IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 30521

LEE MALCOLM,

Applicant/Appellant,

vs.

BRENT FLUKE, WARDEN
OF THE MIKE DURFEE STATE PRISON,

Respondent/Appellee.

Appeal from Circuit Court
Third Judicial Circuit, Codington County, South Dakota
Honorable Patrick T. Pardy, Circuit Court Judge

BRIEF OF APPELLANT

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Notice of Appeal Filed November 3, 2023

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PRELIMINARY STATEMENT

The Appellant will be referred to as Malcolm. The Appellee will be referred to as State. The Clerk's record is designated "R" with the appropriate page number. There was no underlying transcript of any hearing in this action. The record and transcripts in the underlying criminal action of State v. Malcolm, 14CRI20-000060 will be referred to as "CR" with the appropriate page number within that record.

JURISDICTIONAL STATEMENT

Malcolm appeals the Circuit Court's July 11, 2023 Order Denying Writ of Habeas Corpus pursuant to SDCL 15-6-12(b)(5). (R 96)(Appendix 1) On July 14, 2023, Malcolm timely filed a Motion to Reconsider or Alternatively Motion to Grant Certificate of Probable Cause pursuant to SDCL 21-27-18.1. (R 98) On August 8, 2023, the Circuit Court entered an Order denying Malcolm's Motion. (R 120) On August 15, 2023, Malcolm filed a Motion for Certificate of Probable Cause with the South Dakota Supreme Court pursuant to SDCL 21-27-28.1. On October 17, 2023, this Court entered its Order Granting Certificate of Probable Cause in Part. (R 121-22)(Appendix 3-4) Malcolm timely filed a Notice of Appeal on November 3, 2023. (R 133) This Court has jurisdiction of this appeal pursuant to SDCL 15-26A-3(4) and SDCL 21-27-28.1.

STATEMENT OF LEGAL ISSUES

1. *Whether the circuit court erred in dismissing Malcolm's claim under SDCL 15-6-12(b)(5) that he was denied effective assistance of counsel with respect to Counsel's failure to move to suppress the cell phone videos as obtained in violation of his Fourth and Fourteenth Amendment Rights.*

The Circuit Court concluded, without opinion, that Malcolm failed to state a claim under SDCL 15-6-12(b)(6) and this Court granted a Certificate of Probable Cause (CPC) to appeal this issue.

Legal Authority:

Ally v. Young, 2023 S.D. 65, --- N.W.2d ---
Riley v. California, 573 U.S. 373, 134 S.Ct. 2473, 189 L. Ed.2 430 (2014).
State v. Fairley, 457 P.3d 1150 (Wash. App. 2020).
U.S. v. Winn, 79 F.Supp.3d 904 (S.D. Ill. 2017).

2. *Whether the circuit court erred in dismissing Malcolm's claim under SDCL 15-6-12(b)(5) that he was denied effective assistance of counsel with respect to the impact of Counsel's failure to research and ascertain the nonviability of an advanced consent defense and thus pursue other defense strategies that would potentially have been more viable.*

The Circuit Court concluded, without opinion, that Malcolm failed to state a claim under SDCL 15-6-12(b)(6) and this Court granted a CPC to appeal this issue.

Legal Authority:

State v. Jones, 521 N.W.2d 667 (S.D. 1994).
Steiner v. Weber, 2011 S.D. 40, 815 N.W.2d 549.
SDCL 22-22-1(4)

STATEMENT OF THE CASE

Malcolm is currently an inmate at Mike Durfee State Penitentiary in Springfield, South Dakota. (R 1) On August 31, 2020, Malcolm was charged by Superseding Indictment with nine alternate counts of 3rd Degree Rape in violation of SDCL 22-22-1(3) and 22-22-1(4). (R 1) Malcolm was represented at trial by Court appointed attorney Terry Sutton of Watertown, South Dakota (Counsel). (R 1)

A jury trial was held March 15-18, 2021, before the Honorable Carmen Means, Judge of the Circuit Court. (R 2) Malcolm was acquitted of all counts pertaining to SDCL 22-22-1(3), but was convicted of the alternate counts alleging violations of SDCL 22-22-1(4) on March 18, 2021. (R 3) On April 28, 2021, Judge Means sentenced Malcolm to a 20-year sentence on count one and a 15-year sentence on count two, to be served consecutively. (R 2) The trial court suspended the 15-year sentences on the remaining counts, which were concurrent to each other and consecutive to the sentences for counts one and two. (R 2)

Malcolm timely filed a Notice of Appeal on May 21, 2021, through different counsel than his trial counsel. (R 2) On January 25, 2023, the Supreme Court of South Dakota issued its opinion on the direct appeal, affirming the Judgment of Conviction entered by the Circuit Court without reviewing Malcolm's ineffective assistance of counsel claim. *State v. Malcolm*, 2023 S.D. 6, 985 N.W.2d 732.

On April 17, 2023, Malcolm, pro se, filed a Petition for Writ of Habeas Corpus. (R 9-33) On April 20, 2023, the Honorable Patrick T. Pardy issued a Provisional Writ

and also appointed current counsel. (R 38) On June 6, 2023, Malcolm filed his Amended Application for Writ of Habeas Corpus. (R 45)

On July 7, 2023, the State filed a Motion to Dismiss and Brief in Support of Motion to Dismiss. (R 77-85) On July 11, 2023, without allowing hearing on the State's Motion to Dismiss, the Circuit Court entered an Order denying the Application for Writ of Habeas Corpus under SDCL 15-6-12(b)(5). (R 96-97)(Appendix 1-2) On July 14, 2023, Malcolm filed his Motion to Reconsider or Alternatively Motion to Grant Certificate of Probable Cause. (R 98-106) On August 8, 2023, the Circuit Court entered its Order denying Malcolm's Motion for Certificate of Probable Cause. (R 120)

On August 15, 2023, Malcolm filed a Motion for Certificate of Probable Cause with the South Dakota Supreme Court pursuant to SDCL 21-27-28.1. (Action #30428 at Doc. 1) On October 17, 2023, this Court entered its Order Granting Certificate of Probable Cause in Part. (R 121-22)(Appendix 3-4) This Court's October 17, 2023 Order found in relevant part that:

> [A]ppealable issues exist as to whether the circuit court erred in dismissing the following ineffective assistance of counsel claims raised by Petitioner, as facially insufficient under SDCL 15-6-12(b)(5):
>
> 1. Whether Petitioner was denied effective assistance of counsel with respect to the impact of counsel's failure to research and ascertain the nonviability of an advanced consent defense and thus pursue other defense strategies that would potentially have been more viable, including suppression of the cell phone videos; and
>
> 2. Whether Petitioner was denied effective assistance of counsel with respect to counsel's failure to move to suppress the cell phone videos as obtained in violation of his Fourth and Fourteenth Amendment Rights.

Id.

Pursuant to this Court's October 17, 2023 Order, on November 3, 2023, Malcolm appealed the Circuit Court's July 11, 2023 Order Denying Writ of Habeas Corpus pursuant to SDCL 15-6-12(b)(5). (R 133)

STATEMENT OF FACTS

A Codington County Jury convicted Malcolm of nine counts of rape in the third degree in violation of SDCL 22-22-1(4) on March 18, 2021. (R 46) SDCL 22-22-1(4) prohibits sexual penetration with a person "incapable of giving consent because of any intoxicating, narcotic, or anesthetic agent or hypnosis and the perpetrator knows or reasonably should know the victim is incapable of giving consent." The superseding indictment alleges such acts took place on October 28, 2019. (CR 30-34)

The events leading to Malcolm's conviction arise from events involving J.C., Malcolm's girlfriend. (CR 583) According to Malcolm, J.C. and Malcolm were together from approximately 2015 until 2019, with a break in 2018. (CR 584-86) J.C. moved in with Malcolm at his mother's home in July 2019 and lived there until her passing on October 28, 2019. (CR 586)

On October 27, 2019 at about 4:30 p.m., J.C. and Malcolm left home to go to Walmart to fill her prescription she had been prescribed due to a work injury. (CR 588) Following that, they bought a six pack of beer and two single shots of vodka. (CR 589) They drank the beer and vodka at his mother's home. (CR 589-90) They then left, returned an auto part to an auto parts store, bought cigarettes and eventually ended up at a local Watertown bar, Woody's, at around 7:30 p.m. or a bit later. (CR 590-92) Malcolm testified that he thought they consumed five beers there and each had a shot of Fireball. (CR 592) They then left there for another Watertown bar, Doc's Bar, and arrived there

around 1:15 a.m. (CR 593) There they consumed additional drinks and also obtained four more doubles to go. (R 594-95) J.C. then drove them home after closing time. (CR 595-96)

They got to Malcolm's mother's home around 2:15 a.m. and they sat out back and smoked and drank what they had brought home with them. (CR 596) After they finished at about 2:35 a.m., they went upstairs and had sex. (CR 596-97) Malcolm then came downstairs, ate a bowl of chili and smoked a cigarette. (CR 597) J.C. then came downstairs, got a lighter, smoked a cigarette and they eventually went back upstairs and Malcolm fell asleep. (CR 597-98)

Malcolm later woke up to J.C. having a panic attack looking for a lighter and telling him that he did not give her enough attention. (CR 598) Malcolm tried to ease her concerns, but she packed a bag and then unpacked it. (CR 598) Malcolm ultimately went downstairs to the main floor to ride out what he considered a panic attack. (R 599) A bit later, J.C. went outside for a short period. (CR 599) She later came in a short while later, calmed down, and they went back up to Malcolm's room and watched a television show. (CR 600)

Malcolm then fell asleep and woke up to something hitting him above his left eye. (CR 600) He saw that J.C. was laying on the floor, having apparently tripped on a rug by the bed. (R 602) Malcolm noticed she had a cut by her eye and he told her to go downstairs and put a bandage on it. (CR 601-02) J.C. then went downstairs and put a bandage on her cut. (CR 602-03) When she returned upstairs, she seemed distraught and felt Malcolm was not giving her enough attention, which he described as typical when she had a panic attack. (CR 603) She laid down, Malcolm laid down and he fell asleep.

(CR 603) J.C. eventually woke Malcolm up and told him she wanted him to make love to her. (CR 603-04)

Malcolm then took a shower and returned and engaged in sexual relations with J.C. that were recorded on his phone. (CR 604) After that, he fell back asleep. He woke up later next to J.C. and she was cold. (CR 604) Malcolm called 911 and police and fire rescue arrived shortly thereafter. (CR 604) Unfortunately, J.C. later passed away at the hospital in Watertown. Kenneth Snell, M.D., the forensic pathologist who performed the autopsy on J.C., concluded the cause of death was due to combined Hydroxyzine and Baclofen toxicity, and the manner of death was accidental. (CR 481-84; 490)

Due to J.C.'s death at the home she shared with Malcolm, the police performed an unattended death investigation. During this investigation, the Watertown Police Department, through Detective Ryan Fischer, obtained a search warrant on October 28, 2019. (R 141-47)(Appendix 5-11) The Affidavit in Support of Request for Search Warrant stated it was "in the matter of a death investigation occurring at 420 4th Street SE in Watertown, SD." (R 141)(Appendix 5) The Affidavit provided to the Court by Detective Fischer stated in part:

> The undersigned being duly sworn upon oath, respectfully requests a search warrant to be issued for the following property. (Describe with particularity):
>
> - Buccal swab from the mouth of Lee Malcolm.
> - Photographs of Lee Malcolm's person and clothing, to include any bruises or injuries.
> - Sheets and bedding from the bed in Lee Malcolm's room.
> - Any clothing, bandages, or any other items with blood on them.
> - Digital media, defined as (sic) SDCL 22-24A-2(6) as any electronic storage device, including any compact disc that has memory and the capacity to store audio, video or written materials.
> - Cell phone belonging to Lee Malcolm.

- Medications belonging to Lee Malcolm and or [J.C.].
- Marijuana or green leafy substance.
- Paraphernalia used to ingest illegal and/or controlled substances into the body.
- Any controlled substance, including, but not exclusively, methamphetamine, cocaine, dabs, and prescription drugs.
- Swabs of any blood on Lee Malcolm's person.

Id.

Although the Affidavit template used by the Detective specifically instructed that the items to be found at the residence be described with particularity, nothing was provided to the Court as to what specific phone law enforcement intended to search nor what specific areas of the phone were necessary to be searched. (R 141-45)(Appendix 5-9) In fact, at page two of the Affidavit, it provided:

> The undersigned respectfully requests that the search warrant be issued to permit a search at the following premises for the above described property (Describe premises or area with legal description and particularity):
>
> 420 4th St. SE in Watertown, SD. The residence is on the east side of 4th St. South East. The number 420 is clearly posted on the exterior of the residence. The building is white in color with black trim around the windows and doors. The building is a two story residence.

(R 142)(Appendix 6) The Affidavit template further at page two again instructed that the premises or area requested to be searched be described with particularity, but nothing was provided concerning a cell phone or what data was expected to be gathered from the non-described cell phone to be seized. *Id.* In fact, the Affidavit was for the search of the premises and seizure of the phone.

The Affidavit further provides a paragraph of Detective Fischer's training and experience, largely related to drug related crimes. (R 143)(Appendix 7) The next paragraphs, labeled a-j, refer to drug trafficking and drug possession. (R 143-

44)(Appendix 7-8) The final four paragraphs labeled 1-4, refer to the unattended death investigation. (R 144-45)(Appendix 8-9) Paragraph three of the Affidavit is the only place in the Affidavit referring to media of any type and provides:

> While Officers were on the scene, Lee made mention of a medication bottle that possible (sic) belonged to [J.C.]. The medication bottle appeared to be empty. Officer's (sic) also noticed that while Lee was talking to the Officers, he took out multiple media storage devices from a drawer and later moved them to a shaving kit in one of the bathrooms. Lee advised Officers that he was the individual that called 911.

(R 145)(Appendix 9)

Based upon the Affidavit, Magistrate Judge Patrick J. McCann granted a Search Warrant. (R 146-47)(Appendix 10-11) A careful reading of the Search Warrant establishes that law enforcement could seize the phone, but the warrant did not authorize the search of a phone. At page two of the Warrant, it provides:

> You are therefore commanded to search (describe premises or area with legal description and particularity):
>
> 420 4th St. SE in Watertown, SD. The residence is on the east side of 4th St. South East. The number 420 is clearly posted on the exterior of the residence. The building is white in color with black trim around the windows and doors. The building is a two story residence.

(R 147)(Appendix 11) No further identification was made concerning the cell phone nor was any authorization specifically given to search the cell phone and, to the extent law enforcement believed this allowed a search of a smart phone seized, no limitation was placed on what areas of the cell phone could be searched – i.e. text messages, applications, GPS, phone logs, internet browsing history, photos or videos. *Id.*

Law enforcement ultimately performed a search at Malcolm's residence that began at 6:15 p.m. and was completed at 6:42 p.m. on October 18, 2019. (R

149)(Appendix 13) According to the inventory filed, law enforcement seized various items that included, among other things, a ZTE Smart Phone and a camera case containing micro sd cards. *Id.* This ZTE Smart Phone was not the phone that Malcolm was using for communication and he continued to maintain possession of his phone with service for communication. (R 53)(CR 473) In fact, he was on this phone during the interview at the Watertown Police Station at 4:17 p.m. when Detective Hardie came back into the interview room. (CR – Trial Ex. 15) As alleged in Malcolm's Amended Application, law enforcement did not inform the Court issuing the search warrant of the existence of the phone Malcolm was actually using for communication that had service. (R 53)

Ultimately, law enforcement performed a search and full extraction of the ZTE Smart phone and in their unlimited search located the videos later identified at trial. (CR 461-62) At Malcolm's criminal trial, Lead Detective Shane Hardie testified an image of the phone containing all data on the phone was made and then it is loaded into another device that makes a report of all data on the phone. *Id.* In this search of all data on the ZTE Smart Phone, law enforcement located ten videos recorded on the morning of October 28, 2019 and these videos resulted in Malcolm being charged and indicted on the alternative counts alleging violation of SDCL 22-22-1(3) and SDCL 22-22-1(4). (CR 462-63) (R 46); *Malcolm, supra,* 2023 S.D. 6, ¶11, 985 N.W.2d at 735.

Counsel did not file a Motion to Suppress such video evidence and, in fact, did not even substantively object to the videos being played before the jury.[1] (R 49)(CR 464)

[1] Counsel did claim lack of foundation, which was overruled.

Counsel's defense theory was that J.C. gave Malcolm advanced consent to sexually penetrate her while she was passed out and was unable to give contemporaneous consent. (R 47) Malcolm alleged in his Amended Application that Counsel failed to conduct effective or adequate legal research regarding the viability of such "advanced consent" defense and further failed to investigate alternative trial strategies. (R 47)

Although Counsel's "pass out sex" defense theory was presented to the jury in opening, Counsel was essentially prohibited from presenting any such defense. (R47) First, Counsel failed to file a timely Motion under SDCL 19-19-412 to allow any evidence of J.C.'s other sexual behavior or predisposition subject to Rule 412(b)'s exception for purposes of proving consent. (48) This led to the State making a Motion in Limine that largely excluded any evidence that Counsel could have relied on for such failed defense theory. *Id.*

Further, and more importantly, this advanced consent theory was rejected by the trial judge in Malcolm's criminal trial because the trial court recognized that "pass out" sex is "rape in the third degree." *Malcolm, supra,* at ¶19, 985 N.W.2d at 737.

Finally, given this failed advanced consent or "pass out" sex defense, Counsel did not obtain or provide any evidence, expert or otherwise, of J.C.'s ability to consent or whether Malcolm knew or reasonably should know that she was incapable of giving consent due to her accidental overdose from the combination of Baclofen and Hydroxyzine. (R47)

STANDARD OF REVIEW

"As habeas proceedings are civil in nature, the rules of civil procedure apply to the extent they are not inconsistent with SDCL chapter 21-27. SDCL 15-6-81(a)." *Jenner v. Dooley,* 1999 S.D. 20, ¶13, 590 N.W.2d 463, 469. "A court may dismiss a habeas corpus petition for failure to state a claim under SDCL 15-6-12(b)(5) only if it appears beyond doubt that the petition sets forth no facts to support a claim for relief." *Id.* "Fact allegations must be viewed in a light most favorable to the petitioner." *Id.* "[W]hether [a] complaint failed to state a claim upon which relief could be granted ... is a question of law we review de novo." *Nooney v. StubHub, Inc.*, 2015 S.D. 102, ¶ 9, 873 N.W.2d 497, 499 (citing *Wells Fargo Bank, N.A. v. Fonder*, 2015 S.D. 66, ¶ 6, 868 N.W.2d 409, 412). As this Court recognized: "Although we ordinarily review a habeas court's fact findings under the clearly erroneous standard, when, as here, the circuit court receives no evidence but grants the State's motion to dismiss as a matter of law, our review is de novo and we give no deference to the circuit court's legal conclusions." *Steiner v. Weber,* 2011 S.D. 40, ¶4, 815 N.W.2d 549, 551 (citing *Jenner, supra,* at ¶11, 590 N.W.2d at 468). At this stage, the Court must assume all of Malcolm's allegations as true and determine whether his claim made in his Amended Application meets the "minimum threshold of possibility." *Id.* at ¶11, 815 N.W.2d at 553.

