IN THE SUPREME COURT

STATE OF SOUTH DAKOTA

No. 26914

CHASKE MCDONOUGH,

Petitioner and Appellant,

vs.

DOUGLAS WEBER, Warden of the
South Dakota State Penitentiary,

Respondent and Appellee.

Appeal from the Circuit Court
First Judicial Circuit
Clay County, South Dakota

The Honorable Steven R. Jensen
Circuit Court Judge

APPELLANT'S BRIEF

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Notice of Appeal filed December 5, 2013

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PRELIMINARY STATEMENT

Petitioner and Appellant, Chaske McDonough, will be referred to throughout this brief as “McDonough" or "Petitioner". The Appellee, Douglas Weber, Warden of the South Dakota State Penitentiary, will be referred to as "State".

The transcript of the Arraignment Hearing will be referred to as "A.H.". The transcript of the Arraignment and Change of Plea Hearing will be referred to as "P.H.". The transcript of the Sentencing Hearing will be referred to as “S.H.”. The transcript of the Motion Hearing will be referred to as “M.H.”. The

transcript of the Court Trial (habeas hearing) will be referred to as "C.T.". All transcript citations shall be followed by the appropriate page and line number(s).

JURISDICTIONAL STATEMENT

A Complaint was filed on August 17, 2002, charging Chaske McDonough with Murder in the Second Degree contrary to SDCL 22-16-7. An Indictment was filed on August 29, 2002, charging Chaske McDonough with the crimes of Murder in the Second Degree contrary to SDCL 22-16-7, or in the alternative Murder in the Second Degree contrary to SDCL 22-16-9. Mr. McDonough entered a "not guilty" plea at his Arraignment on August 30, 2002.

On November 25, 2002, Mr. McDonough entered a "guilty" plea to an Information charging, Count 1: Manslaughter in the First Degree contrary to SDCL 22-16-15(3), with the State dismissing the remaining charges. The Honorable Arthur L. Rusch pronounced sentence on April 14, 2003. Judgment and Sentence were filed on April 14, 2003.

On October 15, 2004, McDonough filed a pro se Petition for Writ of Habeas Corpus.

A Provisional Writ of Habeas Corpus was filed on December 5, 2012 and a Return of Writ of Habeas Corpus

was filed on January 31, 2013. An Amended Provisional Writ of Habeas Corpus was filed on June 4, 2013 and an Amended Return of Writ of Habeas Corpus was filed on June 27, 2013.

An August 30, 2013 the trial court considered Petitioner's Amended Application for Writ of Habeas Corpus via a Court Trial. On October 10, 2013 the trial court issued a Letter Decision denying Petitioner's Amended Application for Writ of Habeas Corpus. Findings of Fact and Conclusions of Law were filed on November 1, 2013. An Order Granting Certificate of Probable Cause was signed by the trial court on November 8, 2013 and filed on November 12, 2013. Notice of Appeal was timely filed on December 5, 2013.

This Court has jurisdiction pursuant to SDCL 15-26A-3.

STATEMENT OF LEGAL ISSUES

1. The trial court erred by finding a sufficient factual basis and a knowing, voluntary, intelligent plea of guilty to First Degree Manslaughter.

The trial court found that the guilty plea entered was knowing, voluntary, and intelligent and that there was a proper factual basis to support the same.

Gregory v. State, 325 NW2d 297 (SD 1982)
State v. Nachtigall, 741 NW2d 216 (SD 2007)
State v. Schulz, 409 NW2d 655 (SD 1987)

2. The trial court erred by finding that Appellant for afforded effective assistance of counsel at the trial court level.

The trial court found that Appellant's trial counsel rendered effective assistance of counsel even though he failed to file a motion to suppress statements and failed to file an appeal on Appellant's behalf.

