weight and value you believe it is entitled to receive.

Instruction No. 35

A statement made by a defendant other than at his trial may be an admission.

An admission is a statement by a defendant admitting one or more of the facts at issue. It is not sufficient by itself to prove guilt of the crime charged, but it may prove one or more of the elements of the crime charged.

You are the exclusive judges as to whether an admission was made by the defendant and if the statement is true in whole or in part. If you find that such statement is entirely untrue, you must reject it. If you find it is true in part, you may consider that part which you find to be true. It is for you to determine what weight, if any, to give to a purported admission. However, evidence of a claimed oral admission of the defendant ought to be viewed with caution and weighed with care.

The guilt of a defendant may not be established only by an admission made outside of this trial. Before any person may be convicted of a criminal offense, there must be proof, independent of the statement, that the crime in question was committed, but it is not necessary the independent proof include proof as to the identity of the person by whom the offense was committed.

Instruction No. 36

I have previously instructed you that certain things are not evidence. Statements, arguments, questions and comments made by the attorneys during the trial are not evidence. I have also previously instructed you that statements made and questions asked by Detective Carda during his recorded interview with Mr. Ally, conducted on December 26, 2012, are not evidence. Such statements or questions cannot be used by you for any purpose. You may, however, consider Mr. Ally's own statements during his interview on December 26, 2012, as evidence.

Detective Carda's testimony in court is evidence, and you may consider it.

Instruction No. 37

A person is qualified to testify as an expert if the person has special knowledge, skill, experience, training or education sufficient to qualify as an expert on the subject to which the testimony relates.

Qualified experts may give their opinions on questions in controversy at the trial. To assist you in deciding such questions, you may consider the opinion with the reasons given for it, if any, by the expert who gives the opinion. You may also consider the qualifications and credibility of the expert. You are not bound to accept an expert's opinion as conclusive, but should give to it the weight to which you find it to be entitled. You may disregard any such opinion if you find it to be unreasonable.

Instruction No. 38

In examining an expert witness an attorney may ask a type of question known in the law as a hypothetical question. By such a question the witness is asked to assume to be true a hypothetical state of facts and to give an opinion based on that assumption.

In permitting such a question the court does not rule that all of the assumed facts in the question have been proved. The court only determines that those assumed facts are within the probable or possible range of the evidence.

It is for the jury to determine from all the evidence whether or not the facts assumed in a hypothetical question have been proved, and if you should find that any assumption in such a question has not been proved, you are to determine the effect of that failure of proof on the value and weight of the expert opinion based on the assumption.

Instruction No. 39

The credibility of a witness may be attacked by introducing evidence that on some former occasion the witness made a statement on a matter of fact or acted in a manner inconsistent with the witness's testimony in this case on a matter material to the issues. Evidence of this kind may be considered by you in connection with all the other facts and circumstances in evidence in deciding the weight to be given to the testimony of that witness, but you must not consider any such prior statement as establishing the truth of any fact contained in that statement.

Instruction No. 40

You are the sole and exclusive judges of all questions of fact and the credibility of the witnesses and the weight to be given the testimony of each of them.

In determining the credit to be given any witness you may take into account ability and opportunity to observe, memory, manner while testifying, any interest, bias, or prejudice, and the reasonableness of the testimony considered in the light of all the evidence in the case.

Instruction No. 41

If you believe that any witness has knowingly sworn falsely to any material fact in the case, you may reject all of the testimony of the witness.

Instruction No. 42

The function of the jury is to determine the facts under the instructions of the court without prejudice, fear or favor, solely upon a fair consideration of the evidence in the light of your own observations and experience in the affairs of life.

Offered testimony stricken, or not received and statements of counsel not supported by the evidence or a fair inference drawn therefrom should not be considered by you in arriving at your verdict.

You must accept and apply the law as stated in these instructions which you must consider as a whole. You should not disregard any instruction, or give special attention to any one instruction, or question the validity of any rule of law.

Instruction No. 43

The function of the court is to conduct the trial in an orderly, fair and efficient manner, to rule upon questions of law arising during the course of the trial, and to instruct the jury as to the law which applies to this case.

The actions of the court during the trial in ruling on motions or objections by counsel, in comments to counsel, in questions to any person involved in the trial, or in setting forth the law in these instructions, are not to be taken by you as any indication of any opinion by the court as to how the jury should determine any issue of fact. As you are the exclusive judges of all questions of fact in the case, the court in the conduct of the case does not express or intimate any opinion as to the facts which are for your sole determination.

Instruction No. 44

During your deliberations in this case, the subject of penalty or punishment is not to be discussed or considered by you.

Instruction No. 45

Consider this case carefully and honestly with due regard for the interests of society and the rights of Mr. Ally. You should decide the case fairly and impartially upon the evidence and the instructions of the court. It must not be decided from any feeling of bias or prejudice against or sympathy for the defendant.

Your duty upon such fair consideration of the case is to determine whether Mr. Ally is guilty or not guilty of the offense charged in the indictment.

Instruction No. 46

In order to return a verdict, all jurors must agree.

The jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment.

Each juror must decide the case independently, but only after an impartial consideration of the evidence with the other jurors.

In the course of deliberations, jurors should not hesitate to re-examine their own views and change their opinions if convinced they are erroneous. However, no juror should surrender an honest belief as to the weight or effect of the evidence solely because of the opinion of the other jurors, or for the mere purpose of returning a verdict.

Instruction No. 47

When you have retired to your jury room, you will select a foreperson. All twelve of you must agree upon any verdict.

When all twelve of you have agreed upon a verdict, and the foreperson has completed, dated, and signed the verdict form, you will report to the bailiff. You will then be brought into court where your verdict will be received. Return to court these instructions and any exhibits sent out with you.

If it becomes necessary during your deliberations to communicate with the court, you may send a note by the bailiff. But the jury is not to reveal to the court or to any person how the jury stands, numerically or otherwise, on the question of the guilt or innocence of the accused until after you have reached a unanimous verdict and reported the same into court.

A written form of verdict will be furnished to you for your convenience.

Dated at Sioux Falls, South Dakota this 27th day of February, 2014.

BY THE COURT

Mark Salter
Circuit Court Judge

FILED
FEB 27 2014
Minnehaha County, S.D.
Clerk Circuit Court

STATE OF SOUTH DAKOTA) :SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, Plaintiff, vs. MANEGABE CHEBEA ALLY, Defendant.	CR. 12-8143 **VERDICT**

Count One – Murder in the 1st Degree and Count Two- Murder in the 2nd Degree are charged in the alternative. (The Defendant can be found "Not Guilty" of both counts, "Guilty of one or the other count, but cannot be found "Guilty" of both counts.)

1. As to Count 1 of the Indictment, Murder in the 1st Degree, we, the Jury, duly impaneled in the above entitled case, find the Defendant Manegabe Chebea Ally:

GUILTY

PLEASE CIRCLE ONE

NOT GUILTY

If you find the Defendant "Guilty" of Count 1, you need not proceed to consider Count 2, Murder in the 2nd Degree or the lesser offenses of Manslaughter in the 1st Degree. Please sign the verdict form and notify the bailiff that you have reached a verdict.

If you found the Defendant "Not Guilty" of Count 1, then you must proceed to consider Count 2.

2. As to Count 2 of the Indictment, Murder in the 2nd Degree, we, the Jury, duly impaneled in the above entitled case, find the Defendant Manegabe Chebea Ally:

GUILTY

PLEASE CIRCLE ONE

NOT GUILTY

If you find the Defendant "Guilty" of Count 2, you need not proceed to consider the lesser offenses of Manslaughter in the 1st Degree. You should sign the verdict form and notify the bailiff that you have reached a verdict.

If you find the Defendant not guilty of both Count 1 and Count 2, then you must go on to consider the lesser offenses of Manslaughter in the 1st Degree.

3. As to Counts 3 of the Indictment, Manslaughter in the 1st Degree (while engaged in Abuse or Cruelty to a Minor) as charged in Count 3 of the Indictment, we, the Jury, duly impaneled in the above entitled case, find the Defendant Manegabe Chebea Ally:

GUILTY

PLEASE CIRCLE ONE

NOT GUILTY

4. As to Count 4 of the Indictment, Manslaughter in the 1st Degree, while engaged in Aggravated Assault, causing or attempting to cause serious bodily injury under circumstances manifesting extreme indifference to the value of human life, as charged in Count 4 of the Indictment, we, the Jury, duly impaneled in the above entitled case, find the Defendant Manegabe Chebea Ally:

GUILTY

PLEASE CIRCLE ONE

NOT GUILTY

5. As to Count 5 of the Indictment, Manslaughter in the 1st Degree, while engaged in Aggravated Assault, assaults another with intent to commit bodily injury which results in serious bodily injury, as charged in Count 5 of the Indictment, we, the Jury, duly impaneled in the above entitled case, find the Defendant Manegabe Chebea Ally:

GUILTY

NOT GUILTY

PLEASE CIRCLE ONE

6. As to Count 6 of the Indictment, Manslaughter in the 1st Degree (while engaged in Aggravated Battery to an Infant) as charged in Count 6 of the Indictment, we, the Jury, duly impaneled in the above entitled case, find the Defendant Manegabe Chebea Ally:

GUILTY

NOT GUILTY

PLEASE CIRCLE ONE

Dated at Sioux Falls, South Dakota this 27th day of February, 2014.

Tina Underwood
Foreperson

FILED
FEB 2 7 2014
Minnehaha County, S.D.
Clerk Circuit Court

STATE OF SOUTH DAKOTA) :SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT

JOSHUA BAUSCH, Petitioner, vs. **DARIN YOUNG, Warden South Dakota State Penitentiary,** Respondent.	CIV 18-158 **MEMORANDUM OPINION DENYING HABEAS RELIEF**

This matter came before the Court for an evidentiary hearing on June 23, 2020. Petitioner appeared personally and with his attorney, Jason Adams. Attorney Drew DeGroot appeared on behalf of Respondent. At the conclusion of the hearing, the Court took the matter under advisement and allowed the parties an opportunity to submit post-hearing briefs. Having reviewed the record and considered the arguments of counsel, the Court denies habeas relief.

In CRI 13-3072, Petitioner Joshua Bausch (Petitioner) was charged by indictment on June 19, 2013, with four (4) counts of First Degree Rape (involving a Victim less than 13 Years of Age) and two (2) counts of Sexual Contact with a Victim under the age of Sixteen Years Old. A jury trial commenced on March 17, 2015, with Judge Lawrence E. Long presiding. Petitioner was represented by

Attorneys Michelle Thomas and Neil Fossum. On March 20, 2015, the jury convicted Petitioner on all counts.

On June 29, 2015, Judge Long sentenced Petitioner to twenty (20) years in the State Penitentiary as to Count 1 of First Degree Rape and fifteen (15) years as to Count 5 of Sexual Contact with a Child. Both Count 1 and 5 related to conduct that occurred in December 2012. The sentences as to Counts 1 and 5 were ordered to be served concurrent to each other, but consecutive to Counts 2, 3, 4, and 6. As to Counts 2, 3, and 4 of First Degree Rape, Judge Long imposed sentences of twenty (20) years as to each count, concurrent to each other and Count 6, but consecutive to Counts 1 and 5. As to Count 6 of Sexual Contact with a Child, Petitioner was sentenced to fifteen (15) years concurrent with Counts 2, 3, and 4, but consecutive to Counts 1 and 5. Counts 2, 3, 4, and 6 related to conduct occurring in March 2013.

Petitioner filed a direct appeal to the South Dakota Supreme Court, raising the following issues:

1. Whether the circuit court abused its discretion in limiting cross-examination by excluding questions regarding statements A.L. made about self-harm.

2. Whether the circuit court erred in denying a judgment of acquittal on the two sexual contact counts.

3. Whether the circuit court's jury instructions amounted to plain error.

4. Whether the State offered sufficient evidence to convict Bausch.

5. Whether the circuit court imposed a cruel and unusual punishment in violation of the Eighth Amendment and abused its discretion.

State v. Bausch, 2017 S.D. 1, ¶ 10, 889 N.W.2d 404, 408 (Bausch I). The South Dakota Supreme Court affirmed as to all issue, except it concluded that the sexual contact convictions should be vacated because they arose from sexual contact incidental to the rapes. Id. at 29, 889 N.W.2d at 413. Therefore, the South Dakota Supreme Court remanded for the limited purpose of the trial court vacating the sexual contact convictions (Counts 5 and 6) and resentencing as to the rape convictions. Id. Petitioner sought rehearing by the South Dakota Supreme Court, which was denied in March 2017.

On June 5, 2017, Judge Long vacated the Judgment and Sentences as to Counts 5 and 6 of Sexual Contact with a Child. He resentenced Petitioner to the same sentences as to Counts 1, 2, 3, and 4 with credit for time served. On June 12, 2017, Petitioner filed a Motion for New Trial, which was denied by Judge Long. Petitioner appealed the denial of his Motion for New Trial to the South Dakota Supreme Court. State v. Bausch, 2017 S.D. 86, 905 N.W.2d 314 (Bausch II). The South Dakota Supreme Court affirmed, holding that the circuit court on a limited remand only had authority to vacate Petitioner's convictions for sexual contact and to resentence Petitioner as to the rape convictions. Id. at ¶20, 905 N.W.2d at 319. It held that the circuit court could not consider Petitioner's Motion for New Trial. Id.

This is Petitioner's first application for habeas relief.

Habeas corpus is not a substitute for direct review and the scope of habeas review is limited. "'Habeas corpus can be used only to review (1) whether the court had jurisdiction of the crime and the person of the defendant; (2) whether the sentence was authorized by law; and (3) in certain cases whether an incarcerated defendant has been deprived of basic constitutional rights.'" Loderman v. Class, 1996 S.D. 134, ¶3, 555 N.W.2d 618, 622 (quoting Loop v. Class, 1996 S.D. 107, ¶11, 554 N.W.2d 189, 191 (citations omitted)). "The habeas applicant has the initial burden of proving entitlement to relief by a preponderance of the evidence." Hays v. Weber, 2002 S.D. 59, ¶11, 645 N.W.2d 591, 595 (citing New v. Weber, 1999 S.D. 125, ¶5, 600 N.W.2d 568, 572 (citing Lien v. Class, 1998 S.D. 7, ¶11, 574 N.W.2d 601, 607)).

Petitioner asserts a claim of ineffective assistance of his trial counsel. He claims that his trial counsel was ineffective based on the following claims:

1. Trial counsel's failure to seek dismissal or acquittal on double jeopardy grounds prejudiced Petitioner by the number of charges allowed to be considered by the jury.

2. Trial counsel failed to interview witnesses and properly investigate and prepare for trial.

3. Trial counsel's work load exceeded the ABA recommended limits, which prevented counsel from spending the necessary amount of time on Petitioner's case and providing effective representation.

Generally, a two-prong test is applied to determine ineffective assistance of counsel claims. "In order to meet the burden of proof for a claim of ineffective assistance of counsel, a defendant must prove (1) that counsel's representation fell below an objective standard of reasonableness, and (2) that such deficiency

prejudiced the defendant." Rhines v. Weber, 2000 S.D. 19, ¶13, 608 N.W.2d 303, 307 (citing Siers v. Class, 1998 S.D. 77, ¶12, 581 N.W.2d 491, 495; Sprik v. Class, 1994 S.D. 134, ¶22, 572 N.W.2d 824, 829; Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674, 693 (1984)).

First, counsel's performance must be shown to be deficient. Mitchell v. Class, 524 N.W.2d 860, 862 (SD 1994) (citations omitted). In order to the meet the first prong, Petitioner must show that the counsel's errors were "'so serious that counsel was not functioning as the 'counsel' guaranteed ... by the Sixth Amendment.'" Mitchell, 524 N.W.2d at 862 (citations omitted). "'Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]'" Hofer, 1998 S.D. 58, ¶10, 578 N.W.2d at 586.

Second, "Applicants must prove that the outcome was prejudiced by inferior performance of counsel." Ramos v. Weber, 2000 S.D. 111, ¶12, 616 N.W.2d 88, 92 (citing Hofer, 1998 S.D. 58, 9, 578 N.W.2d at 585). "Prejudice means 'a reasonable probability that, but for the unprofessional errors of counsel, the result of the proceeding would have been different.'" Ramos, 2000 S.D. 111, ¶12, 616 N.W.2d at 92 (citing Phyle v. Leapley, 491 N.W.2d 429, 432 (S.D. 1992), as modified by Hopfinger v. Leapley, 511 N.W.2d 845, 846-47 (S.D. 1994)). "A 'reasonable probability' is said to exist when there is proof sufficient to 'undermine confidence in the outcome.'" Ramos, 2000 S.D. 111, ¶12, 616 N.W.2d at 93 (citing Phyle, 491 N.W.2d at 432).

A court need not determine the sufficiency of counsel's performance before examining whether prejudice resulted from the alleged deficiencies. Jenner, 1999 S.D. 20 at ¶16, 590 N.W.2d at 471 (citing Strickland, 466 U.S. at 697 104 S.C.t at 2069). "'If it is easier to dispose of an ineffective assistance claim on the ground of lack of sufficient prejudice, . . . that course should be followed.'" Id. "[D]efendants 'shoulder a heavy burden of proof in their ineffective assistance of counsel claims.'" Crutchfield v. Weber, 2005 S.D. 62, ¶11, 697 N.W.2d 756, 759 (quoting Coon v. Weber, 2002 S.D. 48, ¶11, 644 N.W.2d 638, 642). "'There is a strong presumption that counsel's performance falls within the wide range of professional assistance and the reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all circumstances.'" Brakeall v. Weber, 2003 S.D. 90, ¶15, 668 N.W.2d 79, 84 (quoting Bradley v. Weber, 1999 S.D. 68, 19, 595 N.W.2d 615, 621). "Effective assistance of counsel does not equate with a successful outcome for the accused." Denoyer v. Weber, 2005 S.D. 43, ¶19, 694 N.W.2d 848, 855 (citations omitted).

A. Trial counsel's failure to seek dismissal or acquittal on double jeopardy grounds

Petitioner asserts that his trial counsel was ineffective for failing to seek dismissal or acquittal on the sexual contact charges on the grounds of double jeopardy. While not specifically arguing double jeopardy, trial counsel did move for judgment of acquittal on all counts at the conclusion of the State's case, arguing that the State failed to make a prima facie case. TT Vol. III, page 102, lines 2-5. The motion was denied. On direct appeal, Petitioner successfully argued that his

sexual contact and rape convictions violated double jeopardy. In Bausch I, the South Dakota Supreme Court found that the sexual contact conviction should be vacated because the convictions arose from conduct incidental to the rapes. However, Petitioner claims that that trial counsel's failure to limit the charges against him prejudiced him.

At the evidentiary hearing, his trial counsel Michelle Thomas testified that, while she did not recall thinking specifically about double jeopardy in making the motion for judgment of acquittal, she "absolutely" wanted the jury to be able to consider the less severe offense of sexual contact in lieu of convicting Petitioner of First Degree Rape. Ultimately, trial counsel had a strategy to keep the lesser counts as providing an option for the jury to convict for something less than First Degree Rape. Further, even if trial counsel should have made the double jeopardy argument at the trial level, Petitioner has not shown a reasonable probability that the jury would have acquitted him on all counts if the sexual contact counts were removed from its consideration. Therefore, Petitioner has not established prejudice under Strickland.

B. Trial counsel's failure to interview witnesses and properly investigate and prepare for trial.

Petitioner argues that trial counsel failed to adequately interview witnesses and properly investigate and prepare for trial. Specifically, Petitioner argues that trial counsel was ineffective for failing to contact and interview Celena Ackerman, who testified at the habeas hearing that she was present in the trailer house when the rape was alleged to have occurred in December 2012. She testified that she

stayed up all night, and that she did not see Petitioner leave the bedroom after he went to bed. She testified at the habeas hearing that she also did not see anyone go in or out of the victim's bedroom. She testified that no one contacted her regarding Petitioner's case until after his sentencing. Michelle Thomas testified that she interviewed Rosalina Bauer who was also present the night of the rape and that Rosalina mentioned Celena Ackerman (also known as Cici) also being present. Ms. Thomas had the name "Cici" in her notes but did not contact or interview Celena Ackerman.

"Under the deficiency prong of Strickland we note, '[c]ounsel has a duty to make a reasonable investigation based on the information provided by a defendant, particularly when an alibi is involved.' " Siers v. Class, 1998 S.D. 77, ¶ 17, 581 N.W.2d 491, 495 (quoting Hadley v. Groose, 97 F.3d 1131, 1135 (8th Cir.1996) (citing Strickland, 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d 674)). Petitioner testified at the habeas hearing that he knew Celena Ackerman was present and that he could have gotten her contact information, but he did not think it was necessary at the time to talk to her. His girlfriend, Becky, was actually in the bedroom with him and she was interviewed by law enforcement and testified at trial. "[I]nquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions." Siers, 1998 S.D. 77, ¶ 18, 581 N.W.2d at 496 (quoting Strickland, 466 U.S. at 691, 104 S.Ct. at 2066, 80 L.Ed.2d 674). Petitioner never told his trial counsel that Ms. Ackerman was a key witness or someone who should be interviewed. Further, Petitioner was insistent

that his girlfriend be called as a defense witness despite the fact that she made statements to law enforcement that Petitioner had left the bedroom the night they stayed at the trailer.

Even if defense counsel failed to investigate a witness, Petitioner must satisfy the prejudice prong of Strickland.

> To establish prejudice from counsel's failure to investigate a potential witness, a petitioner must show that the witness would have testified and that their testimony 'would have probably changed the outcome of the trial.' " Id. (quoting Stewart v. Nix, 31 F.3d 741, 744 (8th Cir.1994) (emphasis added)). In conducting this analysis, we will consider: "(1) the credibility of all witnesses, including the likely impeachment of the uncalled defense witnesses; (2) the interplay of the uncalled witnesses with the actual defense witnesses called; and (3) the strength of the evidence actually presented by the prosecution." McCauley-Bey v. Delo, 97 F.3d 1104, 1106 (8th Cir.1996).

Siers, 1998 S.D. 77, ¶ 25, 581 N.W.2d 491, 497–98. Perhaps Ms. Thomas should have called Ms. Ackerman as a witness if she would have said at trial what she said at the habeas hearing, but that is speculative. Ultimately, the Court finds that Ms. Ackerman's testimony would not have changed the outcome of the trial. Her testimony was weak, and its probative value was minimal because it is questionable that she was up all night and constantly observant of the hallway. When interviewed by law enforcement Petitioner's girlfriend said that Petitioner had left the bedroom at some point during the night, although she testified at trial that she did not recall him leaving the room. The credibility of Ms. Ackerman is low, and she would have been subject to impeachment by other witnesses' testimony. In fact, her testimony at the habeas hearing was contradicted by Petitioner's own testimony at the hearing. She testified she could see every room down the hall and that her

view was not obstructed. Petitioner testified that he did leave the bedroom to use the bathroom and that it was possible for someone to go from the bedroom to the bathroom without being seen by somebody sitting up in the living room. He testified that there was a "jog" in the hallway that would have obstructed the view. Ms. Ackerman also testified that the victim's sister slept in the same room as the victim. This contradicts all the other witness accounts offered at trial, including Petitioner's trial witness, his girlfriend. The inconsistencies in Ms. Ackerman's version of events calls into question the validity of her testimony that comes approximately seven years after the incidents. Petitioner has not met the prejudice prong of Strickland because he has not shown that the outcome probably would have changed with Ms. Ackerman's testimony at trial.

Petitioner also claims that his trial counsel was ineffective for failing to investigate the scene of the rape, specifically failing to investigate the height of the victim's bed. The victim testified that the rape occurred on her bunkbed. Petitioner claims that trial counsel should have taken measurements of the height of the bunkbed and the trailer ceiling. He also argues that trial counsel should have offered information as to Petitioner's height. He argues trial counsel should have used actual or demonstrative evidence to show the jury how difficult it would have been for Petitioner to climb or reach into the bed as claimed by the victim. Petitioner refers to this in his closing argument as "scientific improbability" of the victim's allegations.

This Court disagrees with that characterization. There was testimony and evidence offered at trial as to the height of the bed and the ceiling. Petitioner's trial counsel established that, at most, there was approximately 2 ½ feet between the bed and the ceiling. There was not "scientific improbability" to the victim's allegations. Petitioner, himself, testified at the habeas hearing that it was possible, but stating:

> The bunk bed is so high. And there's not a lot of room above a bunk bed. The victim is claiming that I climbed up on top of this bunk bed. And with that little bit of room it's possible, but not quiet and not easy.

There was enough room for Petitioner to get on the bed and he acknowledged it was possible. Obtaining measurements would not have been exculpatory, and in fact, may have been detrimental to the defense. As a matter of trial strategy, trial counsel was able to blame the State for not getting the actual measurements and used it to argue reasonable doubt. The fact that the jury asked Petitioner's height during deliberations shows that his trial counsel was effective at raising this issue and making it an issue of deliberation. The jury received photos of the room, the bed, and the measurements of the bed. This Court does not believe that the jury's verdict would have been different had it known Petitioner's height. The jury was able to observe Petitioner during the trial and judge his size. "This Court will not second-guess experienced counsel regarding trial tactics or strategy. Counsel must investigate and consider possible defenses and make reasonable decisions. A difference in tactics and strategy is not ineffective assistance of counsel." Davi v. Class, 2000 S.D. 30, ¶ 17, 609 N.W.2d 107, 112 (internal citations omitted). Therefore, Petitioner has failed to satisfy the standard of Strickland.

Petitioner further argues that his trial counsel failed to properly cross-examine the State's witnesses, especially the victim, about her allegedly inconsistent statements. Petitioner acknowledges that trial counsel did address inconsistencies in the victim's statements. However, Petitioner argues that the inconsistencies should have received greater focus and should have been used to a greater extent to impeach her credibility. Trial counsel testified that she felt she needed to be careful in attacking the credibility of the victim "because you also don't want to be seen as, by the jury, as the person who's just attacking this child." "Strategic decisions are best left up to counsel. A defendant is entitled to a fair trial, not a perfect one." Davi, 2000 S.D. 30, ¶ 51, 609 N.W.2d at 118 (citing Black v Class, 1997 SD 22 at ¶ 24, 560 N.W.2d at 550; State v. Raymond, 540 N.W.2d 407 (S.D.1995)). "A defendant is entitled to competent lawyers, not perfect ones." Davi, 2000 S.D. 30, ¶51, 609 N.W.2d at 118 (citing State v. Wika, 464 N.W.2d 630 (S.D.1991)). "The test is whether the errors are so serious that we question whether the result of the trial is reliable and whether we have confidence in the outcome." Davi, 2000 S.D. 30, ¶51, 609 N.W.2d at 118 (Black, 1997 SD 22 at ¶ 18, 560 N.W.2d at 549; Lykken v. Class, 1997 SD 29, ¶ 27, 561 N.W.2d 302, 308; Woods v. Solem, 405 N.W.2d 59, 61 (S.D.1987)). While he now argues she should have attacked the victim's credibility more fiercely at trial, Petitioner's trial counsel did address the inconsistencies in the victim's statements and made a strategic decision to not push so far as to be seen as attacking a child. Ultimately, Petitioner had a fair trial and he has not shown that the result is unreliable.

Lastly, Petitioner argues that his trial counsel should have called an expert witness to testify regarding child testimony and suggestibility. However, the suggestibility of the victim's testimony was addressed by defense counsel through her cross-examination of the State's expert, Colleen Brazil. The defense theory was that the victim made up the allegations to get attention. In addition to the cross-examination of the State's expert regarding suggestibility, Petitioner's counsel "elicited testimony from multiple witnesses through cross-examination suggesting that [the victim] needed more attention." Bausch, 2017 S.D. 1 at ¶ 20, 889 N.W.2d at 410. Petitioner was able to establish a theory to explain why the victim may have fabricated the rape allegations. Id. at ¶ 23, 889 N.W.2d at 411. Petitioner did not present any expert testimony at the habeas hearing in support of his claim that an expert would have affected the outcome of the trial. It is merely speculation as to what an expert might have testified about. "Failure to call a witness will not automatically produce ineffective assistance of counsel." Rodriguez v. Weber, 2000 S.D. 128, ¶ 38, 617 N.W.2d 132, 144–45 (quoting Lodermeier, 1996 SD 134, ¶ 20, 555 N.W.2d at 625 (citing Garritsen, 541 N.W.2d at 94)). "There must be a showing of prejudice that deprived the accused of a fair trial." Rodriguez, 2000 S.D. 128, ¶ 38, 617 N.W.2d at 145 (citing Sund, 1998 SD 123, ¶ 21, 588 N.W.2d at 226 (other citations omitted)). Petitioner has not made that showing.

The Court finds Petitioner's remaining claim regarding trial counsel's workload exceeding the ABA recommended limits to be a red herring and not a basis for a finding of ineffective assistance of counsel. Petitioner makes a blanket

claim that because Petitioner's trial counsel caseload was busy, she was unable to properly investigate the case and represent Petitioner. However, the transcripts of the underlying criminal case, as well as the testimony at the habeas hearing, contradict Petitioner's claim. Two attorneys and a paralegal spent a substantial amount of time on Petitioner's case and preparing for trial. Trial counsel billed a total of 149.70 hours, and she testified that she probably spent even more time on the case than reflected in her billings. She testified that she would never go into trial unprepared and would spend the time necessary regardless of her workload. She specifically testified that she felt prepared for Petitioner's trial. Petitioner has not presented any evidence to support his claim that trial counsel's performance was affected by her caseload.

As to his ineffective assistance of counsel claim, Petitioner is asking this Court to use hindsight to second guess decisions of experienced trial counsel. The South Dakota Supreme Court has cautioned against such scrutiny in habeas review:

> [W]hile we "will not compare counsel's performance to that of some idealized 'super-lawyer' and will respect the integrity of counsel's decision in choosing a particular strategy, these considerations must be balanced with the need to insure that counsel's performance was within the realm of competence required of members of the profession." Sprik v. Class, 1997 SD 134, ¶ 24, 572 N.W.2d 824, 829 (citing Roden v. Solem, 431 N.W.2d 665, 667 n. 1 (S.D.1988)). We will also examine the conduct of counsel and the options they faced from counsel's perspective prior to, and during trial. Aliberti, 428 N.W.2d at 641 (citing Waff v. Solem, 427 N.W.2d 118, 121 (S.D.1988) (quoting Kimmelman v. Morrison, 477 U.S. 365, 381, 106 S.Ct. 2574, 2586, 91 L.Ed.2d 305, 323 (1986)); Luna v. Solem, 411 N.W.2d 656, 658 (quoting Kimmelman, supra). We will not engage in some sort of twenty-twenty hindsight or Monday morning quarterbacking. Id. (citing Conaty v. Solem, 422 N.W.2d

102, 103 (S.D.1988); Woods v. Solem, 405 N.W.2d 59, 62 (S.D.1987); State v. Dornbusch, 384 N.W.2d 682, 686–87 (S.D.1986)).

Denoyer v. Weber, 2005 S.D. 43, ¶ 18, 694 N.W.2d 848, 855. Petitioner has failed to meet his burden under both prongs of Strickland. Even if trial counsel could have made different strategic decisions, Petitioner has not shown that any alleged error "deprived [Petitioner] of a fair trial, a trial whose result is reliable." Denoyer, 2005 S.D. 43 at ¶ 19, 694 N.W.2d at 855. Therefore, Petitioner's claim of ineffective assistance of counsel is denied.

Counsel for Respondent shall prepare the appropriate Findings of Fact, Conclusions of Law incorporating this Memorandum Opinion and Order denying habeas relief. Petitioner may follow standard protocol for filing of objections and alternative proposals before the Order will be signed. Thank you to both counsel for your fine advocacy skills and efforts in this case.

Dated this 18 day of March, 2021.

BY ~~THE~~ COURT:

Douglas E. Hoffman
Circuit Court Judge

ATTEST:
ANGELIA M. GRIES, CLERK OF COURTS
BY: _____, DEPUTY

FILED
MAR 19 2021
Minnehaha County, S.D.
Clerk Circuit Court

STATE OF SOUTH DAKOTA) :SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT

CHRISTOPHER DEAN KRYGER, Petitioner, vs. **DARIN YOUNG, or His Successor, Warden of the South Dakota State Penitentiary,** Respondent.	CIV 19-147 **MEMORANDUM OPINION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**

This matter came before the Court for hearing September 24, 2021, on Respondent's Motion for Summary Judgment. Attorney Maggie Gillespie appeared on behalf of Respondent. Petitioner appeared personally via Zoom/ITV and with his attorney, John Hinrichs. Having reviewed the record and considered the argument of counsel, Respondent's Motion for Summary Judgment is granted.

FACTUAL AND PROCEDURAL BACKGROUND

In Minnehaha County CRI 14-1956, Petitioner Christopher Dean Kryger (Petitioner) was charged by indictment with five counts of First Degree Murder, one count of Second Degree Murder, one count of Second Degree Rape, one count of Third Degree Rape, and two counts of First Degree Burglary. The body of Kari Kirkegaard (Kirkegaard) was found in her house by her son's fiancé on March 16, 2014. She was found lying naked on her side in a full bathtub with the water running. Initially authorities did not suspect foul play, but they later began a homicide

investigation. Law enforcement reviewed camera surveillance footage from a nearby mosque and observed an individual on a bicycle double back on the sidewalk of Kirkegaard's home and slow down. Later an individual was visible in the video crossing the street in front of the mosque. The video also showed Kirkegaard's SUV leave the driveway and return an hour later. Police released the mosque video footage and several individuals came forward to identify Petitioner as the individual on the video. Law enforcement collected evidence from Kirkegaard's home and body. DNA evidence from Kirkegaard's rape kit matched Petitioner.

Petitioner was represented at the trial level by Attorneys Mark Kadi and Austin Vos. A jury trial commenced on November 9, 2015. On November 20, 2015, the jury returned a verdict convicting Petitioner on all counts, except Third Degree Rape. On February 25, 2016, the Honorable Mark Salter sentenced Petitioner to life imprisonment for First Degree Murder, 50 years for Second Degree Rape, and 25 years for First Degree Burglary to run concurrently with the First Degree Murder Sentence, but consecutive to the sentence for Second Degree Rape.

Petitioner filed a direct appeal to the South Dakota Supreme Court, raising the following issues:

1. Whether the circuit court erred by precluding questioning of Kirkegaard's brother, Brian Johnson (Johnson), concerning his bias against Petitioner.
2. Whether the circuit court erred by admitting expert testimony expressed in terms of possibilities.
3. Whether the circuit court erred by admitting irrelevant evidence without a foundation of physical evidence from the State's investigation of Petitioner.
4. Whether the circuit court erred by admitting Petitioner's statements that he has a criminal mind.
5. Whether the circuit court erred by denying Petitioner's motions for mistrial.
6. Whether the circuit court erred by denying Petitioner's proposed jury instructions regarding Petitioner's statements about his criminal mind, speculation and conjecture, and an alibi defense.
7. Whether the circuit court erred by denying Petitioner's motion for judgment of acquittal.
8. Whether the accumulation of the errors claimed by Petitioner constituted reversible error.

State v. Kryger, 2018 S.D. 13, ¶ 10, 907 N.W.2d 800, 807, reh'g denied (Mar. 15, 2018), cert. denied sub nom. *Kryger v. S. Dakota*, 139 S. Ct. 127, 202 L. Ed. 2d 78 (2018). The South Dakota Supreme Court affirmed Petitioner's conviction and sentence.

This is Petitioner's first application for habeas relief. In his pro se Petition, Petitioner raises claims of ineffective assistance of counsel, prejudicial jury, reasonable doubt, and due process. Habeas counsel has not filed an Amended Petition. Respondent moved to dismiss, arguing that the grounds for habeas relief asserted by Petitioner did not support a claim for relief. Petitioner opposed the motion to dismiss. This Court granted the motion to dismiss as to Petitioner's claim that the South Dakota Supreme Court applied the incorrect legal standard in reviewing the trial court's limit on cross-examination of the victim's brother, Brian Johnson. This Court concluded that claim was barred by res judicata and dismissed it with prejudice. The Motion to Dismiss was denied as to Petitioner' remaining six claims alleging ineffective assistance of counsel.

Respondent now moves for summary judgment. In response to the Motion for Summary Judgment, Respondent's habeas counsel filed a Sweeney brief, along with Petitioner's separate, pro se, response to the Motion for Summary Judgment.

LAW AND ANALYSIS

Habeas corpus is not a substitute for direct review and the scope of habeas review is limited. "'Habeas corpus can be used only to review (1) whether the court had jurisdiction of the crime and the person of the defendant; (2) whether the sentence was authorized by law; and (3) in certain cases whether an incarcerated defendant has been deprived of basic constitutional rights.'" *Loderman v. Class*, 1996 S.D. 134, ¶3, 555 N.W.2d 618, 622 (quoting *Loop v. Class*, 1996 S.D. 107, ¶11, 554 N.W.2d 189, 191 (citations omitted)). "The habeas applicant has the

initial burden of proving entitlement to relief by a preponderance of the evidence." *Hays v. Weber*, 2002 S.D. 59, ¶11, 645 N.W.2d 591, 595 (citing *New v. Weber*, 1999 S.D. 125, ¶5, 600 N.W.2d 568, 572 (citing *Lien v. Class*, 1998 S.D. 7, ¶11, 574 N.W.2d 601, 607)).

Habeas corpus is a civil proceeding and subject to a motion for summary judgment. *Sweeney v. Leapley*, 487 N.W.2d 617, 618 (S.D. 1992) (citing *Reutter v. Meierhenry*, 405 N.W.2d 627 (S.D. 1987)). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law." SDCL 15-6-56(c). All reasonable inferences drawn from the facts must be viewed in favor of the non-moving party. *Hayes v. Northern Hills Gen. Hosp.*, 1999 SD 28, ¶12, 590 N.W.2d 243, 247 (SD 1999) (citation omitted). The burden is on the moving party to clearly show an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law. *Id.* "A disputed fact is not material unless it would affect the outcome of the suit under the governing substantive law in that 'a reasonable jury could return a verdict for the nonmoving party.'" *SD State Cement Plant Comm'n v. Wausau Underwriters Ins. Co.*, 2000 SD 116, 9, 616 N.W.2d 397, 400-01 (quoting *Weiss v. Van Norman*, 1997 SD 40, 11 n.2, 562 N.W.2d 113, 116 (internal citations omitted)). However, the party who opposes a Motion for Summary Judgment "may not rest on the mere allegations . . . in his pleading. He must present evidentiary matters showing that there is a genuine issue of material fact that is worth bringing to trial." *Peterson v. Spink Electric Co-op Inc.*, 1998 SD 60, 568 N.W.2d 589, 591.

Ineffective Assistance of Counsel

Petitioner asserts a claim of ineffective assistance of counsel. Generally, a two-prong test is applied to determine ineffective assistance of counsel claims. "In order to meet the burden of

proof for a claim of ineffective assistance of counsel, a defendant must prove (1) that counsel's representation fell below an objective standard of reasonableness, and (2) that such deficiency prejudiced the defendant." *Rhines v. Weber*, 2000 S.D. 19, ¶13, 608 N.W.2d 303, 307 (citing *Siers v. Class*, 1998 S.D. 77, 12, 581 N.W.2d 491, 495; *Sprik v. Class*, 1994 S.D. 134, ¶22, 572 N.W.2d 824, 829; *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674, 693 (1984)).

First, counsel's performance must be shown to be deficient. *Mitchell v. Class*, 524 N.W.2d 860, 862 (SD 1994) (citations omitted). In order to the meet the first prong, Petitioner must show that the counsel's errors were "'so serious that counsel was not functioning as the 'counsel' guaranteed ... by the Sixth Amendment.'" *Mitchell,* 524 N.W.2d at 862 (citations omitted). '"Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]'" *Hofer,* 1998 S.D. 58, ¶10, 578 N.W.2d at 586.

Second, "Applicants must prove that the outcome was prejudiced by inferior performance of counsel." *Ramos v. Weber,* 2000 S.D. 111, ¶12, 616 N.W.2d 88, 92 (citing *Hofer*, 1998 S.D. 58, 9, 578 N.W.2d at 585). "Prejudice means 'a reasonable probability that, but for the unprofessional errors of counsel, the result of the proceeding would have been different.'" *Ramos*, 2000 S.D. 111, ¶12, 616 N.W.2d at 92 (citing *Phyle v. Leapley*, 491 N.W.2d 429, 432 (S.D. 1992), as modified by *Hopfinger v. Leapley*, 511 N.W.2d 845, 846-47 (S.D. 1994)). "A 'reasonable probability' is said to exist when there is proof sufficient to 'undermine confidence in the outcome.'" *Ramos*, 2000 S.D. 111, ¶12, 616 N.W.2d at 93 (citing *Phyle*, 491 N.W.2d at 432).

A court need not determine the sufficiency of counsel's performance before examining whether prejudice resulted from the alleged deficiencies. *Jenner*, 1999 S.D. 20 at ¶16, 590 N.W.2d at 471 (citing *Strickland*, 466 U.S. at 697 104 S.C.t at 2069). "'If it is easier to dispose of an ineffective assistance claim on the ground of lack of sufficient prejudice, . . . that course should be followed.'" *Id.* "[D]efendants 'shoulder a heavy burden of proof in their ineffective assistance of counsel claims.'" *Crutchfield v. Weber*, 2005 S.D. 62, ¶11, 697 N.W.2d 756, 759 (quoting *Coon v. Weber*, 2002 S.D. 48, ¶11, 644 N.W.2d 638, 642). "'There is a strong presumption that counsel's performance falls within the wide range of professional assistance and the reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all circumstances.'" *Brakeall v. Weber*, 2003 S.D. 90, ¶15, 668 N.W.2d 79, 84 (quoting *Bradley v. Weber*, 1999 S.D. 68, 19, 595 N.W.2d 615, 621). "Effective assistance of counsel does not equate with a successful outcome for the accused." *Denoyer v. Weber*, 2005 S.D. 43, ¶19, 694 N.W.2d 848, 855 (citations omitted).