LEGAL ARGUMENT

1. Ineffective Assistance of Counsel Standard.

Malcolm asserts a claim that his trial counsel was ineffective in his representation. This Court has recognized that:

> A petitioner's ineffective assistance claim is analyzed under the familiar two-pronged standard set out in *Strickland v. Washington*:
>
> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable.

Ally v. Young, 2023 S.D. 65, ¶32, ---N.W.2d--- (citing *Reay v. Young*, 2019 S.D. 63, ¶ 13, 936 N.W.2d 117, 120 (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 80 L.Ed.2d 674 (1984))). "[A]ny deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." *Strickland*, 466 U.S. at 692, 104 S. Ct. at 2067. This Court has "held that deficient performance results in prejudice when the petitioner shows that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Ally*, 2023 S.D. 65, ¶36 (citing *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (citing *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068).

2. *The circuit court erred in dismissing Malcolm's claim under SDCL 15-6-12(b)(5) that he was denied effective assistance of counsel with respect to Counsel's failure to move to suppress the cell phone videos as obtained in violation of his Fourth and Fourteenth Amendment Rights.*

Counsel failed to file a Motion to Suppress the videos obtained from the ZTE Smartphone. (R 49) This video evidence was the State's entire case. Malcolm made no admissions concerning an alleged rape and the investigation and underlying criminal trial largely focused on law enforcement's investigation of an unattended death.

Malcolm raised this issue in his application and further asserted the supporting affidavit lacked probable cause, particularity concerning the phone, lack of what information was sought from the phone, failed to inform the issuing Court of the other activated phone Malcolm had that was ultimately not obtained, and that law enforcement used this overbroad warrant regarding an unattended death investigation to improperly obtain evidence of other crimes. (R 52-53) This claim passes the minimum "threshold of plausibility" required to defeat a 12(b)(5) Motion.

In 2014, the U.S. Supreme Court established that law enforcement must secure a warrant to search a cell phone. *Riley v. California*, 573 U.S. 373, 134 S.Ct. 2473, 189 L.Ed.2d 430. In establishing this standard, the *Riley* Court aptly observed:

> Although the data stored on a cell phone is distinguished from physical records by quantity alone, certain types of data are also qualitatively different. An Internet search and browsing history, for example, can be found on an Internet-enabled phone and could reveal an individual's private interests or concerns—perhaps a search for certain symptoms of disease, coupled with frequent visits to WebMD. Data on a cell phone can also reveal where a person has been. Historic location information is a standard feature on many smart phones and can reconstruct someone's specific movements down to the minute, not only around town but also within a particular building.

> Mobile application software on a cell phone, or "apps," offer a range of tools for managing detailed information about all aspects of a person's life. There are apps for Democratic Party news and Republican Party news; apps for alcohol, drug, and gambling addictions; apps for sharing prayer requests; apps for tracking pregnancy symptoms; apps for planning your budget; apps for every conceivable hobby or pastime; apps for improving your romantic life. There are popular apps for buying or selling just about anything, and the records of such transactions may be accessible on the phone indefinitely.

Riley, 573 U.S. at 395–96, 134 S. Ct. at 2490. The *Riley* Court also observed:

> Indeed, a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is.

Id. at 396–97, 134 S. Ct. at 2491.

In this case, although a search warrant was requested for the seizure of an unidentified "cell phone belonging to Lee Malcolm," there was nothing to establish probable cause for a complete search of all data on the phone. (R 141)(Appendix 5). Also, the Affidavit did not mention the word cell phone again and only referred to media storage devices. (R 141-45)(Appendix 5-9) The Affidavit was totally lacking of any reference to what was sought from the phone, such as texts, call information, or location information. The Affidavit also failed to inform the issuing Court that Malcolm had an activated cell phone in his possession at the police station and the cell phone law enforcement was apparently seeking was a non-activated phone at the home. (R 53) The resulting Search Warrant only provided for a search of the home and seizure of the cell phone. (R 146-47)(Appendix 10-11)

This Court has recognized that:

The text of the Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
>
> US Const. amend. IV. The Fourth Amendment's prohibition against unreasonable searches "generally require searches of persons and places to be authorized by warrant and require such warrants to be based on probable cause to believe that the search will yield contraband or other evidence of a crime."

State v. Helland, 2005 S.D. 121, ¶ 14, 707 N.W.2d 262, 268 (quoting *State v. Shearer,* 1996 SD 52, ¶ 10, 548 N.W.2d 792, 795 (citing *State v. Zachodni,* 466 N.W.2d 624, 627 (S.D.1991))). Furthermore, "[t]he determination of whether an affidavit in support of a search warrant shows probable cause for issuance of the warrant must be based upon an examination of the four corners of the affidavit." *State v. Jackson*, 2000 S.D. 113, ¶ 11, 616 N.W.2d 412, 416 (citing *State v. Lodermeier,* 481 N.W.2d 614, 622 (S.D.1992) (quoting *State v. Iverson,* 364 N.W.2d 518, 522 (S.D.1985))).

This Court has also recognized that: "Both the Fourth Amendment to the United States Constitution and its corresponding state provision (S.D. Const. art. VI, §11) require particularity to avoid the "general exploratory rummaging through one's personal belongings." *State v. Habbena*, 372 N.W.2d 450, 456 (S.D. 1985) (quoting *State v. Clark*, 281 N.W.2d 412, 415 (S.D. 1979)(citing *Andersen v. Maryland*, 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976); *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971))). As succinctly explained by the U.S. Supreme Court:

> The Warrant Clause of the Fourth Amendment categorically prohibits the issuance of any warrant except one "particularly describing the place to be searched and the persons or things to be seized." The manifest purpose of this particularity requirement was to prevent general searches. By limiting

> the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit. Thus, the scope of a lawful search is "defined by the object of the search and the places in which there is probable cause to believe that it may be found. Just as probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase."

Maryland v. Garrison, 480 U.S. 79, 84–85, 107 S. Ct. 1013, 1016–17, 94 L. Ed. 2d 72 (1987)(quoting *United States v. Ross*, 456 U.S. 798, 824, 102 S.Ct. 2157, 2172, 72 L.Ed.2d 572 (1982)).

The search warrant in this case allowed the search of the home and the seizure of the cell phone. (R 146-47) Authorization to seize a cell phone does not grant authorization to search the cell phone. In *U.S. v. Russian*, 848 F.3d 1239, 1245 (10th Cir. 2017), the Court recognized:

> [T]he warrant itself merely authorized a search of Russian's residence and seizure of any cell phones found inside. The warrant did not identify either of the phones that were already in law enforcement's custody, nor did it specify what material (e.g., text messages, photos, or call logs) law enforcement was authorized to seize.
>
> Accordingly, we agree with Russian that the warrant failed to meet the Fourth Amendment's particularity requirement.

Id. at 1245-46. Similarly, in *State v. Fairley*, 457 P.3d 1150, 1154 (Wash. App. 2020), the Washington Appeals Court noted:

> The warrant was based on a probable cause affidavit indicating evidence of the crime of threats to bomb would be found at Mr. Brown's property. The warrant authorized seizure of listed property, including Mr. Brown's cell phone. The warrant did not specifically authorize a search of the cell phone or any of the other listed items to be seized. No subsequent warrants were sought or obtained.

Id. at 1152. The *Fairley* Court further noted that "[w]hile law enforcement undoubtedly obtained the warrant in hopes of conducting a search, permission to search the phone was neither sought nor granted." *Id.* at 1154. The Court went on to recognize:

> Given this potential exposure to private information, authorization to search the contents of a cell phone does not automatically follow from an authorized seizure. *[Riley]* at 403, 134 S. Ct. 2473. Instead, law enforcement officers must obtain a warrant that complies with the Fourth Amendment's particularity requirement.
>
> To hold that authorization to search the contents of a cell phone can be inferred from a warrant authorizing a seizure of the phone would be to eliminate the particularity requirement and to condone a general warrant. This outcome is constitutionally unacceptable. The particularity requirement envisions a warrant will describe items to be seized with as much specificity as possible.

Id. at 1154. Here, there was no information provided to the Court issuing the search warrant as to what items were to be searched on the unidentified cell phone and the search warrant did not even authorize a search of the cell phone.

Moreover, the Affidavit was utterly lacking in probable cause to search the entire contents of the unidentified phone. There was nothing provided to the issuing Court that would allow it to determine there was probable cause for particular data on the phone. The Warrant here did not authorize a top to bottom search of the phone.

In *Buckham v. State,* 185 A.3d 1 (Del. 2018), the Delaware Supreme Court considered a search warrant for a cell phone and found the search warrant invalid. The Court observed the following in considering the warrant:

> But whether or not the warrant resembles a founding-era general warrant, Buckham is correct that it does not pass muster. As we said in *Wheeler*, a warrant must "describe the items to be searched for and seized with as much particularity as the circumstances reasonably allow" and be "no broader than the probable cause on which it is based." This warrant fails both requirements.

> The trial court concluded that the affidavit created probable cause to search the phone for GPS data to ascertain where Buckham had been during the six weeks prior to his arrest, but the warrant did not limit the search of Buckham's cell phone to any relevant time frame and authorized the search of any data on the phone. Worse still, it authorized law enforcement to search categories of data that had nothing to do with GPS location information, like "incoming/outgoing calls, missed calls, contact history, images, photographs and SMS (text) messages." So this warrant was both vague about the information sought—despite the fact that a far more particularized description could have been provided—and expressly authorized the search of materials there was no probable cause to search, like the contents of all of the Facebook messages Buckham sent. For both of those reasons, the warrant is invalid, and the search for and review of the messages violated Buckham's rights under the United States and Delaware constitutions.

Id. at 18–19. The Delaware Supreme Court then went on to reverse on a "plain error" review of this issue. *Id.* at 20.

Further, law enforcement in this case used a warrant that only authorized a seizure of the unidentified cell phone to rummage through the entire contents of the phone they located to the extent they deemed pertinent to their investigation without any showing of probable cause. This is not proper and undermines the protections of the Fourth Amendment. As later observed by the Delaware Supreme Court in *Taylor v. State*, 260 A.3d 602, 616 (Del. 2021):

> [A] warrant that allows investigators to search for "any and all data" "pertinent to the criminal investigation" is unlimited in scope. To find information pertinent to the investigation, investigators were authorized, in general warrant fashion, to rummage through all of the smartphones' contents. The free-ranging search for anything "pertinent to the investigation" undermines the essential protections of the Fourth Amendment—that a neutral magistrate approve in advance, based on probable cause, the places to be searched and the parameters of the search. Although the record is not entirely clear, investigators apparently extracted almost all data from Taylor's smartphones from an eleven-year time span, and then searched without restriction for evidence of criminal conduct.

Id. at 616.

In *Burns v. United States*, 235 A.3d 758 (D.C. App. 2020), the Court recognized that a search warrant actually requesting the ability to search a phone was overbroad. The Court there first observed that:

> A search warrant for data on a modern smart phone therefore must fully comply with the requirements of the Warrant Clause. It is not enough for police to show there is probable cause to arrest the owner or user of the cell phone, or even to establish probable cause to believe the phone contains some evidence of a crime. To be compliant with the Fourth Amendment, the warrant must specify the particular items of evidence to be searched for and seized from the phone and be strictly limited to the time period and information or other data for which probable cause has been properly established through the facts and circumstances set forth under oath in the warrant's supporting affidavit. Vigilance in enforcing the probable cause and particularity requirements is thus essential to the protection of the vital privacy interests inherent in virtually every modern cell phone and to the achievement of the "meaningful constraints" contemplated in *Riley*, 573 U.S. at 399, 134 S.Ct. 2473. As the Supreme Court recently reiterated, judges are "obligated — as 'subtler and more far-reaching means of invading privacy have become available to the Government' — to ensure that the 'progress of science' does not erode Fourth Amendment protections." *Carpenter v. United States*, —— U.S. ——, 138 S.Ct. 2206, 2223, 201 L.Ed.2d 507 (2018) (quoting *Olmstead v. United States*, 277 U.S. 438, 473-74, 48 S.Ct. 564, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting) (requiring that search warrants be obtained for cell-site location data generated from the use of smart phones and held by third-party providers)).

Id. at 773–74. The Court then went on to conclude that the affidavit supporting the search provided probable cause for text messages, phone records and GPS, but did not allow law enforcement to rummage through all data on the phone. *Id.* at 774. The Court concluded such unlimited search was not proper:

> In sum, the affidavits submitted by Detective Littlejohn in support of the search warrant applications established probable cause to look for and seize evidence likely to be found in at most three narrow categories of data on Mr. Burns's phones. The warrants, however, authorized a far more extensive search and failed to describe the items to be seized with anywhere near as much particularity as the Constitution required in the circumstances.

> Overbroad and lacking in probable cause and particularity, the warrants were therefore issued in violation of the Warrant Clause of the Fourth Amendment.

Id. at 777–78; *See also, State v. Allen*, 408 P.3d 89 (Or. App. 2017)(reversing murder conviction based upon overbroad warrant due to officer's failure to specify in affidavit what phone data was relevant to the shooting in question).

The decision of *U.S. v. Morales* 77 M.J. 567 (A. Ct. Crim. App. 2017) is instructive here and factually similar. In *Morales*, military law enforcement was investigating an alleged sexual assault between soldiers and applied for a search warrant for a cell phone they had seized from the defendant. *Id.* at 571. The affidavit supporting the later warrant described an inculpatory text message the defendant allegedly sent the victim, but it presented no other facts to establish a nexus between the alleged assault and any other data that might be found on the phone. *Id.* The warrant issued, however, authorized a forensic examination of all of the phone's digital data, and in the course of the ensuing search, police reviewed a photo-editing application on the phone and came across three photographs of the actual assault as it was being committed. *Id.* at 571-72. The trial court denied a motion to suppress the photographs, and the defendant was convicted of the sexual assault. *Id.* at 572-73. The appellate court reversed, holding that although the warrant affidavit made out probable cause to search the defendant's text messages, the affidavit "provided no factual predicate" to search for photographs "and no factual basis to conduct an open-ended search of the phone's entire contents." *Id.* at 577. The Court concluded the warrant there for an actual search of the phone violated the particularity clause of the Fourth Amendment. *Id.* at 575.

Furthermore, the warrant here to seize a cell phone was then used to investigate other crimes unrelated to the purpose of the warrant. In *People v. Hughes*, 958 N.W.2d 98 (Mich. 2020), the Michigan Supreme Court considered this issue and concluded "that a search of digital cell phone data pursuant to a search warrant must be reasonably directed to obtaining evidence relevant to criminal activity alleged in *that* warrant." *Id.* at 104. The Court ultimately concluded that uncovering evidence of criminal activity not identified in the affidavit and warrant is outside the purview of any warrant and becomes a warrantless search. *Id.* Here, there was not a warrant issued for anything more than a phone seizure for an unattended death investigation, which certainly would not allow the unlimited search of a smart phone for unrelated crimes.

Similarly, in *U.S. v. Winn*, 79 F.Supp.3d 904 (S.D. Ill. 2017) the Court suppressed evidence obtained by law enforcement due to an overly broad smart phone search. In *Winn*, Winn was reported to have photographed young girls in their swimsuits at a pool while rubbing his genitalia through his clothes. *Id.* at 909. Officers interviewed him and found probable cause to seize and search his cell phone to search for evidence of public indecency. *Id.* at 910. Winn ultimately let law enforcement seize his phone. *Id.* Law enforcement later sought a search warrant through using a template that allowed the search of the phone for essentially all possible data a smart phone could contain. *Id.* at 910-11.

Based upon the search warrant, law enforcement performed an extraction of the cell phone which did not find the photos of the young girls at issue, but found a substantial amount of child pornography. *Id.* at 911. A later manual search of the phone did disclose the photos from the pool. *Id.* at 912.

Because the smart phone extraction resulted in locating child pornography, the case was referred to the U.S. Attorney's Office to pursue federal child pornography charges against Winn. *Id.* Winn ultimately moved to suppress. *Id.* The *Winn* Court concluded that the warrant was overbroad concluding:

> In sum, the complaint establishes that the police had probable cause to look for and seize a very small and specific subset of data on Winn's cell phone. But the warrant did not limit the scope of the seizure to only that data or describe that data with as much particularity as the circumstances allowed. Instead, the warrant contained an unabridged template that authorized the police to seize the entirety of the phone and rummage through every conceivable bit of data, regardless of whether it bore any relevance whatsoever to the criminal activity at issue. Simply put, the warrant told the police to take everything, and they did. As such, the warrant was overbroad in every respect and violated the Fourth Amendment.

Id. at 922.

The *Winn* Court also concluded that such overbroad warrant was also, similar to the situation here, improperly used to obtain evidence of another unrelated crime and that law enforcement improperly abandoned their search for public indecency and used the overly broad warrant to investigate unrelated crimes. *Id.* at 925-26. The *Winn* Court concluded law enforcement thereby "conducted a general search for crimes unrelated to public indecency and violated the Fourth Amendment." *Id.* at 926.

Finally, the State cannot argue that the good faith exception applies here. This Court has recognized that the good faith exception to an invalid warrant cannot be used

by the State when the error resulted from the failure of the affiant requesting the search warrant. *State v. Belmontes*, 2000 S.D. 115, ¶¶19-20, 815 N.W.2d 634, 640. In fact, the cited decisions of *Burns,* 235 A.3d at 779; *Morales,* 77 M.J. at 576; and *Winn,* 79 F.Supp.3d at 922 all rejected such claim that the good faith exception applied. Furthermore, the burden here is on the State to show that the good faith exception applies. *See, e.g., State v. Tenold*, 2019 S.D. 66, ¶24, 937 N.W.2d 6, 13 (recognizing after defendant establishes evidence recovered by State is tainted, burden shifts to State to establish it is not); *U.S. v. Underwood*, 725 F.3d 1076, 1085 (9th Cir. 2013)(recognizing government has burden to establish good faith exception to invalid warrant). At the pleading stage, any good faith claim would necessarily require a factual review of the circumstances surrounding the Warrant, which has yet to occur at a hearing.

Based upon the arguments stated above, Counsel's performance was deficient because he failed to move to suppress the video evidence that was improperly obtained. Further, as such video evidence should have been excluded and it was basically the only evidence of the alleged rape, Counsel's deficient performance was highly prejudicial. Counsel's error here in failing to move to suppress the improperly obtained video evidence was so serious that it deprived Malcolm of a fair trial. At a minimum, Malcolm has established that his Amended Application meets the "minimum threshold of possibility" for asserting an ineffective assistance of counsel claim under *Strickland, supra,* 466 U.S. at 687, 104 S. Ct. at 2064.

3. The circuit court erred in dismissing Malcolm's claim under SDCL 15-6-12(b)(5) that he was denied effective assistance of counsel with respect to the impact of Counsel's failure to research and ascertain the nonviability of an advanced consent defense and thus pursue other defense strategies that would potentially have been more viable.