Miranda v. Arizona, 384 US 436 (1966)
Roe v. Flores-Ortega, 528 US 470 (2000)
Strickland v. Washington, 466 US 668 (1984)

PROCEDURAL STATEMENT

A Complaint was filed on August 17, 2002, charging Chaske McDonough with Murder in the Second Degree contrary to SDCL 22-16-7. An Indictment was filed on August 29, 2002, charging McDonough with the crimes of Murder in the Second Degree contrary to SDCL 22-16-7, or in the alternative Murder in the Second Degree contrary to SDCL 22-16-9. Mr. McDonough, assisted by Clay County Public Defender Phillip Peterson, entered a "not guilty" plea at his Arraignment on August 30, 2002.

On November 25, 2002, Mr. McDonough entered a "guilty" plea to an Information charging, Count 1: Manslaughter in the First Degree contrary to SDCL 22-16-15(3), with the State dismissing the remaining charges. After a lengthy Sentencing Hearing the Honorable Arthur L. Rusch pronounced sentence on April 14, 2003. Mr. McDonough was sentenced to eighty-five (85) years in the South Dakota State Penitentiary, with twenty (20) years

suspended on various terms and conditions. Judgment and Sentence were filed on April 14, 2003.

On October 15, 2004, McDonough filed a pro se Petition for Writ of Habeas Corpus. On October 21, 2004 the Honorable Steven R. Jensen appointed attorney James E. McCulloch to represent Mr. McDonough with respect to the Petition for Writ of Habeas Corpus. Nothing substantive happened that counsel can see until a Stipulation and Order for Withdrawal was signed by the Petitioner, the State, Attorney McCullough, and Judge Jensen; the same being filed on August 3, 2011.

Attorney Ron J. Volesky of Huron was retained to represent the Petitioner. A Provisional Writ of Habeas Corpus was filed on December 5, 2012 and a Return of Writ of Habeas Corpus was filed on January 31, 2013. A Motion for Leave to Amend Pleadings was filed on June 4, 2013. An Amended Provisional Writ of Habeas Corpus was filed on June 4, 2013 and an Amended Return of Writ of Habeas Corpus was filed on June 27, 2013.

An August 30, 2013 the trial court considered Petitioner's Amended Application for Writ of Habeas Corpus via a Court Trial. On October 10, 2013 the trial court issued a Letter Decision denying Petitioner's Amended Application for Writ of Habeas Corpus. Findings

of Fact and Conclusions of Law were filed on November 1, 2013. An Order Granting Certificate of Probable Cause was signed by the trial court on November 8, 2013 and filed on November 12, 2013. Notice of Appeal was timely filed on December 5, 2013.

STATEMENT OF FACTS

On the night of August 11, 2002 Chaske McDonough was out partying with some neighbors in Vermillion, Clay County, South Dakota. *Transcript of Arraignment and Change of Plea Hearing, November 25, 2002, pg. 14, lines 24-25.* McDonough was on his way home by the Lamplighter motel and drinking his last beer. *Id. at pg. 15, lines 1-2.* When McDonough finished his last beer he tried to throw the empty bottle over the house but failed. *Id. at lines 2-4.* The bottle hit Mark Paulson's (hereinafter "Paulson") trailer house and broke a window. *Id. at lines 3-10.*

Upon hearing his window break, Paulson came out of his trailer house and started an argument with McDonough. *Id. at lines 4-5.* Paulson immediately asked McDonough who hit the house and McDonough admitted to being the one who threw the bottle. *Id. at lines 5-7.* Paulson told McDonough to come in his house to check out what happened. *Id. at lines 7-8.* McDonough walked over

to the trailer with Paulson and saw the window had been broken by the bottle he threw. *Id. at lines 8-13.*

After seeing the damage the bottle had caused, McDonough told Paulson that he would pay for the damage that he caused. *Id. at lines 14-16.* Paulson said he didn't want McDonough to pay for the window. *Id. at lines 16-17.* Paulson offered McDonough a beer, which he accepted, but indicated that he would be leaving after finishing it. *Id. at lines, 17-21.*

While they were drinking the beers, Paulson was asking McDonough about sports and talking about football. *Id. at lines 22-25.* The longer McDonough remained in Paulson's trailer, the more uncomfortable he felt. *Id. at lines 23-24.*