I. First Prong of *Strickland* – Deficient Performance

In his pro se Petition, Petitioner sets forth the following specific instances of alleged deficient performance:

i. **Trial counsel was in trial with another client and distracted from representation of Petitioner; that Petitioner questioned counsel about trial tactics and received unsatisfactory responses.**

Petitioner's trial counsel, Mark Kadi, was in trial in State v. Aluong on October 14-16, 2015. Petitioner's trial started on November 3, 2015. Mr. Kadi has submitted an affidavit stating, in relevant part, "As a result of the proximity of the two trials, and the extensive trial preparation required by each, the opportunity cost of my preparing and trying Aluong was that I was not able to use that time to prepare for Kryger." It appears that Mr. Kadi merely states that

he was not able to use the time he spent on the Aluong trial to prepare for Petitioner's trial. However, Mr. Kadi does not state that he was not able to adequately prepare for Petitioner's trial or was in fact unprepared for Petitioner's trial.

The trial record reflects that Mr. Kadi filed multiple pretrial motions in this case and there were at least seven hearings prior to trial on the various motions. Trial counsel was successful in keeping out other acts evidence regarding a prior breaking into a woman's residence and a physical assault of the woman. Trial counsel's time entries show that he spent a significant amount of time on Petitioner's case. Petitioner has not shown a genuine issue of material fact as to counsel being "distracted." Petitioner also generally asserts that he questioned trial counsel's trial tactics and received unsatisfactory answers. The South Dakota Supreme Court has said that it is not the habeas court's job to "second guess the decisions of experienced trial attorneys regarding matters of trial tactics unless the record shows that counsel failed to investigate and consider possible defenses...." *Piper v. Young*, 2019 S.D. 65, ¶ 50, 936 N.W.2d 793, 810–11, cert. denied, 141 S. Ct. 247, 208 L. Ed. 2d 22 (2020) (quoting *Randall v. Weber*, 2002 S.D. 149, ¶ 7, 655 N.W.2d 92, 96 (quoting *Sprik v. Class*, 1997 S.D. 134, ¶ 24, 572 N.W.2d 824, 829). "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Piper*, 2019 S.D. 65 at 50, 936 N.W.2d at 811 (quoting *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065). In response to summary judgment, Petitioner asserted no disputed material facts as to his claim that trial counsel performance was deficient or as to how he was prejudiced by any alleged deficiency.

ii. **That trial counsel failed to adequately cross examine Johnson about money that Johnson alleged to have been stolen from Kirkegaard's residence and why Johnson's claims changed before trial.**

Petitioner asserts that he believes that the person who murdered the victim also stole money from the victim. Consistent with this, there was evidence presented by the State at trial that Petitioner had money in his possession in the days following the murder to purchase items, including an engagement ring for his girlfriend and a phone. The victim's brother, Brian Johnson, owned the home where the victim lived. During his direct examination by the State, he testified that the victim was paying him for the property taxes and that she would store money in the freezer. In addition to her missing purse, Mr. Johnson testified that he initially believed that the tax money was missing from her freezer following her death. However, he later learned that the victim had deposited the tax money in her bank account. Reviewing the trial transcript, Petitioner's trial counsel did cross examine Mr. Johnson regarding the tax money. TT6, pg. 119. However, given that Mr. Johnson testified on direct examination that the money had been accounted for following the victim's death, trial counsel's cross-examination was adequate, and it is unclear what further point could have been made by trial counsel. Petitioner does not indicate what additional cross-examination may have been required or how he was prejudiced by the lack of any further cross-examination.

iii. **That trial counsel failed to cross examine Johnson about the smell of bleach in Kirkegaard's home as Petitioner maintains that the family tampered with the crime scene and caused evidence to be lost.**

Initially law enforcement did not suspect foul play and believed that the victim died of natural causes. Later the family became concerned about missing items and said that there was an odor of bleach or cleaning products in the house. They requested that law enforcement return to the house. When law enforcement returned, they also reported smelling the odor of bleach or cleaning products. Petitioner maintains that the family changed the condition of the scene by cleaning the home after law enforcement left the first time. Petitioner acknowledges that Mr.

Johnson was asked whether anybody cleaned the residence after law enforcement and first responders left initially and before law enforcement later returned. However, Petitioner apparently believes Mr. Johnson should have been further questioned in some way. This issue was explored by trial counsel with Johnson and other family members. At trial, all family members who testified that they were present at the home denied that anyone used bleach or other cleaning products. Reviewing the trial transcript, trial counsel's examination of the witnesses regarding the bleach smell was adequate.

iv. **That trial counsel failed to point out to the jury the state's misleading assertions regarding the evidence, including assertions that Petitioner drove Kirkegaard's SUV at the same time another video showed Petitioner riding his bike blocks away.**

In his closing argument, trial counsel argued to the jury that Petitioner was the person riding a bicycle on a Family Market video at the same time the State claimed the perpetrator of the murder was driving the victim's SUV as shown in the Mosque video. While acknowledging that trial counsel pointed out to the jury that the State did not play the Family Market video for the jury, Petitioner claims that trial counsel was somehow ineffective because he did not draw the jury's attention to the State's failure to acknowledge the Family Market video, presumably in its closing statement. This argument lacks merit. Trial counsel presented the defense theory that the individual shown on the Family Market video was Petitioner and that he could not be the individual shown driving the victim's SUV at the same time on the Mosque video. Trial counsel attempted to get an alibi jury instruction, but the request was denied by the trial court. The State presented testimony and made argument regarding the fact that Petitioner's bicycle had reflectors and the bicycle on the Family Market video did not show reflectors. The jury was made aware of the defense theory, had the opportunity to view both videos and make their determination as to evidence. Considering the claims in the light most favorable to the Petitioner, Petitioner has not

asserted facts to show that trial counsel's performance was inadequate or deficient under Strickland.

v. That trial counsel failed to adequately argue to the jury that witness identification of Petitioner from the surveillance video was unreliable.

When law enforcement released the Mosque video and asked for the public's help in identifying the individual in the video, Petitioner's girlfriend and other friends contacted law enforcement to identify Petitioner. Petitioner argues that his trial counsel was ineffective for inadequately arguing that the poor quality of the video made the witness identification unreliable. However, a review of the trial transcript shows that Petitioner's trial counsel cross-examined the witnesses regarding the quality of the video and that it was difficult to see details of the person's clothing or face. Trial counsel also attacked the credibility of the witness identification. A review of the record does not support Petitioner's claims that trial counsel's performance failed to meet the wide range of reasonable professional assistance.

vi. **That trial counsel failed to object to admission of certain pieces of evidence that were immaterial or cross-examine witnesses regarding the same.**

Petitioner claims that trial counsel should have objected to certain pieces of evidence that were immaterial or should have cross-examined witnesses concerning them. Those items include: 1) a Coke Zero can with a mixture of two individuals' DNA, but did not contain Petitioner's DNA, which was not tested for fingerprints; 2) a number of cleaning supplies, shampoo and conditioner bottles and hand soap that did not have Petitioner's DNA or fingerprints on them; 3) two gauze squares that did not test positive for any substance attributable to Petitioner; 4) a black, fleece-lined zip-up hooded sweatshirt, which Petitioner claims was not tied to, and did not belong to, Petitioner. Petitioner asserts that he wanted his trial counsel to object to the admission of these items.

A review of the record shows that these items actually supported one of the defense theories of the case. Trial counsel was able to use these items in support of an argument that the State only tested the items that supported their theory and that there was a lack of evidence connecting Petitioner to the scene of the crime. Petitioner's trial counsel was able to argue that these items could not be connected to Petitioner. It seems clear that not objecting to these items was a reasonable defense strategy. "Strategic decisions are best left up to counsel. A defendant is entitled to a fair trial, not a perfect one." *Davi v. Class*, 2000 S.D. 30, ¶ 51, 609 N.W.2d 107, 118 (citing *Black v Class*, 1997 SD 22 at ¶ 24, 560 N.W.2d at 550; *State v. Raymond*, 540 N.W.2d 407 (S.D.1995)).

Petitioner has not shown that there are disputed material facts in this case and a review of the trial transcripts shows that counsel performance was not deficient under the Strickland standard.

II. Second Prong of *Strickland* -- Prejudice

Even if Petitioner could establish deficient performance as to any of his claims regarding trial counsel's representation, he must also meet the prejudice prong of Strickland. In analyzing the prejudice prong, the South Dakota Supreme Court has stated that the court must focus on "whether the result of the proceeding was fundamentally unfair or unreliable, not merely on whether the outcome would have been different." *Rhines v. Weber*, 2000 S.D. 19, ¶ 15, 608 N.W.2d 303, 307 (other citations omitted).

> The law does not entitle the defendant to have his conviction set aside "solely because the outcome would have been different but for the counsel's error." *Lockhart v. Fretwell*, 506 U.S. 364, 369-70, 113 S.Ct. 838, 842-43, 122 L.Ed.2d 180, 189 (1993). Rather, "counsel's errors [must be] so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693.

Rhines, 2000 S.D. 19, ¶ 15, 608 N.W.2d at 307–08.

There was DNA evidence from the rape kit that matched Petitioner's DNA. On direct appeal, Petitioner argued that the trial court erred in denying his motion for judgment of acquittal. *Kryger*, 2018 S.D. 13, ¶¶46-51. The Supreme Court disagreed and offered the following summary of the facts supporting the conviction:

> The evidence in this case does not match Kryger's assertion that his conviction was based on speculation and conjecture. Both direct and circumstantial evidence existed linking Kryger to Kirkegaard's death. Kryger's sperm cell DNA was found in Kirkegaard's vagina after he initially denied knowing Kirkegaard or having sex with her. Kirkegaard lived alone and the evidence suggested that she did not have a relationship or any prior contact with Kryger. Further, Kirkegaard returned home on the night of her death shortly after a family gathering, diminishing the likelihood that she had brought Kryger into her home from another location. Kryger admitted riding his bike during the timeframe that Kirkegaard was killed, and he was seen on the mosque video riding his bike in the immediate vicinity of Kirkegaard's home around the time of Kirkegaard's death. Three people identified Kryger in the mosque video.
>
> Kirkegaard's autopsy revealed ligature marks indicating strangulation. She also had numerous other traumatic injuries, including a fractured hyoid bone and thyroid cartilage, and multiple red marks in her vagina. These injuries indicated a deliberate use of force, as well as an imminently dangerous act done with a depraved mind.
>
> Kirkegaard's purse was discovered missing from her home. The day after her death, Kryger suddenly had enough money to buy an engagement ring for his girlfriend, a cell phone, and a calling plan. After his DNA was found on the body, Kryger claimed in a phone call to Nagel that he had consensual sex with Kirkegaard. However, the injuries to Kirkegaard and the circumstances surrounding the night of Kirkegaard's death provide no explanation or possibilities as to how or why that consensual sex would have occurred.

Id. at ¶¶ 48-50, 907 N.W.2d at 815.

Based on a review of the record and consideration of the Sweeney brief filed by habeas counsel and the arguments made by Petitioner, Respondent's Motion for Summary Judgment is GRANTED.

ORDER

Based upon the foregoing, it is hereby ORDERED:

1) Respondent's Motion for Summary Judgment is GRANTED;

2) The request for habeas corpus relief is DENIED;

3) These proceedings are DISMISSED and concluded in all respects.

Dated this 27 day of September, 2021.

BY THE COURT:

Hon. Douglas E. Hoffman
Circuit Court Judge

ATTEST: Angelia M. Gries, Clerk of Courts

By: _____
DEPUTY

FILED
SEP 27 2021
Minnehaha County, S.D.
Clerk Circuit Court

27202

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27202

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

MANEGABE CHEBEA ALLY,

Defendant and Appellant.

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED
JUL 17 2015
Clerk

27202

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

THE HONORABLE MARK E. SALTER
Circuit Court Judge

APPELLANT'S BRIEF

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ATTORNEYS FOR PLAINTIFF
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Notice of Appeal filed September 9, 2014

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27202

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

MANEGABE CHEBEA ALLY,

Defendant and Appellant.

PRELIMINARY STATEMENT

In this brief, Defendant and Appellant, Manegabe Chebea Ally, will be referred to as "Ally." Appellee, the State of South Dakota will be referred to as the "State." The settled record consists of Minnehaha County file CR 12-466, which will be referred to as "SR" followed by the appropriate page number(s). References to the brief filed by Ally will be cited as "AB" followed by the referenced page number(s). Exhibits will be identified by "EX" followed by the appropriate indicator. References to the appendix will be designated by "APP" followed by the cited page(s). Transcripts of the hearings will be cited as follows, along with the appropriate page number(s):

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Jury Trial, February 18, 2014.....JT1

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this matter pursuant to SDCL 15-26A-3 and SDCL 23A-32-2.

STATEMENT OF THE LEGAL ISSUES AND AUTHORITIES

I.

WHETHER ALLY WAS UNCONSTITUTIONALLY DENIED HIS RIGHT TO COUNSEL DURING QUESTIONING:

(A) Was Mr. Ally "in custody" for purposes of Miranda?
(B) Were Mr. Ally's statements involuntary?

The trial court found that Mr. Ally was not "in custody" for purposes of Miranda and his right to the presence of an attorney was not violated. The trial court further found Mr. Ally's statements were voluntary.

Relevant Cases: *State v. Wright*, 2009, S.D. 51, 768 N.W.2d 512

Relevant Statutes: U.S. Const. Amend. 5 & 14; S.D. Const. Art. VI, Section 9.

II.

WHETHER THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE JURY VERDICT FINDING ALLY GUILTY OF FIRST DEGREE MANSLAUGHTER

The trial court held there was sufficient evidence.

Relevant Cases: *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *United States v. Warner*, 441 F.2d 821 (1975).

Relevant Statutes: S.D.C.L 22-19-1.

III.

WHETHER THE SEQUESTERING OF THE DEFENDANT'S BIOMECHANICAL ENGINEER FROM THE COURTROOM DURING THE "MEDICAL TESTIMONY" RESULTED IN A VIOLATION OF HIS RIGHT TO A FAIR TRIAL

Relevant Cases: *State v. Traversie*, 387 N.W.2d 2 (SD 1986)

Relevant Statutes: U.S. Const. Amend. 5 & 14; S.D. Const. Art. VI, Section 7; S.D.C.L. 19-15-3

STATEMENT OF THE CASE AND FACTS

1. *Statement of the Case.*

On January 9, 2013, Manegabe Chebea Ally was indicted by a Minnehaha County Grand Jury on charges as contained in an Indictment alleging Count I: Murder in the First Degree-Felony Murder; Count II: Murder in the Second Degree-Depraved Mind; Count III: Manslaughter in the First Degree-Abuse or Cruelty to a Minor; Count IV: Manslaughter in the First Degree-Aggravated Assault; Count V: Manslaughter in the First Degree-Aggravated Assault; Count VI: Manslaughter in the First Degree-Aggravated Battery of an Infant.

On January 16, 2013, Manegabe Chebea Ally appeared before the Honorable Bradley G. Zell to enter pleas of Not Guilty to each Count. A jury trial commenced before the Honorable Mark Salter, of the Second Judicial Circuit on February 18th, 2014. Appellant appeared with counsel, Traci Smith, and Kenny Jacobs of the Minnehaha County Public Defender's Office. The State appeared through Donald Hanson and Tara Palmiotto of the Minnehaha County State's Attorney's Office.

On February 27, 2014, the jury delivered its Verdict finding Appellant Not Guilty of Count One, Murder in the First Degree, and Not Guilty of Count Two, Murder in the Second Degree. (JT8 p. 79) Appellant was found Guilty of Count Three, Manslaughter in the First Degree, while engaged in Abuse or Cruelty to a Minor, and Guilty as to Count Four of the Indictment, Manslaughter in the First Degree, while engaged in Aggravated Assault, causing or attempting to cause serious bodily injury under circumstances manifesting extreme indifference to the value of human life. (JT8 p. 80) Appellant was found Guilty as to Count Five of the Indictment, Manslaughter in the First degree, Aggravated Assault, with intent to commit bodily injury which results in serious bodily injury, and Guilty of Count Six of the Indictment, Aggravated Battery to an Infant. (JT8 p. 80)

On May 29, 2014, the Court sentenced Appellant as to Count Three, Manslaughter in the First Degree, while engaged in Abuse or Cruelty to a Minor to the South Dakota State Penitentiary to serve a total term of forty-five years,

with twenty years suspended, giving Appellant credit for five hundred and eighteen days previously served. (SH1 p. 29-30)

Notice of Appeal was filed on September 9, 2014.

2. *Statement of the Facts*

Twenty four year old Manegabe Ally, was born in the Democratic Republic of Congo. (JT7 P. 49) He spent a significant amount of time in a refugee camp in Tanzania, and attended a total of six years of schooling while residing at the refugee camp. (JT7 P. 39) Ally came to the United States in 2010 and moved to Sioux Falls following a long distance relationship with Katoke Kasangu (Kasangu). (JT7 p.50-51) While residing in the Congo, his primary language was Swahili, which consisted of a mixture of several different native languages, including French. (MH1 p. 100) In Tanzania, the type of Swahili spoken was more of "pure Swahili." (MH1 p. 100) Due to the war, Ally did not receive any formal education until he reached the refugee camp in Tanzania. (MH1 p. 101)

Prior to December 24, 2012, Ally had never been questioned by law enforcement officers. (MH1 p. 102) He had taken English as a Second Language (ESL) classes in 2010 and 2011, attending classes four days per week. (JT7 p.39)

Ally moved from Maryland to reside with Kasangu and her two children in Sioux Falls in October of 2012, while the couple planned their wedding. (JT7 p.51) During the day, Ally would care for the two children to save on childcare costs until he could acquire full time employment. (JT4 p. 32) The couple

resided in a small garden level apartment on the East side of Sioux Falls. The couple had recently taken apart M.K.'s crib, and the plan was to buy him a new toddler bed at Shopko after Kasangu got off of work. (JT4 p. 32-33) It was the day before Christmas. (JT7 p.56) Ally testified that after he took Kasangu to work that morning for her 7:00 a.m. shift at Morrells, he and the children returned home and slept until about 9:00 a.m. (JT7 p.53) He then went to the Community Health Clinic to get some immunizations that he needed in order to finish processing his immigration paperwork. (JT7 p. 53) When they were finished, he scheduled a dentist appointment for C.K. (JT7 p.54) When they arrived home, he made the children "ugali," a type of bread, along with some cooked vegetables and meat for lunch. (JT7 p.54) After the meal, he bathed M.K. while his sister, C.K. watched cartoons. (JT7 p.57) After changing M.K., Ally had the toddler join his sister in the living room while he cleaned the kitchen. (JT p. 57) C.K. soon informed Ally that M.K. had fallen asleep. (JT p. 57) Ally proceeded to put both kids down for naps, placing M.K. on the bed in the master bedroom, and C.K. went to her room. (JT7 p. 57-58)

At approximately 2:40 p.m., medical personnel were dispatched following a frantic call by Ally that he needed medical assistance. The operator continually tried to calm Ally down as he repeatedly cried, "Baby fall down! Baby fall down! Please! Baby dies!" (JT3 p. 54, St. Exh. 2) When the operator tried to make sense of who the child was that the caller was referring to, Ally stated, "my baby," referring to one year old M.K. (St. Exh.2) The operator asked him several follow

up questions about how the child was injured. (St. Exh. 2) Ally responded, "from his sleeping." (St. Exh. 2) Ally continued to beg for help. (St. Exh. 2) As the call progressed, the operator asked several follow-up questions regarding the nature of the patient's injuries, including his vital signs, and other pertinent information. (St. Exh 2) Frustrated with his inability to effectively communicate with the 911 operator, Ally sought the assistance of a neighbor. (JT7 p.61) The neighbor eventually took over the call. (St. Exh. 2) She explained to the 911 operator that the baby was making a weird noise and was not breathing properly. (JT4 p. 47; St. Exh 2) She attempted to perform CPR. (JT4 p.47; St. Exh 2) There were no noted injuries to the child's neck, chest, abdomen, or extremities, or face. (JT4 p. 102; St. Exh 2)

Ally testified that he entered the master bedroom after hearing the child cry out. (JT7 p. 59) He observed M.K. lying at the foot of the bed, with the child's head resting against the footboard. (JT7 p.60) The head was tilted back and resting against the bed. (JT p. 60) He checked for breathing, laid him back down on the floor, and immediately called for help. (JT7 p. 61)

After medical personnel arrived and the child was transported to the hospital, law enforcement officers questioned Ally about M.K.'s injuries. (JT5 p. 25) Ally was transported to the Law Enforcement Center and informed that he was not to return to the hospital. (JT5 p.26-28)

Approximately twenty-five hours after the initial call for help, M.K. succumbed to the injuries and passed away. The autopsy was conducted by the

Minnehaha County Coroner, Dr. Paul Snell, at the Sanford Health Pathology Center on December 26, 2013. (JT5 p. 26) It was determined that the baby died from a complex depressed skull fracture to the back of the head. (JT5 p. 124)

On December 26 and 27, 2013, Ally was re-interviewed at the Law Enforcement Center. (JT5 p.30) Ally reiterated that he heard a distress cry, went into the room and found M.K. on his back at the foot of the bed on the floor. Dr. Hazvalah, the emergency room doctor that treated M.K., testified extensively that a lay person with no medical training walking into the room would not have known that M.K. was severely coagulopathic and could easily confuse bruising similar to that seen on the elderly to abuse. (JT6 p. 37) "Disseminated intravascular coagulopathy" can result from drastic lifesaving efforts, multi-system organ failure, and head trauma. (JT6 p. 37)

Kasangu was told by law enforcement that they had evidence that Ally had hurt her son. (JT4 p. 36) Law enforcement continued to maintain that her son had bruising all over his body and that there were fingermarks on his arms and legs from someone grabbing him. (JT4 p. 37-38) She was told that her son had been hit in the head at least four times. (JT4 p. 38) Law enforcement told her that her child could not have fallen by himself. (JT4 p.36) When Kasangu asked the police for proof that Ally had done this to her son, law enforcement showed her photos of her son with bruising on his arms. They claimed the bruising was from Ally squeezing his arms so hard he left marks. (JT4 p. 38) Kasangu never observed Ally mistreat the children. (JT4 p.32)

Ally was questioned a third and final time by Detective Carda on December 26, 2012. Ally again denied guilt or abuse of M.K. (M.H.2 p.6). Given the fact that Ally was the last caregiver for M.K., Detective Carda was unwilling to accept Mr. Ally's statements that he did not injure the child. (MH2 p. 6) In light of his inability to provide a plausible explanation other than his belief that the child must have fallen off the bed, Ally was placed under arrest.

The case assembled by the state for trial included testimony that the child received multiple impacts, possibly three or four, through separate blows, most notably, one non-linear depressed skull fracture to the head which resulted in the child's death.

STANDARD OF REVIEW

A "circuit court's grant or denial of a motion to suppress involving an alleged violation of a constitutionally protected right" is reviewed *de novo*. *State v. Smith*, 2014 S.D. 50, ¶ 14, 851 N.W.2d 719, 723. However, "[t]he circuit court's findings of fact are reviewed under the clearly erroneous standard, but . . . no deference is given to the circuit court's conclusions of law." *Id.* at 723-24 (*quoting State v. Mohr*, 2013 S.D. 94, ¶ 12, 841 N.W.2d 440, 444) (alterations in original).

A challenge to the sufficiency of the evidence is reviewed *de novo*. *State v. Brende*, 2013 S.D. 56, ¶ 21, 835 N.W.2d 131, 140 (*citing State v. Plenty Horse*, 2007 S.D. 114, ¶ 5, 741 N.W.2d 763, 764).

A trial court's ruling on the sequestration of expert witnesses is reviewed under the abuse of discretion standard. *State v. Traversie*, 387 N.W.2d 2 (S.D. 1986) (*citing State v. Johnson*, 254 N.W.2d 114, 117 (S.D. 1977).

ARGUMENT

I. WHETHER THE TRIAL COURT ERRED WHEN IT DENIED ALLY'S MOTION TO SUPPRESS STATEMENTS MADE TO LAW ENFORCEMENT

Article VI, Section 9 of the South Dakota Constitution declares that "[n]o person shall be compelled in any criminal case to give evidence against himself...." The Fifth Amendment to the United States Constitution proclaims the same right against self-incrimination and is made applicable to the states through the Due Process Clause of the Fourteenth Amendment. *State v. Morato*, 2000 S.D. 149 ¶ 11, 619 N.W.2d 655, 659.

The state must prove that an accused's Miranda rights were knowingly, intelligently, and voluntarily waived by a preponderance of the evidence. *State v. Tuttle*, 2002 SD 94, ¶ 9, 650 N.W.2d 20, 30 (*citing State v. Morato*, 2000 S.D. 149 ¶ 11, 619 N.W.2d 655, 659. The Miranda "warnings must 'be clear and not susceptible to equivocation' and provide 'meaningful advice to the unlettered and unlearned in language which [he] can comprehend and on which [he] can knowingly act.'" *State v. Ortiz*, 766 N.W.2d 244, 253 (2009) (*quoting United States v. Perez-Lopez*, 348 F.3d 839, 848 (9th Cir.2003) (citations omitted)).

A hearing on Defendant's Motion to Suppress was held on January 30 and 31, 2013 based on statements made by Ally to Detective Carda of the Sioux Falls

Police Department on December 24, 2012, December 26, 2012, and December 27, 2012. The first interview occurred after M.K. was transported to the hospital. (MH1 p.25) Law enforcement officers began to ask Ally how the child could have sustained such serious injuries. (MH1 p.52) Ally was separated from family and friends who had gathered at the hospital and transported to the Law Enforcement Center in a patrol car. (MH1 p. 52) Based on the inaccurate translations provided by the interpreter, Ally did not knowingly and intelligently waive his right to have an attorney present prior to speaking with Detective Carda. (See SR 119, Defendant's Exh. A)

DECEMBER 24, 2012

The translations of the Miranda waiver from December 24, 2012 are as follows:

C: Do you wish to waive these rights, and talk to me at this time?

T: [Can you say, 'these rights, I don't want them, so you can talk to him (pointing with his hand at the Detective)?]

M: How?

T: [Meaning, these rights that you have just talked about, . . .]

C: Oh , Oh . . . .What did he say, you have to tell me?

T: [(Speaking in English): He was trying to ask: "At ease!" Like, "come again, come again"].

C: Do you wish to waive these rights and talk to me at this time?

T: [Can you say, "these rights, I don't need them, let's go ahead, so the two of you continue to talk?]

M: (Appearing confused) And then to say that . . . . and to say that . . . (pause), eehhee . . .

T: [(Speaking in English) It's like . . . (Pause)].

M: And then to say how? . . . (pause). I have not understood those well.

T: [(Speaking to Detective in English): Let me understand well the rights].

C: Do you understand or do you not understand?

T: [You have not understood or have you understood?]

M: I have not understood well.

T: [(Speaking to Detective in English): I didn't understand well].

C: If you don't understand well, I'm not going to try. . . .Reading them again isn't gonna help you understand.

M: I have understood those his rights. He has said that I can pause his questioning, or I can defend myself, or if I understand well the question, I don't need an attorney, or if I don't have an attorney, they can give me an attorney. Those are the rights I have heard him say.

T: [(T not translating exactly what M has said above): Regarding those rights that you read for him, it's like, aah, should I have to go with the rights or should I have to talk with you?]

C: If you told me that you don't understand your rights, that's okay; I'm not . . . (pause), I don't want to pressure you into talking with me; if you . . .

T: [I cannot force you to talk with me if you do not understand your rights].

M: I am understanding . . .

T: [I understand my rights].

C: You understand the rights?

M: I hear those.

C: Do you have any questions about Miranda Warning?

T: [Do you have any questions about these rights?]

M: (Sounding hesitant.) So (pause) those rights (pause) I have understood.

T: [On those rights, I have understood].

C: What?

T: [I understood].

C: Understand? Okay. If you understand the rights, then we can talk.

T: [If you understand the rights, we can talk now].

C: Do you want to talk?

M: Yes.

The Miranda warnings interpreted to Ally did not comport with the Miranda warnings as read by Detective Carda. There were several responses that were not translated to either Ally or to Detective Carda, which became apparent when Detective Carda specifically explained to the interpreter "What did he say, you have to tell me." (See SR 119, Defendants Exh. A)

At one point Ally states, "At ease!" The interpreter explains to the detective that this means "Come again, Come again!" However, the interpreter does not go back and explain to Ally what he just explained to the detective. It is clear throughout the interview that something is amiss in the translation. At one point the interpreter purports to say that Ally asked, "Should I have to go with the rights or should I have to talk to you?" when Ally said no such thing.

There are also several points when Ally appears confused. When Detective Carda states, "Do you wish to waive these rights and talk to me at this

time?" The translator interprets, "Can you say, 'these rights, I don't need them, let's go ahead' so the two of you continue to talk? Ally continues to appear very confused, and states "How?" (SR 119)

He state's to the Detective in English "I have not understood well." To which the translator restates to the Detective, also in English "I didn't understand well." Detective Carda replies, "If you don't understand well, I'm not going to try. . . . Reading them again isn't gonna help you understand." (SR 119)

In reviewing the totality of the circumstances surrounding the December 24th interview the Miranda warnings translated to Defendant were improper. Given his limited education, knowledge of the English language, and lack of understanding of the criminal justice system, Defendant's motion to suppress should have been granted.

DECEMBER 26, 2012

For the interview on December 26, 2012, Ally was interviewed by Detective Carda once again at the Sioux Falls Law Enforcement Center. A female interpreter named Samira was provided to administer the Miranda warning. There were instances during the interview when Ally attempted to respond to the officer's questions, however, his responses are inaudible because the interpreter attempted to speak over Ally. (See SR 125, Defendant's Exhibit B) There were also instances during the interrogation where the detective would ask a question, but would cut off the interpreter or Ally before Ally was given an opportunity to fully respond or have his responses interpreted. (See also,

Plaintiff's Exh. 2, 1-30-14) Detective Carda treated the interrogation much like a typical interrogation, cutting off the defendant, or the interpreter before the information was fully relaying to the parties. However, just because he cut off the interpreter does not mean that the words were not said, it just means that the translations was not properly provided.

There were also areas in the interview where the interpreter simply did not interpret at all. The Detective stated over and over that he wanted "the truth." Ally appeared confused, and said, "you keep asking me that," and when Ally attempted to ask Detective Carda questions for clarification, he would be cut off. (SR 125) It became clear during the interview that Ally was frustrated. At one point he told Carda that he could not understand the interpreter. At one point during the interview the officer accused Ally of disrespecting the little boy by continually referring to him as "the kid." Carda did not have a good understanding of how to work with translators, or that as a non-English speaker, Ally's "words," were dependent upon the words selected by the interpreter.[1]

DECEMBER 27, 2012

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[1] See Say What? South Dakota's Unsettling Indifference to Linguistic Minorities in the Courtroom, 54 S.D. L. Rev. 33, 45 (2009)(citing Susan Berk-Seligson, The Bilingual Courtroom: Court Interpreters in the Judicial Process 38 (William O'Barr & John Conley, ed., University of Chicago Press 2002) (1990); Charles M. Grabau & Llewellyn J. Gibbons, Protecting the Rights of Linguistic Minorities: Challenges to Court Interpretation, 30 New Eng. L. Rev. 227, 245 (1996)). "Given the careful attention practitioners pay to nuances in courtroom communication, it may disturb the bench and bar to realize how surprisingly simple it is for an interpreter to inadvertently change the tenor of a participant's statements and thereby communicate an attitude that the speaker neither holds nor wishes to convey.... She found that when interpreters added or deleted polite forms of address, such as "sir" or "ma'am," it influenced mock jurors' perceptions of the witnesses' "convincing[]ness, competence, intelligence, and trustworthiness.' Researchers have also discovered that interpreters can unwittingly undermine aggressive cross examination strategies by diminishing the force of an attorney's questions.'"

On December 27, 2012, Ally was interviewed a third and final time by Carda. (See SR 128 Defendant's Exhibit C)

The translation is as follows:

C: Manegabe, Would you like to talk to me today, I'd like to visit with you. I'd like to tell you why you are here today.

T: [Manegabe, do you like to talk with me about those matters I asked you about? Today I want to talk with you and there is information I want to tell you].

C: Okay, do you remember the Miranda warning?

T: [Do you remember the instructions you were given?]

C: Number One – You have the continuing right to remain silent, and to stop questioning at any time.

T: [Number One – You have the right to remain silent, and you can also stop me at any time you wish to ask me a question: (stop me and) ask me.

C: Number Three – You have the continuing right to consult with and have the presence of an attorney.

T: [Number Three – You have adequate laws to enable you to see an attorney, the individual who will be the one to help you].

C: Number Four – If you cannot afford an attorney, an attorney will be appointed for you.

T: [Number Four – If you cannot secure a helper, a helper will be the one chosen for you by these authorities].

C: Number Five – Do you understand these rights?

T: [Number Five – Do you apprehend these laws?]

C: Number Six – Do you wish to waive these rights and talk to me at this time?

T: [Number Six – Do you wish to change your mind about these laws – these your rights about which he has spoken – do you want to change your mind so you can talk to me?].

M: He can talk, I will listen.

T: [He say, "You can talk, I can listen"].

C: Well, I need to know if you want to talk to me.

T: To M: [He says he needs to understand, if you, yourself, you want to talk to him].

C: I'd like to have a conversation with you, but I need an answer to the question before we can start.

T: [I would have liked to have a conversation with you, but before I continue, I want to get permission from you that you, yourself, are ready to talk with me].

M: I'm ready.

C: Yes or No? Do you wish to waive your rights and talk to me at this time?

T: [Do you want to remove those rights that we talked about so you can talk to me?].

M: Yes, let's talk.

When Carda advised, "You have the continuing right to consult with and have the presence of an attorney," the interpreter relayed to Mr. Ally:

"You have adequate laws to enable you to see an attorney, the individual who will help you."

When Detective Carda advised:

"If you cannot afford an attorney, an attorney will be appointed for you."

The interpreter relayed to Ally:

"If you cannot secure a helper, a helper will be chosen for you by these authorities."

The December 27th, 2012 advisement of "you have the continuing right to remain silent and to stop questioning at any time" was translated to Mr. Ally as "you have the right to remain silent, and you can also stop me at any time you wish to ask me a question." (SR 128) Further in the December 27th interview when Defendant was asked, "Do you wish to waive these rights and talk to me at this time?" He was relayed, "Do you wish to change your mind about these laws, these your rights about which he has spoken-- do you want to change your mind so you can talk to me?" (SR 128) This warning was not clear, and did not give Ally meaningful advice that he did not have to stay and speak with the police officer. He was advised that he could stop the interpreter and ask the interpreter a question if he did not understand. Unfortunately, given Ally's limited educational background, he did not even know what an attorney was. (MH1 p. 108) They did not have "attorneys" at the refugee camp in Tanzania. (MH1 p. 109) Given the previous reactions of the officer when he would try to ask questions, Ally relented and simply agreed once again to speak with the officer even though he did not understand the interpreter.

(A) WAS MR. ALLY "IN CUSTODY" FOR PURPOSES OF MIRANDA?"

Relying on the principles from *State v. Wright*, the trial court held that Ally was not in custody on December 24th and December 26th, 2012, and denied the Motion to Suppress statements made by the Defendant to law enforcement on

each of those dates. (MH2 p. 8) A two-part test is utilized to determine whether an individual is in custody at the time of questioning:

First, what were the circumstances surrounding the interrogation; Second, would a reasonable person have felt he or she at liberty to terminate the interrogation and leave. *State v. Walth, (citing State v. Wright,* 2009 SD 51, ¶19). The ultimate inquiry is whether there has been a formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest. *Walth, citing Wright,* 2009 S.D. 51, ¶ 19, 768 N.W.2d at 520; *Johnson,* 2007 S.D. 86, ¶ 22, 739 N.W.2d at 9.

It is clear that Mr. Ally was in custody at the time the Miranda warnings were administered on December 24, 2012. Ally was taken to the interview in a police car and interviewed at the law enforcement center in an interrogation room in an area of the building where members of the public are not permitted to roam without an access key or the assistance of a law enforcement official. Recently in *State v, Walth,* this Court reiterated that merely accepting an invitation to go to police station does not make an interrogation "custodial." *State v. Walth,* SD SD 77, ¶16, *citing State v. Anderson,* 2000 SD 45, ¶77, 608 NW2d 644, 66. However, in this case, the interrogation went beyond a simple voluntary interview similar to in *Walth* where the interview was conducted in public view, and where "the tone of the questioning was conversational in nature." *Id.* at ¶16-17.

In addition to holding that the Defendant was not in custody in this particular case, the trial court recognized that the Miranda translations were "imperfect," and "probably not effective." (MH2 p.15) The fact that Detective Carda never told Ally he was "under arrest," on December 24th and 26th is irrelevant. Detective Carda also never told Ally he was free to leave. *See United States v. Longbehn*, 850 F.2d 450, 453 (8th Cir.1988) (finding defendant in custody where record reflected no evidence that suspect was free to leave). Even if Ally believed he could leave, he had no transportation to leave. He was prohibited from returning to the hospital, which is where his fiancé and the other members of his community were.

On December 26th, Ally once again rode with members of law enforcement from his house to the law enforcement center. On the way, the police stopped at an elder's house to pick up Katoke, who was mourning with other women in the community and had Ally ride with the elder to the police station. (MH1 p.117) The police searched Ally before the trip to the law enforcement center as they had done on previous occasions. (MH1 p. 118) Ally was again interviewed in an interrogation room. Ally was the prime suspect and the only focus of the investigation for all three interrogations. Given Ally's limited understanding of the court system, and his interest in being at the hospital, he thought by cooperating, and showing respect for the police, that he would be able to earn his way back into their good graces so that he could be with Kasangu and C.K. There was no evidence that Ally ever understood the

consequence of waiving his rights. A waiver is knowing and intelligent if it is "made with a full awareness of both the nature of right being abandoned and the consequences of the decision to abandon it." *United States v. Syslo*, 303 F.3d 860, 865 (8th Cir.2002).

After the third and final interrogation, Ally was placed under arrest. The Court agreed that Ally was in custody on that date. (MH2 p. 17) However, the Court held that the waiver was knowing and voluntary in light of the advising and subsequent waiver he had made on December 26, 2012, and the follow up advising he received on the 27th. (MH2 p. 18)

(B) WERE MR. ALLY'S STATEMENTS INVOLUNTARY?

In reviewing the totality of the circumstances surrounding each interview, all statements should have been suppressed. In determining whether a confession is voluntary, "'[t]he factual inquiry centers on (1) the conduct of law enforcement officials in creating pressure and (2) the suspect's capacity to resist that pressure." *McDonough v. Weber*, 2015 SD 1, ¶29, 859 N.W.2d 26, 39, (*citing State v. Wright*, 2004 S.D. 50, ¶ 6, 679 N.W.2d at 468; *State v. Tuttle*, 2002 S.D. 94, ¶ 22, 650 N.W.2d 20, 31). "'We consider the totality of the circumstances in gauging the suspect's capacity to resist pressure created by law enforcement.'" *Id.* This includes: the defendant's age; level of education and intelligence; the presence or absence of any advice to the defendant on constitutional rights; the length of detention; the repeated and prolonged nature of the questioning; the use of psychological pressure or physical punishment, such as deprivation of

food or sleep; and the defendant's prior experience with law enforcement officers and the courts. Further, while law enforcement interrogation may utilize psychological tactics, the trial court may consider law enforcement's deceptions and misrepresentations in its determination of the voluntariness of admissions. *Id.* (citations omitted).

In the December 24th interview, Ally was advised by the interpreter brought in by the Sioux Falls Police Department that he had the right to defend himself. In that same interview he was asked if he understood and he stated in his language that he "not understood well." (SR 119, Def. Exh. A) His statement was translated by the interpreter to "let me understand well the rights." (SR 119, Def. Exh. A) The December 27th, 2012 advisement of "you have the continuing right to remain silent and to stop questioning at any time," was translated to Mr. Ally as "you have the right to remain silent, and you can also stop me at any time you wish to ask me a question." (SR 128, Def. Exh. C) This warning did not give Ally meaningful advice. Further, in the December 27th interview when Defendant was asked "do you wish to waive these rights and talk to me at this time?" He was relayed, "do you wish to change your mind about these laws, and these your rights about which he has spoken, and do you want to change your mind so you can talk to me?" (SR 128, Def. Exh. C) This interpretation was not "clear and not susceptible to equivocation."