Counsel's strategy to argue "advance consent," or as framed by Counsel, "pass out" sex, was a fatal trial strategy. Unknowingly, Counsel was essentially arguing to the trial court and jury that Malcolm had committed the rape of J.C.

First, it should be noted that Counsel failed to read and ascertain the charges against Malcolm. The language of SDCL 22-22-1(4) is not technical or complicated and provides: "Rape is an act of sexual penetration accomplished with any person under any of the following circumstances: (4) If the victim is incapable of giving consent because of any intoxicating, narcotic, or anesthetic agent or hypnosis and the perpetrator knows or reasonably should know the victim is incapable of giving consent." Further "pass out" has the common meaning of being unconscious. As this Court recognized, "pass out sex can only be understood to mean that J.C. was incapable of consenting when Malcolm was penetrating her." *Malcolm, supra,* at ¶25, 985 N.W.2d at. 739.

The language of the statute would foreclose such defense and this "pass out" sex defense should have never been attempted. As this Court recognized:

> As a matter of statutory interpretation, the plain and unambiguous text of SDCL 22-22-1(4) makes it a crime to perform "an act of sexual penetration" upon a person "under circumstances" in which the person "is *incapable of giving consent*[.]" (Emphasis added.) Under this uncomplicated reading of the statute, the act of sexual penetration and the inability to give consent must be contemporaneous, meaning a person is guilty of third-degree rape if at the time the person accomplishes an act of sexual penetration, the victim is incapable of giving consent.

Malcolm, supra, at ¶ 24, 985 N.W.2d at 738.

Moreover, minimal legal research would have uncovered such defense was misguided. In *State v. Jones*, 521 N.W.2d 662, 667 (S.D. 1994), this Court had rejected a jury instruction that told jurors no rape occurs if consent is withdrawn after penetration, which would signal that consent must be contemporaneous. The trial court expressed its concerns and rejected "pass out" sex as a defense in its reasoning after consideration of South Dakota law. (R 471, 543-545) The trial court also noted later that it had located the California decision of *People v. Dancy*, 124 Cal. Rptr.2d 898, 911 (Cal. App. 2002) that essentially supported its earlier reasoning based upon its interpretation of South Dakota law. (R 576) Further, the legal encyclopedia, American Jurisprudence, has a specific discussion of this issue advising that "advance consent" is not a defense to sex with an unconscious person. Unconscious Woman as Unable to Consent for Purposes of Rape, 65 Am. Jur.2d Rape § 6 (Westlaw 10/23 Update).

Simply put, Counsel's performance was deficient when he utilized a strategy to argue "advance consent," or "pass out" sex. Moreover, this defense essentially foreclosed any claim that Malcolm believed J.C. was capable of consenting when he was having sex with her and that he would not have known that she was unable to consent because he was not aware she had accidentally overdosed.

There were other available, more viable, trial strategies.

First, as thoroughly discussed above, Counsel could have moved to suppress the videos. There was certainly no trial strategy in failing to file a motion to suppress this video evidence as set forth more fully, *supra.*

Additionally, no effort was made by Counsel to provide any defense that there was a belief of contemporaneous consent and that Malcolm simply had no knowledge J.C. could not consent due to the fatal drug combination she had ingested without his knowledge. SDCL 22-22-1(4) requires that Malcolm knew or reasonably should have known that J.C. was incapable of giving consent. While Malcolm was aware they had been drinking and bar hopping earlier, he did not know that J.C. had overdosed.

At trial, the State called Alan Lawrence, M.D. to opine about J.C.'s consciousness based upon reviewing two videos and calculating J.C.'s Glascow Coma Score (GCS). (CR 497-98, 502, 504) Dr. Lawrence recognized that his GCS calculation of a 7-8 of J.C. could be due to the unintentional overdose. (CR 505) Malcolm is definitely not a medical doctor. Far from it, especially on the morning of October 28, 2019, when he and J.C. had engaged in fairly lengthy drinking the night before and early morning hours before this incident.

Malcolm and J.C. had a fairly unusual sex life and had videos of them performing sex before this incident. *Malcom, supra,* at ¶15, 985 N.W.2d at 736, fn. 1. Although this Court correctly recognized those were not in the record on appeal and of course were not part of the limited habeas record, the videos exist. This is somewhat unusual, but it is this case. Quite possibly, Malcolm and J.C. could have had a pattern of going out drinking, arguing and then having some kind of later morning sex. Malcolm could have certainly thought what he was doing was with J.C.'s contemporaneous consent, but did not know that she had accidentally overdosed.

However, with Counsel's "pass out" sex theory, there was no chance for Malcolm to explain what really happened. He was prevented from explaining anything about the videos or, more importantly, any discussion before the videos or during any breaks in the videos. (CR 604) Due to Counsel's "pass out" sex defense theory, his failure to timely file a Rule 412 Motion and the State's resulting Motion in Limine that was largely granted, there was no evidence allowed of what happened. If a timely 412 motion would have been made concerning contemporaneous consent instead of the "pass out" sex defense, the trial court should have allowed the evidence under SDCL 19-19-412(b), as it would actually be a viable theory of consent under the exception therein.

The State can certainly claim this alternative defense lacks support on this limited record, but the test at this stage is not that. "A motion to dismiss under SDCL 15–6–12(b) tests the legal sufficiency of the pleading, not the facts which support it." *Mordhorst v. Dakota Truck Underwriters & Risk Admin. Servs.*, 2016 S.D. 70, ¶ 8, 886 N.W.2d 322, 323 (quoting *Nygaard v. Sioux Valley Hosps. & Health Sys.*, 2007 S.D. 34, ¶ 9, 731 N.W.2d 184, 190 (quoting *Guthmiller v. Deloitte & Touche, LLP*, 2005 S.D. 77, ¶ 4, 699 N.W.2d 493, 496). As this Court further recognized:

> "[I]t may appear ... that a recovery is very remote and unlikely but that is not the test." *Jenner*, 1999 S.D. 20, ¶ 13, 590 N.W.2d at 469 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974)). Instead, we must only determine whether the habeas petition meets the "minimum threshold of plausibility." *Id.* We believe that it does. Steiner's allegations are not unspecific, conclusory, or speculative. If they are true, they may support a claim for relief. Whether they are true and whether they actually support a claim for relief are questions that can be decided only after an evidentiary hearing on the merits of the habeas petition.

Steiner, supra, at ¶ 11, 815 N.W.2d at 553.

CONCLUSION

The Circuit Court dismissed Malcolm's Amended Petition under SDCL 15-6-12(b)(5) before any hearing of any kind. Malcolm has presented claims for ineffective assistance of counsel that meet the required "minimum threshold of possibility" to move forward to an evidentiary hearing. Malcolm respectfully requests that the Court reverse the Circuit Court's Denial of Writ of Habeas Corpus and allow Malcolm to move forward on his ineffective assistance claims regarding the failure to move to suppress the video evidence from the smart phone and Counsel's failure to assert other viable trial strategies other than then a claim of "pass out" sex.

Dated this 2nd day of January, 2024.

SCHAFFER LAW OFFICE, PROF. LLC

/s/ Paul H. Linde

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Attorneys for Appellant

REQUEST FOR ORAL ARGUMENT

The Appellant respectfully requests the privilege of oral argument in this appeal.

/s/ Paul H. Linde

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL 15-26A-66(b)(4), I hereby certify that *Brief of Appellant* complies with the type volume limitation provided for in SDCL 15-26A-66. *Brief of Appellant* contains 8143 words. Such word count does not include the table of contents, table of cases, jurisdictional statement, statement of legal issues, or certificates of attorneys. I have relied on the word and character count of our word processing system used to prepare *Brief of Appellant.* The original *Brief of Appellant* and all copies are in compliance with this rule.

/s/ Paul H. Linde

CERTIFICATE OF SERVICE

The undersigned, the attorney for Appellant, hereby certifies that a true and correct copy of the foregoing "Appellant's Brief" was served by Odyssey E-File and Served to the following attorneys on January 2, 2024, before 11:59 p.m. on that date:

Marty Jackley, Attorney General
Chelsea Wenzel, Assistant Attorney General
1302 E. Hwy 14, Suite 1
Pierre, SD 57501-8501
Email: atgservice@state.sd.us

on this 2nd day of January, 2024.

/s/ Paul H. Linde

APPENDIX

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT

COUNTY OF CODINGTON — THIRD JUDICIAL CIRCUIT

****

LEE TODD MALCOM,

Petitioner,

-vs-

BRENT FLUKE, Warden,
SOUTH DAKOTA STATE PENITENTIARY,

Respondent.

14CIV23-000094

DENIAL OF WRIT
OF HABEAS CORPUS

****

After reviewing the Petition for Writ of Habeas Corpus and the Return of Writ. this Court has determined that the Petition is not facially sufficient.

Having considered the Respondents motion to dismiss, the Court finds that the Petition for Writ of Habeas Corpus fails to allege that the court lacked jurisdiction of the crime or the Petitioner or that the sentence was not authorized by law or that he has been deprived of basic constitutional rights.

Petitioner has failed to show that his counsel's conduct fell below an objective standard of reasonableness and that he was prejudiced by his counsels' actions based on the overwhelming video evidence of his crime. The Petitioner's claim is speculative, vague, and unsubstantiated.

Petitioners second claim of unreasonable search and seizure is an improper collateral attack on final judgment and fails to state a claim on which relief can be granted.

Petitioners third claim that his rights under the confrontation clause and due process were violated is dismissed as the Petitioner fails to allege any facts for the Court to consider his vague and unspecific allegations.

The Court finds beyond a doubt that the petition sets forth no facts to support a claim for relief.

NOW THEREFORE, the Habeas Corpus Petition is dismissed for failure to state a claim under SDCL 15-6-12 (b) (5).

Dated this 11th day of July 2023

BY THE HABEAS CORPUS ACT.

Circuit Court Judge

ATTEST:_____, CLERK

BY: _____, DEPUTY

FILED

JUL 11 2023

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
3RD CIRCUIT CLERK OF COURT

By _____

14CIV23-000094

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

* * * *

LEE TODD MALCOLM, Petitioner, vs. BRENT FLUKE, Warden, Mike Durfee State Prison, Respondent.	ORDER GRANTING MOTION FOR CERTIFICATE OF PROBABLE CAUSE IN PART #30428

Petitioner served and filed a motion for a certificate of probable cause asserting that appealable issues exist in the above-entitled habeas corpus proceeding. Respondent served and filed a response. Petitioner served and filed a reply. The Court considered the motion, response, and reply and determined that Petitioner has demonstrated probable cause that appealable issues exist as specified herein.

IT IS HEREBY CERTIFIED that the Court finds that the appealable issues exist as to whether the circuit court erred in dismissing the following ineffective assistance of counsel claims raised by Petitioner, as facially insufficient under SDCL 15-6-12(b)(5):

1. Whether Petitioner was denied effective assistance of counsel with respect to the impact of counsel's failure to research and ascertain the nonviability of an advanced consent defense and

thus pursue other defense strategies that would potentially have been more viable, including suppression of the cell phone videos; and

2. Whether Petitioner was denied effective assistance of counsel with respect to counsel's failure to move to suppress the cell phone videos as obtained in violation of his Fourth and Fourteenth Amendment rights.

IT IS FURTHER ORDERED that the Court does not find probable cause to appeal the remaining issues identified in Petitioner's motion.

DATED at Pierre, South Dakota this 17th day of October, 2023.

BY THE COURT:

Steven R. Jensen, Chief Justice

ATTEST:

Clerk of the Supreme Court
(SEAL)

PARTICIPATING: Chief Justice Steven R. Jensen and Justices Janine M. Kern, Mark E. Salter, Patricia J. DeVaney and Scott P. Myren.

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

OCT 17 2023

Clerk

STATE OF SOUTH DAKOTA
In the Supreme Court
I, Shirley A. Jameson-Fergel, Clerk of the Supreme Court of South Dakota, hereby certify that the within instrument is a true and correct copy of the original thereof as the same appears on record in my office. In witness whereof, I have hereunto set my hand and affixed the seal of said court at Pierre, S.D. this 17 day of Oct 2023.

Clerk of Supreme Court
(Seal)

-2-

STATE OF SOUTH DAKOTA

IN CIRCUIT COURT
3rd JUDICIAL CIRCUIT

CODINGTON COUNTY

****

STATE OF SOUTH DAKOTA,

Plaintiff,

VS.

Malcolm, Lee Todd
420 4th St. SE
Watertown SD, 57201

Defendant

SWA19-206

AFFIDAVIT IN SUPPORT OF REQUEST FOR SEARCH WARRANT

(In the matter of a death investigation occurring at 420 4th St. SE in Watertown, SD)

****

THE UNDERSIGNED, BEING DULY SWORN UPON OATH, RESPECTFULLY REQUESTS A SEARCH WARRANT TO BE ISSUED FOR THE FOLLOWING PROPERTY. (DESCRIBE WITH PARTICULARITY):

- Buccal swab from the mouth of Lee Malcolm.
- Photographs of Lee Malcolm's person and clothing, to include any bruises or injuries.
- Sheets and bedding from the bed in Lee Malcolm's room.
- Any clothing, bandages, or any other items with blood on them.
- Digital media, defined as SDCL 22-24A-2(6) as any electronic storage device, including any compact disc that has memory and the capacity to store audio, video, or written materials
- Cell phone belonging to Lee Malcolm.
- Medications belonging to Lee Malcolm and or Jamaica Christensen.
- Marijuana or green leafy substance.
- Paraphernalia used to ingest illegal and/or controlled substances into the body.
- Any controlled substance, including, but not exclusively, methamphetamine, cocaine, dabs, and prescription drugs.
- Swabs of any blood on Lee Malcolm's person.

THE UNDERSIGNED RESPECTFULLY REQUESTS THAT THE SEARCH WARRANT BE ISSUED TO PERMIT A SEARCH AT THE FOLLOWING PREMISES FOR THE ABOVE DESCRIBED PROPERTY (DESCRIBE PREMISES OR AREA WITH LEGAL DESCRIPTION AND PARTICULARITY):

420 4th St. SE is in Watertown, SD. The residence is on the east side of 4th St. South East. The number 420 is clearly posted on the exterior of the residence. The building is white in color with black trim around the windows and doors. The building is a two story residence.

THE UNDERSIGNED REQUESTS A SEARCH WARRANT BE ISSUED BECAUSE THE ABOVE DESCRIBED PROPERTY IS:
(PLACE INITIALS IN THE APPROPRIATE BLANK)

MC PROPERTY THAT CONSTITUTES EVIDENCE OF THE COMMISSION OF A CRIMINAL OFFENSE.

MC CONTRABAND, THE FRUITS OF A CRIME, OR THINGS OTHERWISE CRIMINALLY POSSESSED.

MC PROPERTY DESIGNED OR INTENDED FOR USE IN, OR WHICH IS OR HAS BEEN USED AS THE MEANS OF, COMMITTING A CRIMINAL OFFENSE.

THE UNDERSIGNED FURTHER REQUESTS: (PLACE INIITALS IN APPROPRIATE BLANK)

____ EXECUTION OF THE SEARCH WARRANT AT NIGHT PURSUANT TO SDCL 23A-35-4

____ THAT NO NOTICE BE GIVEN PRIOR TO THE EXECUTION OF THE SEARCH WARRANT PURSUANT TO SDCL 23A-35-9

____ AUTHORIZATION TO SERVE THE SEARCH WARRANT ON SUNDAY

MC EXECUTION OF THE SEARCH WARRANT DURING THE DAYTIME

The facts in support of the issuance of a Search Warrant are as follows:

Your affiant, Ryan O. Fischer, states that he has been employed with the Watertown Police Department since October 1st 2008. Your affiant has attended and completed a twelve-week basic law enforcement certification class in South Dakota. Your affiant has attended and completed various drug related trainings including training on micro drug labs. Your affiant states that throughout his law enforcement career he has interviewed drug users and dealers regarding the manner in which they conduct business and I have become familiar with their techniques. Based upon my training, experience and participation in narcotic investigations and my assistance with other law enforcement officers specializing in narcotic investigations, with which I am associated, know:

(a)

That illegal drug traffickers maintain books, records, receipts, notes ledgers, airline tickets, money orders and other papers relating to the transportation, ordering, possession, sale and distribution of controlled substances and marijuana. The aforementioned book, records, receipts, notes, ledgers, etc., are usually maintained at the suspect's residence.

(b)

That it is common for illegal drug traffickers to hide contraband proceeds of drug sales, and records of drug transactions in secure locations within their residences and/or their businesses, and automobiles for ready access and to conceal them from law enforcement authorities.

(c)

That illegal drug traffickers commonly maintain addresses or telephone numbers in books or on papers, which reflect names and addresses of other in the trafficking organization.

(d)

That illegal drug traffickers usually keep paraphernalia for packaging, diluting, weighing and distributing their drugs. That paraphernalia includes but is not limited to scales, plastic bags, and diluting agents.

(e)

That illegal drug traffickers attempt to legitimize their profits from the sale of drugs. To accomplish these goals, drug traffickers utilize, for example, foreign banks, domestic banks, and their attendant services, cashier's checks, money orders, real estate, businesses, either real or fictitious.

(f)

That persons involved in illegal drug trafficking conceal in their residences and businesses controlled substances and/or marijuana, large amounts of currency, financial instruments, precious metals, jewelry and other items of value which are the proceeds of illegal drug transactions relating to obtaining, transferring, hiding, or spending of large sums of money made from the engaging in illegal drug trafficking activities.

(g)

That illegal drug traffickers take, or cause to be taken, photographs or video movies of themselves, their conspirators, and their property and assets purchased with drug proceeds which are normally kept by drug traffickers in their possession and/or in their residence.

(h)

That illegal drug traffickers commonly have in their possession (on their person or in their residence), firearms, including but not limited to: pistols, revolvers, rifles, shotguns, and machine guns. The said firearms are most often used and/or maintained in order to protect and secure an illegal drug trafficker's person and property.

(i)

That illegal drug traffickers commonly have people at their residence or arriving at their residence purchasing illegal substances.

(j)

That illegal drug traffickers involved in the possession/distribution of marijuana, will often be involved in the possession/distribution of controlled substances.

1.

On 10-28-19 at approximately 1440 hours, a 911 call was placed into the dispatch at the Watertown Police Department. The caller reported that there was a 41 year old female who was not conscious and not breathing. The caller stated that they were are 420 4th St. SE. Watertown, SD. The female was later identified as Jamaica Christensen. At approximately 1446 hours, Officer and Paramedics arrived on scene at 420 4th St. SE. Watertown, SD.

2.

When Officers and Paramedics arrived on-scene, they made contact with Lee Malcolm. Jamaica Christensen was found to be not conscious and not breathing. Jamaica was

found on her back, on the floor in Lee's bedroom. Officer on scene also noticed that Lee and Jamaica appeared to have fresh injuries to their face. Officer also noticed that there appeared to be blood and bandages on the floor in Lee's bedroom. Officer's noticed that there appeared to be blood on Lee's bed sheets.

3.

While Officers were on scene, Lee made mention of a medication bottle that possible belonged to Jamaica. The medication bottle appeared to be empty. Officer's also noticed that while Lee was talking to the Officers, he took out multiple media storage devices from a drawer and later moved them to a shaving kit in one of the bathrooms. Lee advised Officers that he was the individual that called 911.