After some time had passed, Paulson went back outside the trailer house and asked McDonough what they were going to do about the window. *Id. at pg. 16, lines 1-2.* McDonough again indicated that he was willing to pay for the window. *Id. at lines 2-3.* Paulson did not accept McDonough's invitation to pay for the window, instead he indicated he would tell McDonough's father about the incident. *Id. at lines 3-6.* Paulson then walked back into the trailer house and told McDonough to come in as well. *Id. at lines 6-12.*

McDonough, believing that Paulson just wanted to talk about the window further, walked back into the trailer. *Id. at lines 8-12.* McDonough again asked if he should pay for the window and was again told "no". *Id. at lines 12-13.* During this time McDonough became increasingly uncomfortable and felt that Paulson was trying to proposition him. *Id. at lines 13-15.* McDonough asked to use the bathroom and was told that he could go outside and Paulson would watch. *Id. at lines 15-18.* McDonough refused.

Paulson continued to ask McDonough about the window and what they were going to do about it, to which McDonough continually told Paulson that "he would pay for it." *Id. at lines 19-22.* Paulson then approached McDonough and put his hand on him. *Id. at lines 22-23.* Paulson was holding McDonough down at this point and was physically on him. *Transcript of Interview of Chaske McDonough, August 16, 2002, pg. 47, lines 1-12.* McDonough panicked and hit Paulson in the head. *Id. at line 8.* Paulson then started coming at McDonough, swinging at him and asking him "what are we going to do about this?" *Id. at lines 15-16.* McDonough panicked because he was scared after being attacked by Paulson, but he also panicked because he had been previously

sexually assaulted when he was a child. *Id. at pg. 48-49, lines 25-1.*

McDonough, twenty years old and 150 lbs., was on the ground with Paulson on top of him. *Id. at pg. 49, lines 9-12.* McDonough swung and hit Paulson in temple. *Id. at lines 12-13.* Paulson was still on top of McDonough and really coming at him and still holding his shirt and still holding him to the ground. *Id. at lines 18-20.* McDonough would get up and try to go for the door again, but Paulson would choke McDonough so he couldn't leave. *Id. at lines 20-24.* McDonough then hit Paulson four (4) times in the temple to get him off him. *Id. at pg. 50 lines 9-12.*

Paulson and McDonough were by the door and Paulson was still grabbing and squeezing McDonough. *Id. at lines 13-15.* McDonough then hit Paulson one time and Paulson fell near the end table and couch. *Id. at lines 21-23.* Paulson was on his way up again. *Id. at line 24.* At this point, fearing for his life, McDonough grabbed a knife off the table and stabbed Paulson two times with it. *Id. at pgs. 50-51, lines 1-2.* Paulson died from his injuries. On or about August 13, 2002, Paulson was discovered by his father and the police were called. *Transcript of Court Trial, August 30, 2013, pg. 13,*

lines 13-14.

DCI Agent Todd Rodig came from Yankton to help with the investigation. *Id. at pg. 6, lines 11-13.* Agent Rodig questioned McDonough on two occasions. *Id. at pg. 7, line 22.* The first time Agent Rodig questioned McDonough was over in the area of the crime scene. *Id. at lines 22-24.* The questioning was not very long in length. *Id. at lines 16-20.* The second time he questioned McDonough was at the police station. *Id. at 24-25.* On both occasions McDonough denied any involvement in the death of Paulson. *Id. at pg. 8, lines 1-3.* This ended Agent Rodig's involvement regarding any direct contact with McDonough in the case. *Id. at pg. 10, lines 8-14.*

On August 16, 2002, Vermillion Police Department Detective Lowell Oswald made contact with McDonough. *Id. at pg. 14, lines 10-11.* Detective Oswald made contact with McDonough near the Lamplighter trailer court. *Id. at line 17.* McDonough, a suspect at the time, but not told the same, was asked if he would go to the Vermillion Police Department for an interview. *Id. at lines 18-24.* McDonough was reluctant to go to the police department and talk to the police. *Id. at pg. 15, lines 2-5.* McDonough told Detective Oswald at this time "I

think I need an attorney and . . . told him very clearly that I would like an attorney." *Id. at pg. 76, lines 11-13.* McDonough was then taken to the Vermillion Police Station. *Id. at lines 24-25.* Detective Oswald drove McDonough to the police station. *Id. at pg. 16, lines 20-21.*