As in *People v. Redgebol*, 184 P.3d 86 (Colo. 2008), the translators in the present case were so "unfamiliar with our legal system that they knew neither

what an attorney was nor how that role differed from a 'helper.'" At no time during any of the three interviews were steps taken to ensure that any of the three interpreters were effectively communicating with Ally. No steps were taken to ensure that the interpreting abilities of any of these interpreters met the minimum constitutionally permissible thresholds to ensure that Mr. Ally's Fifth Amendment rights were protected. Their English proficiencies were never verified prior to being permitted to interpret for Ally. The translations did not convey the necessary information to allow for Ally to make a voluntary, knowing and intelligent waiver of his rights. The fact that he was advised on more than one occasion did not make up for the deficiencies and inaccuracies of the previous occasions.

Ally testified that he believed that he felt intimidated by the officer and that he kept referring to the officer as "Afwande" as a showing of respect or "praise" to try to get on his good side. (MH1 p. 110) The officer kept raising his voice and stood up as he was speaking when he became more and more upset which was concerning to Ally (MH1 p. 110) He believed that the officer had told him not to ask questions, and then became very upset when he asked a question. (MH1 p. 111) He believed that if people refused to talk to police that they were beaten. (MH1 p. 109) Ally testified that he did not understand what they meant when they said that a "helper" would be chosen for him by these authorities. (MH1 p. 112) He did not know if that meant someone would come from the police or if somebody would come from somewhere else. (MH1 p. 112)

Ally's statements were highly prejudicial and his statements formed the crux of the investigation that would eventually lead to his arrest. It was continually noted throughout the state's theme in opening and each of the state's witnesses that the injuries sustained by the child were inconsistent with the purported statements of Ally as to how M.K. was found in the room. Ally's statements made him the prime focus of the state's case. Numerous witnesses referred to the fact that the injuries were inconsistent with his "story" that the child had injured himself after a fall from the master bed, including the ultimate medical opinion of Dr. Snell, who stated that the injuries were inconsistent with a fall. (JT4 p. 125) The trial court's denial of the motion to suppress each interrogation violation Ally's right to a fair trial.

II. WHETHER THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE JURY VERDICT FINDING THE DEFENDANT GUILTY OF FIRST DEGREE MANSLAUGHTER

When conducting a *de novo* review of the sufficiency of evidence, the Court does not "ask itself whether it believes that the evidence at trial established guilt beyond a reasonable doubt." State v. *Plenty Horse*, 2007 S.D. 114, ¶ 5, 741 N.W.2d at 765 (*quoting Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). Rather, "the ultimate question in such an appeal is 'whether there is evidence in the record, which, if believed by the fact finder, is sufficient to sustain a finding of guilt beyond a reasonable doubt.'" *State v. Martin*, 2015 S.D. 2, ¶ 5, 859 N.W.2d 600, 602 (*quoting State v. Carter*, 2009 S.D. 65, ¶ 44, 771 N.W.2d 329, 342). An appellate

court, when answering this question, must also ask "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. *Brende*, 2013 S.D. 56, ¶ 21, 835 N.W.2d at 140 (*quoting Plenty Horse*, 2007 S.D. 114, ¶ 5, 741 N.W.2d at 765).

While engaged in the sufficiency of evidence analysis, this Court "will not usurp the jury's function in resolving conflicts in the evidence, weighing credibility, and sorting out the truth." *State v. Swan*, 2008 S.D. 58, ¶ 9, 753 N.W.2d 418, 420 (*quoting State v. Pugh*, 2002 S.D. 16, ¶ 9, 640 N.W.2d 79, 82). Thus, "[i]f the evidence, including circumstantial evidence and reasonable inferences drawn therefrom, sustain[s] a reasonable theory of guilt, a guilty verdict will not be set aside." *Id.* (*citing State v. Shaw*, 2005 S.D. 105, ¶ 19, 705 N.W.2d 620, 626). Evidence will be deemed insufficient "only 'when no rational trier of fact could find guilt beyond a reasonable doubt.'" *Martin*, 2015 S.D. 2, ¶ 5, 859 N.W.2d 600, 602 (*quoting Brende*, 2013 S.D. 56, ¶ 21, 835 N.W.2d at 140).

Homicide is manslaughter in the first degree if perpetrated:

(1) Without a design to effect death by a person while engaged in the commission of any felony other than as provided in SDCL 22-16-4(2);

(2) Without any design to effect death, including an unborn child, and in a heat of passion, but in a cruel and unusual manner;

(3) Without any design to effect death, including an unborn child, but by means of a dangerous weapon;

(4) Unnecessarily, either while resisting an attempt by the person killed to commit a crime or after such an attempt has failed.

SDCL 22-16-5

COUNT THREE: ABUSE OR CRUELTY TO A MINOR

Any person who abuses, exposes, tortures, torments, or cruelly punishes a minor in a manner which does not constitute aggravated commits the felony of abuse or cruelty to a minor. SDCL 26-10-1 The State had the duty of proving beyond a reasonable doubt that Ally abused, tortured, tormented, or cruelly punished M.K. As previously argued and won't be reargued here, the state never presented any theory as to how the child was injured. The State's theory of the case was that on the morning of December 24, 2012, the minor child was alive and healthy with the exception of an ear infection, and by the afternoon he wasn't. (JT6 p. 49) Ally was the sole caregiver by his own statements. (JT6 p. 49) The jury was never asked to consider whether or not the defendant hurt the child by torturing, abusing, tormenting, or cruelly punishing M.K. The jury was never asked whether Ally provided any contradictory or inconsistent statements as far as what happened that day, or whether he engaged in any attempts to cover up his own misconduct. The jury was merely told to find Ally guilty because he was the last adult with the child, therefore he must have done some sort of criminal act. The problem with this theory was that it allowed for the jury to also find him guilty of Count Three under an alternative theory of "abuse or cruelty" to a minor which specifically states that the underlying felony would be "in a

manner that does NOT constitute aggravated assault." SDCL 26-10-1 (emphasis added). In order to find the Defendant guilty of every other count, the jury would have to find the defendant guilty of aggravated assault. Other than the one incident, the head injury, which the coroner testified was significant enough to justify an allegation of aggravated assault, there was no other allegation of assault, torture, or abuse.

Ally was a young African man who was left alone to care for two small children. Had been seen at the clinic earlier in the day and both children were described as happy and healthy. (JT7 p.45) A neighbor testified that she never heard any crying or indications of violent behavior that afternoon. (JT 4 p. 51) The jury was never presented with a theory as to how he hurt the child. At one point in the trial, the coroner described the injury that M.K. sustained as having been consistent with striking "something with an edge," like the table in front of him. (JT5 p. 106) He also compared the injury to one he might see in a bar fight with a baseball bat or a fist. (JT p. 106) Later on in his testimony, he admitted that based on his training and experience, it would be dangerous for anyone to make any sort of presumption as to what caused the injury just be looking at a fracture. (JT7 p. 33) He testified that without any other data and witnesses he could not say what caused the injury. (JT7 p. 33)

The jury was asked to guess what could have happened that afternoon. The trouble with asking the jury guess what could have happened, was that they were also asked to speculate whether the actions were cruel, abusive, and

tortuous. They were never asked to differentiate which of those acts rose to the level of aggravated assault and which did not so as to differentiate between the counts. *See State v. Well*, 2000 SD 156, 620 N.W.2d 192(conviction for aggravated assault with dangerous weapon and abuse or cruelty to a minor were statutorily defined and mutually exclusive, absent evidence supporting two distinct crimes, the state failed to submit sufficient evidence to support the separate underlying offenses, and simply sentencing the Defendant for one crime did not cure the defect).

Even in the light most favorable to the state, no reasonable jury could have found that Ally committed any act of abused, tortured, or cruelly punished M.K., and as such, there was insufficient evidence to support the guilty verdict of guilty as to Count Three of Manslaughter in the First Degree.

COUNT FOUR: AGGRAVATED ASSAULT, UNDER CIRCUMSTANCES MANIFESTING EXTREME INDIFFERENCE TO THE VALUE OF HUMAN LIFE

Recently in *State v. Miland,* this Court was presented with an opportunity to define the circumstances manifesting an "extreme indifference to the value of human life." *State v. Miland*, 2014 SD ¶16, 858 B.W.2 328, 332. *See Also, State v. Shear*, 295 N.W. 2d 176 (1980) (Defendant's conduct did not support finding that he inflicted injury to his wife under circumstances manifesting extreme indifference to the value of human life for severe beating in which the wife could hardly stand and suffered a broken rib in addition to extensive body bruises). The Court explained that given its plain meaning," the assault "'must by necessity

be more dire and formidable in terms of affecting human life.'" *Miland*, 2014 at ¶19 (*citing Tigue v. State*, 319 Ark. 147, 889 S.W.2d 760, 761-76(1994) (interpreting language similar to SDCL 22-18-1.1). "It is the circumstances of the crime that must manifest extreme indifference." *Miland*, 2014 SD at ¶17. The main focus when determining the accused's state of mind as is germane to the extreme indifference question is on the "conduct of the accused." *Id.* at ¶18.

Ally called 911 and was pleading with the operator to send help for his baby. (Plaintiff's Exh. 2) He ran to get aid from a neighbor when the language barrier was making it difficult for him to get the aid he was desperately seeking. It can hardly be said that these were the circumstances that manifested an "extreme indifference to the value of human life."

This Court considered the "cruel and unusual" aspect of manslaughter in *State v. Jaques*, 428 N.W.2d 260 (S.D.1988), also a first-degree manslaughter case by stating, the sufficiency of trial evidence rests on whether the evidence, if believed by the jury, is sufficient to find guilt beyond a reasonable doubt. *Id.* at 267 (*citing State v. Andrews*, 393 N.W.2d 76, 80 (S.D.1986); *State v. Faehnrich*, 359 N.W.2d 895 (S.D.1984). The factual basis supporting a manslaughter charge grounded in a cruel and unusual manner must show that the killing was done with "some refinement or excess of cruelty sufficiently marked to approach barbarity, and to make it especially shocking....") *State v. Lange*, 82 S.D. 152 N.W.2d 635, 638 (1967). "While death from a single shove in a drunken street brawl is not cruel and unusual, a prolonged beating of a woman by a drunken

defendant outweighing her by 100 pounds is sufficient to reach the jury on the point." *Id.* In other words, in order to do the balancing in determining what behavior was sufficient to constitute "cruel and unusual," the court had to know what the behavior was.

The test to determine sufficiency of the evidence is "whether, taking the view most favorable to the Government, a reasonably-minded jury could accept the relevant evidence as adequate and sufficient to support the conclusion of the defendant's guilt beyond a reasonable doubt." *United States v. Warner* 441 F.2nd 821,825(C.A.Tex. 1971), (*citing Sanders v. United States* 416 F.2d 194 (5th Cir. 1969). The test is "whether reasonable minds could conclude that the evidence is inconsistent with the hypothesis of the accused's innocence." *Warner*, 441 F.2d at 825(*citing United States v. Andrews*, 427 F.2d 539, 540 (5th Cir. 1970). This test was expanded in *Jackson v. Virginia*, which provided that the inquiry does not require a court to ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt, but whether after viewing the facts in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-319, 99 S.Ct 2781, 61 L.Ed.2d 560(1979), (*citing Woodby v. Immigration and Naturalization Service*, 385 U.S. 276,282 (1966), *Johnson v. Louisiana*, 406 U.S. 356,362, 87 S.Ct. 483, 17 L.Ed.2d 362 (1972). "The criterion thus impinges upon 'jury' discretion only to the extent necessary to guarantee the fundamental protection of due process of law." *Jackson*, 443 U.S. at 319.

Here, a finding of guilt would clearly be a violation of due process. The State's purported "evidence" was that the "morning of December 24, 2012, M.K. was alive and healthy with the exception of a minor ear infection. . . and by the afternoon he was unconscious and unresponsive; and the Defendant was the sole caregiver by his own statement...." (JT6 p.49) Based on the evidence presented, no reasonable jury could have found that the Defendant was guilty of aggravated assault under circumstances manifesting extreme indifference to the value of human life.

COUNT FIVE: AGGRAVATED ASSAULT, INTENT TO COMMIT BODILY INJURY WHICH RESULTS IN SERIOUS BODILY INJURY

The county coroner testified initially that the injuries could have resulted from striking something with an edge, like a table. (JT5 p. 106) However, by the end of the trial, after hearing the defendant and the defense's witnesses testify, the state had changed its own theory, and Dr. Snell testified that the injury was inconsistent with an injury caused by an "edge," "such as the edge of a table," and that the injury was not consistent with a long, single edge type injury, but was more of a "rounded, depressed skull fracture," like that from a round object. (JT7 p. 82) The state did not put forth any theory whatsoever as to how the child sustained any of his injuries except to say that Ally abused the child and caused his death.

Ally was convicted of manslaughter despite the fact that the State never put on any evidence as to how the child was injured. There was never any

evidence that Ally's "intent" based on the actual "conduct itself." *See State v. Shear*, 295 N.W. 2d 176 (1980) (Defendant's conduct did not support finding that he inflicted serious bodily injury to his wife under circumstances manifesting extreme indifference to the value of human life for severe beating in which the wife could hardly stand and suffered a broken rib in addition to extensive body bruises.)

In *People v. Vollmer*, 299 NY 347 (Ct.App. NY 1949) the court held that killing a man in an assault with a bare fist was not done by means of a "dangerous weapon" within meaning of statute defining manslaughter in first degree. *Id.* (*See slso, Ransom v. Alaska*, 460 P.2d 170 (1969)(Assault victim's testimony that defendant was possibly wearing boots, was insufficient to sustain a conviction for assault with dangerous weapon)(*Com v Davis*, 406 N.E.2d 417(Mass.1980))(Neither human teeth nor other parts of body are to be considered by fact finder as instrumentalities which can be used as "dangerous weapons," within meaning of statute proscribing assault and battery by means of dangerous weapons, and thus defendant, who allegedly bit off portion of victim's ear, was not guilty of such crime.) So whether the state speculates on whether it was a "fist," or "round," or "straight," they never put forth any evidence of a "dangerous weapon." Based on the evidence presented, no reasonable jury could find that Ally was guilty of Count Five.

COUNT SIX: AGGRAVATED BATTERY TO AN INFANT

"Any person who intentionally or recklessly causes serious bodily injury to an infant, less than three years old, by causing any intracranial or intraocular bleeding, or swelling of or damage to the brain, whether caused by blows, shaking, or causing the infant's head to impact with an object or surface is guilty of aggravated battery of an infant." SDCL 22-18-1.1. The state did not put forth any evidence for the jury to consider whether any act by the Defendant was "intentional," or "reckless." There was nothing to distinguish his behavior with respect to Count Six from the behavior in Count Three. The state never put forth a theory that there were "two separate incidents." *State v. Wells*, 2000 SD 156, ¶21, 620 N.W.2d 192, 196. "There must be different facts to constitute each crime." *Id.* We are left to speculate what happened to M.K. given the state did not have a clear theory other than that a child died in Ally's care. The state argued that the medical testimony showed "one" linear, depressed skull fracture, but then Dr. Snell testified that there was "three, possibly four additional impact points which would indicate that this was not a single blow from either an object or propelling [M.K.] into an object." (JT6 p. 49) If the state did not even have a theory as to the extent of the injuries, or a good understanding of whether it was one, or three, or four head injuries, or any idea as to whether it was from the child striking an object or the child striking another object, then the state cannot be said to have submitted a prima facie case in which a jury could have found

proof beyond a reasonable doubt that the Defendant was guilty of the underlying offense of aggravated battery.

Further, the same facts were used to convict Ally of multiple statutory offenses were the result of one single death. Given the absence of factual evidence to support each separate conviction, a jury conviction for multiple crimes cannot be supported. *Id.* at ¶23. Simply choosing to sentence Ally to one sentence cannot cure the defect. *Id.* at ¶24.

III.

WHETHER THE SEQUESTERING OF THE DEFENDANT'S BIOMECHANICAL ENGINEER FROM THE COURTROOM DURING THE "MEDICAL TESTIMONY" RESULTING IN A VIOLATION OF THE DEFENDANTS RIGHT TO A FAIR TRIAL

Throughout opening statements and into its case in chief, the state presented a theory of the case that there was evidence of separate blows, and multiple impacts. (JT4 p. 19) The state opined that a "short fall off the bed [was] not consistent with M.K.'s injuries." (JT4 p. 19) At the hearing on the motion to suppress, Detective Carda testified that it immediately became apparent to him observing M.K. in the hospital that his injuries were non-accidental in nature. (MH1 p. 69) The state was not even aware that the child suffered from disseminated intravascular coagulopathy, a significant bleeding disorder that resulted in the areas of discoloration that appeared as "bruising," until testified to by Dr. Hazvalah, the emergency room treating physician at the trial. (JT6 p.42) The county coroner never made any mention of the serious medical condition in

his autopsy report. The mother was led to believe throughout the case that the discolorations on M.K.'s arms and legs was bruising. Simply said, the entire basis of the county coroner's opinion was based upon Detective Carda's initial observations of M.K. in the hospital on December 24th, 2012. The county coroner did no other independent investigation of the apartment, no scientific testing, did not talk to the treating physician, or the emergency responders. At the grand jury, he testified that a biomechanical engineer would need to be consulted before an opinion could be rendered about the amount of force that would be necessary to cause the injury sustained by M.K. (JT8 p.98)

During the trial, the state moved to sequester the Defense's expert, Dr. Chris Van Ee, a biomedical engineer, during the "medical testimony" on the grounds that his testimony was "separate and distinct from the medical testimony." (JT6 p. 58) The trial court granted the state's motion opining that given the testimony involved, principles of physics, force, and other "non-medical" testimony, he should be sequestered. (JT6 p. 59)

As a biomechanical engineer, Dr. Chris Van Ee's role as it relates to the medical field, is to focus on injuries and how they happen, in hopes of applying principles of science to prevent them from occurring in the future. (JT6 p. 114) He had worked in the area of acceleration, speed, and safety design in multiple areas, including the air bag industry, helmet research, and all-terrain-vehicle/four-wheeler design. (JT6 p. 117-118) He also had conducted cadaver

studies related to muscle properties and conducted biomechanical trainings related to trauma in young children. (JT6 p. 120)

The court sequestered the Defense's expert despite the fact that the county coroner, had already been permitted to offer his expert opinion that the injuries sustained by M.K. were inconsistent with a reported fall from a bed. (JT5 p. 124) Whether deemed "medical," or "non-medical," Dr. Van Ee's testimony was specifically related to the amount of force necessary to cause the injuries that were in issue in the case and that both of the medical experts testified to. Dr. Janice Ophoven testified that based on her analysis that based upon her review of the case and the circumstances of the death-- an unwitnessed fall, and a depressed skull fracture, she felt it prudent that a biomechanical engineer be consulted. (JT6 p. 73) "Biomechanics is the study of force on tissue." (JT6 p. 74) Forensic pathologists may study the effect of force in tissue in a car wreck or any other fatal accident, but they but they do not do physics. (JT6 p. 74) They do not make calculations, and they cannot answer questions as to how much potential force can be generated in such a circumstance, and this was why Dr. Ophoven specifically recommended that a biomechanical engineer be consulted. (JT6 p. 74) It was an abuse of discretion for the trial court to sequester the biomechanical engineer from the court room during the "medical" testimony, particularly since Dr. Snell testified on rebuttal that he was present in the courtroom for both the testimony of Dr. Ophoven and Dr. Van Ee. (JT7 p. 80-81) A significant issue in the case was the testimony of Dr. Ophoven as it related to

whether there was only one impact sight or two. Dr. Snell was permitted to remain in the courtroom, and offer rebuttal testimony to explain why he felt that there was more than one impact. (JT7, p. 81-82) Unfortunately, Dr. Van Ee was not present when Dr. Ophoven presented this testimony, and the state was not required to present any compelling reason for the sequestration other than to say that his testimony was "non-medical."

Although Dr. Van Ee was sequestered because his testimony was deemed "non-medical," he had examined all of the same information, including police reports and medical records as both forensic pathologists. Dr. Van Ee had actually gone further than either of the medical experts in that he had also evaluated the carpeting, padding, and cement photos, and had measurements of the house.

The sequestering of witnesses is within the trial court's discretion. *State v. Traversie*, 387 N.W.2d 2, 11, (*citing State v. Johnson*, 254 N.W.2d 114117 (S.D. 1977); and this includes the sequestering of expert witnesses. Id. (*citing Lewis v. Owen*, 395 F.2d 537, 541 (10th Cir. 1967). Generally, witnesses who are to testify in an expert capacity only and not to the facts of the case should be exempt from a sequestration order. *Traversie*, 387 N.W.2d at 11 (*citing Morvant v. Constr. Aggregates Corp.*, 570 F.2d 626, 629 (6th Cir. 1978), *cert. dismissed*, 439 U.S. 801, 99 S.Ct. 44, 58 L.Ed. 2d 94 (1978). It has been generally held that experts are usually exempt from sequestration. 75 Am.Jur.2d Trial § 62 (1974). "While it is usual to ... except expert witnesses from the operation of the [sequestration] rule, a refusal

to do so does not necessarily constitute error." *Traversie*, 387 N.W.2d 2, 9 (Hertz, Acting Justice (concurring specially)). Absent a "compelling reason" to the contrary, expert witnesses should be exempt from a sequestration order, as it is only in this way that the experts can intelligently respond to the issue and assist the jury in the fact finding process. *Traversie*, 387 N.W.2d at 9 (Hertz, concurring specially)

In this case, Dr. VanEe's testimony was vital to Ally's defense. The state did not provide any "compelling reason" to have him removed from the courtroom. His ability to know findings of the medical experts and to adjust his testimony accordingly so as to better assist trial counsel for cross examination was essential to Ally's defense. The record reveals that Dr. Snell's rebuttal was significantly based on the testimony of Dr. VanEe, and not just limited to the "medical" testimony offered by Dr. Ophoven.

SDCL 19-15-3 provides that the facts or data in a particular case upon which an expert bases an opinion or interference may be those perceived by or made known to him at or before the hearing. Facts reasonably relied upon by experts in the particular field may be those perceived or made known to him at or before a hearing. SDCL 19-15-3 (Rule 703). It was clear that Dr. VanEe was relying on the same medical evidence that the state's experts were relying on. There was no legitimate basis for sequestering Dr. VanEe from the courtroom.

The aim of imposing the practice of sequestering witnesses is twofold. It exercises a restraint on witnesses "tailoring" their testimony to that of earlier

witnesses; and it aids in detecting testimony that is less than candid.) 6 J. Wigmore, Evidence s 1837, 1838 p. 348 (3d ed., 1940); F. Wharton, Criminal Evidence s 405 (C. Torcia ed. 1972). Sequestering a witness over a recess called before testimony is completed serves a third purpose as well by preventing improper attempts to influence the testimony in light of the testimony already given. *Geders v. US*, 425 U.S. 80, 87 (1976) In this case, it was clear that by not sequestering the county coroner, he had the advantage of being able to "tailor" his testimony after hearing the testimony of the Defendant's witnesses.

The sequestration of the defense expert from the courtroom was an abuse of discretion. It significantly impacted counsel's ability to present a full defense, and also impacted the defendant's constitutional right to confrontation pursuant to the Sixth Amendment and Article VI, Section VII of the SD Constitution. *See Generally, Moeller v. Weber*, 649 F.3d 839, (8th Cir. 2001) (Strickland standard applied as to whether counsel "vigorously" and "effectively" challenged the State's DNA evidence at trial); 103 A.L.R.6th 721.

CONCLUSION

WHEREFORE, based on the above analysis, Appellant Manegabe Ally respectfully requests this Honorable Court to reverse the Judgment of Conviction.

REQUEST FOR ORAL ARGUMENT

Attorney for Appellant, Manegabe Chebea Ally, respectfully requests thirty (30) minutes for oral argument.

Respectfully submitted this 17th day of July, 2015.

/s/ Traci Smith

Traci Smith
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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Brief is within the limitation provided in SDCL 15-26A-66(b) using Book Antiqua typeface in 12 point type. Appellant's Brief contains 9,852 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2013.

Dated this 17th day of July, 2015.

/s/ Traci Smith

Traci Smith
Minnehaha County Public Defender

APPENDIX

STATE OF SOUTH DAKOTA) : SS COUNTY OF MINNEHAHA)		IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
		SFPD 201287865
STATE OF SOUTH DAKOTA, Plaintiff,	+	CR. 49CRI12008143 A0
vs.	+	JUDGMENT & SENTENCE
MANEGABE CHEBAEA ALLY, Defendant.	+	

An Indictment was returned by the Minnehaha County Grand Jury on January 9, 2013, charging the defendant with the crimes of Count 1 Murder in 1st Degree-Premeditated Murder on or about December 24, 2012; Count 2 Murder in 2nd Degree-Depraved Mind on or about December 24, 2012; Count 3 Manslaughter-1st Degree-Comm. of Felony on or about December 24, 2012; Count 4 Manslaughter-1st Degree-Comm. of Felony on or about December 24, 2012; Count 5 Manslaughter-1st Degree-Comm. of Felony on or about December 24, 2012 and Count 6 Manslaughter-1st Degree-Comm. of Felony on or about December 24, 2012. The defendant was arraigned upon the Indictment on January 16, 2013, Traci Smith and Kenny Jacobs appeared as co-counsel for the Defendant; and, at the arraignment the defendant entered his plea of not guilty of the charges in the Indictment. The case was regularly brought on for trial, Donald Hanson and Tara Palmiotto, Deputy State's Attorneys appeared for the prosecution and, Traci Smith and Kenny Jacobs, appeared as co-counsel for the defendant. A Jury was impaneled and sworn on February 18, 2014 to try the case. The Jury, after having heard the evidence produced on behalf of the State of South Dakota and on behalf of the defendant on February 27, 2014 returned into open court in the presence of the defendant, returned its verdict: "We the Jury, find the defendant, MANEGABE CHEBAEA ALLY, not guilty as to Counts 1 and 2; guilty as charged as to Count 3 Manslaughter-1st Degree-Comm. of Felony (SDCL 22-16-15(1)); guilty as charged as to Count 4 Manslaughter-1st Degree-Comm. of Felony (SDCL 22-16-15(1)); guilty as charged as to Count 5 Manslaughter-1st Degree-Comm. of Felony (SDCL 22-16-15(1)); guilty as charged as to Count 6 Manslaughter-1st Degree-Comm. of Felony (SDCL 22-16-15(1))." The Sentence was continued to May 29, 2014, after completion of a presentence report.

Thereupon on May 29, 2014, the defendant was asked by the Court whether he had any legal cause why Judgment should not be pronounced against him. There being no cause, the Court pronounced the following Judgment and

SENTENCE

AS TO COUNT 3 MANSLAUGHTER-1ST DEGREE-COMM. OF FELONY : MANEGABE CHEBAEA ALLY shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for forty-five (45) years with credit for five hundred eighty (518) days previously served and with twenty (20) years of the sentence suspended.

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It is ordered that the court costs in this matter are hereby waived and the attorney fees shall be converted to a civil lien in favor of Minnehaha County.

No formal sentence was pronounced as to Counts 4, 5 and 6.

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

Dated at Sioux Falls, Minnehaha County, South Dakota, this 6th day of ~~May~~ August, 2014.

BY THE COURT:

JUDGE MARK SALTER
Circuit Court Judge

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

FILED
AUG 11 2014
Minnehaha County, S.D.
Clerk Circuit Court

STATE OF SOUTH DAKOTA } ss.
MINNEHAHA COUNTY
I hereby certify that the foregoing instrument is a true and correct copy of the original as the same appears on record in my office.

AUG 15 2014

Clerk of Courts, Minnehaha County

By _____ Deputy

A-2

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of Appellant's Brief in the matter of *State of South Dakota v. Manegabe Chebea Ally* were served electronically upon:

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Dated this 17th day of July, 2015.

/s/ Traci Smith

Traci Smith
Minnehaha County Public Defender

27202

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27202

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED
SEP 18 2015
Clerk

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

MANEGABE CHEBEA ALLY,

Defendant and Appellant.

27202

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

THE HONORABLE MARK E. SALTER
Circuit Court Judge

APPELLEE'S BRIEF

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ATTORNEY FOR DEFENDANT
AND APPELLANT

Notice of Appeal filed September 9, 2014

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27202

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

MANEGABE CHEBEA ALLY,

Defendant and Appellant.

PRELIMINARY STATEMENT

Throughout this brief, Defendant and Appellant, Manegabe Chebea Ally, will be referred to as "Defendant." Plaintiff and Appellee, State of South Dakota, will be referred to as "State." The juvenile victim will be referred to as "M.K." and his mother, the girlfriend of Defendant, will be referred to as "Mother."

The various transcripts and reports will be cited as follows:

Suppression Hearing—January 30 and 31, 2014.....MH1

Suppression Hearing—February 5, 2014 ..... MH2

Jury Trial—February 18, 2014 .....JT1

Jury Trial—February 19, 2014 .....JT2

Jury Trial—February 20, 2014 .....JT3

Jury Trial—February 21, 2014 .....JT4

Jury Trial—February 24, 2014 .....JT5

Jury Trial—February 25, 2014 .....JT6

Jury Trial—February 26, 2014 .....JT7

Jury Trial—February 27, 2014 .....JT8

Transcript of Sentencing Hearing – May 29, 2014 .....ST

The settled record in the underlying criminal case, *State of South Dakota v. Manegabe Chebea Ally,* Minnehaha County Criminal File No. 12-466, will be referred to as "SR." Any reference to Defendant's brief will be designated as "DB." All references will be followed by the appropriate page number(s).

JURISDICTIONAL STATEMENT

Defendant appeals from the Judgment of Conviction and Sentence entered by the Honorable Mark Salter, Circuit Court Judge, on August 6, 2014, and filed on August 11, 2014. SR 614-15. Defendant filed a Notice of Appeal on September 9, 2014. SR 669. This Court has jurisdiction under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I

WHETHER THE TRIAL COURT PROPERLY HELD DEFENDANT WAS NOT IN CUSTODY FOR PURPOSES OF *MIRANDA* ON DECEMBER 24 AND 26, 2012, AND WHETHER THE TRIAL COURT PROPERLY FOUND DEFENDANT'S STATEMENTS WERE VOLUNTARY?

The trial court held Defendant was not in custody during his interviews with Detective Carda on December 24 and 26. The trial court held Defendant's statements were voluntary.

State v. Diaz, 2014 S.D. 27, 847 N.W.2d 144

State v. Johnson, 2015 S.D. 7, 860 N.W.2d 235

State v. Wright, 2009 S.D. 51, 768 N.W.2d 512

II

WHETHER THE EVIDENCE WAS SUFFICIENT TO CONVICT DEFENDANT OF VOLUNTARY MANSLAUGHTER BY ENGAGING IN ABUSE OR CRUELTY TO A MINOR?

The trial court held there was sufficient evidence to convict Defendant of Manslaughter in the First Degree while Engaging in Abuse or Cruelty to a Minor.

State v. Brende, 2013 S.D. 56, 835 N.W.2d 131

State v. Jensen, 1998 S.D. 52, 579 N.W.2d 613

SDCL 22-16-15

SDCL 26-10-1

III

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION AND DENIED DEFENDANT A FAIR TRIAL BY SEQUESTERING DEFENDANT'S BIOMECHANICAL ENGINEER?

The trial court sequestered all witnesses with the exception of those offering medical testimony.

State v. Dixon, 419 N.W.2d 699 (S.D. 1988)

State v. Traversie, 387 N.W.2d 2 (S.D. 1986)

STATEMENT OF THE CASE

On December 27, 2012, the Minnehaha County State's Attorney filed a Complaint charging Manegabe Ally (Defendant) with: Count 1—Murder in the First Degree, in violation of SDCL 22-16-4(1); Count 2—

Murder in the Second Degree, in violation of SDCL 22-16-7; Count 3—Manslaughter in the First Degree, while engaged in Abuse of Cruelty to a Minor (SDCL 26-10-1), in violation of SDCL 22-16-15(1); Count 4—Manslaughter in the First Degree, Aggravated Assault, attempting to cause serious bodily injury, or causing injury, manifesting extreme indifference to the value of human life (SDCL 22-18-1.1(1)), in violation of SDCL 22-16-15(1); and Count 5—Manslaughter in the First Degree, Aggravated Assault, assaulting another with intent to commit bodily injury which results in serious bodily injury (SDCL 22-18-1.1(4)), in violation of SDCL 22-16-15(1). SR 5-6.

On January 9, 2013, a Minnehaha County Grand Jury indicted Defendant with the same crimes charged in the Complaint and added Count 6—Manslaughter in the First Degree, while engaged in Aggravated Battery of an Infant (SDCL 22-18-1.4), in violation of SDCL 22-16-15(1). SR 14-15.

Defendant pled not guilty to all charges. AT 7; SR 709. On February 27, 2014, a jury found him guilty of all four counts of Manslaughter in the First Degree. JT8 79-80; SR 1055-56.

Defendant was sentenced on May 29, 2014, on Count 3—Manslaughter in the First Degree, while engaged in Abuse or Cruelty to a Minor (ST 3; SR 764) to forty-five years imprisonment, with twenty years suspended. ST 29; SR 790.

The Judgment of Conviction and Sentence was signed on August 6, 2014, and filed on August 11, 2014. SR 614-15. Judgment and sentence was entered on only Count 3. SR 614-15. Defendant filed a Notice of Appeal on September 9, 2014. SR 669.

STATEMENT OF FACTS

In 2010, Defendant moved from the Congo to the United States. In July 2012, Defendant and Mother began a long-distance relationship over the telephone and Facebook. JT4 31. On October 14, 2012, Defendant moved in with Mother, and met her two children, sixteen-month-old M.K. and five-year-old C.K., for the first time. JT7 66.

Early on December 24, 2012, Defendant, M.K., and C.K. took Mother to work. JT4 33. Later that morning, Defendant and the children went to Community Health for Defendant's immunization shots to obtain his green card. JT7 44-45, 47. Nurse Debra Goldstine immunized Defendant and communicated with him with only a little difficulty. Debra testified that M.K. appeared, without examining him, fine and not ill. JT7 45.

At approximately 2:40 p.m., Defendant called 911 claiming his "baby fall down." Def. Ex. 2. Nicole Mckenzie, Defendant's neighbor, saw Defendant pacing in the apartment's hallway, appearing so panicked that she took the phone from him to speak with the 911 dispatcher. JT4 46-47. Nicole testified that M.K. was unresponsive but not bleeding. JT4 47. She stated that M.K.'s head was near the rug

next to the bed.[1] JT4 49. Nicole performed CPR on M.K. with the dispatcher's guidance, but did not move him. JT4 49, 53.

Sioux Falls Fire and Rescue, police officers, and paramedics, all arrived. Fire Captain Gramlick testified that he was able to communicate with Defendant to learn what had transpired. JT4 60. Captain Gramlick and the other firefighters noticed Defendant's odd demeanor in that he did not exhibit anxiety. JT4 60. Captain Gramlick testified that M.K. was found "almost conspicuously in the middle of the room. He wasn't near the bed, he wasn't near the dresser, he wasn't near the [closet] . . ." JT4 63. *See* State's Ex. 5.

Paramedic Katie Kruger testified that she observed older abrasions on the left side of M.K.'s head and nose, but no external bleeding. JT4 114. She observed a hard ridge on the back of his head, indicative of a head injury that had been there for a while. JT4 115. The paramedics transferred M.K. to the hospital while providing him continuous care. JT4 116.

Officers McMahon and Statema arrived and spoke with Defendant. JT4 133. McMahon testified that he was able to communicate with Defendant and that his English was fair. JT4 133.

Statema also testified that he was able to converse with Defendant, despite a language barrier. JT4 150. Defendant explained

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[1] State's Exhibit 5 shows a picture of the bedroom. The floor is carpeted and there is an additional rug directly next to the side of the bed.

to Statema that M.K. and C.K. were napping, and Defendant was cleaning up after lunch and doing dishes when he heard M.K. cry out once. JT4 151. Defendant told Statema that he went to the bedroom, found M.K. on the floor, and saw blood on the side of M.K.'s mouth. JT4 151. Statema testified that there were no dishes in the sink nor was there any evidence of dishwashing. JT4 151. Statema noted that "everything was very clean and orderly." JT4 151; Def. Ex. D. Statema noticed that Defendant's demeanor was "very calm, emotionless." JT4 152.

After M.K. had been taken to the hospital, Officers Statema and Baker, and Lieutenant McManus investigated the scene, taking pictures of the apartment and measurements of the bedroom. JT4 171. Lt. McManus testified that he investigated the bedroom and did not see any blood or fluids. JT4 168. Upon surveying the scene, Lt. McManus called Detective Carda to investigate whether this was more than an accidental fall. JT4 168.

Carda first interviewed Mother in a conference room at the hospital, where he learned that Defendant had been the primary caregiver for M.K. and C.K. JT5 25. Carda asked Defendant to come to the police station for an interview to discuss what happened to M.K., telling him that he would be taken home after the interview. JT5 26. Defendant agreed to go to the station with Carda, and sat in the front seat of the police car without handcuffs or restraints. JT5 26.

Defendant was brought to an interview room, with a closed and unlocked door. JT5 27, 68. Carda brought in a Swahili interpreter. JT5 27. Although Defendant had not been arrested and was not in custody, Carda read Defendant his *Miranda* rights, explaining

> [s]ome people feel that even though they are told that they will be going home, being in a police car can possibly make them feel like they are compelled to talk to me against their wish. And I wanted to ensure that Defendant understood that he was not compelled to talk to me.

JT5 27-28. Defendant agreed to speak with Carda. JT5 28.

Defendant told Carda during that first interview that he was M.K.'s caregiver while Mother was at work. JT5 29. Defendant claimed that he was waking C.K. from her nap when he heard M.K. cry out. JT5 29. He ran to the bedroom and found M.K. on the floor. JT5 29. Defendant stated he was the only adult present at the apartment. JT5 29. Upon conclusion of the approximately one-hour long interview, Carda did not arrest Defendant, and took Defendant home. JT5 30. Carda explained to Defendant that he could not take Defendant to the hospital because M.K. and C.K. had been placed in protective custody and only their mother was allowed to visit them. JT5 58.

On December 25, 2012, M.K. died. JT5 78. Defendant called Carda that day wanting to speak with him. JT5 30. Carda followed up on that phone call on December 26, 2012, around six p.m. JT5 30. Carda met Defendant in the parking lot of Defendant's apartment and asked Defendant if he would again speak with him at the police station,

offering to drive him back home after the interview. JT5 30. Defendant agreed. JT5 30.

Carda also asked Defendant where Mother was, and whether Defendant would take him to see her. JT5 30. Carda and Defendant rode in the front seat of the unmarked police car, unrestrained, while Detective Hoffman sat in the back seat and they proceeded to the residence where Mother was located. JT5 30-32.

Carda asked Mother to come to the police station to talk with him. JT5 32. She agreed, and Mother, Defendant, and their pastor rode in one car, while Carda and Hoffman rode in the police car. JT5 32. They arrived at the station around 7:30 p.m. JT5 32.

Carda interviewed Defendant in the same room, and closed the door but kept it unlocked. JT5 68. Carda again obtained an interpreter, specifically requesting a different one because he was not "familiar with the language and I was not familiar with the capabilities of the particular interpreters[.] I wanted to make sure [Defendant] understood what was being said. And I wanted to . . . make sure that I understood what [Defendant] was saying." JT5 33.

Carda did not intend to arrest Defendant that day. Although the interview was noncustodial, Carda again read Defendant his *Miranda* rights so that Defendant would not feel compelled to speak with him. Defendant said he understood his rights and waived them. JT5 34.

Carda showed Defendant pictures from M.K.'s autopsy, showing marks on M.K.'s body, legs, and arms, injuries to M.K.'s ears, and M.K.'s fractured skull. JT5 35. Defendant responded that he was playing with M.K. prior to laying him down for a nap on the bed. JT5 36. Carda gave Defendant a doll and asked him to demonstrate how he was playing with M.K. JT5 36. The video demonstrates Defendant held the doll under its arms and moved the doll in an up and down motion. State's Ex. 15. Defendant then held the legs of the doll moving it up and down. State's Ex. 15.

The next day, Carda arrested Defendant around noon, December 27, 2012. JT5 37. Carda handcuffed Defendant and took him to the police station for a third and final interview. JT5 37. Carda specifically requested a different interpreter for the third interview, again because he was unfamiliar with Swahili, and wanted to ensure Defendant his rights were adequately and accurately interpreted to him. JT5 31; MH1 67.

Carda read Defendant his *Miranda* rights prior to the interview, and Defendant stated he understood and waived his rights. JT5 37. Defendant denied harming M.K. JT5 37.

During all three interviews, Defendant claimed he was cleaning dishes while M.K. and C.K. were napping, and heard M.K. cry out while he was waking C.K. JT5 38.

M.K. was brain dead upon arrival to the hospital on December 24, 2012, and proceeded to lose his pulse multiple times throughout the day. JT6 19, 22. Dr. Hafzalah, who treated him in the emergency room, testified that she performed a CT on M.K.'s head, found a large depressed fracture on the left side of his head, and noted that the "skull was basically broken and pushed inwards . . ." JT6 20. There was a large hematoma, and blood over the fracture. JT6 20. The brain was "extremely swollen and damaged." JT6 21. M.K. had developed "coagulopathy," resulting from trauma and cardiac arrest, which meant that vital organs were not receiving blood or oxygen to function because the heart was not working. JT6 42.

Dr. Hafzalah expressed her concerns to law enforcement, opining that M.K.'s significant injuries were inconsistent with a fall from a bed. JT6 27-28. She determined the cause of M.K.'s death to be "significant nonaccidental trauma to the head that caused the brain swelling and with it the anoxic ischemic injury as well." JT6 28.