4.

It should be noted that Jamaica died and life saving measures did not work.

Based on the afore-mentioned information, your affiant respectfully requests this court to issue its search warrant based on the fact that there was blood on the floor and the bed sheets in Lee's bedroom, injuries to both Lee and Jamaica and the mention of alcohol and prescription medication, It is probable to believe there is evidence of a crime pertaining to a suspicious death investigation at 420 4th St. SE. in Watertown, SD.

Signature of Affiant
Detective
Ryan Fischer

Subscribed and sworn to before me, in my presence, this 28th day of October, 2019.

Commission expires
07/15/2025

(Notary) (Magistrate) (Circuit Court Judge)

BRANDON JOHNSON
SEAL NOTARY PUBLIC SOUTH DAKOTA SEAL

FILED
OCT 30 2019
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
3RD CIRCUIT CLERK OF COURT
By

STATE OF SOUTH DAKOTA

CODINGTON COUNTY

IN CIRCUIT COURT
3rd JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,

Plaintiff,

VS.

Malcolm, Lee Todd
420 4th St. SE
Watertown SD, 57201
Defendant

SWA19-206

SEARCH WARRANT

(In the matter of a death investigation occurring at 420 4th St. SE in Watertown, SD)

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE:

PROOF BY AFFIDAVIT, INCORPORATED HEREIN BY REFERENCE, HAS BEEN MADE BEFORE ME BY: OFFICER RYAN FISCHER, THAT THERE IS PROBABLE CAUSE TO BELIEVE THAT THE PROPERTY DESCRIBED HEREIN MAY BE FOUND AT THE LOCATION SET FORTH HEREIN AND THE PROPERTY IS: (DESCRIBE WITH PARTICULARITY)

- Buccal swab from the mouth of Lee Malcolm.
- Photographs of Lee Malcolm's person and clothing, to include any bruises or injuries.
- Sheets and bedding from the bed in Lee Malcolm's room.
- Any clothing, bandages, or any other items with blood on them.
- Digital media, defined as SDCL 22-24A-2(6) as any electronic storage device, including any compact disc that has memory and the capacity to store audio, video, or written materials
- Cell phone belonging to Lee Malcolm.
- Medications belonging to Lee Malcolm and or Jamaica Christensen.
- Marijuana or green leafy substance.
- Paraphernalia used to ingest illegal and/or controlled substances into the body.
- Any controlled substance, including, but not exclusively, methamphetamine, cocaine, dabs, and prescription drugs.
- Swabs of any blood on Lee Malcolm's person.

(PLACE INITIALS IN THE APPROPRIATE BLANK)

PJM PROPERTY THAT CONSTITUTES EVIDENCE OF THE COMMISSION OF A CRIMINAL OFFENSE.

PJM CONTRABAND, THE FRUITS OF A CRIME, OR THINGS OTHERWISE CRIMINALLY POSSESSED.

PJM PROPERTY DESIGNED OR INTENDED FOR USE IN, OR WHICH IS OR HAS BEEN USED AS THE MEANS OF, COMMITTING A CRIMINAL OFFENSE.

YOU ARE THEREFORE COMMANDED TO SEARCH (DESCRIBE PREMISES OR AREA WITH LEGAL DESCRIPTION AND PARTICULARITY):

420 4th St. SE is in Watertown, SD. The residence is on the east side of 4th St. South East. The number 420 is clearly posted on the exterior of the residence. The building is white in color with black trim around the windows and doors. The building is a two story residence.

IT IS FURTHER ORDERED, THAT THIS SEARCH WARRANT SHALL BE EXECUTED WITHIN TEN (10) DAYS AFTER THE SIGNING OF THIS WARRANT PURSUANT TO SDCL 23A-35-4.

THIS WARRANT MAY BE EXECUTED IN ACCORDANCE WITH MY INITIALS PLACED BELOW.

____ EXECUTION OF THE SEARCH WARRANT AT NIGHT PURSUANT TO SDCL 23A-35-4

____ THAT NO NOTICE BE GIVEN PRIOR TO THE EXECUTION OF THE SEARCH WARRANT PURSUANT TO SDCL 23A-35-9

____ AUTHORIZATION TO SERVE THE SEARCH WARRANT ON SUNDAY

PJM EXECUTION OF THE SEAROH WARRANT DURING THE DAYTIME

IF THE ABOVE DESCRIBED PROPERTY BE SEIZED, IT SHOULD BE RETURNED TO ME AT THIS COURTHOUSE OF THIS COURT.

DATED THIS 28 DAY OF OCTOBER 20 19.

(MAGISTRATE) (CIRCUIT JUDGE)

FILED

OCT 30 2019

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
3RD CIRCUIT CLERK OF COURT

By

STATE OF SOUTH DAKOTA

COUNTY OF CODINGTON

IN CIRCUIT COURT
MAGISTRATE DIVISION
THIRD JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,
Plaintiff,

-vs-

Lee Malcolm
DOB: 01/22/1977

Defendant,

6WA 19-206

VERIFIED INVENTORY

I, Detective Fischer, a law enforcement officer of the State of South Dakota, executed a Search Warrant dated: 10/28/2019 issued by the Honorable Patrick McCann, and do swear that the following inventory contains a true and detailed account of all property taken by me during the execution of the above described Warrant:

- **See attached inventory sheet**

Dated this 30th day of October 2019, at Watertown, South Dakota.

Law Enforcement Officer

Subscribed to and sworn to before me, a Notary Public, on this 30TH day of OCTOBER 2019.

Notary Public – South Dakota
My commission expires 12-28-2024

(SEAL) CHAD STAHL NOTARY PUBLIC SOUTH DAKOTA

FILED
OCT 30 2019
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
3RD CIRCUIT CLERK OF COURT
By

Copy Distribution
White - To Case File
Canary - To Case Subject
Pink - To Evidence Custodian

Watertown Police Department
EVIDENCE INVENTORY and RECEIPT

Page 1 of 1

Case Number: 19-1276 Officer: Fischer
Time Search Initiated: 1615
Time Search Terminated: 1647
Subject(s) Name: Lee Malcolm
Address/Place of Search/Seizure: 420 4th St SW

Exhibit No.	Description & List of Evidence	Found By	Location of Property or Evidence Found/Rec'd
1	ZTE Smartphone	214	Bathroom (main floor) Shaving bag
2	Camera case w/micro SD card	335	Lee's bedroom (2nd floor)
3	Jamaican Medication bottles (6)	335	Stand next to bed - lee's Room
4	Mattress Pad	212	Lee's bedroom - 2nd floor
5	Bandage	214	Lee's bedroom floor
6	Glass Pipe	214	Lee's bedroom Left side table
7	Jamaica medication bottle	214	Lee's bedroom Right side floor
8	Rug	212	Lee's bedroom left side of bed
9	Glass Jar with wine	212	lee's bedroom left side
10	Bandage	212	Lee's bedroom in garbage

Received From: _____ (Signature)
Date: _____ Time: _____
Submitted By: _____ (Officer's Signature)
Date: _____ Time: _____

Received By: _____ (Signature)
Date: 10-28-19 Time: 1842
Received By: _____ (Evidence Custodian's Signature)
Date: _____ Time: _____

WPD 304.1

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30521

LEE TODD MALCOLM,

Petitioner and Appellant,

v.

BRENT FLUKE, Warden, Mike Durfee State Prison,

Respondent and Appellee.

APPEAL FROM THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
CODINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE PATRICK T. PARDY
Circuit Court Judge

APPELLEE'S BRIEF

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ATTORNEYS FOR RESPONDENT
AND APPELLEE

Notice of Appeal filed November 3, 2023.

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30521

LEE TODD MALCOLM,

Petitioner and Appellant,

v.

BRENT FLUKE, Warden, Mike Durfee State Prison,

Respondent and Appellee.

PRELIMINARY STATEMENT

In this brief, Lee Todd Malcolm is referred to as "Malcolm" or "Petitioner." Brent Fluke, Warden of Mike Durfee State Prison, is referred to as "Respondent." Citations to the settled records for the jury trial ("TR") and habeas action ("HR") are followed by the corresponding page number(s).

JURISDICTIONAL STATEMENT

On July 11, 2023, the Honorable Patrick T. Pardy, Circuit Court Judge, Third Judicial Circuit, entered a Denial of Writ of Habeas Corpus. HR:96. Malcolm moved for a Certificate of Probable Cause ("CPC") on July 14, 2023. HR:98-106. Judge Pardy denied the Motion on August 8, 2023. HR:120. Malcolm filed a Motion to Grant Certificate of Probable Cause for Appeal with this Court on August 15, 2023. *See* South Dakota Supreme Court Case No. 30428 (judicial notice requested). This Court granted Malcolm's Motion, in part, on

October 17, 2023. HR:132-33. Malcolm filed a Notice of Appeal on November 3, 2023. HR:133. This Court has jurisdiction under SDCL 21-27-18.1.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I. WHETHER THE HABEAS COURT ERRED IN DISMISSING MALCOLM'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM RELATED TO DEFENSE COUNSEL'S ALLEGED FAILURE TO RESEARCH AND ASCERTAIN THE NONVIABILITY OF THE ADVANCED CONSENT DEFENSE?

The habeas court did not rule on this issue.

Ashcroft v. Iqbal, 556 U.S. 662 (2009)

Reay v. Young, 2019 S.D. 63, 936 N.W.2d 117

Riley v. Young, 2016 S.D. 39, 879 N.W.2d 108

Sisney v. Best Inc., 2008 S.D. 70, 754 N.W.2d 804

II. WHETHER THE HABEAS COURT ERRED IN DISMISSING MALCOLM'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM RELATED TO DEFENSE COUNSEL'S FAILURE TO MOVE TO SUPPRESS CELL PHONE VIDEOS?

The habeas court did not rule on this issue.

Guthrie v. Weber, 2009 S.D. 42, 767 N.W.2d 539

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

*Nygaard v. Sioux Valley Hospitals & Health Sys*tem, 2007 S.D. 34, 731 N.W.2d 184

STATEMENT OF THE CASE

Following a three-day jury trial, a Codington County jury found Malcolm guilty of nine counts of Third-Degree Rape in violation of SDCL

22-22-1(4) and not guilty of nine alternative counts of rape charged under SDCL 22-22-1(3). TR:147-51. The trial court sentenced Malcolm to twenty years in the state penitentiary for Count 1 and fifteen years for Count 2, with the sentences to run consecutively. SR:154-57. The court sentenced Defendant to fifteen years in prison for each of Counts 3 through 9, to run concurrently, and suspended the execution of the entire terms. SR:158-71.

Malcolm filed a direct appeal to this Court, raising five issues. *See* South Dakota Supreme Court No. 29644 (judicial notice requested). This Court restated the issues as follows:

> 1. Whether the circuit court erred by determining that Malcolm's theory that J.C. gave "advance consent" to the instances of sexual penetration for which he was charged was not a legally valid defense that could be supported by evidence and argument.
>
> 2. Whether the circuit court abused its discretion by ruling that evidence of specific instances of J.C.'s sexual behavior was inadmissible under Rule 412.
>
> 3. Whether the circuit court committed plain error by not providing the jury with an instruction further defining the intoxication element of third-degree rape under SDCL 22-22-1(4).
>
> 4. Whether the circuit court committed plain error by admitting video evidence of the charged offenses without first viewing the videos.
>
> 5. Whether exceptional circumstances justify review of Malcolm's ineffective assistance of counsel claim on direct appeal.

State v. Malcolm, 2023 S.D. 6, ¶ 22, 985 N.W.2d 732, 738.

Relying on the language of SDCL 22-22-1(4), this Court determined that "the act of sexual penetration and the inability to give

consent must be contemporaneous, meaning a person is guilty of third-degree rape if at the time the person accomplishes an act of sexual penetration, the victim is incapable of giving consent." *Malcolm*, 2023 S.D. 6, ¶ 24, 985 N.W.2d at 738. Consistent with other state appellate courts, this Court explained that the ability to consent also must contemplate the concomitant ability to withdraw consent during the sexual encounter. *Id.* at ¶¶ 28-29, 985 N.W.2d at 739 (relying on intermediate appellate courts from California and Virginia).

This Court also determined that the trial court followed the requirements of Rule 412, and sustained the court's rulings excluding, in part, the defense's proposed witness testimony on lack of relevance hearsay grounds. *Id.* at ¶ 34, 985 N.W.2d at 740. With regard to the remaining issues, this Court determined it was not plain error for the circuit court to fail to act on its own to include the jury instructions Malcolm cited on appeal; there was no binding precedent that required the court to view the video evidence and, sua sponte, apply Rule 403; and Malcolm's ineffective assistance of counsel claim was not appropriate for review on direct appeal. *See Id.* at ¶¶ 31-43, 985 N.W.2d at 740-42. Malcolm's convictions were affirmed on January 25, 2023.

Malcolm filed a pro se Petition for Writ of Habeas Corpus ("First Application") on April 17, 2023. HR:9-15. Malcolm's claims were similar to those raised on direct appeal with regard to evidence that, in

Malcolm's view, would have supported the advanced consent defense and Malcolm's view of the propriety of his actions. HR:11-13. Malcolm also claimed the State charged him under SDCL 22-22-1(4) to gain an "unfair advantage." HR:12. Malcolm again asserted that J.C. was capable of making her own choices and that he should have been able to argue that J.C. consented. HR:13-14.

The habeas court issued a Provisional Writ of Habeas Corpus and appointed counsel to represent Malcolm. HR:38. Habeas counsel filed an Amended Application for Writ of Habeas Corpus ("Amended Application") on June 6, 2023, alleging that: 1) trial counsel was ineffective, based on cumulative error; 2) the search and seizure of Malcolm's phone was a violation of the Fourth and Fourteenth Amendments; and (3) Malcolm's rights to confrontation and due process were violated because he was not able to effectively confront his accusers and other experts. HR:45-55. Respondent filed a return to Malcolm's Amended Application and a motion to dismiss, arguing, among other things, that Malcolm failed to allege sufficient facts to support his claims for relief. HR:77-94. Malcolm did not file a response to Respondent's motion to dismiss.

After reviewing the Amended Application and the Return to Writ, the habeas court determined that the Amended Application was not facially sufficient. HR:96. The court also granted Respondent's motion to dismiss with regard to the ineffective assistance of counsel claim,

finding that the Amended Application failed to allege a recognized ground for habeas corpus, failed to show that defense counsel's conduct fell below the objective standard of reasonableness, and failed to show that Malcolm was prejudiced by his counsel's actions. HR:96. The court also determined that the claim was "speculative, vague, and unsubstantiated." *Id.*

The court granted the motion to dismiss with regard to Malcolm's claim of unreasonable search and seizure, determining that it was an improper collateral attack on a final judgment and failed to state a claim upon which relief could be granted. HR:96. The court dismissed the third claim related to confrontation of witnesses and due process because Malcolm failed to allege any facts for the court to consider his vague and unspecific allegations. HR:96.

Malcolm filed a motion to reconsider or, in the alternative, a motion for a certificate of probable cause to appeal. HR:98-105. After briefing, the court denied Malcolm's request for a certificate of probable cause. HR:120. Malcolm applied to this Court for a certificate of probable cause to appeal and this Court granted that request, in part. HR:121-22; SDSC No. 30428.

STATEMENT OF THE FACTS

After a night of heavy drinking, Malcolm and his girlfriend, J.C., returned to the home they shared with Malcolm's mother and son. J.C. took a lethal dose of her pain medication and then passed out. While

J.C. was passed out, Malcolm used a broken cell phone to video himself raping her.[1]

At trial, counsel's primary defense theory was that J.C. gave Malcolm "advanced consent" to have sex with her after she passed out. Counsel's strategy was based on Malcolm's insistence that his actions were private and consensual and, therefore, not criminal. TR:188, 192-93, 476, 478, 609, 620, 659, 674-77. This same theme was present on appeal while represented by different counsel and in Malcolm's first Application. SDSC Case No. 29644 (Defendant's Brief at 13-18) (judicial notice requested); HR:12-14. Consistent with a jury nullification defense, at trial, defense counsel also highlighted the relationship between Malcolm and J.C. and focused on Malcolm's love for J.C., notwithstanding her mental health issues. TR:394-97; 598-609.

STANDARDS

Habeas Corpus and Ineffective Assistance of Counsel

"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." *Jenner v. Dooley*, 1999 S.D. 20, ¶ 11, 590

[1] A detailed account of the facts leading up to the rapes and J.C.'s death is laid out in *State v. Malcolm*, 2023 S.D. 6, 985 N.W.2d 732.

N.W.2d 463, 468. Malcolm has the initial burden of proof to establish a colorable claim for habeas corpus relief. *Id.*

Generally, ineffective assistance of counsel claims are analyzed under a two-prong test. *Legrand v. Weber*, 2014 S.D. 71, ¶ 34, 855 N.W.2d 121, 130. Under the first prong, Malcolm must establish that counsel's performance was so deficient as to deprive him of a constitutional right. *Id.* Under the second prong, Malcolm must establish prejudice. *Id.* "In order to establish prejudice, a defendant must demonstrate that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* at 131 (quoting *State v. Craig*, 2014 S.D. 43 ¶ 38, 850 N.W.2d 828, 838).

Motions to Dismiss and Review on Appeal

"A motion to dismiss under [SDCL 15-6-]12(b)(5) challenges the legal sufficiency of the petition." *Jenner*, 1999 S.D. 20, ¶ 13, 590 N.W.2d at 469. An application for a writ of habeas corpus is "more susceptible to dismissal" because it is "a collateral attack on a final judgment." *Id.* The application "must pass a minimum 'threshold of plausibility'" to survive a motion to dismiss. *Id.*

In a petition for habeas corpus, the petitioner must provide the "grounds" of his "entitlement to relief," which "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Sisney v. Best Inc.*, 2008 S.D. 70, ¶ 7, 754

N.W.2d 804, 808 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007)). "Factual allegations must be enough to raise a right to relief above the speculative level[.] [T]he pleading must contain something more ... than ... a statement of facts that merely creates a suspicion [of] a legally cognizable right of action on the assumption that all the allegations in the complaint are true (even if doubtful in fact)[.]" *Id.* A petitioner is not required to set out detailed facts, but he or she must provide a "showing" of entitlement to relief rather than a blanket assertion. *Id.*

In his brief, Malcolm cites the prior pleading standard that allowed a habeas court to dismiss a petition for failure to state a claim "only if it appears beyond doubt that the petition sets forth no facts to support a claim for relief." Petitioner's Brief ("PB") at 12 (citing *Jenner*, 1999 S.D. 20, ¶ 13, 590 N.W.2d at 469). In *Sisney v. Best Inc.*, this Court moved away from that standard and adopted the standard announced in *Bell Atlantic Corp. v. Twombly* quoted above. *See Sisney*, 2008 S.D. 70, ¶ 7, 754 N.W.2d at 808. "[T]he [United States Supreme] Court retired the generous and often disparaged 'no set of facts' language because it permitted an 'approach to pleading [that] would dispense with any showing of a reasonably founded hope that a plaintiff would be able to make a case.' " *Id.*[2]

---

[2] This Court has not yet used the *Twombly* standard when reviewing the dismissal of a habeas corpus petition. *See Riley v. Young*, 2016 S.D.