McDonough was then turned over to Deputy Andy Howe for an interrogation. *Id. at lines 23-25.* At no time prior to this was McDonough advised of his *Miranda* rights. *Id. at pg. 17, lines 2-8.* Further, Detective Oswald could not recall whether he told Deputy Howe, prior to his interrogation of McDonough, that McDonough was reluctant to come to the police station, that he was reluctant to give another interview, that he did not want to be videotaped, that he had at one point do you think I should have a lawyer? *Id. at lines 9-21.*

McDonough then was interrogated by Deputy Howe at the Vermillion Public Safety Center. *Id. at pgs. 23-24, lines 25-2.* At the time the police were developing McDonough as a suspect. *Id. at pg. 24, lines 7-9.* During the interrogation, McDonough asked Deputy Howe if he should have his attorney here. *Id. at lines 21-24.* McDonough was also told that he could face the death penalty if convicted and that if he wanted that he could

continue to be a prick. *Id. at pg. 27, lines 4-17.* Deputy Howe also told McDonough scenarios where people charged with killing someone got out after a couple of years in the penitentiary. *Id. at pg. 28, lines, 4-7.* McDonough was also told by Deputy Howe that the police had a lot of evidence against him that was being secured at the scene by the lab in Pierre; this information was untrue. *Id. at pg. 38, lines 5-10.* McDonough eventually confessed. After Deputy Howe had secured a confession, he stepped out of the interrogation room and spoke with his boss, the sheriff. *Id. at pg. 34, lines 19-25.* Deputy Howe then came back into the room and read McDonough *Miranda* rights, prior to having him sign a written statement. *Id. at pgs. 34-35, lines 22-5.* McDonough wrote out a statement and signed the same. *Id. at pg. 35, lines 6-8.* McDonough was then released, only to be arrested a short time later that day. *Id. at 14-19.* McDonough was charged with Second Degree Murder via a Complaint filed on August 17, 2002.

LEGAL ANALYSIS

1. Standard of review.

This Court's standard of review for habeas decisions is well settled:

> "[The South Dakota Supreme Court's] review of habeas corpus proceedings is limited because it is a collateral attack on a final judgment. The review is limited to jurisdictional errors. In criminal cases, a violation of the defendant's constitutional rights constitutes a jurisdictional error. The [petitioner] has the burden of proving he is entitled to relief by a preponderance of the evidence.
>
> The findings of fact shall not be disturbed unless they are clearly erroneous. A claim of ineffective assistance of counsel presents a mixed question of law and fact. The habeas court's conclusions of law are reviewed de novo."

Owens v. Russell, 726 NW2d 610, 614-615 (SD 2007) (Quoting

Vanden Hoek v. Weber, 724 NW2d 858, 861-62 (SD 2006)).

2. Issues.

A. The trial court erred in finding that the Guilty plea was constitutionally entered.[1]

"In plea hearings, the record must demonstrate that

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[1] Appellate counsel is aware that this issue was raised under the ineffective assistance claim outlined by habeas counsel and decided by the habeas court under the ineffective assistance portion of the Memorandum Decision. Appellate counsel will set forth the argument under this heading due to the fact a plea cannot be considered voluntary if the defendant does not possess an understanding of the law in relation to the facts. *See, Mccarthy v. United States, 394 US 459 (1969)*, but also under the ineffective assistance of counsel for failure to timely file an appeal due to the fact the State may argue that McDonough is not entitled to habeas corpus relief based upon a statutory violation. See, *Rennich-Craig v. Russell, 609 NW2d 123, 127 (SD 200).* (Holding, "due process violations and compliance with substantive statutory procedures are also subject to challenge in habeas corpus proceedings." (Quoting, *Security v. Mueller, 308 NW2d 761, 762-63 (SD 1981)*)).