On December 26, 2012, Dr. Snell, the county coroner, performed an autopsy on M.K. JT5 70-71. Dr. Snell testified to M.K.'s injuries and to principles of force necessary to cause the manner of death. JT5 125. He analyzed M.K.'s injuries using the worst case scenario, as if there were cement under the carpet. JT5 138.

Dr. Snell testified that there was nothing abnormal about M.K.'s development or condition prior to death. JT5 80. Dr. Snell explained

that there were three, possibly five points of impact on M.K.'s head. JT5 88-105; JT7 104. The first point of impact was M.K.'s bruised and swollen left eye. JT5 92. Something had hit his eye, and the injury could not have resulted from lifesaving attempts. JT5 92. There were three three-inch long abrasions on the right side of M.K.'s head above his ear, and beneath the scalp was a subgaleal hemorrhage, indicating a second impact site. JT5 93. A hemorrhage existed beneath M.K.'s forehead to the crown of his head, suggesting a third possible impact to the front of his head. JT5 101. The fourth impact site was located at the back of M.K.'s head, finding a large bruise all the way across the back of the head, three and one-fourth inches long, with a subgaleal hemorrhage beneath the scalp. JT5 88.

The final point of impact and the trauma that ultimately caused M.K.'s death was the large depressed skull fracture on the left side of M.K.'s head above and behind his ear. JT5 105. This fracture crossed three bones and two sets of sutures, and was eight centimeters in length. JT5 105. The bone was pressed down, and pushed into the head, indicating "a large object struck the head in that area." JT5 105, 109. Dr. Snell used examples of a fist, a baseball bat, or the head striking something with an edge. JT5 106. "[T]hat something has to be an edge or something that's rounded, not a simple floor." JT5 110.

Dr. Snell further explained that a simple fall on the carpeted floor may result in a simple fracture to just one bone. JT5 104. Dr. Snell

testified that a small fall from the bed may result in one or two possible points of impact, however, M.K. had at least three, possibly five separate points of impact. JT5 126.

Dr. Snell explained the acute hemorrhages all over M.K.'s head under the scalp were significant because they indicate separate impact sites where his head was struck in each of these areas. JT5 88. Dr. Snell explained "the fact we have hemorrhage all over supports the fact that there's not just one single impact, but that the impact involves the entire head and there's hemorrhage all over the outside of that scalp out there." JT5 89. Injuries do not spread around the head. Each side of the head, and each impact site, demonstrated a separate injury. JT5 95.

Dr. Ophoven, Defendant's medical expert witness, opined that M.K. died from acute blunt force trauma to the head. JT6 71. She additionally testified that M.K. only had one point of impact. JT6 76. Dr. Ophoven testified that because M.K. developed coagulopathy, the bleeding was from his head fracture, and the blood spread throughout the entire head. JT6 76-78. She testified that the blood settled by gravity in the front of the head and that explained the blood at the forehead and in the eyes. JT6 80-83. She opined this was not indicative of force of impact. JT6 80-83. Dr. Ophoven further opined that the bruise on the back of M.K.'s head was part of the fracture. JT6 100.

Defendant brought Dr. Van Ee, a biomechanical engineer to testify about the force necessary to cause M.K.'s head injury. JT6 112. Dr. Van Ee based his opinion off of Dr. Ophoven's findings of only one impact to M.K.'s head and also Defendant's claim that M.K.'s head was propped up on the footboard. JT6 128, 145. Dr. Van Ee testified that one cannot rule out an accidental fall from the bed with a possible impact on the footboard of the bed. JT6 145. Dr. Van Ee opined that M.K.'s fracture may have been caused by the edge of the footboard. JT7 16.

Dr. Snell rebutted the opinions of Drs. Ophoven and Van Ee, explaining that M.K.'s rounded and depressed fracture could not be caused by an edge, and M.K.'s head would have had to have been impacted by a round or pointed object. JT7 82-83.

Dr. Snell further explained that the blood could not have settled in the front of M.K.'s head and face because M.K. was lying on his back. JT7 92. Additionally, if the blood settled in the front of the face, both eyes would have an equal amount of blood. JT7 92. According to Dr. Snell, the left eye had more blood because a hemorrhage formed. JT7 92-93. Further, the back of M.K.'s head was its own impact site because blood pooling in the back of the head does not create a bruise on the skin. JT7 84. Dr. Snell opined further that it was a separate injury because it was too far from the fracture to be a continuous injury. JT7 84. The hemorrhages on both sides of M.K.'s head also

could not be explained away by the blood spreading with coagulopathy, because very little blood was on the sides of M.K.'s head. JT7 90.

Dr. Snell testified that M.K. was bleeding beneath the membrane that lies between the skull and the brain. JT5 110. Dr. Snell explained that there usually is no blood in that area. JT5 110. Additionally, there was blood filling in the brain on both sides of the head, which indicates head trauma beyond the surface. JT5 111. "Having hemorrhage, subdural, subarachnoid hemorrhage, means there is increased damage to this area. Meaning that the forces that occurred penetrated deeper inside the head." JT5 111. None of M.K.'s injuries produced external bleeding. JT5 113.

Other acute injuries that occurred in the last 12-24 hours were found on M.K.'s body. JT5 86-90. M.K.'s right upper and lower eyelids were swollen, and there was a laceration in the crease of the scalp behind M.K.'s right ear, and an abrasion above the left ear. JT5 86-88.

M.K. also had several non-acute injuries. JT5 81-90. Dr. Snell found multiple areas on M.K.'s body, arms, legs, and back where there was either bruising or darkly pigmented areas, "multiple healing wounds and scar tissues" on the left side of M.K.'s nose and cheek, small scars on M.K.'s right cheek, a healing wound in the tissue between M.K.'s teeth and gums of the upper lip, a small round oval scar on the left side of M.K.'s forehead, and two additional scars behind the right ear. JT5 81, 86-87, 90.

Dr. Snell's opinion of the cause of death to M.K. was "blunt force injury to the head consistent with an assault." JT5 127.

ARGUMENTS

I

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS HIS STATEMENTS TO DETECTIVE CARDA .

A. Standard of Review.

Defendant argues his Fifth Amendment constitutional right was violated as he was in custody during the interviews conducted on December 24 and December 26, 2012, and that his statements were involuntary during the December 24 and December 27, 2012 interviews. DB 12, 18, 21. The trial court's findings of fact on a motion to suppress are reviewed under the clearly erroneous standard; once the facts are determined, the application of the legal standard to the facts is a question of law reviewed de novo. *State v. Wright*, 2009 S.D. 51, ¶ 18, 768 N.W.2d 512, 519 (citations omitted). Denial of a motion to suppress based on an alleged violation of constitutional rights is reviewed de novo. *State v. Johnson*, 2007 S.D. 86, ¶ 21, 739 N.W.2d 1, 8-9.

B. Defendant's December 24 and 26, 2012 Interviews Were Noncustodial.

Miranda requires certain warnings be given to a suspect who is about to undergo custodial interrogation by law enforcement officers.

See Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966). One is only in custody for *Miranda* purposes when a reasonable person shoes would have felt that he or she was not at liberty to terminate the interrogation and leave, or when there was a formal arrest or a restraint on freedom of movement to the degree associated with a formal arrest. *Thompson v. Keohane*, 516 U.S. 99, 112 (1995).

The two-part test for determining whether a person is in custody is (1) "what were the circumstances surrounding the interrogation; and (2) would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." *Wright*, 2009 S.D. 51, ¶ 19, 768 N.W.2d at 520. "[T]he Court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *Id.* Determination of whether Defendant was in custody depends on the objective circumstances, not on Defendant's subjective views. *Id.* at ¶ 20.

1. The circumstances surrounding the December 24, 2012, interview were not custodial.

"The first part of the test involves factual determinations as to 'the circumstances surrounding the interrogation.'" *State v. Walth*, 2011 S.D. 77, ¶ 13, 806 N.W.2d 623, 626 (quoting *State v. Bowker*, 2008 S.D. 61, ¶ 27, 754 N.W.2d 56, 65 (citations omitted)). The trial court held that under the totality of the circumstances, Defendant was not in

custody on December 24, 2012, and not entitled to the *Miranda* warnings. MH2 8.

On December 24, 2012, Carda asked, did not tell, Defendant to come to the police station to speak with him and Defendant accepted. MH1 52. Defendant voluntarily rode in the front seat of the police vehicle unrestrained, and Carda told Defendant before the interview that he would take Defendant wherever he wanted to go afterwards, except the hospital. MH1 52. The trial court held that "a reasonable person would conclude that a police officer would not offer to take him home if he intended to arrest him when he was done talking to him." MH2 9.

Carda was not in uniform, but his badge and gun were visible. MH1 89. He testified that he did not pat down Defendant, nor did anyone handcuff or restrain him. MH1 53. The trial court noted that even if Defendant had been patted down, it would not affect his decision about the custodial nature of the interview.

As is the normal policy for any civilian, Defendant was escorted to the interview room at the police station, which required keycard access. MH1 71. Defendant, Carda, and an interpreter sat in an interview room with the door closed, but not locked. MH1 88. Detective Carda read Defendant his *Miranda* rights as a cautionary measure prior to questioning, even though Defendant was not in custody. MH1 54. The

interview lasted approximately one hour. MH1 56. Defendant's freedom was not restricted in the interview room. MH2 10.

Salim Ahmed, who was born in Somalia and is a native Swahili speaker, interpreted for Defendant and Carda on December 24, 2012. MH1 24-25. He has interpreted for approximately 13 years and has spoken English his entire life. MH1 25. Ahmed testified that he asked Carda to elaborate for him to ensure he was interpreting some terminology accurately. MH1 26. Ahmed testified that he and Defendant had no difficulty conversing. MH1 27. Additionally, the video of the interview shows that Defendant was easily answering questions, and never indicated any difficulty with understanding Mr. Ahmed.

The second part of the test examines whether a reasonable person would have felt that he or she was not at liberty to terminate the interrogation and leave. Defendant testified that he felt intimidated during the interview and did not believe he was free to leave. MH1 106-07. This Court has consistently held that "[s]ubjective thoughts are not a proper basis for the determination of whether [a person] was in custody." *State v. Johnson*, 2015 S.D. 7, ¶ 16, 860 N.W.2d 235, 243 (quoting *Wright*, 2009 S.D. 51, ¶ 20, 768 N.W.2d at 520. "The determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogation officers or the person being questioned." *Id.*

The trial court rejected Defendant's testimony, finding Defendant's claim that he felt compelled to stay in the interview room was not credible. MH2 12. The court stated that the Defendant's "argument rests upon consideration of his personal circumstances," and if applied "would effectively convert the objective test into a subjective one." MH2 12.

The trial court properly held that under the totality of the circumstances Defendant was not deprived of his freedom to leave and that a reasonable person would have believed that he could terminate the interrogation and leave.

2. *The circumstances surrounding the December 26, 2012, interview were not custodial.*

The totality of the circumstances similarly reveal that Defendant was not in custody on December 26, 2012, so the *Miranda* warning was not required, but Defendant nevertheless received it. MH2 8.

The December 26 interview was prompted by Defendant's call the previous day to Carda. MH1 57. At this point, Defendant had become the only suspect in M.K.'s death. MH1 74.

Carda and Defendant were able to communicate in the parking lot of Defendant's apartment, even though Defendant's English was broken and strained. MH1 59. Defendant again agreed to go to the police department for an interview after being told that he would be given a ride back afterwards. MH1 60, 87. Defendant voluntarily rode in Carda's unmarked car to the residence where Mother was, and

waited in the unlocked vehicle while Carda was inside speaking with Mother. MH1 60, 74.

Defendant, Mother, and a pastor then drove to the police department in a separate vehicle. MH1 63. Carda testified he did not pat Defendant down. DB 20; MH1 89.

At the station, Defendant again waited alone in the same unlocked interview room while Carda interviewed Mother elsewhere, and waited for an interpreter. MH1 63-64.

Carda read Defendant his *Miranda* rights before starting the second interview and did not place Defendant under arrest. MH1 64-65. During the interview, Defendant was escorted to the restroom and back to the interview room twice, entering the restroom alone. MH1 88.

Defendant complains that Carda scolded Defendant for referring to M.K. as "the kid." DB 15. Detective Carda testified that Defendant had previously told Carda that he loved M.K., and then he was speaking about M.K. in the third person rather than by name. MH1 82. It was Carda's experience that "sometimes people try to distance themselves from others by using the third person." MH1 82.

Defendant argues that the interpreter spoke over Defendant during parts of the interview, that the interpreter did not interpret during some moments, and that Carda cut off Defendant or the interpreter, treating the interview like a "typical interrogation." DB 14-15. Carda testified that he intentionally interrupted Defendant to make

the interview less comfortable because he believed he was being untruthful. MH1 76. Carda testified that he believed Defendant understood the interpreter. MH1 76. The trial court noted that Defendant "did not capitulate to any questioning technique: [r]aised voice, interruption, anything." MH2 14.

Additionally, while Defendant argues he did not understand the interpreter, his responses to Detective Carda's questions were for the most part consistent and he never expressed any difficulty understanding the interpreter, Samira Carey, during the interview. MH1 86.

Carey, who is 65 years old, has worked as an interpreter for almost ten years, has lived in the United States for over seventeen years, and has spoken English since kindergarten, though her native language is Swahili. MH1 11. Carey testified she had no difficulty understanding Defendant, and he did not appear to have difficulty understanding her. MH1 13. Carey testified that there were no variations or differences in dialects between her and Defendant, and that she understands concepts, such as a person's right to refuse to speak to the police. MH1 18. When asked what "free" and "waive" meant during the suppression hearing, Carey provided appropriate explanations. MH1 20.

Defendant's witness, Langu Okall, testified that Carey's dialect was the closest of the three interpreters to Defendant's. MH1 128.[2]

The second part of the test determines whether a reasonable person would have felt that he or she was not at liberty to terminate the interrogation and leave. This Court has consistently held that "interviews with law enforcement will naturally have coercive pressures . . ." *Johnson*, 2015 S.D. 7, ¶ 15, 860 N.W.2d at 242. However, an interpreter's presence in the interview room may help ease the tension. MH2 11.

Although Detective Carda did not tell Defendant he was not under arrest, a reasonable person would have concluded he was not under arrest after being told he would be given a ride home after the interview, an interview initiated by Defendant. MH2 9-10. Additionally, as the trial court noted, the fact that Defendant was not arrested after the December 24, 2012, interview "strengthens the view that a reasonable person would have understood he was not under arrest when Detective Carda offered him a ride at the conclusion of the December 26, 2012 interview." MH2 9-10.

Escorting Defendant to the bathroom during the interview did not signify that he was in custody, because anyone without access to that area of the department would need an escort, even if they were not a

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[2] Okall testified that Carey interpreted for Defendant on December 27, 2012, but Carey interpreted for Defendant on December 26, 2012. MH1 10.

suspect. MH1 71. Nor does the fact the interview was at the police station make it custodial. *See Johnson*, 2015 S.D. 7. An interview at the police station allows it to be recorded for complete transparency. MH2 10.

Defendant argues that the December 24 and December 26, 2012, interviews were custodial because they were not held at a neutral place such as in *State v. Walth*, 2011 S.D. 77, 806 N.W.2d 623. DB 19. In *Walth*, the interview was held outside of a bar. *Id.* at ¶ 4. *Walth*, however, did not hold that all interviews at police stations are custodial, nor does it outlaw aggressive interrogation techniques.

These facts are more similar to *State v. Johnson*, 2015 S.D. 7, 860 N.W.2d 235. In that case, the investigator asked the defendant to come to the police station for an interview, and the defendant agreed. *Id.* at ¶ 3. The defendant was the only suspect. *Id.* In anticipation of the interview, the investigator obtained an interpreter because the defendant was deaf. *Id.* The defendant was interviewed in an interview room with the door shut but unlocked. *Id.* at ¶ 4. The investigator did not advise the defendant of his *Miranda* rights, but informed him that it was a noncustodial interview and that the defendant was not required to stay for questioning. *Id.* The investigator further told him he was not under arrest. *Id.* The interview lasted 2 hours and 45 minutes. *Id.* at ¶ 5. The investigator used various interrogation techniques, such as saying "I know it happened," "I need you to tell me the truth," and "I

know it's tough to talk about but I can see it all over your face," but did not threaten or deceive the defendant. *Id.* An hour into the interview, the defendant admitted to committing the crime. *Id.* at ¶ 6. The defendant received a ride back to his residence by the investigator upon conclusion of the interview. *Id.* at ¶ 21. This Court held under the totality of the circumstances, the defendant was not in custody and that a reasonable person would have believed he was able to terminate the interrogation and leave. *Id.*

Many aspects of Defendant's interview are similar to *Johnson.* While Detective Carda did not tell Defendant he was not under arrest, he told Defendant during both the December 24 and December 26, 2012, interviews that he would drive Defendant where he wanted to go after the interview.

The trial court properly held that under the totality of the circumstances Defendant was not in custody during the December 26, 2012, interview. MH2 8.

C. Defendant's Statements Were Voluntary.

Defendant asserts that under the totality of the circumstances, his statements to Detective Carda should be considered involuntary. "It is the State's burden to establish voluntariness by a preponderance of the evidence." *Id.* In order to make this determination, this Court considers multiple factors:

> (1) the conduct of law enforcement officials in creating pressure and (2) the suspect's capacity to resist that pressure. On the latter factor, we examine such concerns as the defendant's age; level of education and intelligence; the presence or absence of any advice to the defendant on constitutional rights; the length of detention; the repeated and prolonged nature of the questioning; the use of psychological pressure or physical punishment, such as deprivation of food or sleep, and the defendant's prior experience with law enforcement officers and the courts. Finally, [d]eception or misrepresentation by the officer receiving the statement may also be factors for the trial court to consider; however, the police may use some psychological tactics in interrogating a suspect.

Id. When reviewing the totality of the circumstances, it is clear that the interviews were not of a coercive nature and Defendant's will was not overborne. Defendant demonstrated a capacity to resist any and all pressure Detective Carda created by consistently denying he harmed M.K. throughout all three interviews.

Defendant argues he did not understand the *Miranda* warnings given on December 24 and December 27, 2012. DB 22.

1. December 24, 2012.

Defendant's statement that he did "not understood well" the *Miranda* warning in the December 24, 2012, interview is irrelevant because the interview was noncustodial. SR 121; Def. Ex. A. However, the record shows that Defendant's statements were voluntary. Shortly after Defendant was given *Miranda* warnings, he told Carda he did not understand well. After more discussion, Defendant replied that he understood his rights and that he wanted to talk. SR 122; Def. Ex. A. "In determining whether a particular warning adequately conveys [these

right], a reviewing court must look to the warnings as a whole rather than focusing on one sentence in isolation." *State v. Diaz*, 2014 S.D. 27, ¶ 30, 847 N.W.2d 144, 156 (quoting *State v. Rhines*, 1996 S.D. 55, ¶ 28, 548 N.W.2d 415, 428).

The court was correct in noting that while Defendant testified during the suppression hearing that he did not understand, "the testimony was self-serving and it could be rejected on that basis alone." MH2 17. Furthermore, Defendant testified that he did not speak any English, which was clearly contradicted by the record. MH2 17. Although Defendant testified that he could not understand the interpreter, his answers were rational, and he never expressed difficulty understanding the interpreter at the time of the interview. Def. Ex. A.

Importantly, Defendant never succumbed to any pressure by Carda and denied harming M.K. throughout the interview. While Defendant does not have much education, is not familiar with the legal system, and spoke broken English, the totality of the circumstances established that his statements were voluntary.

2. *December 26, 2012.*

Although the December 26, 2012, interview was noncustodial, Carda again read Defendant his *Miranda* rights. MH1 67. He was concerned that Defendant might feel he was in custody and he wanted to verify Defendant's statements were voluntary. MH1 68. Carda asked Defendant whether he could read English, to which Defendant

responded "a little bit." SR 126; Def. Ex. B. Carda held out the *Miranda* card for Defendant to read along, which Defendant appeared to do. Def. Ex. B.

Defendant was interviewed for approximately one hour. Defendant's expert witness, Okall, testified that Carey most closely interpreted to Defendant's understanding. The trial court found that this *Miranda* translation was a "[f]aithful translation of his *Miranda* rights." MH2 16. The trial court held that while Carey faced difficulties in the translation in that she used the English word for "prove" and "evidence," her statement to [Defendant] still communicated that anything he said could be used against him. MH2 16. After an effective interpretation of the *Miranda* rights, Defendant stated he understood:

> Carda: Do you understand these rights?
> Carey: Do you understand these rights?
> Defendant: I understand them.
> Carda: do you wish to waive these rights and talk to me at this time?
> Carey: Do you wish to waive these rights and talk to me at this time?
> Defendant: Yes.

SR 127; Def. Ex. B.

Under the totality of the circumstances, the trial court was correct to hold that defendant's statements were voluntary during the December 26, 2012, noncustodial interview.

3. <u>December 27, 2012.</u>

Carda arrested Defendant on December 27, 2012, around noon. MH1 65. Defendant was handcuffed and brought to the police

department for an interrogation, approximately sixteen hours after the December 26, 2012 interview. MH1 66. Carda again requested a different interpreter for this interview so that he could be assured Defendant understood his rights and avoid a conflict if one of the three interpreters was deemed unqualified. MH1 67. Carda again read Defendant his *Miranda* rights. JT5 37.

Mahamed Nuur interpreted during the interview and testified that he and Defendant understood each other. MH1 37. The trial court held that the December 27 advisement was consistent with the December 26 advisement. MH2 20.

Even if Defendant's third *Miranda* advisement was deficient in some manner, the trial court noted that because the interviews were sixteen hours apart, Defendant's December 26, 2012, *Miranda* waiver had not grown stale. MH2 18. "[O]nce the mandate of *Miranda* is complied with at the threshold of the interrogation by law enforcement officers, the warnings need not be repeated at the beginning of each successive interview." *State v. Frazier*, 2001 S.D. 19, ¶ 17, 622 N.W.2d 246, 254 (quoting *State v. Davis*, 268 Kan. 661, 998 P.2d 1127, 1138-39 (2000)). "A set of warnings must be repeated 'only in those situations where a substantial probability exists that warnings given at a previous interrogation are so stale and remote that a substantial possibility exists that the suspect was unaware of his or her constitutional rights at the time subsequent interrogation occurs.'" *Id.*

(quoting *People v. Baltimore*, 292 Ill.App.3d 159, 685 N.E.2d 627, 630, 226 Ill.Dec. 372 (1997)). This Court looks to the totality of the circumstances to determine if the warning has grown stale. *Id.* Factors include:

> The length of time between the warnings and the challenged interrogation, whether the interrogation was conducted at the same place where the warnings were given, whether the officer who gave the warnings also conducted the questioning, and whether the statements obtained are materially different from other statements that may have been made at the time of the warnings.

Id. "Miranda warnings will not be considered stale when there has been a "clear continuity of interrogation." *Id.*

Because Defendant effectively waived his *Miranda* rights sixteen hours before his December 27, 2012 advisement and waiver, any claimed deficiency of this advisement is without merit. The December 27, 2012, interrogation was at the police department in the same interview room as the two previous interviews. Detective Carda gave Defendant the warnings before each interview. Despite small variances in interpretation between the December 26 and December 27, 2012 interpretations, the advisements were similar. Lastly, the December 27, 2012, statements from Defendant were consistent with the previous two interviews as he denied harming M.K. Therefore, under the totality of the circumstances, Defendant's December 27, 2012, statements were voluntary. He was advised of his rights for the third time in four days. Moreover, there was a "clear continuity of

interrogation," and the December 26, 2012, *Miranda* warning had not grown stale when Defendant agreed to talk and waive his rights.

Defendant cites *People v. Redgebol*, 184 P.3d 86 (Colo. 2008) to support his argument that the three interpreters did not effectively convey to Defendant his *Miranda* rights because they were unfamiliar with the legal system. DB 22-23. However, the trial court found that Carey provided a satisfactory explanation of the definition of a waiver and the definition of the term "free." MH1 18-20. Carey testified she has interpreted for police and at court in the past, understands the concept that a person can refuse to speak to the police, described the word "free" to mean "to be free," and describes "waive" to mean "to waive your right, to say 'Okay. I agree.'" She further explained, "Legally I know waive means to say, 'Okay . . . I do not object to . . . my right.' 'I give up my rights,' more or less." MH1 20. Carda also explained that he spoke with Carey prior to the interview and felt comfortable with her English. MH1 83.

Defendant further argues that he did not make a voluntary, knowing, and intelligent waiver of his rights because he felt intimidated by Carda. He claims that he referred to Carda as "Afwande" which is a title of respect to a police officer, due to that intimidation. DB23; MH1 110. Defendant argues that he was intimidated when Carda stood up and raised his voice, became upset when Defendant asked a question, and that he believed he would be beaten if he did not talk with Carda.

DB 23; MH1 109. This Court has consistently recognized that "interviews with law enforcement will naturally have coercive pressures." *Johnson*, 2015 S.D. 7, ¶ 15, 860 N.W.2d at 242. While Carda may have used techniques that seemed coercive to Defendant, Defendant has not shown that his will was overcome because he continued to deny he harmed M.K.

Finally, Defendant argues that his statements at the three interviews were "highly prejudicial" because they "formed the crux of the investigation that would eventually lead to his arrest." DB 24. This argument cannot stand because Defendant consistently claimed he did not harm M.K. Defendant told the police officers that responded to his 911 call a similar story that he told Carda during all three interviews. Because Defendant did not admit guilt during any of the interviews, there is no evidence that Defendant's statements, which contained no admissions against his own interests, were highly prejudicial. Moreover, Defendant's statements alone did not cause the investigation that led to his arrest. The circumstances in which M.K. was found and the severity of his injuries compelled law enforcement to investigate Defendant. Defendant also testified in front of the jury claiming he did not harm M.K., similar to the statement he made in the three interviws. JT7 56-59.

The State established by a preponderance of the evidence and the trial court properly determined that, under the totality of the

circumstances, that each of Defendant's statements were voluntary, and that he knowingly, intelligently, and voluntarily waived his *Miranda* rights on three separate occasions.

II

THE EVIDENCE WAS SUFFICIENT TO CONVICT DEFENDANT OF VOLUNTARY MANSLAUGHTER.

A. *Standard of Review.*

A challenge to the sufficiency of evidence is reviewed *de novo*. *State v. Brende*, 2013 S.D. 56, ¶ 21, 835 N.W.2d 131, 140 (citing *State v. Plenty Horse*, 2007 S.D. 114, ¶ 5, 741 N.W.2d 763, 764). This, however, does not mean this Court must "ask itself whether it believes that the evidence at trial established guilt beyond a reasonable doubt." *Plenty Horse*, 2007 S.D. 114, ¶ 5, 741 N.W.2d at 765 (quoting *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). Rather, "the question is whether 'there is evidence in the record, which, if believed by the fact finder, is sufficient to sustain a finding of guilt beyond a reasonable doubt.'" *State v. Beck*, 2010 S.D. 52, ¶ 7, 785 N.W.2d 288, 292 (quoting *State v. Carter*, 2009 S.D. 65, ¶ 44, 771 N.W.2d 329, 342). When analyzing the sufficiency of the evidence, this Court "will not usurp the jury's function in resolving conflicts in the evidence, weighing credibility, and sorting out the truth." *State v. Swan*, 2008 S.D. 58, ¶ 9, 753 N.W.2d 418, 420 (quoting *State v. Pugh*, 2002 S.D. 16, ¶ 9, 640 N.W.2d 79, 82). "If the evidence, including circumstantial evidence and

reasonable inferences drawn therefrom, sustain[s] a reasonable theory of guilt, a guilty verdict will not be set aside." *Beck*, 2010 S.D. 52, ¶ 17, 785 N.W.2d at 292 (citing *State v. Shaw*, 2005 S.D. 105, ¶ 19, 705 N.W.2d 620, 626).

B. The Evidence is Sufficient to Uphold Defendant's Conviction for First Degree Manslaughter.

The jury found Defendant guilty of four counts of First Degree Manslaughter. ST 2. Homicide is manslaughter in the first degree if it is perpetrated without any design to effect death while engaged in the commission of any felony other than that in SDCL 22-16-4(2). SDCL 22-16-15(1).

Defendant argues there is insufficient evidence to convict him on all four counts of first degree manslaughter. The court imposed judgment and sentence on only Count 3, Manslaughter in the First Degree, while engaging in abuse or cruelty to a minor (SDCL 26-10-1). ST 30. Defendant discusses the sufficiency of the evidence for each manslaughter Count. DB 24. Because the court imposed judgment and sentence only on Count 3, the State will examine the sufficiency of the evidence to support Count 3 in detail.

1. The evidence was sufficient for the jury to find Defendant guilty of Count 3: manslaughter in the first degree while engaging in abuse of or cruelty to a minor.

"[A]ny person who abuses, exposes, tortures, torments, or cruelly punishes a minor in a manner which does not constitute aggravated assault" is guilty of felony abuse or cruelty to a minor. SDCL 26-10-1.

The State brought forth expert witness testimony for the jury to find beyond a reasonable doubt that Defendant committed first degree manslaughter by abusing, exposing, torturing, tormenting or cruelly punishing M.K. Dr. Snell provided a detailed explanation of all the injuries inflicted upon M.K. There are at least three, possibly five points of impact to M.K.'s head, indicating that his head was struck three to five times: M.K.'s left eye was swollen and bruised, indicating something struck his eye. JT5 91. The three abrasions above M.K.'s right ear that extends three inches in length indicates a second impact site. JT5 87. Dr. Snell explained that there was a subgaleal hemorrhage beneath the scalp, indicating M.K. was hit above his right ear. JT5 93. The third point of impact was the large three and one fourth inch bruise extending across the back of M.K.'s head. JT5 94. The fourth possible point of impact was a hemorrhage in M.K.'s forehead. JT5 102. The fifth point of impact is the large depressed skull fracture behind M.K.'s left ear. JT5 103. This fracture was eight centimeters in length, crossed three bones and two sets of sutures. JT5 105. Dr. Snell explained that this injury could have occurred by striking the head with a fist, a baseball bat, or that M.K.'s head struck something with an edge. JT5 106; JT7 104.

Dr. Snell's conclusion is that the cause of death to M.K. was "blunt force injury to the head consistent with an assault." JT5 127. Dr. Hafzalah also determined the cause of M.K.'s death to be

"significant non-accidental trauma to the head that caused the brain swelling and with it the anoxic ischemic injury as well." JT6 28. The facts listed above detail the three to five possible impacts on M.K. The facts set forth above support the jury's guilty verdict on all four Counts. The record and the testimony of Drs. Hafzalah and Snell establish Defendant's guilt beyond a reasonable doubt.

Defendant argues that the State never presented any theory as to how the child was injured. The State provided ample expert witness testimony of felony abuse from the doctors that treated M.K. and performed his autopsy. The State also presented evidence about Defendant's odd behavior, and his inconsistent stories. Furthermore, a nurse testified that the child appeared to be fine and not ill prior to the tragic 911 call made by Defendant, the only adult present and only caregiver of M.K. at the time of his injuries.

Defendant cites *State v. Well*, 2000 S.D. 156, 620 N.W.2d 192, to argue that the jury was never asked to differentiate between the manslaughter counts. DB 28. In *Well*, 2000 S.D. 156, ¶ 1, 620 N.W.2d at193, the trial court denied the motion to instruct the jury on alternative counts and the defendant was convicted of the mutually exclusive crimes of aggravated assault and abuse or cruelty to a minor. This Court vacated the conviction for aggravated assault and remanded with instructions to only enter sentence on abuse or cruelty to a minor conviction. *Id.* at ¶ 31.

Here, over no objection from defense counsel, the trial court instructed the jury on alternative counts. *See* Jury Instruction 33; SR 394. In addition the trial court instructed the jury on the elements of each charged offense. Jury Instructions 27-31; SR 388-92. Based on those instructions, the jury found sufficient evidence to convict Defendant on each manslaughter count. Consistent with this Court's direction in *Well*, the trial court entered judgment and sentence on only the abuse or cruelty manslaughter count.

The evidence is sufficient to sustain Defendant's conviction. Viewing the evidence in the light most favorable to the verdict, it is apparent "any rational trier of fact could have found the essential elements of [first degree manslaughter] beyond a reasonable doubt." *See Brende*, 2013 S.D. 56, ¶ 21, 835 N.W.2d at 140.

2. *There was sufficient evidence for the jury to find Defendant guilty on Counts 4-6 Manslaughter, and the trial court properly imposed judgment and sentence only on Count 3.*

In *State v. Jensen*, 1998 S.D. 52, 579 N.W.2d 613, the defendant was charged with three counts of first degree murder for a single death. *Id.* at ¶ 66, 579 N.W.2d at 625. Jensen asserted the State should be required to charge the murder counts in the alternative. *Id.* The State countered that mandatory alternative counts would be unfair to the prosecution because if Jensen's murder conviction was reversed on appeal, "the State would be precluded from retrying the defendant on the 'alternative' murder counts because the court would have mandated

'not guilty' verdicts on these charges." *Id.* The trial court did not require the State to charge the three counts in the alternative. *Id.* at ¶ 67, 579 N.W.2d at 625. Instead, when the jury returned a guilty verdict on all three murder counts, the trial court issued only one judgment of conviction for murder and imposed one sentence. *Id.* The Court held that the trial court properly entered judgment of conviction and sentence on one conviction. *Id.*

The Court again found it proper to enter a judgment of conviction on one count of first degree murder in *State v. Owens*, 2002 S.D. 42, 643 N.W.2d 735. The jury found Owens guilty of three counts of first degree murder for a single death. *Id.* at ¶ 14, 643 N.W.2d at 743. The trial court entered one judgment of conviction and sentenced Owens to one sentence of life imprisonment. *Id.* The Court found the conviction and sentence proper. *Id.*

Most recently, in *State v. Wright*, 2009 S.D. 51, 768 N.W.2d 512, the defendant was convicted of both kidnapping and felony murder arising from the same set of facts. On appeal, Wright claimed the double jeopardy clause prohibited these multiple convictions. *Id.* at ¶ 67, 768 N.W.2d at 533. The Court declined to consider this argument because Wright failed to preserve the issue for appeal, but did note that Wright did not receive multiple punishments because the trial court did not impose a sentence for the felony murder conviction. *Id.*

The evidence is sufficient to sustain Defendant's guilt on all four counts of manslaughter. The trial court properly imposed judgment and sentence on only one of those counts. This case is replete with evidence that, if believed by the fact finder, was sufficient to sustain a finding of guilt beyond a reasonable doubt on all counts. *Beck*, 2010 S.D. 52, ¶ 7, 785 N.W.2d at 292 (quoting *Carter*, 2009 S.D. 65, ¶ 44, 771 N.W.2d at 342).

III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY SEQUESTERING DEFENDANT'S BIOMECHANICAL ENGINEER DURING DEFENDANT'S EXPERT WITNESS REGARDING MEDICAL TESTIMONY.

A. Standard of Review.

"Whether witnesses should be sequestered is a matter that is within the sound discretion of the trial court." *State v. Johnson*, 254 N.W.2d 114, 117 (S.D. 1977); *State v. Traversie*, 387 N.W.2d 2, 6 (S.D. 1986) (citing *Lewis v. Owen*, 395 F.2d 537, 541 (9th Cir. 1968)).

B. Analysis.

SDCL 19-19-615(3)[3] states

> At the request of a party, witnesses testifying at the trial, hearing, or deposition shall be excluded so that they cannot hear the testimony of other witnesses, and the court may make such an order of its own motion. This section does not authorize exclusion of:
> (3) A person whose presence is shown by a party to be essential to the presentation of his cause.

[3] At the time of trial, this statute was SDCL 19-14-29.

"The purpose of sequestering witnesses, of course, is to avoid the coloring of a witnesses' testimony by that which the witness has heard from the witnesses that have preceded him." *Johnson*, 254 N.W.2d at 117. "[I]f an expert witness is to testify in an expert capacity only and not to the facts of the case, *Morvant v. Construction Aggregates Corp,* 570 F.2d 626, 629 (6th Cir. 1978), *cert. dismissed,* 439 U.S. 801, 99 S.Ct. 44, 58 L.Ed.2d 94 (1978), or if the witness is to base his expert opinion on facts or data presented at trial, [SDCL 19-19-703], the expert should be exempt from sequestration." *Traversie*, 387 N.W.2d at 7. "There is no absolute rule of law which requires the exemption of expert witnesses from the rule or order excluding witnesses from the courtroom." *Traversie*, 387 N.W.2d at 9 (Hertz, concurring specially) (quoting 23 C.J.S. *Criminal Law* § 1011 (1961)). "While it is usual to . . . except expert witnesses from the operation of the [sequestration] rule, a refusal to do so does not necessarily constitute error." *Id.* (Hertz, concurring specially) (quoting 75 Am.Jur.2d *Trial* § 62 (1974).

Defendant argues that the trial court abused its discretion in sequestering Defendant's expert witness, Dr. Van Ee, a biomechanical engineer, during the medical testimony of Defendant's expert witness, Dr. Ophoven. DB 35. Immediately before Dr. Ophoven's testimony, Defendant asked whether the sequestration order applied to Dr. Van Ee. JT6 58. The court had only excepted medical testimony from the sequestration order. JT6 58. The State moved to have Dr. Van Ee

sequestered, since his expertise was non-medical. JT6 58. Defendant requested Dr. Van Ee not be sequestered because he was testifying to the relation of injury to the degree of force, similar to Dr. Snell. JT6 59. The trial court denied Defendant's request, holding there was an "absence of a close connection to that medical testimony or sufficient showing that [Dr. Van Ee's] opinions would be . . . influenced by medical testimony." JT6 59.

Defendant's expert witnesses, Drs. Ophoven and Van Ee, consulted before trial, and Dr. Van Ee relied on Dr. Ophoven's opinion that M.K.'s injuries were from a one-hit impact. JT6 126. Additionally, Dr. Van Ee had access to and reviewed all evidence, had analyzed the fall scenario, and had conversed with Defendant. JT6 126. Dr. Van Ee's presence at trial during Dr. Ophoven's testimony was not necessary "to ascertain facts or data upon which to base his expert opinion." *Traversie*, 387 N.W.2d at 7. *See* SDCL 19-19-703.

In *Traversie,* the State and the defendant brought fingerprint experts to testify. *Traversie,* 387 N.W.2d at 6. The trial court denied the defendant's motion to except his fingerprint witness from the sequestration order while the State's fingerprint expert testified. *Id.* The defendant appealed, arguing "it was vital that his fingerprint expert be able to know the findings, opinions, and conclusions of the State's fingerprint expert so that he might assist defense counsel in cross-examination and presentation of his own testimony." *Id.* at 7. This

Court held, however, that both parties' fingerprint experts had access to the physical evidence and the two experts had conversed about their conclusions before trial commenced. *Id.* Therefore, the defendant's expert did not need to be present during the State's expert's testimony to hear or learn additional facts or data on which to base his opinion. *Id.*

Defendant was not prejudiced by Dr. Van Ee's sequestration order. "[P]rejudice is established where the witness' testimony has changed or been influenced by what he heard from other witnesses." *State v. Dixon*, 419 N.W.2d 699 (S.D. 1988)(quoting *State v. Swillie*, 218 Neb. 551, 553, 357 N.W.2d 212, 215 (1984)). Even though Defendant argues Dr. Van Ee's testimony was "vital to [his] defense" (DB 38), Defendant has not shown that Dr. Van Ee's testimony would have been influenced or changed by listening to Dr. Ophoven's testimony in court, because Drs. Ophoven and Van Ee had conferred prior to trial. JT6 126.

Defendant further argues that the trial court abused its discretion when not sequestering Dr. Snell and allowing him to be present in the courtroom during Dr. Ophoven's and Dr. Van Ee's testimony. DB 36; *see* JT6 106-07. The trial court denied Defendant's motion to sequester Dr. Snell, holding that "[h]is testimony did implicate . . . questions of force and the testimony viewed as a whole was very clear; that in his opinion, the circumstances that have been suggested as the basis for

the injury here were not consistent with his medical findings." JT6 107. Further, the literature that Dr. Snell had used in his testimony was referenced in Dr. Van Ee's power point. JT6 107. The trial court did not abuse its discretion in excepting Dr. Snell from the sequestration order.[4]

Defendant argues the State improperly moved for Van Ee to be sequestered immediately before the witness was to testify. DB 39. However, there was already a sequestration order in place excepting medical testimony. Because Dr. Van Ee's testimony was non-medical, the court denied Defendant's request allowing Dr. Van Ee to be present in court. The trial court noted that he may have allowed Dr. Van Ee to hear Dr. Snell's testimony. JT6 60. Because of Defendant's failure before or at trial to request Dr. Van Ee's presence during Dr. Snell's testimony, that argument is waived. *See State v. Corey*, 2001 S.D. 53, ¶ 11, 624 N.W.2d 841, 844. Moreover, plain error does not apply because Defendant has not shown that the error was prejudicial. *State v. Nelson*, 1998 S.D. 124, ¶ 7, 587 N.W.2d 439, 442.

Defendant failed to show that Dr. Van Ee's presence during Dr. Ophoven's testimony was essential to his case per SDCL 19-19-

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[4] Defendant also moved for Dr. Free to be sequestered during Dr. Van Ee's testimony, and the trial court granted that motion. JT6 106. Dr. Free was on the State's witness list as a possible rebuttal witness. Dr. Free is a physician for Child's Voice and the State explained that her testimony would not have relied on the principles of physics. Dr. Free did not testify.