(continued...)

While courts must accept the facts alleged as true, they are not required to accept "bald assertions, subjective characterizations, or legal conclusions." *Nygaard v. Sioux Valley Hosps. & Health Sys.*, 2007 S.D. 34, ¶ 39, 731 N.W.2d 184, 198. Rather, "[u]nspecific, conclusory, or speculative" allegations are ripe for dismissal. *Jenner*, 1999 S.D. 20, ¶ 13, 590 N.W.2d at 469. "Also, if pleadings fail to allege a requisite element necessary to obtain relief, dismissal is in order." *Id.*

Normally, when reviewing the sufficiency of a petition, the court is confined to the face of the petition and any attachments. *Jenner*, 1999 S.D. 20, ¶¶ 14-15, 590 N.W.2d at 469-70. However, a court may take judicial notice of matters of public record, including an underlying criminal record, without converting the motion to dismiss into a motion for summary judgment. *Id.*

When "the circuit court receives no evidence but grants the State's motion to dismiss as a matter of law, [this Court's] review is de novo and [the Court] give[s] no deference to the circuit court's legal conclusions." *Id.* at ¶ 11, 590 N.W.2d 468. When reviewing the grant of a motion to dismiss, this Court reviews the same materials the habeas court viewed to decide if the court ruled correctly. *Riley*, 2016

(...continued)
39, ¶ 6, 879 N.W.2d 108, 112. However, because habeas petitions must pass a "threshold of plausibility," the *Twombly* standard is compatible with and appropriate for use in habeas actions. *See Archambeau* at *7-8 (applying the *Twombly* standard to a motion to dismiss in a federal habeas corpus action).

S.D. 39, ¶ 7, 879 N.W.2d at 112.[3] However, the Court may affirm the habeas court's determination if it is right for any reason. *Hays v. Weber*, 2002 S.D. 59, ¶ 11, 645 N.W.2d 591, 595; *Mach v. Connors*, 2022 S.D. 48, ¶ 11, 979 N.W.2d 161, 166.

ARGUMENTS

In granting Malcolm's motion for a certificate of probable cause, this Court determined that appealable issues existed as to whether the habeas court erred in dismissing two of the ineffective assistance of counsel claims as facially insufficient under SDCL 15-6-12(b)(5):

1. Whether Petitioner was denied effective assistance of counsel with respect to the impact of counsel's failure to research and ascertain the nonviability of an advanced consent defense and thus pursue other defense strategies that would potentially have been more viable, including suppression of the cell phone videos;[4] and

2. Whether Petitioner was denied effective assistance of counsel with respect to counsel's failure to move to suppress the cell phone videos as obtained in violation of his Fourth and Fourteenth Amendment rights.

HR:121-22. This Court will only review the claims identified in the certificate of probable cause. *Ashley v. Young*, 2014 S.D. 66, ¶¶ 8-9, 854 N.W.2d 347, 350 (explaining the substantial showing

[3] Malcolm supplemented the record on appeal with warrants and affidavits that were not part of the underlying criminal or habeas records. Because the habeas court did not view these documents, this Court should not view them when determining if the habeas court's ruling was correct.

[4] Suppression of the cell phone videos in addressed in Issue II.

of probable cause that is required to invoke this Court's discretionary review).

I. THE HABEAS COURT PROPERLY DISMISSED MALCOLM'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM RELATED TO THE ADVANCED CONSENT DEFENSE.

In determining whether an application can survive a motion to dismiss, the court considers the well-pled, non-conclusory factual allegations in the application to determine if they "plausibly suggest an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009). First, the court is not required to accept as true legal conclusions or "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Id.* at 678. Second, determining whether the petition states a plausible claim for relief is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. If the well-pled facts do not permit the court to infer more than a mere possibility of misconduct, the petition has alleged, but has not "shown" that the petitioner is entitled to relief. *Id.* at 679. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.' " *Id.* at 678.

Notably, because habeas corpus review is limited, and because ineffective assistance of counsel claims begin with the "strong presumption that counsel's conduct falls within the wide range professional assistance," a petitioner's "plausible showing" may require

more than a regular complaint that does not come with limited review or presumptions. *Jenner*, 1999 S.D. 20, ¶ 13, 590 N.W.2d at 469 (explaining how a habeas petition is more susceptible to dismissal than other civil complaints because the remedy that a petition for habeas corpus seeks is limited); *See also Denoyer v. Weber*, 2005 S.D. 43, ¶ 18, 694 N.W.2d 848, 854.

A. Failure to Research and Ascertain the Nonviability of the Advanced Consent Defense

Malcolm alleges that "[c]ounsel failed to conduct effective or adequate legal research regarding the viability of [the advanced consent] defense,. . . [and] failed to investigate alternative trial strategies," without pleading facts that allege what research or strategies counsel missed. HR:47. This Court is not required to accept as true Malcolm's subjective characterizations or conclusions about counsel's performance. It is impossible to determine if Malcolm has established a plausible claim for relief if he has not identified the missing research or strategies, or alleged how they could have changed the outcome of his case.

On appeal, Malcolm claims that the language of the statute and minimal legal research would have shown that the advanced consent defense was "misguided." PB at 25-26. This allegation was not included in the Amended Application, and it is not proper for Malcolm to add allegations or detailed explanations to his Amended Application on appeal. *See generally Sisney v. Reisch*, 2008 S.D. 72, ¶ 6, 754

N.W.2d 813, 817 (considering on appeal the factual allegations on the "face of the complaint" to determine whether dismissal under 12(b)(5) was appropriate). This is especially true when the Court's CPC specifically identifies the issue as the facial sufficiency *of the pleading*. Nevertheless, in an abundance of caution, undersigned will address this argument.

"Effective assistance of counsel is not equated with a successful result." *Randall v. Weber*, 2002 S.D. 149, ¶ 6, 655 N.W.2d 92, 96. And "[n]either the result reached nor second-guessing with the benefit of hindsight determine the reasonableness of counsel's performance." *Id.* at ¶ 7. Rather, the court must consider the circumstances at the time the decision was made. *Id.* "Selection of a defense is a trial strategy that this Court will seldom reevaluate." *Id.* at ¶ 10, 655 N.W.2d at 97.

Prior to this Court's decision in *State v. Malcolm*, there were no South Dakota cases dealing with "pass out sex" or "advanced consent," nor were there any interpreting SDCL 22-22-1(4) in the way that it was interpreted in the opinion.[5] Malcolm's reliance on *State v. Jones* as a means of guidance for defense counsel is misplaced. In *Jones*, the defendant requested the following instruction:

---

[5] Contrary to Malcolm's assertion, the circuit court in his criminal trial did not cite to any specific South Dakota law. Rather, the court described its understanding of its research of the law "in general." TR:544-45; *see also* TR: 471-72 (noting that there was no guiding state law on the concept of prospective consent). And, as Malcolm later points out, the court's research was based on out of state cases. PB at 26; TR:576.

> An act of sexual intercourse does not constitute rape, where the female initially consents to the act, but after penetration, withdraws her consent, and the male, without interruption of penetration, continues the act against the will of the female and by means of force.

State v. Jones, 521 N.W.2d 662, 672 (S.D. 1994).

The Court in *Jones* noted that the instruction was based on an out of state case, *People v. Vela*, and then held that "[t]his court has never held that initial consent forecloses a rape prosecution and, *based on the facts of this case, we choose not to adopt the position of the Vela case.*" *Id.* (emphasis added) (mentioning *Vela*, 172 Cal.App.3d 237, 218 Cal.Rptr. 161 (Cal.App.1985)). The *Malcolm* decision conclusively addressed this question, along with the propriety of an "advanced consent" defense. *Malcolm*, 2023 S.D. 6, ¶¶ 27-28, 985 N.W.2d 732 at 739. However, prior to *Malcolm*, those questions were unsettled. This Court's decision affirming the unavailability of the advanced consent defense, after the fact, does not establish that defense counsel's representation was ineffective or unreasonable. *Piper v. Young*, 2019 S.D. 65, ¶ 53, 936 N.W.2d 793, 811.

The decision of whether to use or not use certain trial tactics and defenses is exclusively for trial counsel, and court must not attempt to second guess counsel regarding those kinds of decisions. *Sprik v. Class*, 1997 S.D. 134, ¶ 39, 572 N.W.2d 824, 832. Malcolm must "show more than that the trial strategy of the defense counsel backfired or that another attorney would have prepared and tried the case in a

different manner." *Randall*, 2002 S.D. 149, ¶ 8, 655 N.W.2d at 96–97 (citing *Knecht v. Weber*, 2002 SD 21, ¶ 21, 640 N.W.2d 491, 500). The only time such a decision will constitute ineffective assistance of counsel is when it is clear that "no reasonable attorney would have done as trial counsel did." *Id.* In this case, defense counsel's "failure" to ascertain the admissibility of the defense before trial was likely part of a reasonable trial strategy. The viability of the "pass out sex" defense, alone, was not clearly settled, and the trial record shows that defense counsel: 1) tried to avoid disclosing details about the "pass out sex" defense for as long as possible, and 2) used the defense in tandem with a jury nullification defense.

First, when determining the sufficiency of a petition, courts are permitted to use their judicial experience and common sense. *Kaiser Trucking, Inc. v. Liberty Mut. Fire Ins. Co.*, 2022 S.D. 64, ¶ 29, 981 N.W.2d 645, 656 (citing *Iqbal*, 556 U.S. at 679). Indeed, as in this case, if the legality of a defense is unsettled, requesting the trial court determine the admissibility of the defense could leave the defendant without a defense for trial and without an alternative option if the State is unwilling to provide a plea offer once the defense is excluded.

Second, many of the allegations in Malcolm's Amended Application support a jury nullification defense and a presumption that counsel's decision about the legality of the defense was strategic, rather than ineffective assistance of counsel. For instance, Malcolm claims

that counsel did not prepare him to testify or offer his testimony through the offer of proof. HR:50 (paragraphs 33 and 37). However, having Malcolm engage in long winded answers the first time the court and the State heard his testimony allowed Malcolm to testify about much more than he likely would have if defense counsel had offered the testimony in an offer of proof.

Defense counsel also used Malcolm's long responses to personalize Malcolm and show that he and J.C. were in a loving relationship. TR:585-89, 598-606, 608-11. Consistent with Malcolm's proposed defense on appeal—i.e. showing that Malcolm and J.C. had a habit of "morning sex"—defense counsel elicited testimony from Malcolm about their pattern of having morning sex, including on the day before she died and the morning that she died. TR:587, 603-604.

Malcolm faults counsel for introducing J.C.'s suicide note, but the note is complimentary to Malcolm, at times, and corroborates much of what he testified to regarding J.C.'s panic disorder. HR:49 (paragraph 26); TR:104-10, 585, 598-604. The suicide note, along with J.C.'s use of drugs and alcohol, made her seem like an unsympathetic victim. *Id.* (paragraphs 26 and 27). Indeed, highlighting J.C.'s mental health issues, and painting Malcolm as a loving partner, could have allowed the jury to feel sorry for Malcolm or believe that Malcolm was only fulfilling J.C.'s unconventional wishes. *See also* Trial Ex. 31 at 4:28-6:23 (discussing J.C.'s sexual preferences, including on the day of her

death). Counsel also used the suicide note throughout the trial to argue that law enforcement's investigation was inadequate. TR:397, 474-76, 492, 494, 540, 643.

The inconsistency between Malcolm's claims in his Amended Application and his claims on appeal make it difficult to determine the "more viable" strategies he believes his counsel should have pursued. For example, in his Amended Application, Malcolm claims it was error for his defense counsel to mention J.C.'s use of drugs and alcohol on the night of the rapes because it was not consistent with a consent defense. HR:49 (paragraph 27). On appeal, Malcolm claims that his counsel should have utilized J.C.'s use of drugs on the night of the rapes to argue that he did not know J.C. was incapable of consenting because he did not know she ingested a fatal dose of medication. PB at 27.[6] Malcolm's inability to identify the strategy defense counsel should have used, at the very least, renders his application implausible on its face, and also suggests his counsel was not ineffective.

Regardless, "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." *Ally v. Young*, 2023 S.D. 65, ¶

[6] Malcolm admitted to law enforcement that he saw J.C. take her medication and J.C. told him she was going to take her medicine and not wake up. Trial Ex. 7 at 5:06-10; Ex. 9 at 1:24-34; 2:57-3:02. Malcolm also admitted that J.C. made similar comments in the past. Ex. 8 at 1:00-1:15; Ex. 11 at 0:50-1:05.

51, 999 N.W.2d 237, 254, reh'g denied (Jan. 19, 2024) (citing *Dunn v. Reeves*, 594 U.S. 731, 738 (2021)). "[A] difference in trial tactics does not amount to ineffective assistance of counsel." *Id.* (citing *Piper*, 2019 S.D. 65, ¶ 67, 936 N.W.2d at 814). And few conceivable defenses were available to Malcolm.

"The test for ineffective assistance is not whether counsel could dream up new trial strategies with the benefit of hindsight." *Rhines v. Weber*, 2000 S.D. 19, ¶ 21, 608 N.W.2d 303, 309. Thus, Malcolm's vague and conclusory allegations about counsel's decision to present an advanced consent defense do not pass the threshold of plausibility.

B. Other viable strategies

"The decision to use or not use particular trial tactics and defenses is exclusively for trial counsel, and this Court will not attempt to second guess counsel in those kinds of decisions." *Sprik*, 1997 S.D. 134, ¶ 39, 572 N.W.2d at 832. Rather, "[t]he only time that this Court will hold that failure to raise a defense is sufficient to constitute ineffective assistance of counsel is when that failure is so clear that no reasonable attorney would have done as trial counsel did." *Id.* "[T]he selection of a defense is a trial strategy which this Court will seldom reevaluate." *Randall*, 2002 S.D. 149, ¶ 10, 655 N.W.2d at 97

When a petitioner claims that his counsel was ineffective because of a failure to research or investigate a possible defense, he must allege which defense was missed and, to show prejudice, he must make a

plausible showing that the defense was favorable and likely would have changed the outcome. *Coon v. Weber*, 2002 S.D. 48, ¶ 13, 644 N.W.2d 638, 643; *Kramer v. Kemna*, 21 F.3d 305, 308 (8th Cir. 1994). Indeed, counsel's alleged failure to research would have no "impact" if no other viable trial strategy or option existed.

In his Motion for CPC, Malcolm identified three other strategies he deemed to be "viable": 1) obtain expert evidence concerning J.C.'s ability to consent; 2) file a motion under Rule 412 to admit evidence of prior sex practices between Malcolm and J.C.; and 3) file a motion to suppress the cell phone videos. Motion for CPC at 5-6.[7]

1. Expert Testimony

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[7] This Court granted Malcolm's Motion for CPC, in part, and determined that any issue not specified in the Court's order lacked probable cause to appeal. HR:131-32. The first issue in the Court's order is related to the impact of defense counsel's failure to research and ascertain the nonviability of the advanced consent defense and, thus, pursue other defense strategies that would potentially have been more viable. But Malcolm's Motion for CPC is entirely based on the strategies or actions he believes counsel should have pursued. Undersigned counsel's reading of the Motion for CPC suggests that the two most clearly identified strategies were filing a motion to suppress and obtaining expert evidence about J.C.'s ability to consent. Motion for CPC at 5. Out of an abundance of caution, Respondent will address the Rule 412 argument. Motion for CPC at 6. Malcolm appears to have abandoned the argument related to the unanimity jury instruction on appeal, so Respondent will not further address that strategy. *See also State v. Muhm*, 2009 S.D. 100, ¶ 32, 775 N.W.2d 508, 518 (explaining that the State must either elect the act that applies to each count, or the court must give unanimity instructions); TR:632-39 (describing which act corresponded to each charge); TR:642 (explaining the unanimity concept during closing arguments).

In his Amended Application, Malcolm claimed that "[c]ounsel failed to request and obtain the services of experts, or otherwise consult with experts to evaluate the alleged victim's capability to consent and to help counter the State's experts." HR:47. Defense attorneys are not required to seek the services of an expert in every case. *Knecht*, 2002 S.D. 21, ¶ 20, 640 N.W.2d at 500 (explaining that failing to hire an expert is not per se error). Indeed, "strategic decisions, including whether to hire an expert, are given a strong presumption of reasonableness, reflecting the reality that such decisions also carry the risk of harming the defense by undermining credibility or distracting the jury." *Ally*, 2023 S.D. 65, ¶ 57, 999 N.W.2d at 256 (citing *Dunn*, 594 U.S. at 738).

In this case, where Malcolm videoed the assaults, admitted to J.C.'s high level of intoxication, and claimed that J.C. was "out of it" when she fell beside their bed, utilizing an expert to claim that J.C. was capable of consenting would have been more detrimental to his credibility than helpful.[8] *See also Eviglo v. United States*, No. 4:21-CV-04069-KES, 2021 WL 12180191, at *5 (D.S.D. Oct. 21, 2021), report and recommendation adopted, No. 4:21-CV-04069-KES, 2022 WL 22285867 (D.S.D. Jan. 11, 2022).

[8] The cell phone videos were not yet located when Malcolm made admissions about J.C.'s level of intoxication. TR:481.

Furthermore, Malcolm must, at the very least, allege what *helpful* information an expert could have contributed in order to pass the threshold of plausibility. *Malcolm*, 2023 S.D. 6, ¶ 38, 985 N.W.2d at 741 (explaining that the videos "plainly show[ed] J.C.'s unresponsive state during the charged acts" and noting Malcolm's admissions to law enforcement about J.C.'s level of intoxication). Failing to allege the favorable information an expert could have offered precludes a plausible showing that the expert would have changed the outcome of the case. *See Jenner*, 1999 S.D. 20, ¶ 17, 590 N.W.2d at 471 (affirming the dismissal of a habeas petition that failed to allege what helpful information could have changed the outcome of the case); *Denoyer*, 2005 S.D. 43, ¶¶ 29-33, 694 N.W.2d at 857-58.

Malcolm's vague claims related to challenging the State's experts through a Daubert motion or cross-examination are similarly deficient. HR:48. Malcolm claims that counsel "failed to file a Daubert Motion or otherwise limit the testimony of the State's experts through appropriate objections. . . [and] failed to effectively investigate the State's experts' claims and thereafter failed to properly cross examine the State's experts" without identifying what objections or limits could have been placed on the experts, what expert testimony should have been limited, or what further investigation would have uncovered. HR:48 (paragraphs 18 and 19). Malcolm cannot make a plausible showing that the outcome of his trial would have been different if he does not

allege what favorable information or results would have been available. *Piper*, 2019 S.D. 65, ¶ 72, 936 N.W.2d at 815; *Jenner*, 1999 S.D. 20, ¶ 17, 590 N.W.2d at 471; *Reay v. Young*, 2019 S.D. 63, ¶ 26, 936 N.W.2d 117, 123.