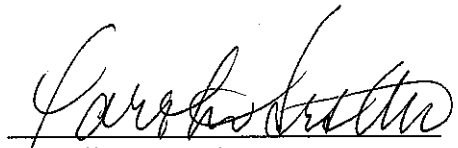
615(3). Defendant did not provide a compelling reason that Dr. Van Ee should have been exempt from the sequestration order during Dr. Ophoven's testimony. Therefore, Defendant failed to establish that his rights were prejudiced and the trial court did not abuse its discretion.

CONCLUSION

The State respectfully requests that Defendant's conviction and sentence be affirmed in all respects.

Respectfully submitted,

MARTY J. JACKLEY
ATTORNEY GENERAL



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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12 point type. Appellee's Brief contains 9,983 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2010.

Dated this 18th day of September 2015.

Caroline Srstka
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 18th day of September 2015, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Manegabe Ally* was served via electronic mail upon Traci Smith at tsmith@minnehahacounty.org.

Caroline Srstka
Assistant Attorney General

27202

ORIGINAL

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27202

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

MANEGABE CHEBEA ALLY,

Defendant and Appellant.

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED
OCT - 5 2015
Clerk

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

THE HONORABLE MARK E. SALTER
Circuit Court Judge

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Notice of Appeal filed September 9, 2014

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TABLE OF AUTHORITIES

IN THE SUPREME CCOURT

OF THE

STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v. No. 27202

MANEGABE CHEBEA ALLY,

Defendant and Appellant.

Defendant and Appellant, Manegabe Chebea Ally, relies upon the Jurisdictional Statement, Statement of the Case, and Statement of Facts presented in the Appellant's Brief previously filed with the Court.

PRELIMINARY STATEMENT

All references to the jury trial held before the Honorable Circuit Court Judge Mark Salter will be indicated by "JT" followed by the Volume Number and Page Number. All references to Appellee's Brief will be indicated by "AB" following by the page number.

LEGAL ISSUES

1. WHETHER ALLY WAS UNCONSTITUTIONALLY DENIED HIS RIGHT TO COUNSEL DURING QUESTIONING:

(A) Was Mr. Ally "in custody" for purposes of Miranda?
(B) Were Mr. Ally's statements involuntary?

The trial court found that Mr. Ally was not "in custody" for purposes of Miranda and his right to the presence of an attorney was not violated. The trial court further found Mr. Ally's statements were voluntary.

Relevant Cases: *Edwards v. Arizona*, 452 U.S. 973, 101 S.Ct. 3128, 68 L.Ed2d 378 (1981); State *v. Hoadley*, 2002 SD 109, 651 N.W.2d 249; State *v. Wright*, 2009, S.D. 51, 768 N.W.2d 512

Relevant Statutes: U.S. Const. Amend. 5 & 14; S.D. Const. Art. VI, Section 9.

2. WHETHER THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE JURY VERDICT FINDING ALLY GUILTY OF FIRST DEGREE MANSLAUGHTER.

The trial court held there was sufficient evidence.

Relevant Cases: *State v. Well*, 2000 SD 156, 620 N.W.2d; *State v. Wright*, 2009, S.D. 51, 768 N.W.2d 512

Relevant Statutes: S.D.C.L 22-19-1.

3. WHETHER THE SEQUESTERING OF THE DEFENDANT'S BIOMECHANICAL ENGINEER FROM THE COURTROOM DURING THE "MEDICAL TESTIMONY" RESULTED IN A VIOLATION OF HIS RIGHT TO A FAIR TRIAL.

Relevant Cases: *State v. Traversie*, 387 N.W.2d 2 (SD 1986)

Relevant Statutes: U.S. Const. Amend. 5 & 14; S.D. Const. Art. VI, Section 7; S.D.C.L. 19-15-3

ARGUMENT

1. Whether Ally was unconstitutionally denied his right to counsel during questioning.

Appellee provides that the advising provided by each of the interpreters was appropriate and sufficient, and that Mr. Ally did not provide sufficient indication that he did not understand. However, the record is replete with instances where Mr. Ally told Detective Carda that he did not understand. Appellee has made no references to any of the dated transcripts for each interrogation which are contained in the record. Nor has Appellee made any assertions that any of the translations are inaccurate.

Second, while the educational background of Samira Carey was significant, and Appellee aptly notes that *she* was able to understand Detective Carda, this is insufficient to infer that Mr. Ally understood given that she was not permitted to fully translate the conversation. (MH 1 p. 75) Appellee does not dispute that Mr. Carda was purposely, and intentionally, cutting her off and preventing her from being able to fully and accurately translate to Mr. Ally. (MH 1 p.75) Detective Carda testified that he purposely interrupted the interpreter in an attempt to affect the interview process. (MH 1 p. 75) The interpreter was also prohibited from conversing with Mr. Ally or expanding on any words to ensure that he did understand the conversation. (MH 1 p. 74) Interpreting is not the same as translating. As should be apparent from review of all the transcripts from all the hearings and the trial, interpreters need to have the ability to stop the conversation, clarify words, and at times,

expand the conversation to properly convey meanings. Detective Carda's tactic of purposely cutting off the interpreter to make Mr. Ally feel uncomfortable was improper. His role at that point in the investigation should have been to gather information.

2. Whether there was sufficient evidence to support the jury verdict finding Ally guilty of first degree manslaughter.

Appellee asserts that "how" the child was injured was adequately explained via the state's witnesses, including Dr. Snell who performed the autopsy, and the Defendant's behavior, as the only adult present and his "inconsistent" stories. (AB p. 36) This argument belies the argument made in issue one in which the state argues that the Defendant was not prejudiced by his statements because he never changed his story. The state's argument also negates the concern presented in the third issue which is the fact that the state was given a tactical advantage due to the Defendant's bio-medical engineer who was actually more qualified to testify on issues related to force and it's relation to injury on the human body than Dr. Snell was sequestered from the courtroom during the medical testimony of the other experts.

As stated in the initial brief, the facts presented by the State were wholly insufficient to support any theory that Ally "tortured, tormented, or cruelly punished M.K." SDCL 26-10-1. Dr. Snell admitted that it would be dangerous for anyone to make any presumption as to what caused the injury just by looking at

a fracture. (JT7 p. 33) He further testified that without any other data, he could not say what caused M.K.'s injury. (JT7 p. 33)

Finally, Appellee notes that the Trial Court only imposed one sentence as to Count Three, Manslaughter in the First Degree, while engaging in abuse or cruelty to a minor, (SDCL 26-10-1) (AB p. 37) Appellee acknowledges that the jury was instructed on alternative counts. (AB 37) Appellee has waived all argument as the sufficiency of the evidence on Counts 4, 5, and 6 and has chosen not to make any argument that each of the convictions were supported by separate underlying facts. Instead Appellee simply states that the convictions for each other manslaughter conviction should still stand because they were charged in the alternative, and it would be unfair for the state to retry the case if the convictions were reversed on appeal. (AB p. 37) Here, Ally's charges were charged in the alternative. Jury Instructions 27-31; SR 388-92.

In this case, there was one single death. Appellee's reliance on *State v Wright* for the argument that because there was only one sentence imposed, there is no defect in having multiple convictions for one single death is misplaced. *State v. Wright*, 2009 SD 51, 768 NW2d 512. In *Wright* the Court declined to consider a double jeopardy argument because it was not preserved for appeal. Id. at ¶67, 768 N.W.2d at 533. Homicide statutes do not allow for multiple convictions or multiple sentences for a single death. *Wilcox v. Leapley*, 488 N.W.2d 654, 655-57 (S.D. 1992); *State v. White*, 1996 S.D. 67 ¶27, 549 N.W.2d 676.

In *Wilcox*, the Court "h[e]ld that double homicide convictions for a single death are improper." *Id.* at 657. In both *Wilcox* and *White* the Court remanded for resentencing, and the remedy was to impose a single sentence but to leave the multiple verdicts and convictions intact. Justice Sabers wrote a vigorous dissent to this in *White* (at ¶¶32-35), arguing that double jeopardy concerns could only be satisfied by vacating the second conviction itself. In *Well*, the Court adopted the view that "[s]imply choosing to sentence [the defendant] to one crime did not remedy [the defect]. To hold otherwise would impose two felony convictions for a single crime." *State v. Well*, 2000 SD 156, ¶24, 620 N.W.2d 192.

Appellee has failed to make a case that each count is supported by separate underlying facts. Without a separate factual record to support each conviction, regardless of whether multiple sentences are imposed, the jury verdicts finding Ally guilty of first degree manslaughter cannot stand. See, *State v. Well*, 2000 SD ¶¶20-25.

3. Whether the sequestering of the Defendant's biomechanical engineer from the courtroom during the "medical testimony" resulted in a violation of his right to a fair trial.

Appellee opines that the defendant should have made a pre-trial motion requesting that his expert be permitted to remain in the courtroom during the state's case, and that by failing to do so, has waived this issue. (AB, p. 43)

Appellee however, does concede that expert witnesses are typically exempt from sequestration orders. SDCL 19-19-615 allows for exclusion of witnesses from the courtroom at the request of a party so that they cannot hear the testimony of the other witnesses. The section excludes exclusion of any person who has been shown by a party "to be essential to the presentation of his cause." SDCL 19-19-615(3).

Typically sequestration is ordered to avoid the "coloring" witness's statement. Fact witnesses are different than expert witnesses. As previously argued and restated by Appellee, there was no showing by the State, of any concern that Dr. Van Ee's testimony would be improperly colored by the testimony of the other experts. It was Dr. Ophoven, who recommended that the defense team consult with a biomechanical engineer. Dr. Van Ee relied on both Dr. Snell and Dr. Ophoven's records in preparation for trial, and he too was a qualified medical expert. There had been a sufficient showing that that the facts surrounding the fall, and the nature of the injuries was a significant point of contention for the trial.

At the first motion hearing, on February 13, 2014, the state stated, that it intended to call Dr. Snell, who would center his findings on the injuries revealed in the autopsy, and his opinion that the injuries are inconsistent with a short fall or a simple fall. (MH 2/13/14 p. 17) It was stated at that time that a Daubert hearing would be conducted before the experts could testify as to the validity of

the diagnosis of "abusive head trauma." (MH 2/13/14 p. 17) At that time, the court indicated that it was less concerned as to the "qualifications" of the experts, and more emphasis was going to be placed on the fact that any opinion given to the jury must be "reliable." (MH 2/13/14 p. 17) At no point and time during the pre-trial hearing, or any subsequent pretrial hearing, did the state make any mention of any concern about the lack of qualifications of any defense expert, the reliability of Dr. Van Ee's testimony regarding short falls, or make a request that the defenses experts be sequestered from the courtroom.

Given his qualifications, the timing of the request, and the previous ruling with respect to sequestration of non-factual witnesses and experts, the burden should have been on the State to prove that his testimony would have been improperly influenced prior to the trial court's ruling.

The Defense was prejudiced due to the lack of qualified expert assistance to assist counsel in listening to the questions and comments of the state in cross examination of opposing counsel of the other expert witnesses. Experts often play crucial roles as members of a defense team in serious cases where DNA, forensic pathology, and ballistics are significant points of contention in the trial. They assist in not only educating the jury on the day of trial, but of assisting defense counsel on the best course of action ensuring the jury is understanding what happened. Listening to other experts so as to advise counsel on scientific and technical matters that may need further developing is a crucial

responsibility, particularly when it is an area of medical science that is beyond the lawyer's area of personal expertise. They can aid lawyers in the development of questions for cross examination and preparing demonstrative evidence for the jury. They can provide counsel with assistance when opposing experts are providing the jury with inaccurate information that is inconsistent with the evidence.

The Defense was unfairly prejudiced due to our inability to consult with our biomechanical engineer about the testimony of the other medical experts regarding a crucial area during the trial, of which we were expecting him to base his opinion. Dr. Van Ee's credibility was significantly hindered because he was precluded hearing the testimony of the other expert witnesses. Dr. Snell's testimony was likely clearer, and he was able to rebut the testimony of both of the defense experts without fear that Dr. Van Ee would be able to link his inconsistencies as easily as he would be if he were present for all the testimony. Dr. Van Ee had a PhD in Biomedical Engineering from Duke University. (JT 6 p. 113) The state raised no concerns as to his qualifications prior to trial. Orthopedic biomechanics is related to understanding the effects of orthopedic conditions and procedures on the human body. (JT 6 p. 113) The focus of his training was not limited to treating patients, but also recognizing the best way to prevent injuries from occurring in the first place. (JT 6 p. 114) If both defense experts had been permitted to have been in the courtroom throughout the entire

trial, particularly since Dr. Snell had no biomechanical engineer training whatsoever, the jury would have had a better understanding of why the possibility of an accidental fall could not be ruled out as a possible cause of M.K.'s tragic death.

CONCLUSION

For the aforementioned reasons, and authorities cited, the Defendant respectfully requests this Court vacate and set aside the Judgment and Sentence as to Counts I through IV of the verdicts of Guilty due to each of the errors that resulted in a denial of Appellant's right to a fair trial.

REQUEST FOR ORAL ARGUMENT

Attorney for Appellant, Manegabe Ally, respectfully requests thirty (30) minutes for oral argument.

Respectfully submitted this 5th day of October, 2015.

/s/ Traci Smith

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Brief is within the limitation provided in SDCL 15-26A-66(b) using Book Antiqua typeface in 12 point type. Appellant's Brief contains 1,987 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2013.

Dated this 5th day of October, 2015.

/s/ Traci Smith

Traci Smith
Minnehaha County Public Defender

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of Appellant's Reply Brief in the matter of *State of South Dakota v. Manegabe Chebea Ally* were served electronically upon:

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Dated this 5th day of October, 2015.

/s/ Traci Smith
Traci Smith
Minnehaha County Public Defender

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

MANEGABE ALLY,	*	
	*	
Petitioner and Appellee,	*	
	*	Case #29790
v.	*	
	*	
DARREN YOUNG, Warden of the South Dakota State Penitentiary.	*	
	*	
Respondents and Appellant.	*	

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

The Honorable Douglas Hoffman
Circuit Court Judge

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Notice of Appeal filed on October 14, 2021

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

MANEGABE ALLY, Petitioner and Appellee, v. DARREN YOUNG, Warden of the South Dakota State Penitentiary. Respondents and Appellant.	*	No. 29790 APPELLEE'S BRIEF

PRELIMINARY STATEMENT

Citations to the settled record will be referred to as "SR" followed by the page number. The Appellee-Petitioner Manegabe Ally will be referred to as "Appellee", "Petitioner" or "Ally".

Citations to the transcripts on the underlying criminal file Cr. 12-8143 will be followed by "T" and the transcript volume number, followed by the page number. The transcript regarding trial date February 21, 2014 will be T4. The transcript regarding trial date February 24, 2014 will be T5. The transcript regarding trial date February 25, 2014 will be T6. The transcript regarding trial date February 26, 2014 will be referred to as T7. The transcript regarding trial date February 27, 2014 will be referred to as T8. The transcript for the pre-trial motion hearing on

February 13, 2014 will be referred to as "MH" followed by the page number. The transcript for the motion to suppress hearing will be "MH2". The Petitioner's sentencing hearing on the underlying charges will be referred to as "S" followed by the transcript page number.

Citations to the four evidentiary habeas hearings shall be as follows. The transcript presenting the testimony of Mr. Jacobs of February 11, 2020 will be referred to as "H1" followed by the page number. The transcript presenting the testimony of Dr. Ophoven of February 12, 2020 will be referred to "H2" followed by the page number. The transcript presenting the testimony of Ms. Smith on March 5 & 19, 2020 will be referred to as "H3" and "H4" respectively. Habeas exhibits will be cited by "E" followed by its number or letter.

Findings of Fact and Conclusions of Law of the habeas court will be referred to as "FF" or "CL" followed by the number or letter. The habeas court's Memorandum opinion will be referred to as "MEM" followed by the page number. Transcripts regarding hearings addressing various motions or case status will be referred to as "HM". The Appellant's Brief will be referred to as "AP" followed by the page number. The Appellee further incorporates all arguments and authorities presented in briefs and motions submitted to the

habeas court and this Court.

JURSDICTIONAL STATEMENT

The Appellant-Respondent presents an appeal following entry of an order by the Honorable Judge Hoffman in CIV 16-824 granting habeas relief via that court's issuance of a certificate of probable cause presenting the following issue: "whether Petitioner received ineffective assistance of counsel at his jury trial in the matter, warranting a new trial". Ally invited this Court by motion to conclude it had no jurisdiction arguing the habeas court's certificate of probable cause did not meet the requirements of Ashley v. Young, 2014 S.D. 66, ¶11, 854 N.W.2d 347, 351; See also Harris v. Fluke, 2022 S.D. 5, ¶ 13, 969 N.W.2d 717, 722; LaCroix v. Fluke, 2022 S.D. 29, ¶ 27. This Court denied the Motion. A Notice of Appeal was timely filed on October 14, 2021. This Court therefore possesses jurisdiction of this matter pursuant to SDCL 21-27-18.1 which permits appeals of habeas corpus matters following issuance of a certificate of probable cause.

CERTIFIED LEGAL ISSUE

I.WHETHER THE PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT HIS JURY TRIAL IN THE MATTER, WARRANTING A NEW TRIAL

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

Dillon v. Weber, 2007 S.D. 81, 737 N.W.2d 420.

STATEMENT OF THE CASE AND FACTS

On December 24, 2011, the Petitioner called 911. He had heard a cry from a nearby bedroom, and he observed the decedent laying on the floor next to a bed. The child was unresponsive. Ally was having difficulty communicating information to the 911 operator due to a language barrier. A neighbor, Nicole McKenzie, heard Ally yelling and sobbing into the telephone and offered him assistance relaying information to the operator. T4:16; T4:20. McKenzie attempted to administer CPR until first responders arrived. T4:16. First responders were able to produce a pulse prior to travel to the Emergency Room, but he was not breathing on his own. T4:16-17. Attempts to resuscitate him at the Avera hospital ultimately failed. T4:17-18; T4:22. First responders noted "no obvious injuries to the neck, to the chest, to the abdomen or to the extremities, including arms and legs." T4:21. They also noted "no obvious injuries to the face and that all of his teeth were intact." T4:21.

The Petitioner indicated that he was watching the decedent and his older sister while their mother was at work. T4:17. Ally indicated the child was taking a nap. T4:17. He heard a cry. T4:18. He went into the room and found the child on the floor near the bed. He surmised that

he fell off a bed in a nearby bedroom. T4:18. He attempted to revive the child who was not breathing, and ultimately called 911.

Ally spoke with law enforcement officers at the scene. He also spoke with detectives in subsequent interviews. T4:17. Ally was interviewed on three separate occasions, over three days, for several hours. Three different interpreters were used during the interviews. The Defendant was an immigrant from the Sudan and spoke little English at the time.

Detective Carda employed various interrogation tactics including chastising Ally's adherence to Islamic religious practices or the lack thereof, and leaving his children in Africa during a political upheaval. AP:26. Nevertheless, Ally steadfastly maintained his innocence. Carda offered Ally to take a polygraph test, which Ally accepted. AP:27. However, a polygraph was never provided to Ally.[1] Trial

[1] The Appellant maintains that "Ally's willingness to take a polygraph is also most likely inadmissible". AP:27. While polygraph *results* are certainly inadmissible, some courts have held that a defendant's acceptance of an *offer* to take the test from police received while unrepresented by counsel are relevant toward the issue of consciousness of guilt (or innocence). See State v. Hoffman, 316 N.W.2d 143 (Ws.App.1982); State v. Santana-Lopez, 613 N.W.2d 918 (Wis.App. 2000); State v. Pfaff, 676 N.W.2d 562, 568-70 (Wis.App. 2004) ("As with evidence bearing directly on consciousness of guilt [citations omitted] evidence bearing directly on consciousness of innocence is also relevant"). The habeas court indicated he thought that part

counsel sought to suppress Ally's statements from these interviews but was unsuccessful. AP:9.

Avera emergency room personnel, such as Dr. Hafzalah, viewed the child's condition with suspicion. Hafzalah was not present for the autopsy.[2] The child passed away and then underwent an autopsy performed by Dr. Kenneth Snell. Snell diagnosed a depressed skull fracture. T4:19. He also observed subgaleal and subarachnoid hemorrhages in the child's head. T4:19.

The State alleged the Petitioner caused the death of a small child in his care via various counts of Murder and Manslaughter. The State called Minnehaha County Coroner Dr. Snell to present the opinion that the "cause of death to [the decedent] is blunt force injury to the head consistent with an assault." T5:127. The mechanism of injury could be

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might be edited out of the video upon a retrial. CL:10.

[2] The habeas court found Hafzalah not to be credible regarding cause and manner of death." Dr. Hafzalah did not have the further benefit of observing changes to M.K. by the time Dr. Snell performed the autopsy. The prosecutor discussed the opinions of Dr. Hafzalah and Dr. Snell at a pretrial hearing on February 13, 2014. The prosecutor conceded "[s]o as a practical matter, if the Court doesn't allow [Snell's] testimony, the State likely has no case to proceed to the jury on.". FF:17; M:21. In addition, Ophoven distinguished between credentials for an ER physician and a forensic specialist. H2:88-91. For further discussion regarding Hafzulah's credentials or the lack thereof, see Reply Brief in Support of Amended Application of for Habeas Corpus (Post Evidentiary Hearing) pp.6-7; Second Amended Application Writ of Habeas Corpus paragraphs 101- 18.

something hitting the decedent's head or a fall of the head onto an object with an edge. (T5:106-07). Snell conceded that "I can tell you by looking at that I cannot tell you which one of those mechanisms occurred. There's no way for me to say it's this or that. I can tell you the two mechanisms and one of those two mechanisms resulted in that." (T5:106-07).[3]

Snell asserted that he detected four areas of impact to the decedent's head. In his brief, the Appellant refers to Snell's opinion discussing "a fall onto a flat floor" and how such a flat surface could not result in a depressed skull fracture. AP:11. The Defense experts discussed falls onto an *edge* possibly causing a depressed skull fracture. EP2; H1:30.

Petitioner's counsel attempted to present a theory via Dr. Ophoven and Dr. Van Ee that an accidental fall from a bed onto the bed's footboard (presenting an edge) could not be ruled out as the manner of death. They detected one *major* point of impact. Other signs of injury as proposed by

[3] Snell's statements presented the jury with the choice of two possibilities, which Petitioner argued cannot support a verdict. South Dakota law does not permit expert opinions expressing conclusions in terms of possibilities. Koenig v. Weber, 174 N.W.2d 218, 224 (S.D. 1970) citing Vaux v. Hamilton, 103 N.W.2d 291, 294 (N.D. 1960). See also Paulsen v. State, 541 N.W.2d 636, 643 (NE 1996). Kenneth Jacobs indicated he should have presented objections to speculative testimony. H1:112.

Snell were actually attributable the decedent's blood condition (DIC) which inhibited blood clotting. Also, changes to the decedent occurred between his entry to the emergency room following attempts at life saving measures and the eventual autopsy. AP:9.

Jacobs cross examined Snell who testified in the State's case in chief. Ophoven was called by Smith to discuss the decedent's injuries. Following Ophoven's cross examination, Smith declined to pursue any redirect examination. Smith later called Van Ee to testify.

After the Defense closed their case, the State called Snell as a rebuttal witness. Following his testimony, the defense did not call Ophoven to rebut Snell's rebuttal testimony. Ophoven was available to testify if asked by trial counsel. They did not.

Although acquitted on Murder charges, Ally was convicted of involuntary manslaughter. He was sentenced to 45 years of which 20 years were suspended. S:29. Ally filed a direct appeal which resulted in a summary affirmance. He then sought habeas corpus relief, and grounds for relief were discovered.

ARGUMENT

I.THE PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT HIS JURY TRIAL IN THE MATTER, WARRANTING A NEW TRIAL

A. STANDARDS OF REVIEW

In a habeas case alleging ineffective assistance of counsel, the petitioner bears the burden of proving he is entitled to relief in circuit court. Owens v. Russell, 2007 SD 3, ¶ 6, 726 N.W.2d 610, 614. However, once a habeas court determines that relief is warranted, the State may then seek permission to appeal via obtaining a certificate of probable cause. Once obtained, the State may then proceed as the Appellant bringing a direct appeal. SDCL 21-27-18.1.

The Appellant states the *Appellee* has not shown prejudice. AP:33-34. As an Appellant, however, it is the State that now "has the burden of showing that the findings of fact are clearly erroneous or that the conclusions of law are incorrect." Hawkins v. Peterson, 474 N.W.2d 90, 92 (S.D.1991). "Error may not be presumed on appeal and [the] appellant has the burden of showing not only error but prejudicial error." Alberts v. Mut. Serv. Cas. Ins. Co., 123 N.W.2d 96, 103 (S.D. 1963). The record shows the habeas court found numerous mistakes of counsel to warrant habeas relief. Any error conceivably not confirmed on appellate review should be considered harmless in light of all the others present.

Questions of law on habeas appeals reviewed de novo

from this Court. Jenner v. Dooley,1999 SD 20, ¶ 11, 590 N.W.2d 463, 468. Factual determinations will only be disturbed on appeal when shown that they are clearly erroneous. New v. Weber, 1999 S.D. 125, ¶¶ 5-6, 600 N.W.2d 568, 571-72; Rennich-Craig v. Russell, 2000 S.D. 49, ¶¶ 11-13, 609 N.W.2d 123, 126. This Court should defer to the habeas court's "findings on such primary facts regarding what defense counsel did or did not do in preparation for trial and in presentation of the defense at trial." Rhines v. Weber, 2000 S.D. 19, ¶ 10, 608 N.W.2d 303, 306-07.

A finding is clearly wrong when this Court "on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948). If the habeas court below was "right for any reason," this Court may affirm the lower court's ruling. Denoyer v. Weber, 2005 S.D. 43, ¶ 17, 694 N.W.2d 848, 854.

B. FACTUAL FINDINGS ARE NOT CLEARLY WRONG

The habeas court found that Jacobs "oversold the theory of the case in opening statement by telling the jury that Petitioner's expert witnesses would show that M.K.'s injury was accidental, rather than that accidental injury was scientifically possible." FF:21. At the evidentiary hearing, Jacobs testified that he knew that if a party

states in an opening statement the evidence will show a particular fact exists, and when it does not, the party's credibility is damaged by overselling what they can deliver. H1:58-59. Jacobs indicated that defense experts would testify the death was an accident, as Ally had told authorities. T4:24. He conceded at the evidentiary hearing that the Defense experts actually would not determine that happened. H1:64. He described this overselling of the unnamed expert opinions as an oversight. H1:59. The habeas court's finding of fact is based in evidence and does not support a definite and firm conviction a mistake has been made.

The State notes that Jacob stated the defense experts "came to the conclusion that this was an accident just as Manegabe explained it was,". AP:15. It then concedes "[s]ure, *on its own*, this statement seems to suggest that the experts would definitively say what happened was an accident". AP:15 (emphasis *original*). The Appellant then compares Jacobs' statement above to the last "paragraph" of his opening statement where he *repeats* "all that can be said is that this an unexpected accident or infrequent outcome." AP:15. Although the Appellant's argument is phrased to "suggest" a distinction exists, no distinction actually manifests itself. Any accident is an unexpected accident.

Expected accidents can be avoided. The State's argument does not support a definite and firm conviction that a mistake had been made by the habeas court.

Trial counsel allowed only a heavily redacted video of Petitioner's interrogations to be shown. FF:22. It further found that "an ordinary juror with common experience would be, as this Court was, deeply affected by the demeanor of the Defendant as he maintained a consistent narrative of his innocence while being subjected to various psychological interrogation techniques conducted with the specific purpose of tripping him up or causing him to succumb and confess. FF:23. The habeas court provided examples, "throughout the six hours of video, over the course of three separate days, include: "The doctor told me that the baby did not receive this injury by falling off the bed. It is not possible. When you tell me that, you are lying." Interrogation Video, 12/26/12 at 19:48:43; "Don't tell me lies about falling off the bed because I know it's not true, you know it's not true, and the doctor knows it's not true." Interrogation Video, 12/26/12 at 19:52:32." FF:24.

Further examples were stated. "On December 27, 2012, Defendant is in the interrogation room for approximately thirty-five minutes alone awaiting questioning. Then the detective trips the fire alarm which sounds in the room for

about 15 seconds. Then the questioning begins. On numerous occasions the detective interrupts Petitioner or his interpreter, cutting off the answer to berate him with more accusations. Aggressive tactics are employed, like confronting Petitioner with an autopsy photo and saying 'these are [M.K.'s] brains coming out of his skull.' Interrogation video 12/27/12 at 12:15:40. The detective also resorts to challenging Petitioner's faith, with questions such as 'What does your religion say about telling the truth?' Interrogation Video 12/27/12 at 13:35:00. In response, Defendant made comments such as, 'An accident happened, I didn't cause any murder.' Interrogation Video, 12/27/12 at 12:13:00; 'This is my first time to be arrested.' Interrogation Video 12/27/12 at 13:34:35; and 'All that I am saying has been the truth.' Interrogation Video, 12/27/12 at 13:35:30." FF:24. In that the video and the above statements are part of the record, the habeas court's findings do not support a definite and firm conviction that a mistake was made.

Smith testified at the habeas hearing as to her level of abhorrence regarding Carda's comments. AP:40. The Appellant concedes that Carda's references to Ally's "life in Africa" "fleeing a war-torn continent", and Ally's "Muslim faith are also irrelevant and could impermissibly

prejudice Ally" upon a retrial. Despite acknowledgement of their impropriety and lack of relevance *now*, the Appellant knows that Detective Carda deliberately chose to use such topics *then*. Those topics failed to produce the results Carda wanted. Ally's ability to maintain his innocence despite that onslaught is relevant to the issue of guilt.

Trial counsel called Dr.Van Ee, a mechanical engineer to assist the defense. Smith prepared a video demonstrating the defendant placing a rag doll to show how the child was positioned when he found the child. FF:29; H3:97. Dr. Van Ee reviewed the video. Trial counsel, however, did not provide a copy of the video to the State. Smith conceded this was an error on her part. H3:98; H4:52.

The habeas court found that "in its closing argument, the State capitalized on the discovery error regarding the video provided to Dr. Van Ee, to make Petitioner's counsel look dishonest. The prosecutor inferred that the State shared everything and Petitioner hid evidence." FF:29. The record supports this assertion. Smith eventually acknowledged she had to devote a portion of her closing argument to assuring the jury she was not hiding anything. H3:101-02. Jacob concluded that the failure to disclose the video damaged the Defendant's case. H1:86. As such, the habeas courts finding will not support a definite and firm

conviction that a mistake had been made.

The habeas court further found that "Dr. Van Ee testified to the biomechanical possibility that an accidental fall in this scenario could have caused the skull fracture, and this was highly exculpatory." FF:26. Van Ee discussed a possible fall onto a lower edge of the bed. It further found that Van Ee's testimony depended on Dr. Ophoven's opinion. FF:27. "Dr. Ophoven testified that there was only one fatal impact, and that all the other significant findings by Dr. Snell were secondary to DIC and massive blood transfusions." FF:27.

In light of those dynamics, the habeas court took issue with Smith not asking additional questions of Ophoven following cross-examination on redirect: "But, following skillful cross examination by the State, Petitioner's counsel chose not to follow up with re-direct questioning to clarify any ambiguities, as is routinely done with expert witnesses, presumably feeling confident of a lead in the battle. But, Counsel inexplicably then sent Dr. Ophoven home on plane to Ohio, even though it was virtually certain that Dr. Snell would retake the stand on rebuttal to attack her testimony, and put her client back in great peril of conviction." FF:27

Evidence in the record supports this conclusion.

Ophoven did not return to testify following Dr. Snell's rebuttal testimony. Jacobs did not call her back. Jacobs testified it would have been helpful to recall Ophoven. H1:98. When asked if anything prevented Smith from asking Ophoven to stay another day regardless of any "possible" conflicts, Smith replied "No. We probably could have if – probably could have if we needed to." H3:112.

The Appellant calls attention to Smith's statement to the court and State concerning Ophoven's "*limited* availability". AP:29 (emphasis *added*). This statement was made prior to Ophoven's testimony on direct and cross. It does not denote that Ophoven was *absolutely* unavailable. Ophoven's testimony at the habeas hearing demonstrates the opposite is true. H2:26.

The habeas court was in the position to judge the credibility and demeanor of Jacobs, Smith, and Ophoven during their live testimony. In light of, inter alia, the consistent testimony between Jacobs and Ophoven, the habeas court's findings regarding Ophoven's actual availability is not clearly wrong.

Smith discussed doing matters differently. She later indicated she would have considered calling Dr. Ophoven after Snell's rebuttal. H3:121. She also indicated the defense could have tried to exclude Snell's opinion as to

manner of death, based on its presentation of choices between possibilities. H3:111. As such, the habeas court's findings regarding the failure to recall Ophoven is not clearly wrong.

Ophoven's testimony at the evidentiary hearing confirms the habeas court's findings. With regard to invitations to remain after testimony, she indicated "if asked, I stay." H2:26. She noted "I have provided surrebuttal testimony in the past, and I would never say no to someone who said you must". H2:17.

With regard to the lack of a redirect examination, Ophoven stated she further expressed concerns that questions asked of her blurred distinctions between any injuries versus injuries of significance causing death: impacts vs. major impacts. H2:51-53. Ophoven testified that what "I was trying to convey in my answers to the cross-examination was that there is only one injury to the child's event that represented the fatal event". H2:51. However, cross examination referred to "other marks and things". H2:51.

Ophoven further explained the need for follow-up after her cross-examination. She stated "If I found the, I found the questions to be, ah, ah, to be misleading in terms of how I was able to answer because it's supposed to be a yes

or no. So, if you frame it as this is an impact. Then, my response is, well, it's not significant. It's not really an impact like in abuse, you know, the becomes me arguing with the question." H2:54. Following Ophoven's cross examination, unfortunately, Smith asked no questions on a redirect-examination to distinguish major impacts leading to the fatal event, from other non-related impacts.

The impact of Ophoven's absence at the rebuttal stage of the trial is apparent. Snell made the following statements using negatives in conjunction with the qualifier "necessarily":

> A Falling on the edge of something does not cause a depressed skull fracture *necessarily* the depressed skull fracture we're seeing would have to have a pointed object to that. It can be round and smooth it doesn't have to have a sharp point like this table. But falling on the *edge* of this where it's long and smooth would not *necessarily* create depressed skull fracture. T5:128 (emphasis *added*).

Use of the term necessarily used with a negative, actually forwarded the view that a depressed skull fracture could be caused by falling on an edge *sometimes*. The tone of the words used at trial, however, suggested that Snell denied that a depressed skull fracture could happen at all. Ophoven's presence at the rebuttal stage would present the

opportunity to point out the significance of Snell's concession, to trial counsel and to the jury. Jacobs concluded he would have pressed Snell harder and would have made more objections. H1:141-43. He could have hammered Snell's concession to the jury if he had spotted it, or otherwise had been made aware of it.

In addition, the State called attention to Snell's comments on rebuttal regarding Ophoven's opinion regarding blood flow around the decedent's head as defying "gravity". AP:12. At the evidentiary hearing, Ophoven indicated that "blood is going to move" to a variety of places especially in light of "[w]ith all the fluids, and bleeding, and transfusions they're getting, their heads, their whole head swells up." H2:58-59. Ophoven's presence following Snell's rebuttal would have countered Snell's argument. As such, the habeas court's findings regarding the misuse or underutilization of Ophoven on redirect and surrebutal do not present a definite and firm conviction that a mistake was made.

The failure to prepare for trial and utilize Ophoven and Van Ee effectively arose in part from the Public Defender's Office caseload in 2013-14. The habeas court found "During the time of its representation of Petitioner, the PDO's own official reporting to the Minnehaha County

Commission indicated that the office was understaffed, and Smith warned them of potential consequences for her ability to provide effective legal assistance to indigent clients. Apropos, while representing Petitioner, Smith was simultaneously preparing for the penalty phase of a capital murder trial (State v. McVay, 49C11-3840A0) scheduled to begin one month after the end of Petitioner's trial. " FF: 19.

This finding is supported by the record. In evaluating caseloads in comparison to available resources, Smith follows standards advocated by the ADA and NLADA. E11-13; H3:31. Although not codified, Smith believes in those standards and uses them. H3:31. The State did not present any contrary evidence of applicable standards to rebut Smith's statements.

In 2013, her standards required her to employ 27 attorneys to handle the PDO caseload. H3:34. Smith made requests for increased funding which were denied. The PDO had only 22 attorneys during this time period. Smith stated the PDO fell below functional professional standards. H3:35; H4:86.

The Appellant cites prior circuit court opinions of the same habeas judge to show that use of professional standards is a "red herring", notwithstanding that this Court or the

habeas court are not bound by such opinions. See State v. Nelson, 2022 S.D. 12, ¶ 47; AP: Appendix at A135. In the Bausch matter, the habeas court noted that the professional standard advocations were blind assertions. In this case, the Petitioner presented more than a blind assertion. Smith and Jacobs testified as to their actual caseloads in 2013-14. On October 2, 2013, Smith submitted an affidavit to the trial court in State v. McVay CR.11-3804 indicating inadequate resources were going to cause problems in 2013-14. H3:23; E11. Smith stated the PDO fell below functional professional standards. H3:35; H4:86. Jacobs indicated his caseload hampered his performance. H1:129—32. The habeas court's finding that their caseload in that atmosphere explained the presence of certain errors is supported by the record, *in this particular case.*

An affirmance by this Court *in this case* will not result in some manner of codification of ABA standards *in all cases*. The habeas court specifically noted that Smith's standards were not codified. CL:21. Fortunately, habeas claims of this nature from this period of time are unlikely to recur. Smith testified at the evidentiary hearing in 2020, that she did not request new positions in 2019. In light of current statute of limitations provisions of 2 years, new filings regarding cases arising from the 2013-14

era are unlikely to be filed at all let alone survive a motion to dismiss, or even initial screening review by the circuit court. See SDCL 21-27-5. The current state of compliance with Smith's caseload standards by the PDO will minimize the effectiveness of any new filings arguing IAC claims based on caseloads.

Smith and Jacobs are talented attorneys dedicated to their profession and their clientele. However, in this particular case and time, their obligations to other clients distracted them from meeting their obligations to Ally.

C. CONCLUSIONS OF LAW SUPPORTED BY PRECEDENCE

The habeas court's conclusions of law are consistent with case precedence. As such, this Court can feel confident agreeing with lower court's conclusions. A habeas court analyzes an ineffective assistance claim under a two-part test "set out in *Strickland v. Washington*: First, the defendant must show that counsel's performance was deficient". Reay v. Young, 2019 S.D. 63, ¶¶ 12-19, 936 N.W.2d 117, 120–22 citing Strickland v Washington, 466 U.S. 668, 687 (1984); U.S.Const.Amend.V, VI, & XIV. Secondly, the analysis turns to examine whether a Petitioner suffers prejudice from a trial counsel(s) deficient performance. Id.

With regards to the first test from Strickland, a habeas court examines the "reasonableness of counsel's representation 'from counsel's perspective at the time of the alleged error and in light of all circumstances.'" Aliberti v. Solem, 428 N.W.2d 638, 641 (S.D.1988) citing Waff v. Solem, 427 N.W.2d 118, 121 (1988) (quoting Kimmelman v. Morrison, 477 U.S. 365, 381 (1986)). Trial counsel's performance must fall within what is regarded as the normal range of professional competency. Engesser v. Dooley, 2008 S.D. 124, ¶¶14-15, 759 N.W.2d 309, 315.

The litigation strategy employed by trial counsel, or the lack thereof, and the steps counsel takes to implement the strategy are pertinent in habeas corpus proceedings. Randall v. Weber, 2002 S.D. 149, ¶7, 655 N.W.2d 92, 96. Generally, habeas courts will not second guess strategic decisions made by trial counsel. Reay v. Young, 2019 S.D. 63, ¶¶12-19, 936 N.W.2d 117, 120–22. However, trial counsel's decisions will receive more scrutiny and less deference when "the record shows that counsel failed to investigate and consider possible defenses." Id.

The failure to investigate a case, consider defenses, and properly implement them was examined in Dillon v Weber, 2007 S.D. 81, 737 N.W.2d 420. In Dillon, the petitioner had been convicted of multiple sex offenses regarding multiple

victims. Dillon, 2007 S.D. at ¶2, 737 N.W.2d at 423. There was little physical evidence, and the State relied primarily on the victim's verbal accusations. Dillon, 2007 S.D. at ¶14, 737 N.W.2d at 426.

Trial counsel obtained the services of a social worker and psychologist as an expert witness. Id. The Court regarded their testimony as crucial. Id. However, the Court regarded trial counsel's use of such experts as ineffective. Id. An expert testified that trial counsel did not properly prepare the experts for the actual trial. Id. Similarly, trial preparation significantly hampered trial counsel's ability to ask the experts appropriate questions. Dillon, 2007 S.D. at ¶15, 737 N.W.2d at 426. The trial court even stepped in to assist trial counsel to ask questions of his own experts. Id.

In the present case, the trial court assisted the defense by permitting additional opportunities to challenge adverse expert opinions during the trial itself. H3:49-50, 58; M:19-20; T1:22. The Defense team, however, failed to take advantage of these opportunities. Instead, trial counsel let opportunities to object to Snell's opinion posing two possibilities slip by.

The underutilization of experts in Ally's case mirrors the problems shown in Dillon. The statements made by both counsel at trial and at the evidentiary hearing demonstrate comprehension issues were present for trial counsel regarding the subject of their expert's testimony. The following exchange between Smith and Van Ee (Smith's "main" expert) demonstrates the gap between the understanding of the material between lawyer and expert:

> 22 Q Okay. And even though that there's never going to be a
> 23 case study exactly on point with a fracture pattern exactly
> 24 the same in every single incident, for every single type of
> 25 fall, *the point is of what your testimony is*: You can't
> 1 predict what object struck or whether it's a skull or a
> 2 piece of metal just by looking at the pattern or the
> 3 fracture; is that the point of your testimony?
> 4 A *I'd like to think my testimony is little bigger than*
> 5 *that*, but the idea that there are conditions where you have
> 6 a very good idea of the nature and the geometry of the
> 7 object that produces a fracture. (T7:3031) (emphasis *added*).

Van Ee's response demonstrated he knew he could establish more with his expertise. Smith lacked full awareness of the source material, as well as Van Ee's awareness of the source material, to phrase and ask appropriate questions to

generate responses from Van Ee to promote the defense theory. As such, issues and defenses were not fully considered per Randall and Dillon.

Smith's testimony at the habeas hearing demonstrated a lack of appreciation for distinct medical terms pertinent to the Defense theory. This led to a failure to retrieve pertinent and available information from the defense experts. Ophoven noted a distinction between any injury found on the child, and an injury of significance, or a major impact leading to the child's death. Smith however demonstrated a lack of understanding of the distinction: "I am not sure why it would have helped us to elaborate on what you're saying now with primary [impact] versus not primary because those theories don't help us with the facts we have." H3:109. Not being sure at the time of the evidentiary hearing, Smith could not have been sure during trial, so as to clear up issues via re-direct examination of Ophoven. The failure to conduct a well-informed re-direct examination arose from a failure to look into issues and defenses per Randall and Dillon.

The State presents a chart demonstrating topics were supposedly presented at trial and at the habeas evidentiary hearing by Ophoven. AP:32-33. This argument ignores a qualitative assessment regarding what was actually

presented on both occasions. The habeas court called attention to the difference. That court noted, "And so the point is, I think, you know the coherent theory that would have potential legs in a habeas, and that Mr. Kadi is obviously pursuing is, the defense hired the right expert, but they didn't use her correctly." H2:40. The court below analogized hiring Michael Jordan, and allowing him to play for only 5 minutes instead of the whole basketball game. H2:41.

Presenting expert testimony is one matter. Understanding the material to present it in an effective and understandable matter is quite another. Trial counsel in Dillon presented expert testimony. However, he failed to prepare his experts for trial. Dillon, 2007 S.D. at ¶¶ 11-16, 737 N.W.2d at 425-27 (Counsel's "failure to prepare his expert witnesses was further evidence of his ineffectiveness."). As such, the quality of presentation of expert testimony must be reviewed beyond acknowledging its mere presence.

This is not merely a case where a litigation strategy is implemented but does not achieve an acquittal. This is a case that involves oversights. The following oversights, inter alia, were not consciously considered and then disregarded tactical decisions.

Jacobs forgoed cross examination of Snell regarding inconsistencies between grand jury and trial testimony concerning Snell's lack of credentials to present an opinion of a mechanical engineer, and Snell's change in the number of impact areas from 3 to 4. H1:75. Jacobs failed to object to Snell's fall hypothetical wherein Snell discussed impacts on an his (adult) skull from a fall from a bed rather than a toddler's skull. H1:74. Jacobs failed to object to Snell's testimony regarding two possible mechanisms of injury. H1:32. Jacobs failed to cross Snell on his admission (via use of negatives and "necessarily") that an accidental fall could have caused the fatal injury. H1:69. Jacobs and Smith failed to call Ophoven back to counter Snell's rebuttal. H1:98. Smith failed to disclose to the State materials used by the Defendant's expert. H1:58-59. Jacobs oversold the known probative value of the defense experts' actual opinions during opening statements. H1:59. While such actions (or omissions) might be a conscious tactic in *other cases generally*, they were not tactics *in this case.* Accordingly, the habeas court's decision to grant habeas relief was correct.

This Court, guided by our State Statutes, should resist the Appellant's persistent invitations to incorporate additional federal standards as advocated by the Appellant

here and in the court below. The State advocates for use of a "no competent lawyer" standard regarding evaluation of a trial counsel's strategy citing Dunn v. Reeves, 141 S.Ct. 2405, 2410 (U.S. 2021). AE:19. Dunn involved a federal habeas claim arising from a state court conviction. While the United States Supreme Court is the final arbiter regarding issues of Constitutional Law, such issues in Dunn were projected through the refractive prism of 28 USC 2254, where "[f]ederal habeas courts must defer to reasonable state-court decisions,". Dunn, 141 S. Ct. at 2407. In Dunn, the state habeas attorney did not call the petitioner's trial counsel to testify concerning the reasons underlying certain strategic litigation choices. Id. In that the habeas court had a cold record, it was not unreasonable for it to deny relief. Id. The Supreme Court found the habeas court's decision was not unreasonable.

28 USC 2254 presents a formidable sieve precluding even basic Strickland standards from state court from being addressed later in federal court (i.e.: unreasonable state court applications of Strickland versus unreasonable trial attorney action per Strickland). Harrington v. Richter, 562 U.S. 86, 101–05 (2011). Strickland concerns about attorney reasonableness should still find application before this Court, thus limiting the value of federal habeas cases for

guidance. Harrington, 562 U.S. at 101 ("A state court must be granted a deference and latitude [in federal court] that are not in operation when the case involves review under the *Strickland* standard itself."). Use of Dunn as advocated by the State would result in decision contrary to an established decision of the U.S. Supreme Court via imposition of tougher 28 USC 2254 standards into a state court habeas proceeding. The totality of the circumstances present in this case demonstrate that the errors found below justified habeas relief per normal Strickland standards.

The State argued cumulative error was not present here. AP:37 n.12. It cited cases where no error was found at all. AP:37 n12. Constitutional error, however, was found here.

Cumulative error analysis has been recognized by this Court in State v. Perovich, 2001 S.D. 96, ¶¶29-30, 632 N.W.2d 12, 18. Often the doctrine is not applied because this Court did not find any errors of a lower court, let alone numerous ones. Id. However, the rule still exists. Although not specifically referred to as "cumulative error", the doctrine had been clearly applied in State v. Nelson, 1998 S.D. 124, ¶20, 587 N.W.2d 439, 447. The United States Supreme Court similarly applied it in Gordon v. United

States, 344 U.S. 414, 420–23 (1953)("We believe, moreover, that the combination of these two errors was sufficiently prejudicial to require reversal.").

The standards of review on direct appeal *versus* state court habeas proceedings *versus* federal habeas cases differ. Considerations of cumulative error from federal habeas cases arising from state convictions is problematic. This is undoubtedly due to the more onerous standards of review imposed by 28 USC 2254. Mathematically speaking, multiple unreasonable state court decisions regarding Strickland versus *mere* Strickland errors of counsel, are less likely to be found, let alone accumulate. Regardless of phrasing the issue in terms of cumulative error, the *totality of the circumstances* here demonstrating numerous errors shows that habeas relief was warranted per Dillon. Dillon, 2007 S.D. at ¶ 11, 737 N.W.2d at 425.

The Appellant argues the State's closing argument regarding the allegation that Smith was hiding something caused no harm to Ally because the trial jury was presumed to follow instructions which provide that attorney statements are not evidence. AP:35. A recent case before this Court demonstrates this presumption is not always correct and instructions are, in fact, disregarded. State

v. Frias, 2021 S.D. 26, ¶ 34, 959 N.W.2d 62, 71 (verdict form left blank by jury despite instructions to consider lesser included offense).

In addition, appellate courts will reverse cases for new trials due to improper statements during closing arguments when attorneys inflame the passions of the jury. See State v. Blaine, 427 N.W.2d 113, 116 (S.D. 1988)("The misconduct was sufficiently flagrant to constitute reversible error and require a new trial."); State v. Vickroy, 205 N.W.2d 748, 751 (Iowa 1973); Viereck v. United States, 318 U.S. 236, 247 (1943). Presumably, the juries in these aforementioned cases were given appropriate instructions about attorney statements not being evidence, but reversals occurred nevertheless because of the effects of such arguments. The State's instruction presumption argument could swallow any opening or closing argument misconduct issue precluding reversals, which actually occurred in Blaine, Vickroy and Viercek.

The State indicates the argument that the Smith was hiding something was insignificant since the argument only took up 3 paragraphs out of 26 pages of transcripts of the State's closing arguments. AP:35. This quantitative observation ignores any qualitative assessment. If the mistake was not made, the prosecutor would not have these

three paragraphs to present at all. The notion that the defense was hiding something would be completely absent. In a case where the expert could not point to the exact mechanism of death, and Ally professed his innocence, the notion that the Defense would hide something would irrevocably tip the scales in the State's favor.

The State further argues prejudice was not shown by Ally from the prosecutor's discovery comments because he was acquitted of some charges. AP:35. Appellants rarely achieve success arguing inconsistent verdicts reveal anything of importance. State v. Gerdes, 258 N.W.2d 839, 841 (S.D. 1977). Each count of an Indictment stands on its own. Id. Juries "have the power, if not the right, to act irrationally." Id.

Jacobs testimony with corresponding emails suggest the discovery mistake bordered on willful conduct due to the manner in which Smith approached discovery issues so as to avoid disclosing reports. H1:80-82; EP3; EP4. While claiming lack of familiarity with the obligation to turn over materials her experts relied on, she nevertheless agreed to turn over their CV's and "some medical studies that Dr. Van Ee intends to reference during his testimony". EP3. Accordingly, if one does not have a report in their possession, there is nothing to disclose. EP4.

With regards to the interrogation videos, the habeas court found "no possible strategic purpose to keeping that powerful evidence from the jury. See State v. Tchida, 347 N.W.2d 338, 340 (S.D. 1984)("we conceive no possible defense strategy")". CL:10. The State presents an inconsistent scattershot response to the court's conclusion of law. It presents two reasons that are incompatible with each other. The Appellant first argues Smith "wanted to suppress the entire interviews – even the exculpatory portions – because the State 'will try to make it out to be inconsistent'". AP:4. On that same page, the Appellant presents Smith's "theory and themes", one of which was the State "tried 'to make inconsistencies where there aren't any'". AP:4. However, Carda "admitted Ally consistently denied hurting M.K. as well as his alternative theories about what happened to M.K.". AP:24. The proffered concerns about inconsistencies were themselves inconsistent. If concerns about inconsistencies are the ends to be avoided, seeking to exclude evidence of consistencies is not a rational means to achieve that end. See Ally v Fluke, #29768 Objection to Motion for Certificate of Probable Cause pp. 10-12. This is especially so when no inconsistencies were present at all.

The habeas court's conclusion is correct.

The Appellee maintains that the habeas court findings and conclusions were outcome determinative. To the contrary, references to whether Ally's trial was fair appear in the record. This Court did not base its decision solely on outcome determination, having concluded, inter alia, that trial counsel made a "fundamental miscalculation of her opponent", "critical importance to the jury's understanding of the theory of defense", and "the failure to meet that standard that they promised to establish for the jury. This spoiled the proper presentation of the case,". CL:13,15,18 citing Hinds v. Comm'r of Correction, 321 Conn. 56, 95, 136 A.3d 596, 619 (2016) ("at least one of the errors was so significant as to render it highly doubtful that the defendant had received a fair trial and the remaining errors created the additional doubt necessary to establish that *there was serious doubt about the fairness of the trial*, which is necessary to reverse a conviction")(emphasis *added*). "Accordingly, it was even more important, in the interests of equal justice, for this disadvantaged individual to be provided with competent representation in the presentation of his defense." CL:23. "Justice requires that Petitioner receive a new, fair trial." CL:25. Ironically, in the court below, the State challenged the

notion that the result at the jury trial would be different. However, the habeas court's decision was based not just on outcome but also whether Ally received a fair trial.

The Appellant indicates somewhat passively that the habeas court misapplied rules concerning circumstantial evidence. AP:42. The habeas court "*seems* to believe the State's charging decisions and defense counsels' strategies are subject to *heightened scrutiny* because the evidence in the case is mostly circumstantial." AP:42 (emphasis *added*). The habeas court stated nothing about "heightened scrutiny" regarding circumstantial evidence. It merely noted circumstantial evidence was present. FF:18. It described the errors of counsel as critical. Id.

The Appellant moved for a Certificate of Probable Cause regarding the habeas court bringing up the issue regarding trial counsel's use or the lack thereof on Ally's interview videos. This Court denied that motion, limiting discussion of that topic to "whether Petitioner received ineffective assistance of counsel at his jury trial in the matter, warranting a new trial". The Appellant, nevertheless, brought the issue up again in its brief. AE:40-41. Respectfully, this Court does not have jurisdiction to consider it presently. See Harris v. Fluke, 2022 S.D. 5, ¶

13, 969 N.W.2d 717, 722; LaCroix v. Fluke, 2022 S.D. 29, ¶ 27.[4]

CONCLUSION

The habeas court's findings of fact and resulting conclusions of law were supported by the evidence. As such, they were not clearly wrong. The habeas court found multiple errors of a constitutional magnitude, as similarly found in Dillon. The totality of the circumstances regarding those errors demonstrate that the Appellee did not receive a fair trial. As such, the habeas court properly awarded habeas relief.

[4] In Harris and LaCroix, petitioners' counsel were tasked to ensure presentation of certificates of probable cause arising from specific stated findings of fact and conclusions of law, leading to a specific question demonstrating an error arising from those findings. Topics deemed outside the certified issue precluded review. In the present case, the motion and certificate acted upon by this Court now presents general references to findings of fact and conclusions of law and a broad certified issue that can arguably be applied to almost any habeas case, regardless of specific issues are contained within it. Perhaps this Court's tolerance of this certificate demonstrates a loosening of certificate presentation requirements where more generalized citation to findings and broad issues presented for certification shall carry the day for future appellants, Ashley v Young, possibly no longer withstanding. If this Court utilizes strict standards when individual defendant/petitioners seek to appeal, while using broad standards when the State seeks to appeal, constitutional issues regarding fairness arise. See Daily v. City of Sioux Falls, 2011 S.D. 48, ¶ 29, 802 N.W.2d 905, 917 citing Withrow v. Larkin, 421 U.S. 35, 46 (1975). This observation is addressed to this Court for the purpose of raising all

The habeas court correctly considered evidence regarding the Appellee's interrogation (videos). Evidence existed in the record to support the habeas court's conclusion. MH2:142-43. The State waived any objections by not requesting a continued hearing to present evidence to rebut the contention. HM(11-30-20):47; See Engesser v. Young, 2014 S.D. 81, ¶ 39, 856 N.W.2d 471, 484; Lehman v. Smith, 168 N.W. 857, 858 (1918). Such an effort would be unavailing as Smith's improper reasons for not presenting the video evidence were stated in the trial record. MH2:142-43.

Assuming arguendo, the habeas court erred regarding the interrogation videos, any error resulting from that is harmless. The other constitutional errors present demonstrate the habeas court had sufficient justification in the record to award relief, and such findings were not clearly wrong. This Court can still "uphold the habeas court if it is right for any reason." Satter v. Solem, 458 N.W.2d 762, 768 (S.D. 1990).

The habeas court below was right, as per Satter, but for many reasons. This Court should affirm that court's decision, and remand this matter so that the Appellee can

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conceivable claims for review in state court per Shinn v. Martinez-Ramirez, 20-1009 (U.S. 2022)

proceed to his new trial.

REQUEST FOR ORAL ARGUMENT

Appellee's attorney requests twenty (20) minutes for oral argument.

CERTIFICATE OF COMPLIANCE

This brief complies with the page length and word count (7546) requirements of this Court.[5]

Dated this 14th day of June, 2022.

MARK KADI
c/o Public Advocate Office
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[5] Court rules limit briefs to 40 pages. The Appellant's Brief is 46 pages which is objectionable. No motions or stipulations as to page extensions were filed to the best of the Appellee's knowledge. A similar occurrence with Appellant's counsel occurred in State v. Jared Stone, #28293. In Stone's Reply Brief, that appellant indicated "The Appellee's Brief is presented filling 43 pages, or 3 pages over the statutory limit. Appellant's counsel can think of no occasion where he did not consent to a page length extension or brief due date extension request of an adverse party when asked in advance. However, none was made prior to submission of the Appellee's Brief. This Court may disregard content beyond its 40th page. See generally SDCL 15-26A-70."

mkadi@minnehahacounty.org
Attorney for Appellee

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 14th day of June, 2022, a true and correct copy of the foregoing Appellee's Brief was served electronically on:

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APPENDIX #29790

Exhibit A

JAN 3 0 2020

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:' SS	
COUNTY OF MINNEHAHA	)	SECOND JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA, Plaintiff, v. JAMES MCVAY, Defendant.	CR. 11-3804 **AFFIDAVIT OF TRACI SMITH IN SUPPORT OF MOTION TO PRECLUDE DEATH PENALTY AS A SENTENCING OPTION DUE TO UNEQUAL FUNDING**

Traci Smith, being duly sworn, states as follows:

1. Undersigned counsel is an attorney of record for the above-named Defendant in the above-entitled action.

2. This affidavit is made in good faith and not for the purpose of securing delay.

3. That counsel has been employed with the Minnehaha County Public Defender's Office since 1999.

4. That counsel became the Chief Public Defender in September 2005.

5. That the Public Defender's Office was appointed to represent James McVay on July 8, 2011.

6. That in 2011, when James McVay was initially appointed to the Public Defender's Office, he was assigned to attorneys Jeff Larson, and Amber Eggert.

7. In 2011, while serving as the Chief Deputy Public Defender, Jeff Larson carried a caseload of .90% based on cases closed in 2011 pursuant to the National Legal Aid and Defender Association Standards [hereinafter NLADA].

8. That in 2011, the Minnehaha County Public Defender's Office was comprised of twenty two lawyers, four paralegals, and five legal office assistants.

9. That in 2011, the office opened 6230 cases, and closed 5514 cases.

10. In 2011, based on NLADA standards, not including Mr. McVay's case, the Public Defender's Office should have had a minimum of 23.14 to handle the caseload demands of the office.

11. That after Jeff Larson left the Public Defender's Office in December of 2011, I assigned the case to myself to assist Amber Eggert and Michelle Thomas with the case.

12. That in 2012, not including Mr. McVay's case, I handled 52% of a caseload based on National Legal Aid and Defender Association standards.

13. That all requests for additional staffing for the Minnehaha County Public Defender's Office (other than a paralegal position granted in January 2013, and a legal office position that was changed from part-time to full-time in August of 2013 have been denied.

14. All staffing and budgetary requests have to be made through the Minnehaha County Commission.

15. That the Minnehaha County Commission receives legal advice on civil legal matters through counsel within the Minnehaha County States Attorney's Office.

16. That as of today's date, October 2, 2013, our office has opened 5066 cases.

17. That based on annual growth over the last five years, we project our attorney caseload for 2014 when Mr. McVay's case is expected to go to trial to be a minimum of 28 lawyers.

18. That as of today's date, all of our budgetary requests for additional staffing have been denied for 2014, and our office is staffed at 22 attorneys, 5 legal office assistances, and 5 paralegals.

19. That due to the constraints due to inadequate funding of the Minnehaha County Public Defender's Office, our office is not in compliance with the Guideline 6.1 for the Appointment and Performance of Defense Counsel in Death Penalty Cases.

DATED this 3rd day of October, 2013.

Traci Smith
Minnehaha County Public
Defender's Office
413 N. Main Ave.
Sioux Falls, SD 57104
(605)367-4242 Phone
(605)367-6102 Fax
tsmith@minnehahacounty.org

Subscribed and sworn to before me this 02 day of October, 2013.

(SEAL)

TESSICA SEVERSON
NOTARY PUBLIC
SOUTH DAKOTA

My commission expires 12-22-16

Notary Public - South Dakota
My Commission Expires:
(605)367-4242 Phone
(605)367-6102 Fax

FILED
OCT 03 2013
Minnehaha County, S.D.
Clerk Circuit Court

Exhibit B

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT

COUNTY OF MINNEHAHA) SECOND JUDICIAL CIRCUIT

* * * * * * * * * * * * * * * * * * * *

MANEGABE CHEBEA ALLY,
Petitioner,

CIV. 16-824

vs.

2nd AMENDED1 APPLICATION
WRIT OF HABEAS CORPUS

DARRIN YOUNG, Warden,
S.D. State Penitentiary,
Respondent.

* * * * * * * * * * * * * * * * * * * *

Manegabe Ally ("Petitioner"), pursuant to the Habeas Corpus Act (SDCL Ch. 21-27), hereby petitions this Court for a Writ of Habeas Corpus, under SDCL 21-27-5 and in support per SDCL 21-27-16 thereof alleges as follows.

1. Petitioner is currently an inmate of the S.D. State Penitentiary. Respondent is the Warden of said Penitentiary; has legal custody and control of Petitioner; and is the proper Respondent to this Habeas proceeding.

2. The alleged authority by which Petitioner is held in custody by Respondent are Judgment and Sentence of the Circuit Court, SECOND Judicial Circuit, Minnehaha County, Cr. #12-8143, and entered on August 11, 2014, (attached and incorporated as Exhibit 1) sentencing him to 45 years of which 20 years were suspended, arising from a conviction for Manslaughter 1st.

3. Petitioner has made no other applications for habeas corpus relief to challenge this Judgment of Conviction, other than a pro se application filed on April 4, 2016.

4. In this application, trial transcripts shall be designated "T" followed by the volume number or trial date number if no volume number is stated. The transcript page number will then follow.

5. Petitioner is being detained under said Judgment

1 This is not a successive petition for habeas corpus discussed in SDCL 21-27-5.1.

unlawfully and in violation of Petitioner's rights under the United States and South Dakota Constitutions, as more particularly specified in the following GROUNDS FOR RELIEF.

6. The Petitioner was represented by the Minnehaha County Public Defender's Office, wherein he received legal representation from Attorney Traci Smith with the assistance of Attorney Kenneth Jacobs. The PDO is, and was at all pertinent times, supervised by Ms. Smith.

7. FIRST GROUND FOR RELIEF -INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner's rights under the due process and "right to counsel" provisions of the United States Constitution (Fifth, Sixth, Fourteenth Amendments) and the South Dakota Constitution (Art. VI, '' 2 and 7), were violated. Petitioner alleges the following specific grounds of the denial of Ineffective Assistance of his various Counsel:

1) The court appointed the Public Defender's Office to represent him regarding charges arising out of Minnehaha County Second Judicial Circuit Criminal Case File No. 12-8143.

2) The PDO, at times pertinent thereto, deals with a substantial caseload.

3) The substantial caseload contributes to stress and fatigue among attorneys and staff at the PDO.

4) PDO attorneys balance their obligations to provide effective assistance of counsel to one client to represent them effectively against their obligations to their other numerous clients on their individual caseloads.

5) On or about April 13, 2016, Traci Smith, Public Defender, indicated to the Sioux Falls Argus Leader that the PDO's 22 attorneys handled 7,459 cases in 2015 (i.e. approximately 339 per attorney).

6) The PDO's 2015 "current case-to-attorney ratio [fell] short of the standard recommended by the National Legal Aid and Defender Association, which say the office should have 30 attorneys" per the Sioux Falls Argus Leader.

7) Between 2010 and 2015 the PDO's caseload increased by 35% and Aggravated Assault prosecutions increased by 190%.

8) In addition to being involved in litigation, a significant portion of Ms. Smith's time is devoted to managing the Public Defender's Office, an organization employing approximately 22 attorneys at the time of the original proceedings.

9) Due, in part, to the significant caseload at the PDO, or her supervisory obligations, Ms. Smith was unable to properly investigate this particular case and to prepare and implement an adequate defense strategy.

10) The case presented competing expert opinions regarding the cause and manner of the child's death.

11) The State alleged the Petitioner caused the death of a small child in his care via various counts of Murder and Manslaughter.

12) The State called Minnehaha County Coroner Dr. Snell to present the opinion that the "cause of death to [the decedent] is blunt force injury to the head consistent with an assault.". Petitioner's counsel attempted to present a theory via Dr. Ophoven and Dr. Van Ee that an accidental fall from a bed could not be ruled out as the manner of death.

13) Throughout Dr. Snell's direct testimony and thereafter, he was asked questions and/or stated conclusions phrased in terms of possibilities, not probabilities to any reasonable degree of certainty.

14) Relevant evidence has "any tendency 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." SDCL 19-19-401 (emphasis *added*).

15) A jury's verdict must "not be based upon speculation, guess or conjecture." See Degen v. Beyman, 241 N.W.2d 703, 706 (S.D. 1976).

16) An opinion addressing possibilities would cause jurors to speculate and guess.

17) Expert testimony may be admitted where it will help the trier of fact. SDCL 19-19-702. Rule 702 "requires a valid scientific connection to the pertinent inquiry as a pre-condition to admissibility". Daubert v. Merrell Dow, 509 U.S. 579, 592-93 (1993).

18) Expert testimony should not be received "if it appears the witness is not in possession of such facts as will enable him or her to express a reasonably accurate conclusion, as distinguished from mere guess or conjecture." Scurlocke v. Hansen, 684 N.W.2d 565, 569 (Ne 2004).

19) Expert testimony "based on 'could', 'may' or 'possibly' lacks the definiteness required to meet the claimant's burden . . . the trier of fact is not required to guess". Paulsen v. State, 541 N.W.2d 636, 643 (NE 1996).

20) South Dakota law does not permit expert opinions expressing conclusions in terms of possibilities. Koenig v. Weber, 174 N.W.2d 218, 224 (S.D. 1970) citing Vaux v. Hamilton, 103 N.W.2d 291, 294 (N.D. 1960) (err to admit opinion following: "Doctor, can you state with a reasonable degree of medical certainty that there is a distinct *possibility* that this might happen?"); *See also* Truck Ins. Exch. V. CNA, 2001 S.D. 46, ¶19, 624 N.W.2d 705, 709; Brady Memorial Home v. Hantke, 1999 S.D. 77, ¶11, 597 N.W.2d 677, 682; Hanten v. Palace Builders, Inc., 1997 S.D. 3, ¶9, 558 N.W.2d 76, 78 (SD 1997); Day v. John Morrell & Co., 490 N.W.2d 720, 724 (S.D. 1992); Armstrong v. Minor, 323 N.W.2d 127, 128 (SD 1982); Thomas v. St. Mary's Church, 283 N.W.2d 254, 258 (SD 1979).

21) The rules of evidence apply to all proceedings in this state, other than those excluded by SDCL 19-19-1101. Criminal jury trials are not excluded. Accordingly, the same rules of evidence which protect *insured* defendants from speculative opinions in civil trials also protect *criminal* defendants from speculative opinions in criminal trials with equal zeal, as the latter risk incarceration in addition to potential monetary losses (not indemnified contractually by a third party).

22) The difference between possibilities and probabilities was noted by Dr. Snell in an exchange between he and

Petitioner's Counsel during Dr. Snell's cross examination regarding injury causation opinions:

(T5:133-34)
21 Q Another area that you spent a little bit of time on was
22 the abrasion behind the right ear on Merveil. You indicated
23 that that was most likely caused by a pulling or a tugging
24 of the ear; is that correct?
25 A I apologize, but *I believe you misunderstood what I*

1 said.
2 Q Okay.
3 A It's a laceration, not an abrasion. Those are two
4 distinct types of blunt injury. So can you please *repeat*
5 *your question using the correct terminology.*
6 Q You indicated that that laceration was *most likely*
7 *caused* by a tugging or pulling of the ear; is that correct?
8 A *No, sir. I was asked was that a possibility and I said*
9 *yes to that question. I did not say that was what caused*
10 it.
11 Did you also say there's a *possibility* that that area
12 as caused by a blunt object?
13 A A laceration can be cause by a blunt object. So that
14 is a *possibility* since there's evidence of a blunt injury
15 above the ear.

23) Opinion evidence regarding possibilities was elicited by the prosecutor, or otherwise appear from Dr. Snell's narrative answers or statements.

24) Counsel did not object to such questions or testimony on the basis of relevance, foundation, speculation, narrative statement or moved to strike such testimony after it was stated.

25) The Petitioner invites the court in review the trial transcripts in their entirety to confirm their proper context. Italics are used here to emphasize the "possibilities" and other pertinent issues.

26) Examples of evidence of possibility opinions (not necessarily all inclusive) are as follows:

(T5:99)
15. Q Is it *possible* that the blood spreads out and goes
16 around to the other areas?

(T5:101-02)
So again, this would indicate
25 we didn't really see any kind of impacts to the skin in this
1 area, but this would suggest that there was *possibly* an
2 impact to that front because we have all of this hemorrhage
3 in the front as well.

(T5:102)
10 The alternative to that is the head strikes something
11 with an edge. The table in front of me has multiple edges.
12 If I fall striking my head on one of these edges, that edge
13 can potentially create a depressed skull fracture. So those
14 are two of the main mechanisms that are listed in the
15 literature about how a depressed skull fracture can occur.
16 *I can tell you* by looking at *that I can not tell you which*
17 one of those mechanisms occurred. There's no way for me to
18 say it's this or that. *I can tell you the two mechanisms*
19 and one of those two mechanisms resulted in that.

(T5:111)
Now we do have to remember, a little bit of a
12 difference between this [subarachnoid] and subgaleal
[bleeding]. Subgaleal represents
13 a point of impact, subdural and subarachnoid do not
14 represent points of impact. *We don't know what causes it to*
15 occur irrespective of the point of impact.

(T5:113-14)
24 The injury that we saw to the head carries symptoms
25 which *can result* in lethargy, decreased activity,
1 progressive swelling of the brain which results in vomiting,
2 and loss of consciousness. Vomiting *could result* in gastric
3 contents ending up in the airways.

(T5:125)
If you remember, I mentioned *if I fell on the floor I*
4 *could get potentially* a small skull fracture, but that would
5 be about it.2

(T5:125)
15 Q And what do you mean when you say a "simple fall?"
16 A Falling from the bed, falling to the floor. *Me*
17 standing up and falling those would be simple falls. I'm
18 not striking anything as *I* go down. *I* am not doing anything

2 Dr Snell is not a small child per, inter alia, his CV.

19 to increase my motions. Again, if *I* fall and *I* hit the
20 floor one point of impact. As you've seen it appears that
21 there are multiple impacts to Merveil and we have a
22 depressed skull fracture, which is not seen with a simple
23 fall to the floor.

(T5:137-38)
15 Q Okay. For example, whether it was a thicker or thinner
16 carpet pad would that alter your opinions as to the death of
17 Merveil?
18 A Well, the literature and research has shown that as you
19 go from cement to carpet to pad with carpet, a simple fall
20 will be less likely to create a skull fracture as you add
21 padding, carpet, and other items. So in this case if we say
22 that he fell directly on the cement floor it would take less
23 energy to create the skull fracture. We add carpet, we add
24 padding, there would be less energy produced with the same
25 heighth fall. So therefore the *possibility* of getting a
1 simple skull fracture would be less.

27) Counsel were inadequately familiar with factual material regarding the decedent's injuries.

28) Trial Counsel strategies arising from this inadequate familiarity prejudiced the Petitioner.

29) For instance, evidence suggested a laceration was observed behind the decedent's ear. (T5:134-35)

30) Counsel mischaracterized the injury as an abrasion, and had been corrected by Dr. Snell regarding the error. (T5:134).

31) Counsel continued to mischaracterize the injury as an abrasion, and sought testimony from their own experts regarding the "abrasion" which, in turn, diminished the credibility value of their expert's testimony:

(T6:88-89)
24 Q So in looking at the testimony that there was this
25 abrasion -- well, first of all is an abrasion an impact?
1 A No. An abrasion is a scratch.
2 Q Okay. So the testimony that there was an abrasion to
3 the ear, a mark on the lip, the frenulum, some abrasions
4 on the cheek and some old scars, were any of these notes
5 related to Merveil's cause of death?
6 A No, Ma'am.

32) Lack of preparation or mutual understanding as to the full substantive aspects of the expert's opinions is shown by Counsel's following exchange between Counsel and Dr. Van Ee:

(T7:30-31)
Q Okay. And even though that there's never going to be a case study exactly on point with a fracture pattern exactly the same in every single incident, for every single type of fall, *the point is of what your testimony is*: You can't predict what object struck or whether it's a skull or a piece of metal just by looking at the pattern or the fracture; is that the point of your testimony?
A *I'd like to think my testimony is little bigger than that,* but the idea that there are conditions where you have a very good idea of the nature and the geometry of the object that produces a fracture. If you have a punch through fracture where just like a punch going through, like, a whole cutter, they have those for metal. If you ever a punch hole through the skull you have a very good idea the geometry of the contacting object. When you have cracking or it's like something more like this and it cracks in like that and there's not a clear punch through hole, then you have a much less -- much decreased ability to predict what that contacting object was except that, you know, that it resulted in localized forces that cracked it down. So it all depends on the situation. For this fracture I don't have something that I can point to and say, Well, based on this fracture pattern we can say it was exactly this geometry of an object that resulted in that depressed fracture.

33) Counsel for the Petitioner formed questions in terms of whether a death resulted from a single impact, without a qualifying term modifying the type of impact, such as "major".

34) The Petitioner's experts, however, both discussed death following a single "major" impact, and other injuries not resulting in death. T7:7-8; T6:89-98.

35) The prosecutor seized upon the grammatical distinction between Counsel and expert by suggesting that the Defendant posed two different incompatible theories from the Defendant's experts T2/27:29.

36) Per the prosecutor's closing argument, Dr. Ophoven allegedly presented a theory that only a single impact which the jury could chose to acquit the Petitioner, and as such the Defendant's assertions were not credible.

37) Per the prosecutor's closing argument, Dr. Van Ee allegedly claimed that at least two impacts were present.

38) Dr. Ophoven's stated opinion at trial was not incompatible with those of Dr. Van Ee.

39) Through their various narrative responses, both experts actually concluded that death was attributed to a single major impact followed by lesser impacts. Statements acknowledging a single major impact causing death does not exclude or contradict that other impacts occurred.

40) Counsel's limitations during questioning of their own experts as to whether death was the result of a single impact versus as to whether death was the result of a single major impact, prejudiced the Petitioner by serving to confuse their own experts as well as the jury, demonstrated uncertainty as to the experts own opinions, where such uncertainty was never in fact present.

41) Dr. Ophoven advises attorneys as to her opinions prior to trial.

42) For attorneys who have time to listen, Dr. Ophoven will also provide attorneys, not possessing independent medical degrees or backgrounds of their own, on how to form and phrase questions regarding the cross examination of state experts.

43) Counsel for the Petitioner did not ask Dr. Ophoven to assist them in this regard.

44) Dr. Ophoven provided an opinion that an accidental fall could not be discounted as the cause of death.

45) Dr. Ophoven was capable to provide an opinion that attributing to a child's manner of death to some nefarious act cannot be proven scientifically in light of all other causes that cannot be ruled out.

46) Dr. Ophoven was capable to provide an opinion that Dr. Snell's opinion that a death occurred consistent with an

assault could not be proven scientifically as there is no scientific methodology to conclusively distinguish *accidental* falls from *purposely* inflicted injuries.

47) Counsel did not fully present this theory depriving the Petitioner of a fair trial.

48) Counsel did not seek to address such topics during trial.

49) Counsel had the opportunity to revisit or clarify such topics at trial, but Counsel waived redirect examination. T6:103.

50) During closing arguments, Trial Counsel did not object, on grounds of relevance and undue prejudice to the prosecutor reminding the jury the alleged events transpired on Christmas Eve, which even the prosecutor later admitted was not relevant. T2/27:15.

51) Counsel did not move for a mistrial following the prosecutor's remarks.

52) Counsel did not produce for the State a tape of the Petitioner's statements used by Dr. Van Ee in advance to trial, subjecting the Petitioner to accusations that information was kept from the prosecutor and the jury. T2/27:54,71.

53) Counsel failed to object to prosecutor vouching as to what documents he had gone through during closing argument per State v Foolbull, T2/27:73.

54) Overwhelming evidence of guilt is not present in this case, in that, inter alia, the prosecutor admitted a fall from a bed is possible to cause the decedent's injuries but rare. T2/27:22-23.

55) The foregoing errors of Trial Counsel, despite their most benevolent of intentions, prejudiced the Petitioner depriving him of a fair trial. Trial counsel failed to introduce evidence of the petitioner's three interviews with Detective Carda.

56) The Petitioner was interviewed by Detective Carda prior to his arrest.

57) The interviews were recorded and provided to original trial counsel.

58) Trial counsel sought to suppress and exclude evidence of the interviews by filing a motion to suppress which proceeded to hearing and was denied by the trial court.

59) During his interview, however, the Petitioner did not make any incriminating statements or admissions against interest.

60) The interviews consumed approximately three hours.

61) The interviews occurred over three separate days.

62) During these interviews, the Petitioner endured interrogation techniques criticizing his dedication to his faith.

63) During these interviews, the Petitioner endured interrogation techniques suggesting he was not a good Muslim for engaging in a relationship with the decedent's mother.

64) During these interviews, the Petitioner endured interrogation techniques criticizing his dedication to his children in Africa.

65) During these interviews, the Petitioner endured interrogation techniques that accused him of abandoning his children in war torn Congo, after being shot at by combatants.

66) During these interviews, the Petitioner endured interrogation techniques alleging that the petitioner gave up searching for his children after looking in a few refugee camps.

67) The Petitioner was often left alone in a room for extended periods of time when Carda would exit the room.

68) Despite being left alone, the Petitioner remained in the interview room and did not make efforts to leave.

69) The petitioner traveled to the first interview voluntarily.

70) After enduring the first interview, the petitioner returned for a second interview.

71) The Petitioner traveled to the second interview voluntarily.

72) After enduring the second interview, the petitioner returned for a third interview.

73) The Petitioner traveled for the third interview voluntarily.

74) In the waning minutes of the third interview, Carda offered the Petitioner an opportunity to take a lie detector test.

75) The Petitioner accepted the offer.

76) The Petitioner was escorted out of the interview room.

77) The Petitioner returned to the interview room after 3 minutes after being informed that the administration recanted on the lie detector offer.

78) The Defendant was placed back in the interview room alone.

79) Carda later re-entered the room and continued to ask the Petitioner questions.

80) Lie detector *results* are not admissible in evidence.

81) A defendant's acceptance of an *offer to take a lie detector test* are probative of consciousness of guilt, or the lack thereof, or a consciousness of innocence. See State v. Hoffman, 316 N.W.2d 143 (Ws.App.1982); State v. Santana-Lopez, 613 N.W.2d 918 (Wis.App. 2000); State v. Pfaff, 676 N.W.2d 562, 568-70 (Wis.App. 2004) ("As with evidence bearing directly on consciousness of guilt [citations omitted] evidence bearing directly on consciousness of innocence is also relevant").

82) The manner in which the Petitioner maintained his actual innocence in the face of interrogation techniques used over 3 hours on three separate occasions constituted exculpatory evidence.

83) The Petitioner's denials and conduct during these interviews demonstrated his actual innocence, or alternatively, a lack of guilt.

84) Trial counsel's failure to offer the interviews in their entirety, rather than seek to suppress them, constituted ineffective assistance of counsel, in violation of U.S.Const.Amend VI, XIV.

85) The attempt to exclude these interviews containing exculpatory evidence and no admissions against interest served no conceivable strategic benefit.

86) The use of these interview videos in their entirety as exculpatory evidence was not fully considered by counsel.

87) The act to withhold from the jury of the interview videos in their entirety should undermine this court's confidence in the result of this case.

88) In the alternative, and in addition to, a denial of Constitutional rights to effective assistance of counsel and a fair trial, per Strickland v Washington, the Petitioner further maintains he is wrongfully held in light of his actual innocence as demonstrated by his conduct and responses to his interrogation over the course of three separate days per Engesser v. Young, 2014 S.D. 81, ¶25, 856 N.W.2d 471, 480, 484 citing *Herrera v. Collins*, 506 U.S. 390, 399, 404, 113 S.Ct. 853, 860, 862, 122 L.Ed.2d 203 (1993).

89) During the evidentiary hearing, Dr. Ophoven indicated that Dr. Hazfulah was not qualified to present an opinion as to cause and manner of death.

90) This testimony led to questioning of Ms. Smith regarding her efforts or the lack thereof to challenge or halt admission as to Dr. Hazfulah's opinion as to cause and manner of death.

91) The Petitioner alleged at the hearing and in briefing associated with the hearing that Smith was ineffective for not attempting to prevent admission of Hazfulah's opinion by objecting as to foundation regarding her qualifications and relevance for providing an opinion based on possibilities that would lead to juror

speculation as to the existence of material facts.

92) The State orally stipulated to allow this issue to become part of the case, although the Respondent objected to the allegation itself.

93) The trial court in the underlying proceedings acknowledged issues of relevance and reliability would also require hearings out side the presence of the jury.

94) This acknowledgment was stated in addition to just expert qualifications issues (i.e. foundation). M:18, 20; Motion Hearing 3-8-14 pp. 22-23.

95) The trial court recognized the differences between foundation objections and those concerning relevance and reliability, and would be expected to continue to do so.