Unlike many types of civil cases, in habeas corpus cases, the court has benefit of being able to look at the petition along with the underlying criminal record to see if the petitioner has made a plausible claim for relief. *Riley*, 2016 S.D. 39, ¶¶ 7-8, 879 N.W.2d at 112-13. In *Riley*, this Court affirmed the dismissal of a habeas petition that alleged the courtroom was improperly closed during trial because the petition failed to allege that any person was excluded from the courtroom. A review of the trial transcript confirmed the insufficiency of the petition because the transcript noted that no member of the public was present when the courtroom was closed. Relatedly, a court is not required to accept facts as true if they are contradicted by the record. *Nyuon v. United States*, No. 4:16-CV-04010-KES, 2016 WL 11201861, at *21 (D.S.D. Sept. 6, 2016), report and recommendation adopted, No. 4:16-CV-04010-KES, 2017 WL 1507450 (D.S.D. Apr. 27, 2017) (citing *Hyles v. United States*, 754 F.3d 530, 534 (8th Cir. 2014)).

In this case, a review of the trial transcript shows that defense counsel used objections to limit the State's expert's testimony and engaged in effective cross-examination. Through cross-examination, counsel limited the coroner's testimony regarding his toxicology

findings and elicited testimony from the coroner saying he did not have the expertise to determine how much time it took for the medication to result in J.C.'s death. TR:495-96. He also objected to the coroner testifying about what J.C. may have been feeling based on the coroner's toxicology results. TR:496.

For the State's other expert, Dr. Lawrence, defense counsel had a standing objection to Dr. Lawrence's testimony. TR:501. Dr. Lawrence was unable to determine whether J.C. was conscious because the scale he used was meant to document a patient's improvement or deterioration and he did not have another assessment to compare. TR:502-03. The only point Dr. Lawrence was able to make was that he would not consider J.C. to be awake. TR:505. Like in *Riley*, reviewing the trial transcript further confirms the insufficient nature of Malcolm's Amended Application.

As many courts have said, "strategic decisions—including whether to hire an expert—are entitled to a strong presumption of reasonableness." *Ally*, 2023 S.D. 65, ¶ 57, 999 N.W.2d at 256 (citing *Dunn*, 594 U.S. at 738). And, choosing a different trial tactic, including cross-examining expert witnesses rather than hiring an expert witness—assuming one exists—does not amount to ineffective assistance of counsel. *Id.*; *Garritsen v. Leapley*, 541 N.W.2d 89, 94 (S.D. 1995). Where defense counsel engaged in effective cross examination and effectively used objections, Malcolm must explain

what limits, cross-examination, or other actions his counsel should have done to establish a plausible claim that his counsel was deficient.

2. Rule 412 Motion

In his Motion for CPC, Malcolm claimed that defense counsel should have filed a motion under Rule 412 to admit evidence of prior sex practices between Malcolm and J.C. Motion for CPC at 6; PB at 25-27. This Court's decision in *State v. Malcolm* affirming the trial court's exclusion of the prior sexual practices on lack of relevance and hearsay grounds precludes this argument. *Malcolm*, 2023 S.D. 6, ¶ 34, 985 N.W.2d at 740; *Legrand*, 2014 S.D. 71, ¶ 28, 855 N.W.2d at 129 (barring use of a habeas action to reexamine issues raised or substantially raised on appeal).

Even if this claim was available on habeas review, Malcolm's Amended Application fails to allege what exceptions under Rule 412 would have allowed the evidence to be admitted. Claiming that counsel failed to "argue any of the exceptions to Rule 412, . . . argue any exception to the hearsay rule, . . . and argue sufficiently that his proffered Rule 412 evidence was relevant. . ." is too vague to support a plausible claim for relief. HR:48 (paragraph 21).

On appeal, Malcolm claims that counsel should have made an effort to provide a defense that Malcolm had no knowledge that J.C. was incapable of consenting or that J.C. was capable of consenting. PB at 25-28. More specifically, Malcolm claims that his counsel should

have used other videos of him and J.C. engaging in sexual intercourse to show that: (1) Malcolm and J.C. had a habit of drinking, arguing, and then engaging in morning sex; and (2) Malcolm thought J.C. contemporaneously consented because of this habit.

First, this proposed defense was not in the Amended Application and, as Malcolm recognizes, these videos are not in the criminal or habeas records. PB at 27. Second, through his testimony, Malcolm told the jury that he and J.C. had a routine of waking up and being "romantic" in the morning and engaged in that routine in the morning before they went out drinking. TR:587. Malcolm later told the jury that J.C. woke up in the morning and asked him to give her attention. TR:603.[9] Malcolm then explained that he went downstairs to shower prior to the sexual activity and then went to sleep afterwards. TR:604. Not only was Malcolm able to testify about his and J.C.'s "pattern," he was also able to testify about her being awake before he went downstairs to shower. Malcolm also testified that he and J.C. had sex after they arrived home from the bar on the night of the rapes. TR:597. A review of the trial transcript and record shows that the vague allegations in Malcolm's Amended Application were not enough to make a plausible showing of entitlement to relief.

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[9] When Malcolm testified that J.C. told him to make love to her, the State objected, and the court sustained the objection. The court also instructed the jury to strike that comment from the record. TR:604.

Further, while Malcolm argues that the videos and evidence would have been admissible under Rule 412(b), it is well-settled that evidence of prior sexual intercourse is only admissible if it is similar to the sexual intercourse at issue. *State v. Lykken*, 484 N.W.2d 869, 874-75 (S.D. 1992) (affirming the exclusion of prior instances of sexual intercourse between the defendant and victim that were different than the alleged acts). A court is not required to admit videos or other evidence, under Rule 412, merely because the defendant says it is related to contemporaneous consent. And, regardless of what the videos showed, they could have been prejudicial to Malcolm. If J.C. was unresponsive, Malcolm could have been charged with additional crimes. If J.C. was awake in the videos, as the State described, the unadmitted videos would not have been similar to what was on the videos admitted at trial and, thus, would not have been admissible.[10]

Notably, defense counsel tried to put forth a defense that Malcolm thought J.C. was consenting because of their unconventional sexual relationship. And, at trial, counsel attempted to admit summaries of what the other videos showed—namely, prior recorded sexual activity between he and J.C—to show that similar videos existed prior to the videos depicting the rapes at issue. TR:470-71. Wisely, defense counsel tried to the use a summary of the videos for Malcolm's benefit,

[10] The videos are not in the record. However, on the record, and as an officer of the court, the State explained that J.C. was conscious in the videos. TR:688, 698.

rather than showing videos that, in either situation, could have been prejudicial.

C. Nonviable Defense Strategies

In his Amended Application, Malcolm provides a laundry list of alleged deficiencies that could arguably be categorized as "defense strategies." A review of these allegations shows that they are facially insufficient and fail to make a plausible showing of deficiency or prejudice—i.e. fail to make a plausible showing that the strategies were viable.

To make a plausible showing that counsel's representation was deficient, Malcolm must identify counsel's errors and identify what counsel should have done or, at the very least, what result could have been achieved. *Archambeau v. United States*, No. 4:21-CV-04033-KES, 2021 WL 11641393, at *13 (D.S.D. Oct. 8, 2021), report and recommendation adopted, No. 4:21-CV-04033-KES, 2021 WL 11641526 (D.S.D. Nov. 2, 2021). Allegations that counsel failed to file certain motions, hire experts, or make objections are vague and speculative unless the proper motion, objection, expert testimony, or research is identified. *Id.* While a long list of alleged errors could be "consistent" with deficient performance, Malcolm must show that his claim is plausible. *Iqbal*, 556 U.S. at 678.

Further, Malcolm is required to show that he was prejudiced by counsel's alleged errors. After alleging what counsel should have done, Malcolm must also allege that the action would have been favorable and changed the outcome of his trial. *Piper*, 2019 S.D. 65, ¶ 72, 936 N.W.2d at 815; *Eviglo* at *6.

For example, Malcolm alleges that his counsel should have objected to parts of the State's closing arguments, but he does not say what objection should have been used or why the comments were objectionable or prejudicial. HR:50. In another instance, Malcolm claims that his counsel failed to object to the 911 call due to lack of foundation, but he does not allege any facts suggesting that the 911 call was prejudicial. HR:50

Again, Malcolm claims that his counsel failed to "object to the introduction of pictures of injuries to Malcolm that did not occur during the alleged rape, . . . failed to object to photos that were irrelevant and high prejudicial," failed to make a motion to exclude "bad act" evidence, and "failed to thoroughly review and to request to redact video evidence played before the jury that was irrelevant and highly prejudicial." HR:50. But Malcolm does not identify what pictures he is talking about, what parts of the videos should have been redacted, or what "bad act" evidence was improperly included. The court is not required to accept Malcolm's subjective characterizations as true. *Nygaard*, 2007 S.D. 34, ¶ 39, 731 N.W.2d at 198. And, without identifying the

evidence he is talking about, Malcolm cannot make a plausible showing that the result of his trial would have been different without it.

Malcolm also claims that counsel did not make any written requests or motions for discovery without identifying what discovery was not provided. HR:47. Counsel's "failure" to request discovery cannot fall below an objective standard of reasonableness or cause prejudice if the State produced all of the required discovery without a request or a motion.

Malcolm claims that counsel "failed to meaningfully discuss the viability of this defense with [him] and failed to fully inform Malcolm of the risks of such defense." HR:47. Similarly, Malcolm also claims that counsel "failed to have a meaningful conversation with [him] regarding the facts, law, offer and opportunity to make a counter offer." HR:50. These allegations implicitly show that counsel had conversations with Malcolm about the defense, facts, law, and plea offers. Now, with the benefit of hindsight, Malcolm claims that those conversations were not good enough. However, Malcolm fails to allege what his counsel should have told him, how that would have changed his mind about going forward with trial, and what, if any, plea offers were extended. HR:47, 50. Defendants are not entitled to a plea offer from the prosecution and the prosecution is certainly not required to accept or even entertain a counteroffer. *Fast Horse v. Weber*, 2013 S.D. 74, ¶ 28, 838 N.W.2d

831, 839; *Eviglo* at *6 (noting that trial counsel cannot be blamed for the government's refusal to extend a plea offer).

Without alleging what plea offer may have been extended, Malcolm cannot show that the outcome would have been different—i.e. that he was offered a plea that would have resulted in a better outcome. Furthermore, a "defendant who maintains his innocence at all the stages of his criminal prosecution and shows no indication that he would be willing to admit his guilt undermines his later [habeas corpus] claim that he would have pleaded guilty if only he had received better advice from his lawyer." *Dones-Vargas v. United States*, No. 4:20-CV-04124-KES, 2021 WL 5547701, at *7 (D.S.D. Aug. 20, 2021), report and recommendation adopted, No. 4:20-CV-04124-KES, 2021 WL 4551552 (D.S.D. Oct. 5, 2021) (quoting *Sanders v. United States*, 341 F.3d 720, 723 (8th Cir. 2003)).

Malcolm's tactic of regurgitating a list of alleged errors could be "consistent" with deficient performance, but it is not sufficient to survive the stringent plausibility standard in habeas cases. And, contrary to his assertion, cumulative error is not a basis for ineffective assistance of counsel claims. *Reay*, 2019 S.D. 63, ¶ 26, n. 7, 936 N.W.2d at 124 n. 7 (rejecting the petitioner's argument that his counsel's failure to hire an expert and failure to investigate the case resulted in cumulative error); *Ally*, 2023 S.D. 65, ¶ 69, 999 N.W.2d at, 260 (citing *Reay*, 2019 S.D. 63, ¶ 26 n. 7, 936 N.W.2d at 124 n.7).

Malcolm has not shown any of these strategies would have been viable, much less that they would have been favorable and changed the outcome of his trial.

D. Prejudice

When a petitioner claims that his counsel was ineffective, he must allege facts showing that his counsel was deficient and that he was prejudiced by that deficiency. *Reay*, 2019 S.D. 63, ¶ 13, 936 N.W.2d at 120 (quoting the two-pronged standard adopted in *Strickland v. Washington*, 466 U.S. 668, 687 (1984)); *Sisney*, 2008 S.D. 70, ¶ 15, 754 N.W.2d at 811. In his Amended Application, Malcolm included a laundry list of alleged failures and missteps to support his claim of cumulative error. Malcolm then concluded that his counsel's conduct "fell below an objective standard of reasonableness" and he was "prejudiced by Counsel's performance so as to be deprived of a fair trial," but he did not allege if or how the result of the proceedings would have been different. HR:52. Instead, he cites *United States v. Cronic* and concludes that he should not have to show prejudice. HR:52 (citing *Cronic*, 466 U.S. 648 (1984)). However, allegations of cumulative error and presumed prejudice are not enough to make a plausible showing of prejudice. *Reay*, 2019 S.D. 63, ¶ 26, n. 6 & 7, 936 N.W.2d at 124.

Prejudice is presumed in ineffective assistance of counsel claims when a defendant is actually or constructively denied assistance of

counsel. *McBride v. Weber*, 2009 S.D. 14, ¶ 7, 763 N.W.2d 527, 531; *Cronic*, 466 U.S. at 659. Malcolm claims that his trial counsel was not effective, but this is not the case where his counsel did not show up for trial or fell asleep during trial. *Moeller v. Weber*, 2004 S.D. 110, ¶ 26, 689 N.W.2d 1, 9. This case concerns the effectiveness of counsel's assistance, not the lack of it. *Id.*

Further, as explained throughout this brief, Malcolm's counsel was more than a "mere physical presence." *Id.* While Malcolm disagrees with the defense's evaluation of the advanced consent defense (that Malcolm demanded and continues to believe in), defense counsel still put on a defense. Even if counsel's strategy did not prove to be successful that does not mean that Malcolm was constructively denied counsel. *Randall*, 2002 S.D. 149, ¶ 6, 655 N.W.2d at 96. Malcolm was required to make a plausible showing of prejudice. *Reay*, 2019 S.D. 63, ¶ 26, n. 6, 936 N.W.2d at 124.

In listing counsel's alleged failures, Malcolm often failed to allege what actions his counsel should have taken or what result that action would have provided. Without this information, Malcolm cannot make a plausible showing that these actions would have been favorable and would have changed the outcome of his trial. Prejudice is a required element of ineffective assistance of counsel claims and failure to plead facts in support of prejudice makes a petition insufficient on its face. *Sisney*, 2008 S.D. 70, ¶ 7, 754 N.W.2d at 808 (requiring a "showing"

rather than a blanket assertion of a right to relief); *Jenner*, 1999 S.D. 20, ¶ 13, 590 N.W.2d at 469.

II. THE HABEAS COURT PROPERLY DISMISSED MALCOLM'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM RELATED TO DEFENSE COUNSEL'S HANDLING OF THE CELL PHONE VIDEOS.

The only arguably "viable" defense strategy Malcolm asserted in his Amended Application related to challenging the warrant used to secure the cell phone from which the videos were obtained. In the Amended Application, Malcolm focused on the affidavit and warrant used to seize the cell phone, and his claim that there was no other warrant for the contents of the cell phone.[11] HR:52-53. Malcolm offered numerous legal conclusions about the sufficiency of the warrant and the alleged constitutional violation, but he did not attach the allegedly deficient warrant to the Amended Application. Courts are not required to accept subjective characterizations or legal conclusions as true in judging the sufficiency of a petition. *Nygaard*, 2007 S.D. 34, ¶ 39, 731 N.W.2d at 198; *Riley*, 2016 S.D. 39, ¶ 8, 879 N.W.2d at 112. This includes Malcolm's claim that the affidavit "lacked particularity," "failed to support or explain the breadth of the items and information sought," and "lacked adequate information related to law enforcement's

[11] A search warrant concerning the contents of the cell phone did exist, as evidenced by the second supplement to the settled record (no available citation at this time). But it was not entered into the underlying criminal record. Because this was not attached to the Amended Application or included in the criminal file, the habeas court was not able to determine if the warrants were sufficient.

need for unlimited access to the phone." HR:53; *Iqbal*, 556 U.S. at 678. When determining whether a warrant is supported by probable cause, courts are to use every reasonable inference that can be drawn in favor of probable cause. *Guthrie v. Weber*, 2009 S.D. 42, ¶ 11, 767 N.W.2d at 543. Malcolm's broad conclusions are not sufficient to show a plausible claim that the affidavit or warrant was insufficient.

Malcolm also failed to allege that trial counsel's failure to move to suppress the cell phone videos resulted in prejudice. *Reay*, 2019 S.D. 63, ¶ 13, 936 N.W.2d at 120. Malcolm claimed that the videos were used during the State's case-in-chief, but he did not allege how the result would have been different if the videos were not included. HR:52 (paragraph 52); *Guthrie*, 2009 S.D. 42, ¶ 10, 767 N.W.2d at 543 (explaining that petitioners must show their Fourth Amendment claims are meritorious and that there is a reasonable probability that the verdict would have been different when alleging an ineffective assistance of counsel claim); *Jenner*, 1999 S.D. 20, ¶ 13, 590 N.W.2d 463, 469, (failing to allege a requisite element results in dismissal). Furthermore, Malcolm admitted that he and J.C. had sex after they arrived at home and offered his own descriptions about how drunk she was, the effects of her medication, the fact that she took her medication, and her claim that she was going to take enough medication to not wake up. TR:597; Trial Ex. 6 at 2:16-50; Ex. 7 at

5:06-23, 5:40-6:50; Ex. 11 at 1:09-1:21; Ex. 13 at 3:25-3:55, 6:05-08, 7:05-30; Ex. 14 at 14:45-15:04.

On appeal, Malcolm provides case law and argument in support of his claim that the affidavit and warrant were insufficient. Respondent maintains that these arguments are outside of the Court's Order granting CPC and improper additions to the allegations in Malcolm's Amended Application. *Sisney v. Reisch*, 2008 S.D. 72, ¶ 6, 754 N.W.2d at 817. However, there are issues with Malcolm's argument on appeal.

For instance, Malcolm claims that the good-faith exception to the exclusionary rule does not apply. PB at 23-24. However, that is not the only exception that prevents exclusion of evidence that may have been obtained in violation of the Fourth Amendment. *State v. Mousseaux*, 2020 S.D. 35, ¶¶ 12-14, 945 N.W.2d 548, 552. Malcolm does not argue or even claim that the other exceptions to the exclusion rule are inapplicable. Additionally, while the first affidavit and warrant were related to an unattended death investigation, the videos of Malcolm raping J.C. were recorded on the same day that her death occurred. TR:462.

Nevertheless, because the warrant was not in the criminal record or attached to the Amended Application, the habeas court was not able to make its own determinations about the sufficiency of the warrant or affidavit. Malcolm's claim that the warrant was unconstitutional,

without providing the warrant or more specific factual information about the warrant and affidavit, is facially insufficient. It is Malcolm's burden to show his right to relief, and that starts with adequately pleading his claims before the habeas court.

CONCLUSION

Respondent respectfully requests this Court affirm the habeas court's denial of Malcolm's application for writ of habeas corpus.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Respondent's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Respondent's Brief contains 8,579 words.

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

Dated this 4th day of March 2024.

/s/ Chelsea Wenzel
Chelsea Wenzel
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 4, 2024, a true and correct copy of Appellee's Brief in the matter of *Lee Todd Malcolm v. Brent Fluke, Warden*, was served by using Odyssey File and Serve upon Malcolm through his attorney, Paul H. Linde, at paull@schafferlawoffice.com.

/s/ Chelsea Wenzel
Chelsea Wenzel
Assistant Attorney General

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 30521

LEE MALCOLM,

Applicant/Appellant,

vs.

BRENT FLUKE, WARDEN
OF THE MIKE DURFEE STATE PRISON,

Respondent/Appellee.

Appeal from Circuit Court
Third Judicial Circuit, Codington County, South Dakota
Honorable Patrick T. Pardy, Circuit Court Judge

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PRELIMINARY STATEMENT

The Appellant will be referred to as Malcolm. The Appellee will be referred to as State. The Clerk's record is designated "R" with the appropriate page number. There was no underlying transcript of any hearing in this action. The record and transcripts in the underlying criminal action of State v. Malcolm, 14CRI20-000060 will be referred to as "CR" with the appropriate page number within that record. The Reply Appendix contains the third search warrant recently located and will be referred to as "RA".

STATEMENT OF LEGAL ISSUES

1. *Whether the circuit court erred in dismissing Malcolm's claim under SDCL 15-6-12(b)(5) that he was denied effective assistance of counsel with respect to counsel's failure to move to suppress the cell phone videos as obtained in violation of his Fourth and Fourteenth Amendment Rights.*

The Circuit Court concluded, without opinion, that Malcolm failed to state a claim under SDCL 15-6-12(b)(5) and this Court granted a Certificate of Probable Cause (CPC) to appeal this issue.

Legal Authority:

Ally v. Young, 2023 S.D. 65, 999 N.W.2d 237.
Riley v. California, 573 U.S. 373, 134 S.Ct. 2473, 189 L. Ed.2 430 (2014).
State v. Fairley, 457 P.3d 1150 (Wash. App. 2020).
U.S. v. Winn, 79 F.Supp.3d 904 (S.D. Ill. 2017).

2. *Whether the circuit court erred in dismissing Malcolm's claim under SDCL 15-6-12(b)(5) that he was denied effective assistance of counsel with respect to the impact of counsel's failure to research and ascertain the nonviability of an advanced consent defense and thus pursue other defense strategies that would potentially have been more viable.*

The Circuit Court concluded, without opinion, that Malcolm failed to state a claim under SDCL 15-6-12(b)(5) and this Court granted a CPC to appeal on this issue.

Legal Authority:

State v. Jones, 521 N.W.2d 667 (S.D. 1994).
SDCL 22-22-1(4)

REPLY ARGUMENT

A. Malcolm is using the correct standard for considering a dismissal under SDCL 15-6-12(b)(5).

The State argues that Malcolm is applying the incorrect standard that the habeas court utilizes when considering a 12(b)(5) Motion to Dismiss. (Appellee's Brief at p. 9) The State argues the proper standard is found in *Sisney v. Best, Inc.*, 2008 S.D. 70, ¶7, 754 N.W.2d 804, 808 and claims that the standard in *Jenner v. Dooley*, 1999 S.D. 20, ¶13, 590 N.W.2d 463, 469 is not correct. However, in both *Steiner v. Weber*, 2011 S.D. 40, 815 N.W.2d 549 and *Riley v. Young*, 2016 S.D. 39, 879 N.W.2d 108, two decisions considering 12(b)(5) dismissals of habeas petitions that were both decided after *Sisney*, this Court still relied on the standard from *Jenner* that "[a] court may dismiss a habeas corpus petition for failure to state a claim under SDCL 12(b)(5) only if it appears beyond doubt that the petition sets forth no facts to support a claim for relief." *Steiner*, 2011 S.D. 40, ¶5, 815 N.W.2d at 551; *Riley*, 2016 S.D. 39, ¶6, 879 N.W.2d at 112. Moreover, the State in its Brief in Support of Motion to Dismiss before the Circuit Court recognized this exact standard from *Jenner*. (R 81-82)

Furthermore, this Court recognized in both *Steiner* and *Riley* that: "To survive a motion to dismiss under § 12(b)(5), an application for habeas corpus must pass a

minimum threshold of plausibility." *Steiner,* 2011 S.D. 40, ¶5, 815 N.W.2d at 551; *Riley,* 2016 S.D. 39, ¶6, 879 N.W.2d at 112. Malcolm's application passes this threshold at this early stage and he should be allowed to have an evidentiary hearing. As this Court has observed:

> A motion to dismiss under § 12(b)(5) challenges the legal sufficiency of the petition. As the United States Supreme Court noted, when a court reviews the sufficiency of a complaint, before the reception of any evidence ... its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.

Riley, supra, 2016 S.D. 39, ¶ 6, 879 N.W.2d at 112 (quoting *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974)).

B. The State's claim that Malcolm did not respond to the State's Motion to Dismiss.

In its Brief, the State alleges that "Malcolm did not file a response to Respondent's motion to dismiss." (Appellant's Brief at p. 5) This is technically correct, but unfairly taken out of context. The State filed a 12(b)(5) Motion to Dismiss on July 7, 2023, a Friday. (R 77-85) On July 11, 2023, the following Tuesday, the Circuit Court entered an Order denying the Application for Writ of Habeas Corpus under SDCL 15-6-12(b)(5). (R 96-97) No hearing was set that would have allowed for a response date or deadline pursuant to SDCL 15-6-6(d), which provides for the non-moving party to respond five days before a hearing.

C. Overview of the Search Warrants.

Further explanation is owing concerning the search warrants in this case. There were three warrants issued. The parties stipulated that two of the warrants could be part

of the appeal record prior to Malcolm providing his opening brief. (R 138) Later, the State discovered an additional warrant that Malcolm's Counsel was not provided through his inquiry with the Clerk. The parties later stipulated that the third search warrant could be made part of the record. (RA 1) This third search warrant does not assist the State's arguments. The search warrants can be summarized as follows with the respective filing number.

1. SWA 19-206 – Affidavit in Support of Request for Search Warrant and Search Warrant dated October 28, 2019, with the search initiated at 6:15 p.m. and ending at 6:42 p.m. that date (1st Warrant). (R 141-149) Among other items, the Affidavit requested the seizure of an unidentified cell phone and digital media as defined in SDCL 22-24A-2(6). (R 141) Malcolm's ZTE Smartphone and a camera case with SD cards were seized through the Warrant. (R 149) As explained briefly in Malcolm's opening brief at page 15 and as further discussed *infra*, the Warrant did not authorize the search of the data on Malcolm's phone. However, Lead Detective Shane Hardie testified that law enforcement performed a search and full extraction of the phone it seized to obtain such data on October 29, 2019. (461-64) The phone that law enforcement searched was the source of the video evidence at Malcolm's trial. *Id.*

2. SWA 19-207 – Affidavit in Support of Request for Search Warrant and Search Warrant, both dated October 31, 2019 (2nd Warrant). (R 151-156) This Affidavit requested aerosol cans, similar objects, and evidence related to a sexual assault. (R 151) The Warrant authorized a search of Malcolm's home for such items. (R 154). The Affidavit revealed that officers had searched Malcolm's phone data and located the videos prior to October 31, 2019. (R 153) In the 2nd Warrant, law enforcement used the

phone data improperly obtained under the 1st Warrant to support probable cause to obtain items that were seen in the videos. (R 153)

3. SWA 19-208 – Affidavit in Support of Request for Search Warrant and Search Warrant, both dated November 1, 2019 (3rd Warrant). (RA 4-9) This was the Warrant Malcolm previously failed to locate. The Affidavit requested a search of the phone's data and SD card data to locate evidence related to a sexual assault. (RA 4) The Affidavit relied on phone data (videos) previously collected from the prior unauthorized search of cell phone data to establish probable cause to obtain such data in this final warrant. (RA 6) This is set forth in paragraph 6, 7, and 8 of the Affidavit. *Id.* Law enforcement requested a warrant for "data" it already had improperly obtained and reviewed through the 1st Warrant. It appears at this stage of the action that law enforcement had previously improperly accessed phone data, including videos, without a qualifying warrant and then later sought this last warrant for the data it already had seized and reviewed to pursue sexual assault charges based upon the previously illegally obtained video evidence.

D. The State's response to the search warrant issues.

The State largely does not address the legal sufficiency of Malcolm's claim relating to the search warrants, but instead largely focuses on Malcom's failure to attach the search warrants to his Amended Application and further asserts that the allegations were inadequate to raise this issue. (Appellee's Brief at 34-35) There was adequate information within the Amended Application to set forth the issues regarding law enforcement's improper search of the phone data and trial counsel's failure to move to suppress. Specifically, Malcolm alleged that trial counsel apparently finally recognized the issue with the search of the phone during closing arguments. (R 49 - ¶28) Malcolm

also alleged that trial counsel made no motion to suppress the cell phone videos. *Id.* He also alleged that his trial counsel's conduct fell below an objective standard of reasonableness and that he was prejudiced. (R 52 - ¶47)

Malcolm further explained in his Amended Application the issue with phone data search, which incorporated the various prior errors of trial counsel, including not making a motion to suppress. (R 52-53) Paragraph 54 of Malcolm's Amended Application clearly sets forth the 4th Amendment issues that trial counsel never raised in a motion to suppress. (R 53) Considering the face of the pleadings, the issue of trial counsel's failure to move to suppress was adequately set forth. Further the Circuit Court's Order stated: " Petitioner has failed to show that his counsel's conduct fell below an objective standard of reasonableness and that he was prejudiced by his counsels' (sic) actions based on the overwhelming video evidence of this crime." (R 96) The Circuit Court's decision actually proves the point about why a motion to suppress should have been made to exclude the videos. This issue was adequately raised and trial counsel should have moved to suppress the illegally obtained videos. His failure to do this fell below the objective standard of reasonableness and this prejudiced Malcolm because this video evidence was obtained in violation of his rights under the 4th Amendment to the U.S. Constitution.

"A complaint need only contain a short plain statement of the claim showing the pleader is entitled to relief and a demand for judgment for the relief to which the pleader deems himself entitled." *Nooney v. StubHub, Inc.*, 2015 S.D. 102, ¶9 873 N.W.2d 497, 499 (citing SDCL 15-6-8(a)). A complaint must put "a person of common understanding" on notice, "with reasonable certainty of the accusations against [them] so

[they] may prepare [their] defense." *Hallberg v. S. Dakota Bd. of Regents*, 2019 S.D. 67, ¶ 28, 937 N.W.2d 568, 577 (quoting *St. Pierre v. State ex rel. S.D. Real Estate Comm'n*, 2012 S.D. 25, ¶18, 813 N.W.2d 151, 157) This was adequately provided in Malcolm's Amended Application.

More importantly, "[a] motion to dismiss under SDCL 15–6–12(b) tests the legal sufficiency of the pleading, not the facts which support it." *Mordhorst v. Dakota Truck Underwriters & Risk Admin. Servs.*, 2016 S.D. 70, ¶ 8, 886 N.W.2d 322, 323 (citations omitted). The State argues that "Malcolm's broad conclusions are not sufficient to show a plausible claim that the affidavit or warrant were insufficient." (Appellee's Brief at p. 35) However, the Amened Application asserted that trial counsel failed to move to suppress the videos, this conduct fell below a standard of reasonableness and he was prejudiced. (R 49, 52) There are also allegations within the Amended Application clearly setting forth issues as to why a motion to suppress was necessary and that the supporting affidavit lacked adequate information to allow unlimited access to the phone data. (R 53) The Circuit Court recognized that the videos showed overwhelming evidence of guilt (R 96), which would signal that a defense attorney would consider a motion to suppress the videos/data if there was available supporting authority, which there was.

Moreover, the State spends little time discussing Malcolm's claim concerning the clear viability of the 4th Amendment issue that trial counsel did not raise through a motion to suppress. Specifically, the 1st Warrant dated October 28, 2019 did not allow the search of data on the phone, it only allowed the seizure of the phone. However, law enforcement searched the phone data from top to bottom on October 29, 2019.

Law enforcement is required to obtain a search warrant in order to search a smart phone for data. *Riley v. California*, 573 U.S. 373, 134 S.Ct. 2473, 189 L.Ed.2d 430. Further, in *U.S. v. Russian,* 848 F.3d 1239, 1245 (10th Cir. 2017), the Court recognized that a warrant authorizing the seizure of a phone does not thereby allow a search of the phone data. The Tenth Circuit recognized:

> [T]he warrant itself merely authorized a search of Russian's residence and seizure of any cell phones found inside. The warrant did not identify either of the phones that were already in law enforcement's custody, nor did it specify what material (e.g., text messages, photos, or call logs) law enforcement was authorized to seize.
>
> Accordingly, we agree with Russian that the warrant failed to meet the Fourth Amendment's particularity requirement.

Id. at 1245. *See also, State v. Fairley*, 457 P.3d 1150, 1154 (Wash. App. 2020)("To hold that authorization to search the contents of a cell phone can be inferred from a warrant authorizing a seizure of the phone would be to eliminate the particularity requirement and to condone a general warrant. This outcome is constitutionally unacceptable.").

At this stage, there is a test of the legal sufficiency of the pleading and Malcolm has established that he has stated a claim that trial counsel was ineffective for failing to file a motion to suppress and the basis of that motion to suppress was a 4th Amendment violation in that phone data was searched without a qualifying warrant. Finally, this was fully supported in briefing before this Court. (Appellant's Brief at pp. 14-24)

Furthermore, this ZTE Smart Phone was not the phone that Malcolm was using for communication and he continued to maintain possession of his phone with service for communication. (R 53)(CR 473). The Amended Application alleged that law enforcement did not inform the Court issuing the search warrant of the existence of the

phone Malcolm was actually using for communication. (R 53) If law enforcement was looking for evidence of last communications or timelines regarding J.C.'s passing, which was the purpose of the 1st Warrant, it would have wanted a working phone.

The State also takes issue with Malcolm not specifically explaining how the results would have been different if the videos were excluded, relying on *Guthrie v. Weber*, 2009 S.D. 42, ¶10, 767 N.W.2d 539, 543. (Appellee's Brie at p. 35) However, Malcolm alleged prejudice in his Amended Application. The Circuit Court recognized the highly prejudicial nature of the videos. Malcolm recognizes that, at an evidentiary hearing his burden is to show how there is prejudice, but he, at this stage, must only plead the basics of the claim. *Steiner*, 2011 S.D. 401, ¶12, 815 N.W.2d at 553. He has claimed prejudice. He has explained that his right to protection under the 4th Amendment was violated. He has later established the legal authority for his claim set forth in his Amended Application. *Guthrie*, was a review after an evidentiary hearing.

The State also claims that Malcolm must defeat all other warrant exceptions, but it fails to explain what exception applies. (Appellee's Brief at p. 36) Malcolm explained this is an affirmative defense where the State would have the burden at an evidentiary hearing. (Appellee's Brief at 23-24); *State v. Tenold*, 2019 S.D. 66, ¶24, 937 N.W.2d 6, 13 (recognizing after defendant establishes evidence recovered by State is tainted, burden shifts to State to establish it is not).

Furthermore, the State relies on *State v. Mousseaux*, 2020 S.D. 35, 945 N.W.2d 548, which dealt with the "attenuation doctrine" that has nothing to do with the situation at issue here.

E. The 3rd Warrant.

The 3rd Warrant was issued on November 1, 2019, with the Affidavit signed that same day. In the Affidavit, law enforcement sought access to cell phone data it had previously improperly obtained and reviewed. Law enforcement provided the issuing Court with evidence from the phone search illegally obtained through the 1st Warrant:

> 6) A review of cell phone data revealed numerous video recordings depicting [J.C.] being sexually assaulted with aerosol cans as well as penis and fingers hours before the 911 call was made.
>
> 7) In the videos [J.C.] seemed to be unconscious and unresponsive while making snore-like sounds during these events.
>
> 8) Based upon the videos it appears [J.C.] would have been in no condition to consent to sexual intercourse.

(RA at 6) This was the only information in the Affidavit that would establish probable cause for this data.

This means that 1) law enforcement knew that that they needed a warrant to get data from a phone and 2) they used improperly obtained data from the phone to obtain the 3rd Warrant to prosecute Malcolm.

This Court has considered a very similar issue in *State v. Boll*, 2002 S.D. 114, 651 N.W.2d 710. Although *Boll* considered a search of a home and curtilage, the considerations apply to a cell phone search under *Riley*. In *Boll*, law enforcement received an anonymous tip that Boll was manufacturing methamphetamine at his home near Hartford. *Id.* at ¶2, 651 N.W.2d at 713. Upon receiving the tip, a Sioux Falls Police Sergeant (Mundt) and a Minnehaha County Detective (Albers) drove to Boll's home. *Id.* at ¶4. Law enforcement did not get a warrant before going to Boll's home on December 14, 2020. *Id.* However, officers knocked on his door, he did not answer and Mundt later

noticed tracks going to a chicken coop within the curtilage of the home. *Id.* at ¶5. Mundt then went to the chicken coop, which door was secured by a fence post to close it, removed the fence post, and looked inside the chicken coop. *Id.* at ¶6. He found evidence of a methamphetamine lab. *Id.* at ¶¶7-8.

Four days letter, on December 19, 2020, officers returned. *Id.* at ¶9, 651 N.W.2d at 714. They then noticed the chicken coop door was open and looked in the chicken coop. *Id.* They discovered evidence in the now open chicken coop. *Id.* at ¶10.

Mundt then prepared an affidavit to obtain a search warrant, but did not inform the issuing Court of the prior illegal search four days before. *Id.* at ¶11. A search warrant was granted and Boll's motion to suppress was denied. *Id.* at ¶13, 651 N.W.2d at 715. He was later convicted.

Upon appeal, Boll argued that the trial court erred in denying his motion to suppress. The State argued four exceptions to the warrant requirement: 1) inevitable discovery; 2) independent source; 3) expanded independent source and 4) good faith. This Court correctly rejected those theories and reversed.

The Court rejected the inevitable discovery doctrine because the evidence had already been seized, making such claim inapplicable to the facts and noted that for inevitable discovery to apply the lawful means upon which the evidence could have been obtained must be wholly independent of the illegal actions. *Id.* at ¶22, fn. 6, 651 N.W.2d at 717.

As to the independent source, the *Boll* Court recognized:

> [I]n *Murray,* the United States Supreme Court identified two circumstances where a search warrant will not qualify as an independent source. The Court specifically cautioned that a warrant would not qualify as an independent

> source "if the agents' decision to seek the warrant *was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant.*" *Murray*, 487 U.S. at 542, 108 S.Ct. at 2536, 101 L.Ed.2d at 483–484 (emphasis added). Both of these disqualifying circumstances prevent the use of the December 19 observations and the fruits of the search warrant in Boll's case.

Id. at ¶26, 651 N.W.2d at 717-18.