96) The State's position stated before the trial court demonstrates Judge Salter would have sustained both foundation and relevance objections regarding Hazfulah's testimony.

97) The prosecutor and trial counsel conceded that Hazfulah was not qualified to present the opinion that non-accidental trauma occurred which could support a verdict of guilt.

98) At the motion hearing of 2-13-14, Mr. Hanson indicates:

MR. HANSON: Judge, I asked for a practical reason. I don't think it's any secret that ***the State's case rests substantially on the opinion of Dr. Snell*** that this was a nonaccidental injury. Dr. Hafzalah's diagnosis and determinative of the case.
THE INTERPRETER: Doctor --
MR. HANSON: Hafzalah. In the natural order, we would anticipate calling Dr. Snell as our final witness. ***So as a practical matter, if the Court doesn't allow his testimony, the State likely has no case to proceed to the jury on*** and I just want to bring that up in case it affects how the Court addresses that particular issue. M:21.

99. The State was concerned it would have no case without Snell's opinion, a case with just Hafzalah's opinion had been regarded by State as being legally insufficient to obtain a conviction.

100. If trial counsel had made an objection regarding foundation and relevance, they demonstrated during the motion hearing before the trial court they possessed the proper argument to support the objection:

"The role of the Pediatrician is not to apportion blame or investigate potential criminal activity, but to identify medical problems and treat the child's injuries. Some specialist that include Radiology, Ophthalmology --
THE INTERPRETER: I'm sorry?
MS. SMITH: Some specialist that include Radiology, Ophthalmology, Neurosurgery, Neurology, ***Biomechanics and Forensics must also be considered to ensure a complete and accurate evaluation before such a diagnosis can be offered;*** otherwise, the diagnosis should be blunt force trauma." M:13.

101. Additional testimony from defense experts Ophoven and Van EE that was available but not fully elicited.

102. Ophoven could have testified at trial, as she did during the habeas hearing, regarding the necessary qualifications to present an opinion on manner of death.

103. She would have testified that Hazfulah was not qualified, and explained the reasons why, and Judge Salter could have considered her perspective, but Judge Salter was not presented with that opportunity.

104. Hazfulah would not be regarded as being qualified to present her opinion by the trial court under the record in this case, if her testimony was challenged.

105. She testified that she reviewed Snell's autopsy "briefly", as opposed to "thoroughly". T6:43.

106. Her opinion was based on possibilities, a central problem in the petitioner's case overwhelmed with possibilities: "a list of the possibilities of what caused the symptoms." T6:33.

107. She did not possess knowledge of the decedent's DIC condition when giving her opinion based on observations made by her prior to the autopsy (which was not mentioned in the autopsy). T6:45.

108. As such she lacked sufficient knowledge of relevant facts, to raise any opinion presented by her beyond the realm of possibilities.

109. She did not offer a sufficient explanation that an alternative cause cannot be ruled out.

110. She did not possess certifications in forensic pathology in her background, or years of experience performing in that field, to present an opinion as to cause and manner of death.

111. If objections were properly raised, as Smith conceded she should have raised, Hazfulah's testimony would have been excluded.

112. The insertion of Hazfulah's testimony should undermine this court's confidence in the result. Trial counsel moved for a judgment of acquittal, based on insufficient evidence arising predominantly from Snell's opinion.

113. Snell's opinion aside, a motion for judgment of acquittal could not ever be granted if some evidence had been entered that non-accidental trauma caused the decedent's death from Hazfulah.

114. Hazfulah's opinion provided some evidence.

115. Its presence in the record precluded any potential that the Supreme Court would conclude the trial court errored when it denied the motion for judgment of acquittal.

116. The defendant was further prejudiced at trial in that a second seemingly expert opinion was offered.

117. It served to bolster Snell's opinion.

118. Its absence would have left Snell's opinion isolated.

119. Snell's opinion was based on possibilities in that he could not determine at all the specific mechanism of injury.

120. Snell offered the jury only a choice of two possible mechanisms, one of which may have been a mechanism that caused the injury:

A If we look at the literature and textbooks regarding
2 the different types of skull fractures, the mechanisms or
3 how those fractures can occur are given in those text. When
4 you look at the section on depressed skull fractures, the
5 mechanisms that are listed there are one thing hitting the
6 head. I used my fist, it could be anything. Let's take a
7 bar fight and somebody uses a baseball bat, anything
8 striking the head with a rounded end to it can result in a
9 depressed skull fracture.
10 The alternative to that is the head strikes something
11 with an edge. The table in front of me has multiple edges.
12 If I fall striking my head on one of these edges, that edge
13 can potentially create a depressed skull fracture. So those
14 are two of the main mechanisms that are listed in the
15 literature about how a depressed skull fracture can occur.
16 *I can tell you* by looking at *that I cannot tell you which*
18 *one of those mechanisms occurred.* There's no way for me to
18 say it's this or that. *I can tell you the two mechanisms*
19 *and one of those two mechanisms resulted in that.* (T5:106-07)

121. Snell described two possible mechanisms that are known to cause a depressed skull fracture.

122. Snell conceded that he could not tell the jury by looking at this skull fracture which occurred. He doubled down on his inability to determine the mechanism proclaiming "there is no way for me to say it's this or that." T5:106-06.

123. Having "no way" to say, Snell failed to present an explanation based on probabilities.

124. Counsel did not object to such questions or testimony on the basis of relevance, foundation, speculation, narrative statement or moved to strike such testimony after it was stated.

125. Such an effort by trial counsel, if undertaken, would have succeeded as per Murphy v. Sioux Falls Serum Co.,

47 S.D. 44, 195 N.W. 835, 835 (1923) ("Upon cross-examination, however, he admitted that his only reason for his opinion was that 'I could not figure out any other way how it happened.' The witness had not shown himself competent to give the opinion, and he should not have been permitted to give it.").

126. The prevention of Snell's opinion reaching the jury if only trial counsel had taken action would have changed the result in the underlying proceedings.

127. This court's confidence in the result should be undermined.

WHEREFORE, Petitioner prays that this Court grant the following relief:

(1) Enter the accompanying ORDER finding Petitioner to be indigent; appointing counsel to assist Petitioner in litigating this Habeas Corpus proceeding; and waiving filing fees.

(2) Issue a Writ of Habeas Corpus, addressed to Respondent herein, ordering Respondent to file a Return to the Court's Writ, which shall answer the allegations contained in this Petition.

(4) Grant Petitioner final habeas corpus relief, ordering Respondent to release Petitioner and holding that Petitioner's Judgment of conviction is invalid and unconstitutional.

(5) Allow the Petitioner leave to present additional amended applications to allege additional grounds if necessary.

DATED this 30th day of November, 2020.

Mark Kadi c/o

Public Advocate's Office
415 N. Dakota Ave.
Sioux Falls, SD 57104
mkadi@minnehahacounty.org
605-367-7392

CERTIFICATE OF SERVICE

The undersigned certifies that the Deputy States Attorney Drew DeGroot, was served a copy of the Petitioner's Second Amended Motion to Amend by email on December 1, 2020.

MARK KADI

1 CATHY

STATE OF SOUTH DAKOTA) : SS COUNTY OF MINNEHAHA)		IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, Plaintiff,	+	SFPD 201287865 CR. 49CRI12008143 A0
vs.	+	JUDGMENT & SENTENCE
MANEGABE CHEBAEA ALLY, Defendant.	+	

An Indictment was returned by the Minnehaha County Grand Jury on January 9, 2013, charging the defendant with the crimes of Count 1 Murder in 1st Degree-Premeditated Murder on or about December 24, 2012; Count 2 Murder in 2nd Degree-Depraved Mind on or about December 24, 2012; Count 3 Manslaughter-1st Degree-Comm. of Felony on or about December 24, 2012; Count 4 Manslaughter-1st Degree-Comm. of Felony on or about December 24, 2012; Count 5 Manslaughter-1st Degree-Comm. of Felony on or about December 24, 2012 and Count 6 Manslaughter-1st Degree-Comm. of Felony on or about December 24, 2012. The defendant was arraigned upon the Indictment on January 16, 2013, Traci Smith and Kenny Jacobs appeared as co-counsel for the Defendant; and, at the arraignment the defendant entered his plea of not guilty of the charges in the Indictment. The case was regularly brought on for trial, Donald Hanson and Tara Palmiotto, Deputy State's Attorneys appeared for the prosecution and, Traci Smith and Kenny Jacobs, appeared as co-counsel for the defendant. A Jury was impaneled and sworn on February 18, 2014 to try the case. The Jury, after having heard the evidence produced on behalf of the State of South Dakota and on behalf of the defendant on February 27, 2014 returned into open court in the presence of the defendant, returned its verdict: "We the Jury, find the defendant, MANEGABE CHEBAEA ALLY, not guilty as to Counts 1 and 2; guilty as charged as to Count 3 Manslaughter-1st Degree-Comm. of Felony (SDCL 22-16-15(1)); guilty as charged as to Count 4 Manslaughter-1st Degree-Comm. of Felony (SDCL 22-16-15(1)); guilty as charged as to Count 5 Manslaughter-1st Degree-Comm. of Felony (SDCL 22-16-15(1)); guilty as charged as to Count 6 Manslaughter-1st Degree-Comm. of Felony (SDCL 22-16-15(1))." The Sentence was continued to May 29, 2014, after completion of a presentence report.

Thereupon on May 29, 2014, the defendant was asked by the Court whether he had any legal cause why Judgment should not be pronounced against him. There being no cause, the Court pronounced the following Judgment and

SENTENCE

AS TO COUNT 3 MANSLAUGHTER-1ST DEGREE-COMM. OF FELONY : MANEGABE CHEBAEA ALLY shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for forty-five (45) years with credit for five hundred eighty (518) days previously served and with twenty (20) years of the sentence suspended.

It is ordered that the court costs in this matter are hereby waived and the attorney fees shall be converted to a civil lien in favor of Minnehaha County.

No formal sentence was pronounced as to Counts 4, 5 and 6.

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

Dated at Sioux Falls, Minnehaha County, South Dakota, this 6th day of August, 2014.

BY THE COURT:

JUDGE MARK SALTER
Circuit Court Judge

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

FILED
AUG 11 2014
Minnehaha County, S.D.
Clerk Circuit Court

Exhibit C

Jacobs, Kenny

From: Smith, Traci
Sent: Tuesday, January 21, 2014 4:30 PM
To: Hanson, Don; Jacobs, Kenny; Palmiotto, Tara
Subject: RE: Managabe Ally Cr. 12-8143

Sure. We would really appreciate the same courtesy. Traci

From: Hanson, Don
Sent: Tuesday, January 21, 2014 4:22 PM
To: Smith, Traci; Jacobs, Kenny; Palmiotto, Tara
Subject: RE: Managabe Ally Cr. 12-8143

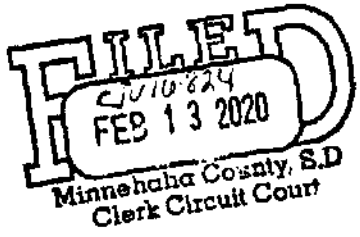
Traci,
Could you send those ASAP. Tara and I need to determine if there is a need for a Daubert hearing regarding the nature of the proposed testimony.
Thank you.

Donald J. Hanson
Minnehaha County Deputy State's Attorney
415 N. Dakota Ave.
Sioux Falls, SD 57104
(605)367-4226 (T)
(605)367-4306 (F)

From: Smith, Traci
Sent: Tuesday, January 21, 2014 3:18 PM
To: Hanson, Don; Jacobs, Kenny; Palmiotto, Tara
Subject: RE: Managabe Ally Cr. 12-8143

Our experts are Dr. Chris Van Ee, and Janice Ophoven. I will get you their CV's as well as some medical studies that Dr. Van Ee intends to reference during his testimony. Let me know if you have questions. Thanks, Traci

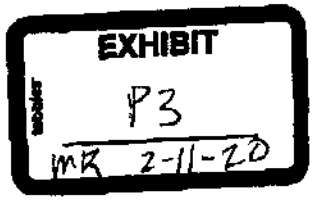
From: Salter, Judge Mark [mailto:Mark.Salter@ujs.state.sd.us]
Sent: Tuesday, January 21, 2014 10:41 AM
To: Smith, Traci; Hanson, Don; Jacobs, Kenny
Cc: Anderson, Brittan
Subject: RE: Managabe Ally Cr. 12-8143



The deadline for disclosing experts is January 31st.

Thank you.

From: Smith, Traci [mailto:TSMITH@minnehahacounty.org]
Sent: Tuesday, January 14, 2014 5:41 PM
To: Salter, Judge Mark; Hanson, Don; Jacobs, Kenny
Subject: Managabe Ally Cr. 12-8143



Good Evening:

In looking at my notes from our motions hearing back on August 6, 2013, there was a discussion about setting a deadline for providing notice of expert witnesses so that the parties would have the opportunity to schedule a Daubert hearing if necessary. This was in response to the Defense's Motion In Limine Re: Opinion Testimony, in which our argument was that the state should be precluded from allowing any expert to offer a medical diagnose "abusive head trauma." (The x-ray techs should also be precluded from diagnosing "non-accidental trauma" from a scan.)

When we met in chambers for our scheduling meeting, I don't think we ever got around to discussing deadlines for providing notice for expert witnesses. If we did, I did not write it down and I apologize. Whether or not the child's injury was accidental or child abuse will be the subject of debate for the trial. I don't want to wait until the morning of trial to deal with issues of Daubert, particularly in light of the Supreme Court's decision in Buccholtz as to issues of experts testifying as to their "diagnosis" of child sexual abuse.

Could the court set a deadline for experts? Second, I have that we set aside some time on the afternoon of February 13th for motions. Once the state provides notice of any experts they intend to call, will we be able to conduct Daubert hearings that afternoon?

Traci

Traci M. Smith
Minnehaha County Public Defender's Office
413 N. Main
Sioux Falls, SD 57104
(605) 367-4242

Exhibit D

Baker, Mary

From: Smith, Traci
Sent: Tuesday, January 07, 2014 9:41 AM
To: Baker, Mary; Jacobs, Kenny
Subject: Managabe Ally Update

Hey Mary: Kenny and I met this morning to talk about Ally. Sorry you were in trial today. : (For the suppression hearing—this is what the plan is:
Kenny will handle the interpreters and Managabe and the interpreters. I will handle the detective and the legal argument. We have marked ourselves out for January 22, 2014 from 1-5 for prep work and to meet with Managabe. I will email Okull to see if he is available that afternoon to meet with Managabe so that we can do a practice direct and cross examination. We need to call him as a witness to establish the voluntariness factors – didn't feel free to leave, and age, education, background, etc.

I emailed Tara and Don to see if there were any proposed plea offers since we did not have a DC.

For the Trial: I looked in my notes from our last phone conference with VanEE and Ophoven and do not see any mention of a report from Van EE. Usually I don't get one because I do not want to turn it over to the state. Do you recall whether we asked for one from him? If so, we need to make sure we get that asap so that the state doesn't ask for a reset if we get that at the last minute. I am hoping he isn't doing one.

Also, will you interview the neighbor who assisted Managabe in talking to the 911 operator?

Finally, will you email Dr. Ophoven and ask her if there are any first responders, doctors or first responders that she needs us to call to establish foundation for her testimony or that she has concerns about that the state will intentionally Not Call or overlook or try to get around? Are there any pictures that she would like us to have blown up or would she feel comfortable if we put together a power point? I haven't worked with her since Simmons and I am not sure what she feels comfortable with. I would do whatever she would prefer. If she tells me what photos she would like, I can go with whatever. (Maybe we should set up another phone conference the week before trial?) Maybe we should go ahead and set one up with Van Zee as well. I probably have the same questions for him. Thanks, Traci

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FILED
Civ 16824
FEB 13 2020
Minnehaha County, S.D
Clerk Circuit Court

EXHIBIT
P4
MR 2-11-20

Exhibit E

STATE OF SOUTH DAKOTA) :SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
MANEGABE CHEBEA ALLY, Petitioner, vs. **DARIN YOUNG, Warden, South Dakota State Penitentiary,** Respondent.	CIV 16-824 **FINDINGS OF FACT AND CONCLUSIONS OF LAW GRANTING HABEAS CORPUS RELIEF**

INTRODUCTION

The Defendant filed a pro se application for habeas corpus relief on March 31, 2016. The Court appointed the Office of the Public Advocate to represent the Petitioner. An Amended Application for Habeas Relief was filed by Petitioner's counsel on September 17, 2018. The Respondent filed a Return on October 3, 2018.

This matter came before the Court for an evidentiary hearing on February 11 and 12, 2020, March 5, 2020, and March 19, 2020, along with subsequent hearings on November 30, 2020 and March 12, 2021. The Petitioner requested leave to file a second Amended Application for habeas corpus relief to conform to the evidence. This Court granted such leave over the Respondent's Objection. An Amended Application was filed on November 20, 2020. The Respondent filed a second Return. Petitioner appeared personally throughout with his attorney, Mark Kadi, via in person or ITV. Minnehaha County Deputy State's Attorneys Donna Kelly or

Drew DeGroot appeared on behalf of Respondent at the various hearings. At the conclusion of the last hearing, the Court took the matter under advisement. Having reviewed the record and considered the arguments and briefs of counsel, the Court announced in its Memorandum Decision of July 1, 2021, its decision to grant habeas relief.

FINDINGS OF FACT

1. This Court takes judicial notice of, and incorporates herein by this reference, the Circuit Court file in State v. Ally, Cr. 12-8143, Minnehaha County, and South Dakota Supreme Court file, State v. Ally, #27202. From the above-entitled CIV. #16-824, the Findings of Fact and Conclusions of Law further incorporates herein by reference, its Memorandum Decision filed on July 1, 2021, transcripts of proceedings in this file, evidentiary hearing exhibits, motions and pleadings contained therein.
2. Manegabe Ally may be referred to herein as Petitioner, Defendant or Ally.
3. Petitioner Manegabe Ally (Petitioner) was charged by indictment in CRI 12-8143 with Count 1: First Degree Murder; Count 2: Second Degree Murder; and Counts 3 through 6: First Degree Manslaughter. Petitioner was represented by Attorneys Traci Smith and Kenny Jacobs. The State was represented by Deputy State's Attorneys Donald Hanson and Tara Palmiotto. A jury trial commenced on February 18, 2014. On February 27, 2014, the jury returned a verdict of not guilty as to Counts 1 and 2, but it found Petitioner guilty of First Degree Manslaughter as charged in Counts 3 through 6.
4. In October 2012, Petitioner moved to Sioux Falls to reside in an apartment with his girlfriend (Mother) and her two children, C.K., age 5 and M.K., age 16 months. Petitioner cared for the two children while Mother worked. Prior to December 24,

2012, there was no record of any prior disturbances, no reports of noise, fights, children crying, or other indicia of violence or abuse in the household.

5. On the morning of December 24, 2012, Mother and Petitioner had disassembled M.K.'s crib, intending to shop for a replacement toddler bed after Mother was finished with her shift at Smithfield that day. After dropping Mother off at work, Petitioner had visited the doctor's office to complete vaccines he needed to obtain employment, with the children in tow, and all appeared well. Thereafter, Petitioner and the children returned to the apartment. Defendant testified that they watched cartoons on TV, then he fed the children and put them down for naps in separate bedrooms. M.K. was placed in an adult bed, because his crib was put away. M.K. had never slept in an adult bed before.

6. The Petitioner indicated that approximately an hour later, as he was waking M.K.'s sibling from her nap, Defendant heard M.K. cry out from the other bedroom. He then found M.K. laying at the foot of the bed with his head against the footboard, unconscious. After attempting to revive the child, Petitioner frantically called 911 and reported that M.K. had fallen and was not breathing. Petitioner had language difficulties communicating with the 911 operator and eventually a neighbor assisted him. The neighbor began CPR at the instruction of dispatch. M.K. was unresponsive when first responders arrived. He was transported to the hospital. At the emergency room, it was discovered that M.K. had a massive skull fracture. M.K. was intubated and infused with blood. M.K. never regained brain activity and died from his injuries the next day.

7. M.K.'s treating Emergency Room physician testified that she did not believe M.K.'s injuries appeared to be consistent with a mere fall from a bed. Law enforcement accordingly was notified and responded to the hospital to investigate.

8. Petitioner was interrogated by police that evening (December 24) as well as on December 26 and 27. At all times he steadfastly and consistently denied doing any harm to M.K. Petitioner stated his belief that the child must have fallen from the bed and struck his head. This Court reviewed the hours of interrogation video and finds that Petitioner gave consistent narratives throughout his interrogations, all in the face of withering questioning by law enforcement, and never made any incriminating statement or admission. Petitioner was arrested for the death of M.K. on December 27, 2012, at the beginning of his third interrogation session.

9. An autopsy of M.K.'s body revealed a large depressed skull fracture to the left rear of his skull. Dr. Kenneth Snell testified at trial that there were two to four other points of impact on M.K.'s head, which were, in his opinion, inconsistent with Petitioner's story that the child was fatally injured by an accidental fall. According to Dr. Snell, M.K. had an impact to his left eye, which was bruised and swollen. There was a subgaleal hemorrhage beneath the scalp indicating a second impact, according to Dr. Snell's testimony. Dr. Snell testified that there was also a hemorrhage beneath M.K.'s forehead to the crown of his head, indicating a third possible impact to the front of his head. A fourth impact was located at the back of M.K.'s head, according to Dr. Snell, with a large bruise all the way across the back of the head, measuring 3 ¼ inches long, with a subgaleal hemorrhage beneath the scalp. In Dr. Snell's opinion, the final, and ultimately fatal, impact was the aforementioned large depressed skull

fracture on the left side of M.K.'s head above and behind his ear. It was 8 cm in length, crossed three bones and two sets of sutures in the skull. The bone in this area was pressed down and pushed into the brain. Dr. Snell testified that a large object struck M.K.'s head in that area, such as a fist, a baseball bat, or his head striking something with an edge. Dr. Snell testified that a fall from the bed to a carpeted floor would not result in the multiple impacts and the extent of injuries sustained by M.K.

10. At trial, Petitioner offered the testimony of Dr. Janice Ophoven.

11. Dr. Ophoven is a forensic pediatric pathologist with over 40 years of experience in the field, having extensive experience in autopsies involving children. She graduated from the University of Minnesota Medical School and completed fellowships in both pediatric pathology and forensic pathology.

12. Dr. Ophoven testified that M.K. suffered only one point of impact, and that impact caused the fatal skull fracture. She attributed the other hemorrhaging noted by Dr. Snell, and characterized by him as other impact sites, as all resulting from the coagulopathy (DIC) that M. K. developed because of the skull fracture, which caused his uncoagulated blood to spread throughout the entire head.

13. Coagulopathy is a condition, which may be caused by shock, in which the blood's ability to coagulate is impaired, and results in prolonged and/or excessive bleeding.

14. As M.K. lay in the Emergency Room unconscious, with unrestrained bleeding from the fracture site which was under his intact scalp, he was administered massive blood transfusions that continued to exit his circulatory system through the fractured skull bone and accumulate under the skin in his head. The defense theory, as presented

through Dr. Ophoven, was that the lesions that Dr. Snell attributed to multiple blows were in fact sequelae of a single head injury.

15. Petitioner also offered testimony at trial from Dr. Van Ee, a biomedical engineer with a PhD from Duke University. Dr. Van Ee testified as to the amount of force necessary to cause M.K.'s skull fracture. Dr. Van Ee opined that M.K.'s skull fracture could have been caused by M.K.'s falling from the bed and hitting his skull on the edge of the footboard. Dr. Van Ee's confirmation of the bioengineering potentiality of sufficient force from an accidental fall from the bed causing the depressed skull fracture that killed M.K. was never contested at trial, and his qualifications to render this opinion were sound.

16. The State's case essentially presented nothing except Dr. Snell's theory that M.K. suffered multiple contemporaneous blows to head that could not be consistent with accident. The emergency room treating physician, Dr. Hafzalah, vouched for this theory but she had no forensic or pathological credentials. O'Conner v. Commonwealth Edison Co., 807 F.Supp. 1376, 1390 (C.D.Ill.1992) ("[N]o medical doctor is automatically an expert in every medical issue merely because he or she has graduated from medical school or has achieved certification in a medical specialty."); Dye v. Wayne Cty., 397 N.W.2d 188, 190–91 (1986)("While Kobe had considerable experience in counseling and suicide prevention, and considerable contact with suicidal persons, nothing in the record suggests that she was an expert in forensic pathology or other forensic sciences such that she could determine when a death was a suicide.").

17. Dr. Hafzalah did not have the further benefit of observing changes to M.K. by the time Dr. Snell performed the autopsy. The prosecutor discussed the opinions of Dr. Hafzalah and Dr. Snell at a pretrial hearing on February 13, 2014. The prosecutor conceded "[s]o as a practical matter, if the Court doesn't allow [Snell's] testimony, the State likely has no case to proceed to the jury on.". This Court finds Dr. Hafzalah's opinion to be of little probative value.

18. In sum, the State's case was based entirely upon circumstantial evidence drawn from the head injury and its sequalae. Given the uncontradicted evidence at trial that a fall from the bed could have caused the fatal skull fracture, the absence of any direct evidence of guilt, and the lack of any circumstantial evidence except Dr. Snell's assertions of multiple contemporaneous but distinct serious head injuries, the case boiled down to two issues- whether Dr. Ophoven's one blow theory was plausible, and whether the Defendant's protestations of innocence seemed genuine. In this Court's view, defense counsel made tactical errors in addressing these two critical issues of such magnitude that they failed to provide him with effective assistance at trial as guaranteed by the Sixth Amendment and Due Process of law.

19. Petitioner's lead counsel was Attorney Traci Smith (Smith), the Director of the Minnehaha County Public Defender's Office (PDO), who had both litigation and administrative duties. Her second chair was Kenny Jacobs, who at the time was a relatively inexperienced junior staff lawyer at the PDO. During the time of its representation of Petitioner, the PDO's own official reporting to the Minnehaha County Commission indicated that the office was understaffed, and Smith warned them of potential consequences for her ability to provide effective legal assistance to

indigent clients. Apropos, while representing Petitioner, Smith was simultaneously preparing for the penalty phase of a capital murder trial (State v. McVay, 49C11-3840AO) scheduled to begin one month after the end of Petitioner's trial.

20. This Court finds several errors by Petitioner's counsel as set out further in these findings, inter alia, including defense counsel's failure to present, and indeed, pretrial motion to exclude, the exculpatory tapes of his withstanding intense interrogation, and counsel's pretrial failure to disclose to the State a doll video made by the defense and provided to Dr. Van Ee for his consideration in developing his expert opinion in this case.

21. The errors continued at trial. 2nd Chair attorney Jacobs oversold the theory of the case in opening statement by telling the jury that Petitioner's expert witnesses would show that M.K.'s injury was accidental, rather than that accidental injury was scientifically possible.

22. Petitioner's counsel allowed only heavily redacted video of Petitioner's interrogations to be shown. That excerpt was used by the State to show that Petitioner admitted to being the only adult present at time of fatal injury. This Court has viewed the interrogation videos in their entirety.

23. It is the view of this Court that an ordinary juror with common experience would be, as this Court was, deeply affected by the demeanor of the Defendant as he maintained a consistent narrative of his innocence while being subjected to various psychological interrogation techniques conducted with the specific purpose of tripping him up or causing him to succumb and confess.

24. In each of the three interrogations, Defendant is left alone for approximately thirty minutes in the interrogation room before questioning begins. Questioning by the armed detective vacillates between browbeating and then understanding. Examples of questions, throughout the six hours of video, over the course of three separate days, include: "The doctor told me that the baby did not receive this injury by falling off the bed. It is not possible. When you tell me that, you are lying." Interrogation Video, 12/26/12 at 19:48:43; "Don't tell me lies about falling off the bed because I know it's not true, you know it's not true, and the doctor knows it's not true." Interrogation Video, 12/26/12 at 19:52:32. On December 27, 2012, Defendant is in the interrogation room for approximately thirty-five minutes alone awaiting questioning. Then the detective trips the fire alarm which sounds in the room for about 15 seconds. Then the questioning begins. On numerous occasions the detective interrupts Petitioner or his interpreter, cutting off the answer to berate him with more accusations. Aggressive tactics are employed, like confronting Petitioner with an autopsy photo and saying "these are [M.K.'s] brains coming out of his skull." Interrogation video 12/27/12 at 12:15:40. The detective also resorts to challenging Petitioner's faith, with questions such as "What does your religion say about telling the truth?" Interrogation Video 12/27/12 at 13:35:00. In response, Defendant made comments such as, "An accident happened, I didn't cause any murder." Interrogation Video, 12/27/12 at 12:13:00; "This is my first time to be arrested." Interrogation Video 12/27/12 at 13:34:35; and "All that I am saying has been the truth." Interrogation Video, 12/27/12 at 13:35:30.

25. While Petitioner did testify in own defense, this was hampered by a language barrier, testifying through an interpreter. The trial testimony was a sterilized version of the Defendant. The interrogation videos show his authentic, raw testimony near the time of the events. This was profoundly exculpatory in the Court's view, and should have been presented to the jury for consideration. Failure to recognize this was ineffective lawyering.

26. Dr. Van Ee testified to the biomechanical possibility that an accidental fall in this scenario could have caused the skull fracture, and this was highly exculpatory. However, Dr. Van Ee admitted during cross-examination by the State that his opinion was hypothetical, and he had no opinion whether this case was in fact an accident. He conceded that if Dr. Ophoven's criticisms of Dr. Snell's opinion were incorrect, and that there were other contemporaneous, serious injuries that contradicted the single blow theory, then Dr. Van Ee's theory was irrelevant to the case. In this way the State neutralized Dr. Van Ee, and focused the jury's attention upon its upcoming, anticipated rebuttal testimony from Dr. Snell, which would attack and cast aspersion upon Dr. Ophoven's prior testimony, clearing the way for conviction.

27. The defense's forensic case depended upon the probative force of Dr. Ophoven's testimony. Dr. Ophoven testified that there was only one fatal impact, and that all the other significant findings by Dr. Snell were secondary to DIC and massive blood transfusions. As noted above, Dr. Ophoven's education, training, and experience as a forensic pediatric pathologist are impressive. She further opined that other minor abrasions behind M.K.'s ear, and on his lip, and nose were old, not suspicious, and therefore not relevant to the fatal incident. This, in combination with Dr. Van Ee's

uncontested biomedical engineering analysis established reasonable doubt whether this incident was a homicide or a tragic accident. But, following skillful cross examination by the State, Petitioner's counsel chose not to follow up with re-direct questioning to clarify any ambiguities, as is routinely done with expert witnesses, presumably feeling confident of a lead in the battle. But, Counsel inexplicably then sent Dr. Ophoven home on plane to Ohio, even though it was virtually certain that Dr. Snell would retake the stand on rebuttal to attack her testimony, and put her client back in great peril of conviction. That was an unacceptable error in a case of this magnitude, and under these critical circumstances.

28. Predictably, the State did recall Dr. Snell in rebuttal, and with his adversary safely hundreds of miles away, he was free to attack Dr. Ophoven's methodology knowing his criticisms would be the last word. Accordingly, Dr. Snell told the jury that Dr. Ophoven was quite mistaken, and had erroneously based her conclusions on the patently absurd premise of liquid (blood) flowing uphill, in full defiance of the ineluctable law of gravity. Dr. Snell then pointed out that, because blood could not flow up from the back of the head to the front while M.K. lay on the hospital gurney, the fact that there were hematomas or apparent bruising in areas of the head forward of the fracture site, proved that M.K was beaten and didn't merely fall off the bed. At this point it was critical to recall Dr. Ophoven to address Dr. Snell's challenges, and re-establish doubt, if she were capable of so testifying. Because Petitioner's counsel had not requested Dr. Ophoven to remain or return, no such sur-rebuttal could be offered. The critical battle for reasonable doubt ended with Dr. Snell's systematic rebuttal of Dr. Ophoven's key points. There was no strategic justification for

allowing the State to have the last word in this debate between the experts. Competent defense requires that, in these circumstances, Dr. Ophoven be recalled for equal time before the jury, assuming she had compelling responses to Dr. Snell's criticism. The habeas testimony of Dr. Ophoven provided to this Court amply demonstrated that she was in fact prepared to do so, and that her sur-rebuttal testimony would have been powerful.

29. In its closing argument, the State capitalized on the discovery error regarding the video provided to Dr. Van Ee, to make Petitioner's counsel look dishonest. The prosecutor inferred that the State shared everything and Petitioner hid evidence. The State spring-boarded off this to characterize Petitioner's experts as hired guns coming in from distant lands, while the local coroner's testimony was not so tainted; rather, he was just a local official doing his honest best for the community. In this way the State implied that Petitioner's entire case was manufactured and inconsistent with any reasonable interpretation of the evidence, and that the only rational conclusion was guilt of murder or manslaughter. That is what the jury heard for summation after Dr. Snell's unchallenged rebuttal testimony.

30. Count 3 on the Indictment alleged that Petitioner did, "without any design to effect death and while engaged in the commission of a felony, abuse or cruelty to a minor, kill a human being, namely, M.K., DOB 6-27-11". On May 29, 2014, sentenced Petitioner on May 29, 2014, as to Count 3 First Degree Manslaughter to forty-five (45) years in the state penitentiary with credit for 518 days previously served and twenty (20) years suspended.

31. Petitioner filed a direct appeal to the South Dakota Supreme Court. The primary topic on direct appeal was sufficiency of the evidence, with the following issues raised:

1) Whether Petitioner was constitutional denied his right to counsel during questioning.
2) Whether there was sufficient evidence to support the jury verdict finding Petitioner guilty of First Degree Manslaughter.
3) Whether the sequestration of Petitioner's biomechanical engineer from the courtroom during the "medical testimony" resulted in a violation of his right to a fair trial.

The Supreme Court summarily affirmed the judgment and sentence on January 19, 2016.

CONCLUSIONS OF LAW

1. This is Petitioner's first application for writ of habeas corpus. He raises a claim of ineffective assistance of counsel. Petitioner alleges that his trial counsel was ineffective in violation of the United States and South Dakota Constitutions because of, among other things, (1) the PDO's overloaded caseload; (2) inadequate trial preparation; (3) failure to elicit critical exculpatory opinions from their retained expert pathologist, Dr. Ophoven, to contradict the County Coroner Dr. Snell's inculpatory opinions, particularly through redirect examination and sur-rebuttal testimony; (4) failure to disclose information to the prosecution that was presented to another defense expert witness, Dr. Van Ee, in violation of the Rules of Criminal Procedure, resulting in an inference that defense counsel was

hiding evidence and not credible; (5) failure to offer into evidence the videotapes of Defendant's entire custodial interrogations, which this Court finds were highly exculpatory and probative of innocence; and (6) improper opening statement which inaccurately summarized the defense theory of the case and anticipated evidence. Petitioner alleges that each of these errors constitutes ineffective assistance of counsel, and that the individual and cumulative effect of these errors undermines the reliability of the guilty verdict, meeting the Strickland v. Washington prejudice standard.

2. This Court agrees.

3. The history of habeas corpus can be traced to the Habeas Corpus Act of 1679, which has been described as the "stable bulwark of our liberties" and was the model upon which the habeas statutes of the thirteen original American colonies were based. See Boumediene v. Bush, 553 U.S. 723, 742, 128 S.Ct. 2229, 2245-2246, 171 L.Ed.2d 41 (2008) (citing 1 W. Blackstone, Commentaries).

4. SDCL 21-27-1 states, "Any person committed or detained, imprisoned or restrained of his liberty, under any color or pretense whatever, civil or criminal, except as provided herein, may apply to the Supreme or circuit court, or any justice or judge thereof, for a writ of habeas corpus." However, habeas corpus is not a substitute for direct review and the scope of habeas review is limited. "'Habeas corpus can be used only to review (1) whether the court had jurisdiction of the crime and the person of the defendant; (2) whether the sentence was authorized by law; and (3) in certain cases whether an incarcerated defendant has been deprived of basic constitutional rights.'" Loderman v. Class, 1996 SD 134, ¶3, 555 N.W.2d 618, 622 (quoting Loop v. Class, 1996 SD 107, ¶11, 554 N.W.2d 189, 191 (citations omitted)). "The habeas applicant has the initial burden of

proving entitlement to relief by a preponderance of the evidence." Hays v. Weber, 2002 SD 59, ¶11, 645 N.W.2d 591, 595 (citing New v. Weber, 1999 SD 125, ¶5, 600 N.W.2d 568, 572 (citing Lien v. Class, 1998 SD 7, ¶11, 574 N.W.2d 601, 607)).

5. A two-prong test is applied to determine ineffective assistance of counsel claims. "In order to meet the burden of proof for a claim of ineffective assistance of counsel, a defendant must prove (1) that counsel's representation fell below an objective standard of reasonableness, and (2) that such deficiency prejudiced the defendant." Rhines v. Weber, 2000 SD 19, ¶13, 608 N.W.2d 303, 307 (citing Siers v. Class, 1998 SD 77, ¶12, 581 N.W.2d 491, 495; Sprik v. Class, 1994 SD 134, ¶22, 572 N.W.2d 824, 829; Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2065, 80 L.Ed2d 674, 693 (1984)).

6. First, counsel's performance must be shown to be deficient. Mitchell v. Class, 524 N.W.2d 860, 862 (SD 1994) (citations omitted). In order to the meet the first prong, the defendant must show that the counsel's errors were "'so serious that counsel was not functioning as the 'counsel' guaranteed ... by the Sixth Amendment.'" Mitchell, 524 N.W.2d at 862 (citations omitted). '"Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]'" Hofer, 1998 SD 58, ¶10, 578 N.W.2d at 586.

7. Second, "Applicants must prove that the outcome was prejudiced by inferior performance of counsel." Ramos v. Weber, 2000 S.D. 111, ¶12, 616 N.W.2d 88, 92 (citing Hofer, 1998 SD 58, ¶9, 578 N.W.2d at 585). "Prejudice means 'a reasonable probability that, but for the unprofessional errors of counsel, the result of the proceeding would have been different.'" Ramos, 200 S.D. 111, ¶12, 616 N.W.2d at 92 (citing Phyle v. Leapley, 491

N.W.2d 429, 432 (S.D. 1992), as modified by Hopfinger v. Leapley, 511 N.W.2d 845, 846-47 (S.D. 1994)). "A 'reasonable probability' is said to exist when there is proof sufficient to 'undermine confidence in the outcome.'" Ramos, 2000 S.D. 111, ¶12, 616 N.W.2d at 93 (citing Phyle, 491 N.W.2d at 432).

8. The case against Petitioner rested entirely upon inferences drawn from the circumstances of M.K.'s death and the opinion of Dr. Snell that, in addition to the fatal skull fracture, there was evidence of other contemporaneous blows to the head. Therefore, according to the State, the evidence proved, beyond a reasonable doubt, that the skull fracture did not result from an accidental fall. The State conceded that, although unlikely, a fall from the bed could have caused the severe skull fracture. But the State maintained that, beyond a reasonable doubt, a single blow to the head could not have caused the other multiple contemporaneous head injuries allegedly disclosed by the autopsy. Petitioner was the only adult present in the apartment at the time of injury. The five-year-old sibling was not capable of causing the injuries sustained. Therefore, the conclusion was logically unavoidable that Petitioner was guilty of causing the fatal abusive trauma.

9. In juxtaposition to this, there was no other evidence suggesting that Petitioner had ever been violent with the deceased child or any other person, or even that he was capable of such an offense. The family lived in an apartment complex, and there had never been any indication emanating from their abode of violence, upset or disturbance. The children were never reported to have been abused in any way, and the children's mother denied that Petitioner was violent, and believed in his innocence even at the time of sentencing. The apartment at the time of the injury was neat and tidy, and there was no evidence of any disturbance even in the bedroom where the child was found unresponsive on the

floor. Indeed, the morning of the injury Petitioner and the children had been to the doctor's office together for Petitioner's inoculations, and all appeared to be well. The Court notes as significant the absence of any evidence of an assault other than Dr. Snell's claim of multiple contemporaneous head wounds. No evidence was offered identifying any weapon or even pointing to a probable source of the alleged blunt force assault. There was no object identified as the potential bludgeon and Petitioner had no marks, bruises, or swelling on either of his hands. There was a dearth of any incriminating evidence other than the severity of the injury itself, and Dr. Snell's opinion interpreting the same.

10. The matter came to the attention of a neighbor as Petitioner was in the hallway of the apartment building, frantically trying to explain to the 911 dispatcher that the child had fallen and was unconscious. Nothing about his reactions in this regard were inconsistent with his version of the event, which was that when he went to wake the child from his nap, Petitioner found the boy unresponsive on the floor by the bed. Particularly probative of innocence, in this Court's view, are the three interrogation videos where Petitioner was subjected to withering and abusive questioning by a very skillful police detective, all without counsel, and with a separate interpreter for each interrogation, all the while steadfastly maintaining his innocence, and, moreover, maintaining the same, consistent narrative of the events. Upon a new trial, however, this Court anticipates the State would be successful seeking to preclude that portion of the videos where the Petitioner accepts an offer to take a polygraph test per State v. Bertram, 2018 S.D. 4, ¶ 14, 906 N.W.2d 418, 423. Nevertheless, it is inconceivable to the Court why the defense chose to withhold that compelling, critical evidence of innocence arising from the videos from the jury. At

the habeas evidentiary hearing, trial defense counsel offered no rational justification for this. The Court can find no possible strategic purpose to keeping that powerful evidence from the jury. See State v. Tchida, 347 N.W.2d 338, 340 (S.D. 1984)("we conceive no possible defense strategy").