The *Boll* Court then went on to consider the expanded independent source doctrine, rejecting the same. The *Boll* Court recognized that "under the expansion the question is whether 'the remaining information presented to the magistrate, after the tainted evidence is excluded, contains adequate facts from which the magistrate could have concluded that probable cause existed for the issuance of the search warrant.'" *Id.* at ¶35, 651 N.W.2d at 720 (quoting *State v. Revenaugh*, 992 P.2d 769, 774 (Idaho 1999)). Because law enforcement was partially prompted to return to the home because of what officers saw in the illegal search, observations from both visits had to be redacted and there was no other untainted evidence remaining that would support a finding of probable cause for the search. *Id.* at ¶36.

Finally, the good faith exception was also rejected because Mundt did not have a reasonable belief that the illegal search on December 14 (first search) was valid or that the resulting affidavit supporting the later search warrant complied with the 4th Amendment. *Id.* at ¶39, 651 N.W.2d at 721.

In this case, the inevitable discovery doctrine does not apply for the same reasons as in *Boll*. The evidence had already been seized, making such claim inapplicable to the facts and, more importantly, here, for the inevitable discovery doctrine to apply, the

lawful means upon which the evidence could have been obtained must be wholly independent of the illegal actions. *Id.* at ¶22, fn. 6, 651 N.W.2d at 717. It was not.

The independent source exception does not apply because the 3rd Warrant cannot qualify as an independent source. Law enforcement's decision to seek the 3rd Warrant was prompted by and based upon the previous illegal entry into the phone data. *Id.* at ¶26, 651 N.W.2d at 718.

Likewise, the expanded independent source doctrine does not apply. The tainted evidence from the 1st Warrant was fully set forth in the 3rd Warrant Affidavit and was the only supporting basis for probable cause for the search of phone data authorized by the 3rd Warrant.

Finally, the good faith exception does not apply. There was no reasonable belief that the 1st Warrant was valid. This can no more clearly be established than through law enforcement seeking the 3rd Warrant and thereby recognizing a warrant was necessary for phone data. Further, as to any claim of last communications, the Magistrate should have been informed of the situation regarding the phones, which the issuing Court was not. This Court has recognized that the good faith exception to an invalid warrant cannot be used by the State when the error resulted from the failure of the affiant requesting the search warrant. *State v. Belmontes*, 2000 S.D. 115, ¶¶19-20, 815 N.W.2d 634, 640.

Malcolm has adequately asserted and supported a sufficient claim that trial counsel's failure to file a motion to suppress fell below an objective standard of reasonableness and that he was prejudiced by trial counsel's failure to move to suppress this overwhelming video evidence.

F. Trial counsel's failure to research his "pass out" sex defense.

Trial counsel admitted the charges against Malcolm by using his unresearched theory that was counter to the plain language of SDCL 22-22-1(4). "[T]he plain and unambiguous text of SDCL 22-22-1(4) makes it a crime to perform "an act of sexual penetration" upon a person "under circumstances" in which the person "is *incapable of giving consent*[.]" *State v. Malcolm*, 2023 S.D. 6, ¶ 24, 985 N.W.2d 732, 738 (emphasis in original). This Court recognized that "pass out sex can only be understood to mean that J.C. was incapable of consenting when Malcolm was penetrating her." *Malcolm, supra,* at ¶25, 985 N.W.2d at. 739.

The trial court rejected "pass out" sex as a defense in its reasoning after consideration of South Dakota law and further later had its law clerk locate a decision rejecting such defense mid-trial. (R 471, 543-545; 576) As discussed more fully in Appellant's Brief at pages 25 to 26, there was legal authority in addition to the "uncomplicated" statutory language rejecting such faulty "pass out" sex defense. The State's argument that this was simply not settled law in South Dakota is misplaced – both the trial court and this Court read the statute and applied it. Any minimal research on top of the clear statutory language would have notified trial counsel of the problem. However, trial counsel took an approach here that "no competent lawyer would have chosen." *Ally v. Young*, 2023 S.D. 65, ¶51, 999 N.W.2d 237, 254 (internal citations omitted).

Furthermore, the State argues that this was some complicated trial tactic of jury nullification that should not be questioned. (Appellee's Brief at pp. 15-16) There was no pre-trial or trial tactic here unless one allows the State to now claim that failing to do any valid pre-trial motions, failing to read statutes and research the same, and then unknowingly admitting the charges is now a good criminal defense tactic for attorneys. The State also argues that this "pass out" sex theory was used in tandem with a jury nullification defense and that trial counsel waited as long as possible to disclose his "pass out" sex theory. (Appellee's Brief at 16) The Amended Application claims that trial counsel told the jury about the "pass out" sex claim in opening. (R 49) Apparently, trial counsel was also waiting to recognize the suppression issue for the invalid search until closing as part of this complicated trial tactic. (R 49 - ¶26)

The State also takes issue with many claims raised in the Amended Application concerning this issue, but at this stage this is merely arguing the facts. *Steiner*, 2011 S.D. 401, ¶12, 815 N.W.2d at 553 (recognizing proper forum for such fact arguments is the evidentiary hearing).

The State also takes issue with the Amended Application by claiming there was no other viable defense theories. There were better viable defenses than not filing a motion to suppress illegally obtained evidence and then admitting the crime.

The State asserts that expert testimony would not have been helpful, but it certainly could have been. The State argues that Malcolm admitted to J.C.'s high level of intoxication, but she drove him home after bar hopping. (CR 595-96) She also walked down stairs to bandage herself after she fell and walked back up again in a story and a

half house with a typically tight stair well that law enforcement navigated with careful steps holding the rail. (CR 602-03; CR Exhibit 3 – 00:01-00:17)

The issue for the expert was how a person in Malcolm's hung over/drunken position would understand the difference in response from a person if there was an overdose of specific drugs versus how someone reacts if just hung over in the morning. Effectively, that Malcolm did not know J.C.'s condition, which is a defense. SDCL 22-22-1(4) requires that Malcolm knew or reasonably should have known that J.C. was incapable of giving consent. While Malcolm was aware they had been drinking and bar hopping earlier, he did not know that J.C. had overdosed. Again, these are factual issues.

The State claims, again a factual argument, that Malcolm was aware of J.C.'s overdose because he "saw J.C. take her overdose." (Appellee's Brief at p. 18, fn. 6) This is not correct, he stated in those videos she threatened to overdose, as she had done in the past and he was surprised to find the empty pill bottle. The citations within that footnote refers to: "Trial Ex. 7 at 5:06-10; Ex. 9 at 1:24-34; 2:57-3:02; Exhibit 8 at 1:00-1:15 and Ex. 11 at 50:00-1:05." The referenced videos show that J.C. had threatened to overdose, which she had threatened in the past. (Trial Ex. 11 at 50:00-1:05)

Trial counsel's only motion was for Malcolm to wear street clothes during the trial. (CR 66) There were deficiencies in his performance, preparation, research and investigation of this case. The bigger issue, however, is that trial counsel did not file a motion to suppress illegally obtained video evidence that was overwhelmingly prejudicial to Malcolm because it was essentially the State's entire case. Following that error, trial counsel then failed to interpret the "uncomplicated" statutory language and admitted the

crime through an unfounded defense theory of "pass out" sex. Either of these errors standing alone was prejudicial and affected the outcome of the trial, and, when combined, establish Malcolm was seriously prejudiced by trial counsel's errors.

CONCLUSION

The Circuit Court dismissed Malcolm's Amended Petition under SDCL 15-6-12(b)(5) before any hearing of any kind. Malcolm has presented claims for ineffective assistance of counsel that meet the required "minimum threshold of possibility" to move forward to an evidentiary hearing. Malcolm respectfully requests that the Court reverse the Circuit Court's Denial of Writ of Habeas Corpus and allow Malcolm to move forward on his ineffective assistance claims regarding the failure to move to suppress the video evidence from the smart phone and trial counsel's failure to assert other viable trial strategies other than then a claim of "pass out" sex.

Dated this 2nd day of April, 2024.

SCHAFFER LAW OFFICE, PROF. LLC

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REQUEST FOR ORAL ARGUMENT

The Appellant respectfully requests the privilege of oral argument in this appeal.

/s/ Paul H. Linde

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL 15-26A-66(b)(4), I hereby certify that the *Reply Brief of Appellant* complies with the type volume limitation provided for in SDCL 15-26A-66. *Brief of Appellant* contains 4634 words. Such word count does not include the table of contents, table of cases, jurisdictional statement, statement of legal issues, or certificates of attorneys. I have relied on the word and character count of our word processing system used to prepare the *Reply Brief of Appellant*. The original *Reply Brief of Appellant* and all copies comply with this rule.

/s/ Paul H. Linde

CERTIFICATE OF SERVICE

The undersigned, the attorney for Appellant, hereby certifies that a true and correct copy of the foregoing "Reply Brief of Appellant" was served by Odyssey E-File and Served to the following attorneys in PDF format on April 2, 2024, before 11:59 p.m. on that date:

Marty Jackley, Attorney General
Chelsea Wenzel, Assistant Attorney General
1302 E. Hwy 14, Suite 1
Pierre, SD 57501-8501
Email: atgservice@state.sd.us

on this 2nd day of April, 2024.

/s/ Paul H. Linde

APPENDIX

STATE OF SOUTH DAKOTA) : SS COUNTY OF CODINGTON)		IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
LEE TODD MALCOM, Applicant/Appellant, vs. BRENT FLUKE, WARDEN, OF THE MIKE DURFEE STATE PRISON, Respondent/Appellee.	*	14CIV23-00094 STIPULATION TO SUPPLEMENT THE RECORD

Comes now the Appellant and Appellee and hereby provide this Stipulation to Supplement the Record, pursuant to SDCL 15-26A-56, so that the record in the above-entitled matter may be supplemented with the additional Warrant File in SWA 19-208 that was just recently located with the Codington County Clerk of Courts. This Stipulation is based upon the following.

1. The Appellant and Appellee previously recognized in a Stipulation during the Appellate Briefing stage, that two warrant files that were issued for evidence in the criminal action against Appellant were not part of the Settled Record in the Criminal Action (14CRI20-000060/Supreme Court File No 29644) and were not made part of the Habeas Record prior to the Circuit Court dismissing this Habeas Action.

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2. The Appellant and Appellee Stipulated that those two Warrant Files, specifically Codington County SWA 19-206 and SWA 19-207, could be made part of the record and those were made part of the record that will be transmitted to this Court.

3. The two Warrant Files at the time of the Stipulation filed on November 7, 2023 were believed to have been the warrants issued based upon what was provided to Appellant by the Clerk of Court during Counsel's investigation after appointment.

4. The Appellee, after further investigation with law enforcement, has since located an additional Warrant File, specifically Codington County SWA 19-208.

5. The Appellee and Appellant agree that such Warrant File in Codington County SWA 19-208 may be part of the record in this current appeal.

Based upon the foregoing, the Appellee and Appellant now respectfully jointly stipulate to allow the record be supplemented to include the Warrant File in SWA 19-208.

Dated this 28 day of February, 2024.

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Dated this 28th day of February, 2024.

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STATE OF SOUTH DAKOTA

COUNTY OF CODINGTON

IN CIRCUIT COURT
MAGISTRATE COURT
THIRD JUDICIAL COURT

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STATE OF SOUTH DAKOTA,

PLAINTIFF

VS.

Lee Malcolm
DOB: 01/22/1977

DEFENDANT

SWA 19-208

AFFIDAVIT IN SUPPORT OF REQUEST FOR SEARCH WARRANT

In the Matter of a Sexual Assault and Death Investigation within Codington County

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The undersigned, being duly sworn upon oath, respectfully requests a Search Warrant to be issued for the following property:

1. **Evidence related to sexual assault to include, but not limited to, audio and visual recordings**

The undersigned respectfully requests that the Search Warrant be issued to permit a search at the following premises for the above-described property:

Digital media cards and cell phone data seized as the result of a search warrant at 420 4th St SE on 10/28/19.

The undersigned requests a Search Warrant to be issued because the above-described property is:

(PLACE INITIALS IN THE APPROPRIATE BLANK)

___ Property that constitutes evidence of the commission of a criminal offense;

___ Contraband, the fruits of crime, or things otherwise criminally possessed;

___ Property designed or intended for use in, or which is or has been used as the means of, committing a criminal offense.

The undersigned further requests:

(PLACE INITIALS IN THE APPROPRIATE BLANK)

___ You may execute this Warrant at any time of day or night because reasonable cause has been shown to authorize nighttime execution pursuant to SDCL 23A-35-4;

_____ You may serve this Warrant only during the daytime. Night is that period from 8:00 p.m. to 8:00 a.m. local time;

_____ You may execute this Warrant without notice of execution required by SDCL 23A-35-8 in that probable cause exists to demonstrate to me that if notice were given prior to execution (that property sought may be easily and quickly destroyed or disposed of) (that danger of life or limb of the officer or another may result).

_____ You may serve this warrant on Sunday.

The facts in support of the issuance of a Search Warrant are as follows:

Investigator Information:

I, Shane Hardie, am a certified law enforcement officer for the Watertown Police Department, currently assigned as a Detective. I am, therefore, an officer of the State of South Dakota, who is empowered to conduct investigations of, and to make arrests for, the offenses enumerated in the South Dakota Codified Law.

I have been employed as a law enforcement officer since February 1st, 2008. I have attended and completed a twelve-week South Dakota Basic Law Enforcement certification class. I have also attended additional training courses; including courses related to homicide, drug investigations, crime scene investigation, Internet Crimes Against Children, and digital data forensics. Your affiant is assigned to the South Dakota Internet Crimes Against Children (ICAC) Task Force and has been so since March 2018.

The facts in this affidavit come from my personal observations, training, and experience, as well as information obtained from other law enforcement officers and agents involved with this investigation. Because this affidavit is being submitted for the limited purpose of securing a search warrant, I have not included each and every fact known to me concerning this investigation. Only those facts necessary to establish probable cause has been added to this report.

Current Investigation:

1) At approximately 1440 hours on Monday, October 28th, 2019, a 911 call was placed into the dispatch at the Watertown Police Department. The caller reported 41 year old Jamaica Christensen was not conscious and not breathing. The caller stated they were at 420 4th St. SE, Watertown, SD. At approximately 1446 hours, Officers and Paramedics arrived on scene.

2) When Officers and Paramedics arrived on-scene, they made contact with Lee Malcolm. Jamaica Christensen was found to be not conscious and not breathing. Jamaica was found on her back, on the floor in the upstairs bedroom. Officers on scene also noticed that Lee and Jamaica had fresh injuries to their faces. Officer also noticed there appeared to be a reddish brown stain and bandages on the floor in the bedroom. Officer's noticed that there appeared to be a reddish brown stain on the bed sheets.

3) While Officers were on scene, Lee made mention of a medication bottle that possible belonged to Jamaica. The medication bottle appeared to be empty. Officers also noticed

that while Lee was talking to the Officers, he took out multiple media storage devices from a drawer and later moved them to a shaving kit in one of the bathrooms.

4) A search warrant was drafted and served on the residence related to the death investigation.

5) As a result of that search warrant, a cell phone was located and taken as evidence.

6) A review of the cell phone data revealed numerous video recordings depicting Jamaica being sexually assaulted with aerosol cans as well as a penis and fingers hours before the 911 call was made.

7) In the videos Jamaica seemed to be unconscious and unresponsive while making snore-like sounds during these events

8) Based on the videos it appears Jamaica would have been in no condition to consent to sexual intercourse.

Therefore, I, Detective Shane Hardie, respectfully request the court to issue a search warrant for the above described property for the purpose of obtaining the items described above.

Shane Hardie
Signature of the Affiant

Detective
(Official Title)

Subscribed to and sworn before me, this 1ST day of NOVEMBER, 2019

CHAD STAHL
SEAL NOTARY PUBLIC SOUTH DAKOTA SEAL

(Notary)

My Commission Expires: 12-28-2024

FILED
NOV 05 2019
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
3RD CIRCUIT CLERK OF COURT
By

STATE OF SOUTH DAKOTA

COUNTY OF CODINGTON

IN CIRCUIT COURT
MAGISTRATE COURT
THIRD JUDICIAL COURT

****

STATE OF SOUTH DAKOTA,

PLAINTIFF

GWA19-208

VS.

SEARCH WARRANT

Lee Malcolm
DOB: 01/22/1977

DEFENDANT

In the Matter of a Sexual Assault and Death Investigation within Codington County

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TO ANY LAW ENFORCEMENT OFFICER IN THE COUNTY OF CODINGTON:

Proof by affidavit has been made before me by Detective Shane Hardie, that there is probable cause to believe that the property described herein may be found at the location set forth herein and the property is:

PJM Property that constitutes evidence of the commission of a criminal offense;

PJM Contraband, the fruits of crime, or things otherwise criminally possessed;

PJM Property designed or intended for use in, or which is or has been used as the means of, committing a criminal offense.

You are therefore commanded to search:

Digital media cards and cell phone data seized as the result of a search warrant at 420 4th St SE on 10/28/19.

For the following property:

1. **Evidence related to sexual assault to include, but not limited to, audio and visual recordings**

It is further ordered that this Search Warrant shall be executed within ten (10) days after the signing of this Warrant pursuant to SDCL 23A-35-4.

This warrant may be executed in accordance with my initials placed below:

_____ You may execute this Warrant at any time of day or night because reasonable cause has been shown to authorize nighttime execution pursuant to SDCL 23A-35-4;

PJM You may serve this Warrant only during the daytime. Night is that period from 8:00 p.m. to 8:00 a.m. local time;

PJM You may execute this Warrant without notice of execution required by SDCL 23A-35-8 in that probable cause exists to demonstrate to me that if notice were given prior to execution (that property sought may be easily and quickly destroyed or disposed of) (that danger of life or limb of the officer or another may result).

_____ You may serve this warrant on Sunday.

If the above-described property be seized, it should be returned to me at the Courthouse of this court.

Dated this 1 day of Nov., 2019.

(Magistrate) (Circuit Judge)

FILED

NOV 05 2019

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
3RD CIRCUIT CLERK OF COURT

By

STATE OF SOUTH DAKOTA

COUNTY OF CODINGTON

IN CIRCUIT COURT
MAGISTRATE COURT
THIRD JUDICIAL COURT

****

STATE OF SOUTH DAKOTA,

PLAINTIFF

SWA 19-208

VS.

VERFIED INVENTORY

Lee Malcolm
DOB: 01/22/1977

DEFENDANT

In the Matter of a Sexual Assault and Death Investigation within Codington County

****

I, Detective Shane Hardie, a law enforcement officer of the State of South Dakota, executed a Search Warrant dated: 11/1/19 issued by the Honorable Patrick McCann, and do swear that the following inventory contains a true /and detailed account of all property taken by me during the execution of the above described Warrant:

1. Copy of digital data from media cards seized during the search warrant, dated 10/28/19, served on 420 4th St SE.

Dated this 4th day of November, 2019 at Watertown, South Dakota.

Shane Hardie
Signature of the Affiant

Detective
(Official Title)

Subscribed to and sworn before me, this 4TH day of NOVEMBER, 2019

(Notary)

CHAD STAHL
NOTARY PUBLIC
SOUTH DAKOTA

My Commission Expires: 12-28-2024

FILED

NOV 05 2019

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
3RD CIRCUIT CLERK OF COURT

By