11. Given the dearth of any incriminating statements, or other corroboration, the entire case came down to interpretation of the child's injuries, and from there, to the competing opinions of the two forensic pathologists who investigated the incident, were qualified to render opinions as to manner of death, and testified at the trial. The County Coroner, Dr. Kenneth Snell, said that certain lesions on the child's head were sequelae of multiple contemporaneous blows to the head occurring at the time of the fatal skull fracture. The defense expert, Dr. Janice Ophoven, a pediatric pathologist with impressive forensic credentials, contradicted the multiple blow theory and argued that the lesions Dr. Snell attributed to other blows were in fact the result of the massive bleeding under the child's scalp from the facture site, fueled by massive blood transfusions and the lack of clotting caused by DIC, the condition where anticoagulants are formed in the bloodstream due to shock. The defense's attempt to carry the day in this titanic battle of experts was undermined by multiple errors committed by defense counsel which prejudiced the defense and, in this Court's view, likely affected the outcome of the trial.

12. The most critical error in the case was the failure of defense counsel to allow Dr. Ophoven the opportunity she needed to neutralize Dr. Snell's rebuttal testimony. Defense counsel did a decent job on direct exam with Dr. Ophoven, but following a skillful cross, there was need of re-direct to reinforce her theory of the case. Defense counsel's excuse for waiving redirect was that she did not want to annoy the jury by

being too picky. She also indicated a belief that Dr. Ophoven's testimony was not critical to the defense. These comments evince a staggering failure to understand the theory of the defense. See Hinton v. Alabama, 571 U.S. 263, 274, 134 S. Ct. 1081, 1089, 188 L. Ed. 2d 1 (2014).

13. It should have been obvious to competently prepared counsel in the heat of this litigation that the fate of the case hinged upon carrying the day in the contest between Drs. Snell and Ophoven. It also revealed a fundamental miscalculation of her opponent, as it should have been foreseen that the prosecution would have Dr. Snell retake the stand for rebuttal, as is standard procedure in any trial involving experts with opposing views critical to the outcome of the case. See Rompilla v. Beard, 545 U.S. 374, 394, 125 S. Ct. 2456, 2470, 162 L. Ed. 2d 360 (2005)("in order to anticipate and find ways of deflecting the prosecutor's aggravation argument",)

14. Predictably, the failure to redirect Dr. Ophoven allowed the prosecution to follow its cross of the defense's key expert witness with the return of Dr. Snell for rebuttal, to cast further doubt upon the credibility of Dr. Ophoven's testimony with a one-two punch series that was the final salvo in the case. As defense counsel testified at length at the habeas hearing, Dr. Snell is a formidable witness and that effective cross examination is very elusive with him on the witness stand. The superior strategy, in her view, was to avoid arguing with him and instead focus on allowing the defense's expert witness to contradict him with superior forensic reasoning and analysis.

15. Unfortunately for Petitioner, his defense counsel failed to follow through with this strategy. Rather, Dr. Snell's forceful rebuttal of Dr. Ophoven was the last word on the subject, as defense counsel inexplicably failed to exercise the procedural right to recall

Dr. Ophoven to the stand for sur-rebuttal. In this Court's view, that decision was fatal to the defense, and unjustifiable by any rational strategy. At the habeas evidentiary hearing in this case, Dr. Ophoven was called to the stand by Petitioner to testify to what she would have said to the jury, had she been allowed to provide them with her testimony on redirect and sur-rebuttal. In this Court's view, that testimony, which responded forcefully and persuasively to all of Dr. Snell's criticisms, was of critical importance to the jury's understanding and appreciation of the theory of the defense, that there was, indeed, reasonable doubt whether this was a case of abuse or merely a tragic accident. Failure to do this undermines the Court's confidence in the verdict, and therefore was error of constitutional magnitude.

16. Dr. Snell's main criticism of Dr. Ophoven's analysis was that she erred in attributing the apparent bruising at the front area of M.K.'s head and face to the excessive bleeding from the fracture site, caused by massive blood transfusions combined with the DIC anti-coagulation effect. Dr. Snell testified that this theory was implausible, because it required M.K.'s blood to flow uphill, against gravity, which doesn't occur. He further admonished the jury that an apparent bruise along the back of the child's scalp couldn't be attributable to the excessive bleeding, nor tied to the blow that caused the depressed fracture, because that bruise and the fracture were not in close enough proximity. At the habeas hearing, Petitioner called Dr. Ophoven to the stand to testify to what she would have said to rebut Dr. Snell's criticisms, if asked. That testimony explained that in the environment of a child's tissues surrounding the skull bone, blood under pressure of transfusion follows the path of least resistance, which in this case would allow migration of blood all around the head and face, including the area of the child's left eye, which

developed apparent bruising after death. Dr. Ophoven further pointed out the lack of any damage to the paper-thin eye socket structure of such a young child, which is inconsistent with Dr. Snell's claim that a serious blow to the eye occurred. She also, among other things, explained how the elastic qualities of a small child's skull bones allow for very significant deformation under pressure, explaining how surface bruising and boney fracture sites may not always appear to line up exactly as Dr. Snell asserted. Overall, in the Court's view, Dr. Ophoven's habeas testimony shows that the absent sur-rebuttal testimony, if offered, would have been compelling, and likely would have cast reasonable doubt upon the theory of the State's case. Had the jury heard this critical evidence, the Court has grave doubt whether the jury could have found the Petitioner guilty of any of the crimes charged. Presenting such evidence, when it exists, is necessary to a competent defense. This is the type of representation that the Sixth Amendment's right to counsel requires. Allowing the retained expert to leave the state and not stay to complete her testimony in this way is deficient advocacy. As such, this deficiency undermines the Court's confidence in the original result at trial.

17. Defense counsel also incompetently prejudiced their own case by overselling the defense to the jury in opening statement. See Gales v. State, 299 So. 3d 861, 869 (Miss.Ct.App. 2020)("State is allowed to comment on the evidence and point out that the defense's theory is unsupported by the evidence"). Defense counsel asserted that the Defense experts would show that the injury was accidental. That was never anticipated by counsel and was not the expected testimony. Dr. Ophoven's testimony was that there was only one fresh injury to the head and that was the skull fracture. Dr. Van Ee's opinion was that a hypothetical fall from the bed to the footboard of the bed was of

sufficient height to create enough force to cause a fracture of the severity that was shown to exist by the autopsy. The anticipated expert testimony, as such, established the scientific possibility of an accident. It would not prove the injury was accidental. But, of course, the defense need not prove innocence. It need only be able to convince the jury that there is a reasonable possibility of innocence. See State v. Forde, 315 P.3d 1200, 1222 (Az. 2014)("If, on the other hand, you think there is a real possibility that the defendant is not guilty, you must give her the benefit of the doubt and find her not guilty. "); Victor v. Nebraska, 511 U.S. 1, 27, 114 S. Ct. 1239, 1253, 127 L. Ed. 2d 583 (1994) ; S.D. Criminal Pattern Jury Instruction 1-6-1.

18. Given the lack of other circumstantial evidence of guilt, a credible forensic hypothesis for innocence would be sufficient to reveal the reasonable doubt existing under the circumstances. Jacobs testified that his presentation during opening argument was a mistake and not a trial strategy. By overselling their expert's testimony in the opening statement, defense counsel set themselves up for failure, as the evidence failed to meet the standard that they promised to establish for the jury. This spoiled the proper presentation of the case as scientific possibility of innocence, when combined with all the circumstantial evidence being consistent with innocence, creating reasonable doubt. As such, trial counsel's mistake in opening argument, accordingly, undermines the Court's confidence in the original result at trial as well. See also Hinds v. Comm'r of Correction, 321 Conn. 56, 95, 136 A.3d 596, 619 (2016) ("at least one of the errors was so significant as to render it highly doubtful that the defendant had received a fair trial and the remaining errors created the additional doubt necessary to establish that there was serious doubt about the fairness of the trial, which is necessary to reverse a conviction").

19. The credibility of the defense was further impeached by a blunder where the defense failed to disclose to the prosecution that it had provided Dr. Van Ee with a videotaped statement from Petitioner explaining, and a drawing Petitioner utilized to show, where he found the injured child by the bed. While there was nothing wrong with the defense making the video or providing it to their expert, this data was subject to discovery. See SDCL 23A-13-12; SDCL 23A-13-13; SDCL 19-19-705. Predictably, while on the stand in cross examination, Dr. Van Ee was asked what information was provided for his review in preparation of his opinions and testimony. When he revealed the video that the prosecution had no knowledge of, the withholding of that information was pounced upon by the State in front of the jury and the defense was put in the position of attempting to explain the nondisclosure. This error was capitalized upon by the prosecutor in closing argument, where he presented himself as the fair truth seeker providing all evidence to the jury, while defense counsel attempted to hide evidence. At the habeas hearing Ms. Smith acknowledged that her assumption that this data was privileged work product was unsupportable. As such, the presence of this discovery error also undermines the Court's confidence in the original result at trial.

20. The lead attorney for the defense is known to this Court to be an ethical, competent and zealous advocate. But the evidence presented at the habeas hearing demonstrated that her office at the time of this trial was understaffed, overworked, and inadequately equipped to handle its burdensome caseload. To that point, counsel presented documentation to the County Commission in her budget presentation the prior year warning that her office was at the risk of being unable to provide adequate representation to its clients under the current staffing shortages. See Habeas Ex. 12 and 13. Those documents, provided by an

attorney to a government agency for an official purpose, by law are required to be true subject to legal penalties. See State v. Bosworth, 2017 S.D. 43, 899 N.W.2d 691; Reaser v. Reaser, 2004 S.D. 116, ¶21, 688 N.W.2d 429, 436. While defense counsel sought to downplay the significance of that report in her testimony during the habeas evidentiary hearing as merely for budget advocacy, the Court finds that the budget and staffing constraints are consistent with the errors herein. Specifically, Smith was scheduled to commence the penalty phase of a death penalty jury trial one month following Petitioner's trial. Her second chair in Petitioner's case was an inexperienced young lawyer. The Public Defender's Office was stretched too thin do provide effective advocacy in all its serious matters, and that weakness manifested itself in this case to the Petitioner's prejudice.

21. The ABA has promulgated very rigorous standards for death cases. See American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003). While not statutorily enacted in South Dakota, Smith indicated that she looks to ABA and NLADA (National Legal Aid and Defender Association) standards in accessing the Public Defender Office's ability to meet their professional obligations to clients. She testified that the office did not meet professional standards in 2014. See Wiggins v. Smith, 539 U.S. 510, 534, 123 S. Ct. 2527, 2542, 156 L. Ed. 2d 471 (2003)(application of professional standards at the time of event).

22. Petitioner's case was not a death penalty case. But it was a murder case, and Petitioner was facing life in prison without parole, arguably the functional equivalent of a death sentence. High regard for preparation, strategy, and execution of the defense apply to all reasonable lawyers in such cases as well, and that expectation must prevail in courts of

justice in an advanced and free society. See Parker v. Bowersox, 188 F.3d 923, 929 (8th Cir. 1999)("We apply the same standard of attorney performance in both capital and noncapital cases."). Having two cases of such magnitude with one month in between, and with only a young and inexperienced co-counsel, is not prudent, and resulted in prejudicial errors in this case, which seems to be explained by the fact that the Public Defender office was being asked to do too much, with too little, for too long. To be sure, staffing shortages alone do not create ineffective assistance per se, but they do appear to explain why the assistance in this case fell short of the requisite standard.

23. Another point needs to be mentioned. The defendant in this case was a legal immigrant who did not speak English and had only been in the country for two years. These circumstances put him at a very appreciable disadvantage vis-à-vis a native South Dakotan who may have found himself in similar circumstances. Unlike most defendants, who exercise their rights to remain silent and to counsel at an early stage, Petitioner submitted to six hours of custodial interrogation without counsel and then testified at trial. However, he had to testify through an interpreter, so that the jury never really had an opportunity to evaluate the credibility of his testimony in court the same way it would if a native speaker were at the witness stand conversing directly with them. The transcripts show that the interpreter struggled to understand legal terms while Petitioner was on the witness stand and the flow of his testimony was subject to interruptions as the interpreter asked for clarifications or restatements. Accordingly, it was even more important, in the interests of equal justice, for this disadvantaged individual to be provided with competent representation in the presentation of his defense. In this case counsel fell short in multiple domains, comprising several individual instances of

ineffective assistance of counsel, the individual and cumulative effect of which, in this Court's view, prejudiced his defense and undermines the Court's confidence in the justness of the verdict.

24. When the State marshals it resources to accuse a person of murder and seeks to take his liberty away potentially for life, the fundamental principles of due process of law that separate this free society from other, oppressive forms of government require that, among other things, the accused be provided effective assistance of counsel. The United States Supreme Court has stated that the principles announced in Strickland "do not establish mechanical rules." Strickland, 466 U.S. at 696, 104 S.Ct. at 2069. The Supreme Court continued:

> Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

Dillon v. Weber, 2007 S.D. 81, ¶ 29, 737 N.W.2d 420, 430. Felony crimes of this magnitude require that the defense bring its "A-game" to the courtroom. Here that was not done. Critical expert testimony was omitted, and compelling exculpatory interrogation videos were withheld from evidence. A major pretrial discovery blunder detonated in the defense's face before the jury and was capitalized upon by an opportunistic prosecution in closing. Opening statement was bungled with a fundamental error. This very outcome was foreshadowed by the PDO's own budget presentation to

the County Commission and was foreseeable. Petitioner has been prejudiced by these errors and the Court's confidence in the integrity of this verdict is compromised.

25. [The South Dakota Supreme Court has] previously acknowledged that:

> "this [C]ourt will not compare counsel's performance to that of some idealized 'super-lawyer' and will respect the integrity of counsel's decision in choosing a particular strategy, [but] these considerations must be balanced with the need to insure that counsel's performance was within the realm of competence required of members of the profession." Sprik v. Class, 1997 SD 134, ¶ 24, 572 N.W.2d 824, 829 (citations omitted).

Hofman v. Weber, 2002 S.D. 11, ¶ 18, 639 N.W.2d 523, 529. This Court is not holding Petitioner's trial counsel to a "super-lawyer" standard, but to those of reasonable lawyers in the practice of law. See New v. Weber, 1999 S.D. 125, ¶¶ 23-25, 600 N.W.2d 568, 577; United States v. Easter, 539 F.2d 663, 665 (8th Cir. 1976) ("the degree of competence prevailing among those licensed to practice before the bar."). Justice requires that Petitioner receive a new, fair trial. Accordingly, the request for habeas corpus relief is granted, and Petitioner will be released from confinement unless he is retried within a reasonable time.

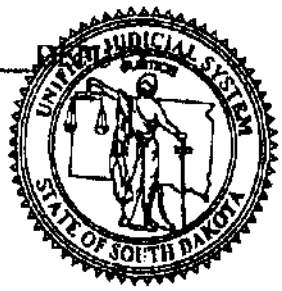
Dated this 27 day of August, 2021.

BY THE COURT:

Douglas E. Hoffman
Circuit Court Judge

ATTEST: Angelia M. Gries, Clerk of Courts

By: [signature]



IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 29790

MANEGABE CHEBAEA ALLY

Petitioner and Appellee,

v.

DARIN YOUNG, Warden, South Dakota State Penitentiary,

Respondent and Appellant.

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

THE HONORABLE DOUGLAS E. HOFFMAN
Circuit Court Judge

APPELLANT'S REPLY BRIEF

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Notice of Appeal filed October 14, 2021

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PRELIMINARY STATEMENT

To comply with SDCL 15-26A-62 and to avoid repetitive arguments, Respondent limits his response to the issues addressed in Ally's Appellee's Brief. Respondent does not intend to waive any issues raised in his Appellant's Brief. Respondent also relies on, without restating, his Jurisdictional Statement, Statement of Legal Issue and Authorities, Statement of the Case, Statement of Facts, and Appendix presented in his Appellant's Brief.

Respondent uses all document, transcript, and exhibit designations identified in the Preliminary Statement of his Appellant's Brief. On top of those designations, this reply brief refers to Ally's Appellee's Brief as "AP." This reply brief also refers to Respondent's Appellant's Brief as "AB." These brief designations are followed by the appropriate page numbers.

ARGUMENT

THE HABEAS COURT ERRED WHEN IT DETERMINED ALLY RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

While Respondent believes that all claims, arguments, and matters raised by Ally in his Appellee's Brief are addressed, in one respect or another, by Respondent's Appellant's Brief, it is imperative to directly respond to some of those claims and arguments in this reply.

A. Ally misreads SDCL 15-26A-66 and ignores part of this Court's April 20, 2022, Order.

There are two housekeeping matters that need to be addressed before reaching Ally's habeas arguments because Ally accuses Respondent of violating both statutory law and a court order.

First, Ally claims Respondent's Appellant's Brief is too long, in violation of SDCL 15-26A-66, because it is more than forty pages long. AP:39. He would be correct *if* SDCL 15-26A-66(a) were the only brief length mandate. But his argument ignores SDCL 15-26A-66(b). Under that subsection, a brief can exceed page limitations if it "contain[s] no more than the greater of 10,000 words or 50,000 characters." SDCL 15-26A-66(b)(2). Respondent submitted his brief in accordance with SDCL 15-26A-66(b) and all its subsections. Thus, the Certificate of Compliance in that brief. AB:46. And Respondent is confident that had his brief violated any of the filing restrictions in SDCL ch. 15-26A, the Clerk of the Supreme Court would have rejected that brief for such non-compliance. SDCL 15-26A-70.

Second, Ally claims this Court lacks jurisdiction to address the habeas court's decision to sua sponte raise an ineffective assistance claim. AP:36. He bases that claim on this Court's April 20, 2022, Order Denying Motion for Certificate of Probable Cause in *Ally v. Fluke*, S.D.S.C. Appeal No. 29768. AP:36.

Ally is correct that Respondent sought a separate certificate of probable cause from this Court asserting that the habeas court abandoned its neutral role in the proceedings and became an advocate for Ally. *See Ally v. Fluke*, S.D.S.C. Appeal No. 29768. Ally is also correct that this Court denied that separate certificate of probable cause to an extent. But Ally ignores the very next paragraph in that Order:

> IT IS FURTHER ORDERED, that this order *does not preclude* the parties from addressing the issue referenced above insofar as it may be relevant to the issue of "whether Manegabe Ally received ineffective assistance of counsel at his jury trial in this matter, warranting a new trial," as certified by the circuit court in its Order Issuing Certificate of Probable Cause on September 17, 2021.

Consistent with that Order, Respondent addressed the habeas court advocacy issue where it is relevant to why the habeas court erred in granting Ally relief. Respondent addressed how the habeas court impermissibly abandoned its role as a neutral arbiter and became an advocate for Ally in the discussion of how the court's analysis was inappropriately outcome determinative. AB:40-41.

B. Ally, like the habeas court, ignores the settled law on ineffective assistance to say Smith and Jacobs were ineffective.

Both Ally and the habeas court give a nod to the presumptions and limits that act as guideposts for applying *Strickland v. Washington*, 466 U.S. 668 (1984). But both then blow past those presumptions and limitations, rather than respecting and applying them, to try to paint Smith and Jacobs's work as a masterpiece of mistakes. By doing so, Ally and the habeas court offer a master class on why *Strickland*—and its presumptions and limits—must be applied with the "scrupulous care." *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

Even though Ally's brief and the habeas court's decision are saturated with examples of how they ignored *Strickland's* presumptions and limitations, Respondent highlights only a few for the sake of brevity. For example, Ally and the habeas court both recognize that trial counsel's performance cannot be reviewed using the harsh light of hindsight. MH:13-25; Appendix:040-041; AP:23; *Engesser v. Dooley*, 2008 S.D. 124, ¶14, 759 N.W.2d 309, 314. Yet they both apply hindsight to attack Smith and Jacobs's strategic decisions.

The habeas court second-guessed Smith and Jacobs's decision to try to exclude Ally's interview videos. Appendix:040-041. It also second-guessed why they would rely on Ally's testimony to tell the defense's version of what happened to M.K. MH:21. For his part, Ally relies on Smith's and Dr. Ophoven's years-after-the-fact reflection about what Smith could have done different with Dr. Ophoven's testimony and how

they could have attacked Dr. Snell's testimony. AP:16-18. By engaging in this second-guessing, Ally and the habeas court ignore that Smith and Jacobs's performance must be viewed "'from counsel's perspective at the time [of trial,]'" not years later. *Reay v. Young*, 2019 S.D. 63, ¶14, 936 N.W.2d 117, 121 (quoting *Strickland*, 466 U.S. at 689). And they both ignore that "[t]here are countless ways to provide effective assistance" and "[e]ven the best criminal defense attorneys would not defend a particular client the same way." *Strickland*, 466 U.S. at 689-90.

Similarly, Ally and the habeas court's second-guessing attack Smith and Jacobs's trial tactics—even though "'a difference in trial tactics'" cannot amount to ineffective assistance, *Piper v. Young*, 2019 S.D. 65, ¶67, 936 N.W.2d 793, 814 (quoting *Brakeall v. Weber*, 2003 S.D. 90, ¶16, 668 N.W.2d 79, 85). What's more, they attack those tactics by pontificating about what could have been done differently, *after* seeing the result of trial. By doing so, Ally and the habeas court again ignore that Smith and Jacobs's performance must be viewed from Smith and Jacobs's perspective at the time. *Reay*, 2019 S.D. 63, ¶14.

By ignoring *Strickland's* presumptions and limitations, Ally and the habeas court fall in the trap that this Court warned us about: It is "'all too tempting for a defendant to second-guess counsel's assistance after conviction . . . and it is all too easy for a court . . . to conclude that a particular act or omission of counsel was unreasonable.'" *Engesser*,

2008 S.D. 124, ¶14 (quoting *Conaty v. Solem*, 422 N.W.2d 102, 103 (S.D. 1988)).

Ally's arguments, and the habeas court's decision, also focus too much on an outcome determination. In effect they both say: "Well, if Smith and Jacobs had done this differently, the trial could have ended differently" or "if Smith and Jacobs had done that differently, the result of trial could have been different." But such arguments and decisions lose sight of the actual analysis under *Strickland's* prejudice prong: Did Ally receive a fair trial? *Hopfinger v. Leapley*, 511 N.W.2d 845, 847 (S.D. 1994). By focusing solely on the outcome, Ally and the habeas court ignore that to establish prejudice under *Strickland* "[t]he likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112 (citing *Strickland*, 466 U.S. at 693). That's why this Court and the United States Supreme Court have expressly rejected an ineffective assistance analysis that focuses "'solely on the mere outcome'" and loses sight of "'whether the result of the proceeding was fundamentally []fair or []reliable . . . .'" *Hopfinger*, 511 N.W.2d at 847 (quoting *Lockhart v. Fretwell*, 506 U.S. 364, 369-70 (1993)).

By getting lost in an outcome determinative analysis, Ally and the habeas court overlook the testimony of several witnesses—for the State and defense alike—that show Ally received a fair trial and the jury's verdicts should be respected. Some witnesses, including the State's witnesses, offered testimony that may have helped Ally's defense. For

example, Captain Gramlick and Dr. Snell admitted M.K. did not have the tell-tale characteristics that they look for with abused children. JT4:69; JT5:129-33. Officer McMahon testified that Ally called 911 as soon as he noticed M.K. was not breathing. JT4:142. Detective Carda admitted that, across all three interviews, Ally consistently said M.K.'s death was an accident. JT5:54. Detective Carda also admitted that he lied to Ally by saying M.K. had bruises that Ally caused. JT5:66-68, 132-33. And Dr. Hafzalah admitted that M.K. had uncontrolled internal bleeding, which could partially support Dr. Ophoven's testimony that M.K.'s hemorrhages came from his skull fracture, not separate impacts. JT6:38-39.

But other witnesses, including some defense witnesses, offered testimony that may have hurt Ally's defense. Nicole McKenzie heard no crying from Ally's apartment, even though the walls were paper-thin and she routinely heard crying children throughout the building. JT4:50-51. This cuts against Ally's story that he went to check on M.K. after hearing him cry. JT5:29. Several witnesses confirmed that M.K. had no external bleeding. JT4:47, 113, 167; JT5:13. This contradicts Ally's claim that he saw blood coming out of M.K.'s mouth. JT4:151. Also, Ally's story changed from when he talked to officers at the apartment to his interviews with Detective Carda about what he was doing before he supposedly found the injured M.K. JT4:151; JT5:54.

Perhaps the most damaging testimony was some of Dr. Ophoven's and Dr. Van Ee's concessions. Dr. Ophoven said that if there is more than one point of impact on an injured child, she would rule out accident as the manner of death. JT6:101. Thus, if the jury believed Dr. Snell's multiple impacts opinion over Dr. Ophoven's single impact opinion, then she confirmed M.K.'s death wasn't an accident. For his part, Dr. Van Ee conceded that while short falls happen, it is extremely rare for them to be fatal. JT7:33. He also confirmed that he based his opinion and analysis mostly on Dr. Ophoven's single impact theory. JT7:7. And he focused his analysis on the worst-case scenario: M.K. was standing on the bed before falling, not that he rolled off while sleeping. JT7:14-15.

Ultimately, it was the jury's responsibility, not Ally's or the habeas court's, "'to decide what conclusions should be drawn from [the] evidence. . . .'" *Coleman v. Johnson*, 566 U.S. 650, 651 (2012)(per curiam)(quoting *Cavazos v. Smith*, 565 U.S. 1, 2 (2011)(per curiam)). *See State v. Wolf*, 2020 S.D. 15, ¶13, 941 N.W.2d 216, 220. That jury's verdicts—both guilty and not guilty—should be respected.

Ally also tries to compare Smith and Jacobs's performance to that of counsel in *Dillon v. Weber*, 2007 S.D. 81, 737 N.W.2d 420, when making his case for ineffective assistance. But there are stark differences between the ineffective assistance there, and Smith and Jacobs's effective advocacy here.

Dillon's attorney, Richard Bode, failed to protect Dillon's Fifth Amendment rights by not raising a double jeopardy claim so obvious that this Court corrected a sentencing issue on direct appeal under the onerous plain error standard. *Dillon*, 2007 S.D. 81, ¶¶4, 12. But unlike Bode, Smith and Jacobs protected Ally's Fifth Amendment rights by raising a self-incrimination claim because English was not Ally's first language and because of cultural differences in how Ally perceived authority figures. *See* CF:183-84, 250, 255-57.

Next, Bode failed to investigate the victims' prior allegations of sexual abuse by another man, which could have been used to try to undercut the prosecution's case. *Dillon*, 2007 S.D. 81, ¶13. Yet Smith and Jacobs undertook an extensive investigation to undercut the State's case. They hired Dr. Ophoven and, at her urging, Dr. Van Ee. JT6:124. They also investigated Ally's apartment, even though it had been renovated after his arrest, to figure out what floor coverings were in the apartment when M.K. died. CF:60-78. Those floor coverings and the padding, or lack thereof, they provided were an essential piece of information for the force calculations needed to support the defense's accidental fall theory. JT5:137-38; JT6:137-39.

Bode also failed to prepare the defense's expert witnesses, as well as some lay witnesses, for their testimony, even though Dillon's case turned on witness credibility. *Dillon*, 2007 S.D. 81, ¶¶14, 17. Here, even though Ally challenges how the defense's experts were questioned, there

are no complaints that Smith and Jacobs failed to prepare their witnesses for trial. *See generally* SR:1-1220. Dr. Ophoven and Dr. Van Ee were both prepped and able to present their opinions that Dr. Snell's autopsy findings were incorrect and that law enforcement's investigation was sloppy and incomplete. Both were given ample opportunity to present the details of why they disagreed with the State's case and evidence. And Ally's displeasure with the questions asked of these witnesses, as well as some questions asked of Dr. Snell stems from using blinders to ignore "the obvious" that "trial lawyers, in every case, could have done something more or done something different. So, omissions are inevitable." *Chandler v. United States*, 218 F.3d 1305, 1313 (11th Cir. 2000).

Finally, Ally tries to argue that because the criminal court offered the defense an opportunity for sur-rebuttal, that court, like the trial court in *Dillon*, was trying to fix counsel's errors in dealing with witnesses. AP:24; *Dillon*, 2007 S.D. 81, ¶15. But that argument looks too deep and tries to make connections that are not supported by the record. In *Dillon* the trial court explicitly said what it would allow Bode to ask of witnesses and provided examples. 2007 S.D. 81, ¶15. And the issue was counsel's failure to provide an offer of proof about the expert witnesses' testimony. *Id.* Because of that failure, almost all the intended expert testimony was excluded. *Id.*

But during Ally's trial, the criminal court simply asked the defense if they had sur-rebuttal evidence they wanted to offer. JT7:105. Just because the criminal court offered the opportunity for sur-rebuttal does not mean Smith and Jacobs made a mistake. The better interpretation of that situation, and the only interpretation supported by the record, is the criminal court, who was a relatively newer judge at the time,[1] was just following SDCL 23A-24-2, which sets the order for how a trial proceeds. The defense didn't offer sur-rebuttal testimony, specifically medical testimony, because they thought they got what they needed from Dr. Ophoven during their case-in-chief. EH2:114. And because in Smith's experience it does not play well with a jury to repeatedly cover the same ground with expert witnesses whose opinions conflict. EH3:78-79.

C. Applying Dunn v. Reeves is not an invitation to change the ineffective assistance analysis.

According to Ally, Respondent's use of *Dunn v. Reeves*, 141 S.Ct. 2405 (2021)(per curiam), in his Appellant's Brief invites this Court to expand the applicable analysis under *Strickland*. AP:28-30. But *Dunn* simply rehashes the long-applied *Strickland* analysis, as well as a recognition of the standards applied to federal review of state court decisions.

[1] Then-Judge Salter was appointed to the circuit bench in 2013, Ally's jury trial took place in early 2014. *Justice Mark E. Salter's Supreme Court Biography*, https://ujs.sd.gov/Supreme_Court/Default.aspx (last visited June 27, 2022).

At the outset, Ally claims *Dunn* is an invitation to extend *Strickland's* ineffective assistance analysis because *Dunn* mainly involves a discussion of 28 U.S.C. § 2254, the habeas statute applicable to federal challenges of state court convictions. AP:28-30. That argument ignores the realities of federal habeas cases. Most state prisoner habeas cases that make their way to the United States Supreme Court have their start under 28 U.S.C. § 2254, not state post-conviction statutes. Since 2015 thirty-one of the Supreme Court's forty-three habeas opinions began in federal court under 28 U.S.C. § 2254.[2] And *Strickland* itself began as a

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[2] The twelve cases that started as writs of certiorari from state courts are: *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020); *Andrus v. Texas*, 140 S.Ct. 1875 (2020)(per curiam); *Ramos v. Louisiana*, 140 S.Ct. 1390 (2020); *Garza v. Idaho*, 139 S.Ct. 738 (2019); *Moore v. Texas*, 139 S.Ct. 666 (2019); *Moore v. Texas*, 137 S.Ct. 1039 (2017); *Rippo v. Baker*, 137 S.Ct. 905 (2017)(per curiam); *Williams v. Pennsylvania*, 579 U.S. 1 (2016); *Foster v. Chatman*, 578 U.S. 488 (2016); *Wearry v. Cain*, 577 U.S. 385 (2016)(per curiam); *Montgomery v. Louisiana*, 577 U.S. 190 (2016); *Maryland v. Kulbicki*, 577 U.S. 1 (2015)(per curiam). The thirty-one cases that started as 28 U.S.C. § 2254 cases are: *Shoop v. Twyford*, 596 U.S.__ (2022)(slip opinion); *Shinn v. Martinez Ramirez*, 142 S.Ct. 1718 (2022); *Brown v. Davenport*, 142 S.Ct. 1510 (2022); *Dunn*, 141 S.Ct. 2405; *Edwards v. Vannoy*, 141 S.Ct. 1547 (2021); *Alaska v. Wright*, 141 S.Ct. 1467 (2021)(per curiam); *Mays v. Hines*, 141 S.Ct. 1154 (2021)(per curiam); *Shinn v. Kayer*, 141 S.Ct. 517 (2020)(per curiam); *Sharp v. Murphy*, 140 S.Ct. 2412 (2020); *Banister v. Davis*, 140 S.Ct. 1698 (2020); *Shoop v. Hill*, 139 S.Ct. 504 (2019)(per curiam); *Sexton v. Beaudreaux*, 138 S.Ct. 2555 (2018)(per curiam); *Wilson v. Sellers*, 138 S.Ct. 1188 (2018); *Ayestas v. Davis*, 138 S.Ct. 1080 (2018); *Tharpe v. Sellers*, 138 S.Ct. 545 (2018)(per curiam); *Dunn v. Madison*, 138 S.Ct. 9 (2017)(per curiam); *Kernan v. Cuero*, 138 S.Ct. 4 (2017)(per curiam); *Davila v. Davis*, 137 S.Ct. 2058 (2017); *Jenkins v. Hutton*, 137 S.Ct. 1769 (2017)(per curiam); *McWilliams v. Dunn*, 137 S.Ct. 1790 (2017); *Virginia v. LeBlanc*, 137 S.Ct. 1726 (2017)(per curiam); *Buck v. Davis*, 137 S.Ct. 789 (2017); *Johnson v. Lee*, 578 U.S. 605 (2016)(per curiam); *Kernan v. Hinojosa*, 578 U.S. 412 (2016)(per curiam); *Woods v. Etherton*, 578 U.S. 113 (2016)(per

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§ 2254 case, not a state post-conviction case that made its way to the Court on a writ of certiorari from the Florida state courts. *Strickland*, 466 U.S. at 678.

But more importantly, *Dunn* delineates its discussion of *Strickland* from its discussion of 28 U.S.C. § 2254.[3] In section II the Court discusses the deference that must be given to trial counsel's decisions under *Strickland*. *Dunn*, 141 S.Ct. at 2410. Within this discussion is the "no competent lawyer" language that Respondent relied on in his Appellant's Brief. *Id*. Then the Court makes a clean break and transitions to the deference that must be given to state court decisions under 28 U.S.C. § 2254. *Dunn*, 141 S.Ct. at 2410-11. Thus, there is no

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curiam); *White v. Wheeler*, 577 U.S. 73 (2015)(per curiam); *Brumfield v. Cain*, 576 U.S. 305 (2015); *Davis v. Ayala*, 576 U.S. 257 (2015); *Woods v. Donald*, 575 U.S. 312 (2015)(per curiam); *Christeson v. Roper*, 574 U.S. 373 (2015)(per curiam); *Jennings v. Stephens*, 574 U.S. 271 (2015).

[3] 28 U.S.C. § 2254 sets the parameters for federal courts to review state court convictions. When Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996, it curtailed federal review and reined in the unchecked use of federal habeas actions to continually attack the finality of state court criminal convictions. *See Hill*, 139 S.Ct. at 506. One of those curtailments was limiting federal review to claims decided on the merits in state court. 28 U.S.C. § 2254(b)&(d). Within that limited review, federal courts must be especially deferential to the state courts decisions. *Dunn*, 141 S.Ct. at 2410-11. But that deferential review does not change the law that is the basis for a given claim. Indeed, one of the reviews is whether the state court reached a decision that is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). In the context of this case, that clearly established federal law is *Strickland* and any Supreme Court precedent applying *Strickland*, including *Dunn*.

confusion or conflation of the different standards of deference that could create questions of whether *Dunn* stays faithful to *Strickland*.

Dunn's "no competent lawyer" language is also not new. Almost two years before Ally killed M.K., the Court used the same language, although substituting the word "attorney" for "lawyer" in *Premo v. Moore*, 562 U.S. 115 (2011). There, the Court stated, in the context of reviewing counsel's belief that a motion to suppress would fail, that "the relevant question under *Strickland*" is whether "no competent attorney would think a motion to suppress would have failed[.]" *Premo*, 562 U.S. at 124.

Likewise, the "no competent lawyer" and "no competent attorney" language does not expand *Strickland* or this Court's cases adopting and applying *Strickland*. It is just another way to phrase *Strickland's* deficient performance prong, which requires showing that "counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. This reasonableness standard promotes and protects the Sixth Amendment's mandate that every criminal defendant is entitled to "'a reasonably competent attorney.'" *Richter*, 562 U.S. at 110 (quoting *Strickland*, 466 U.S. at 687).

The "no competent lawyer" and "no competent attorney" language also furthers the Sixth Amendment's guarantees because an attorney who takes an action no competent attorney would, is not acting reasonably. But this is not a foreign concept shoehorned into habeas cases; reasonableness is applied across many spectrums of the law, like

intentional tort suits, business disputes, and medical malpractice cases. *Syrstad v. Syrstad*, 2021 S.D. 67, 968 N.W.2d 207 (applying the "reasonably prudent person" standard to the discovery trigger of SDCL 26-10-25's statute of limitations); *Mueller v. Cedar Shore Resort, Inc.*, 2002 S.D. 38, 643 N.W.2d 56 (applying "reasonableness" in the context of a shareholder lawsuit and application of the business judgment rule); *Papke v. Harbert*, 2007 S.D. 87, 738 N.W.2d 510 (acknowledging that the standard of care for doctors involves reasonableness while discussing the appropriateness of a jury instruction about a doctor's error in judgment).

In the end, *Dunn* is not a skewed view of the appropriate *Strickland* standard. It is the *Strickland* standard, including its presumption and deference components, that this Court time and again has applied in habeas cases. And it is the *Strickland* standard the habeas court ignored so that court could toss aside the prosecution's charging decisions, the defense's strategic decisions, and the jury's verdicts because it disagreed with them. Even though it was prohibited from doing so. *Cavazos*, 565 U.S. at 2.

D. Cumulative error analysis has no place in an ineffective assistance determination.

It's ironic that Ally believes *Dunn's* reiteration of *Strickland* works an impermissible expansion on the *Strickland* analysis when he openly asks this Court to expand *Strickland* by allowing alleged errors to be aggregated. AP:30-31. Yet his request misses the mark for three reasons.

First, all the cases Ally relies on to support his claim that cumulative error analysis should be applied in the ineffective assistance context are direct appeal cases. Even if that procedural posture did not doom those cases, the issues each reviewed are unlike the issues in Ally's case. *Gordon v. United States*, dealt with "questions concerning production and admission of documentary evidence tending to impeach the testimony of a prosecution witness." 344 U.S. 414, 415 (1953). *State v. Nelson*, dealt with jury instruction issues and too many jurors deliberating to reach a verdict. 1998 S.D. 124, ¶20, 587 N.W.2d 439, 447. *State v. Perovich*, dealt with alleged errors surrounding the testimony of the child-victim. 2001 S.D. 96, ¶¶13-29, 632 N.W.2d 12, 16-18.

Ally's reliance on those cases also ignores that habeas proceedings are a *limited collateral review*, not the ordinary error correction domain that is a direct appeal. *Piper*, 2019 S.D. 65, ¶ 21; *Richter*, 562 U.S. at 102-03 (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979)(Stevens, J., concurring in judgment)).

Second, Ally's cumulative error argument ignores that *Strickland's* analysis has remained the same since 1984. Within that consistency and longevity is that the Supreme Court has not expanded *Strickland's* analysis to allow combining attorney errors for review. Brian Means, *Postconviction Remedies Volume 2*, § 35:4, pg. 508-09 (2016 ed.).

Finally, Ally's cumulative error argument ignores that this Court followed the lead of some federal circuit courts,[4] including the Eighth Circuit, and rejected a cumulative error analysis in the *Strickland* context. *Reay*, 2019 S.D. 63, ¶26 n.7; Means, *Postconviction Remedies Volume 2*, pg. 508-09. This rejection makes sense because if a cumulative error analysis were allowed, it would result in a windfall where the alleged errors fail on their own. That windfall is like the one this Court rejected in *Hopfinger*, because it does not accurately reflect whether the given proceedings were "'fundamentally []fair.'" 511 N.W.2d at 847 (quoting *Fretwell*, 506 U.S. at 369-70). Any cumulative error analysis loses sight of the big picture mandated by the Sixth Amendment: reasonably competent counsel and a fair trial. *Strickland*, 466 U.S. at 687; *Brown v. United States*, 411 U.S. 223, 231-32 (1973); *State v. Talarico*, 2003 S.D. 41, ¶48, 661 N.W.2d 11, 26.

Unless the United States Supreme Court changes the *Strickland* analysis to include cumulative error review, this Court should continue to follow its own precedent and reject any arguments calling for a cumulative error analysis.

[4] *See Forrest v. Steele*, 764 F.3d 848, 860-61 (8th Cir. 2014); *Fisher v. Angelone*, 163 F.3d 835, 852 (4th Cir. 1998); *Wainwright v. Lockhart*, 80 F.3d 1226, 1233 (8th Cir. 1996).

CONCLUSION

Respondent requests that this Court reverse the habeas court's determinations that Ally received ineffective assistance of counsel. Respondent also requests that this Court remand this matter with specific instructions to deny Ally's request for habeas relief in *all respects*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Reply Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellant's Brief contains 4,193 words.

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

Dated this 11th day of July, 2022.

/s/ *Matthew W. Templar*
Matthew W. Templar
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 11th day of July, 2022, a true and correct copy of Appellant's Reply Brief in the matter of *Manegabe Chebaea Ally v. Darin Young* was served via electronic mail upon Mark Kadi at mkadi@minnehahacounty.org.

/s/ *Matthew W. Templar*
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