defendants not only understand the constitutional and statutory rights they are waiving by pleading guilty, but also fully understand the charges for which they are admitting guilt." *State v. Nachtigall, 741 NW2d 216, 220 (SD 2007).* "[B]ecause a guilty plea is an admission of all elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." *McCarthy v. United States, 394 US 459, 466 (1969).*

"Before accepting a guilty plea, a court must be subjectively satisfied that a factual basis exists for the plea. The court must find a factual basis for each element of the offense. The factual basis must appear on the record." *State v. Schulz, 409 NW2d 655, 658 (SD 1987).* "The factual basis may come from 'anything on the record.'" *Nachtigall, 741 NW2d at 219* (quoting, *Schulz, 409 NW2d at 658*). "It is not necessary that a defendant state the factual basis in his own words." (citation omitted). This Court noted:

> "[r]eading the indictment to the defendant coupled with his admission of the acts described in it is a sufficient factual basis for a guilty plea as long as the charge is uncomplicated, the indictment is detailed and specific, and the admission unequivocal."

Schulz, 409 NW2d at 658.

"In cases where defendants proclaim their innocence while at the same time pleading guilty, the factual basis to support such pleas must be strong." *Gregory v. State, 325 NW2d 297, 299 (SD 1982).* This Court noted in *Gregory,* that a denial "of acts constituting essential elements of the offense raises further question of whether the defendant fully understood the nature of the offense charged." *Id.*

Developing a factual basis on the record is essential to the plea process. In *Schulz* we stated:

> "Receiving guilty pleas is a process beset with pitfalls. The two most dangerous of these have long been recognized: coerced pleas and ignorant pleas. The first of these plainly is condemned by the Fifth Amendment's mandate that no one be compelled in any criminal case to be a witness against himself. The second arises from the guilty plea as perhaps the supreme instance of waiver known to our system of justice, one by which all trial rights and safeguards are voluntarily foregone, and a defendant deliberately submits to conviction. If this is to be permitted, a decent system of justice, at a minimum, will concern itself that the admission is voluntary and intelligently made. These are core considerations, requirements that manifestly must lie at the heart of any respectable system for settling (as opposed to trying) criminal charges."

Schulz, 409 NW2d at 658. (Citing *United States v. Dayton, 604 F2d 931 (5thCir 1979).* "The factual basis requirements in SDCL 23A-7-2 (Rule 11(a)) and SDCL 23A-7-14 (Rule 11(f)) were 'designed to protect these core

considerations by ensuring that a guilty plea is entered voluntarily and intelligently.'" *Nachtigall, 741 NW2d at 220.* (Quoting *Schulz, 409 NW2d at 658*). "Without an adequate factual basis, the trial court cannot assure itself and this Court the guilty plea was voluntarily and intelligently entered." *Id.*

The Arraignment and Change of Plea Hearing transcript of November 25, 2002 does not support a proper factual basis for the trial court to have accepted the plea. The relevant portions are:

> THE COURT: I also need to make sure that there's a factual basis for your plea. In other words, that there's facts that show that you did, indeed, commit the offense. So, is there an agreement about how the factual basis would be established?
>
> MR. PETERSON: My client's ready to tell the Court what happened.
>
> THE COURT: Okay. Mr. McDonough, if you would tell me, then, in your own words just what happened that you think makes you guilty of this offense.
>
> MR. MCDONOUGH: Well, um, on the night of August 11 I was out partying with some neighbors, having some beers. And I was on my way home because it was my last drink and I threw a bottle over the house trying to make it over the house and it hit Mark's trailer. He then came out and there was an argument out there. He was asking who hit his house. I then told him it was me, after an argument. He told me to come in his house with him at that time to check out what happened. I walked in there, I looked and I seen what was broken out, a window.

THE COURT: So the bottle you had thrown broke out a window.

MR. MCDONOUGH: Yes.

THE COURT: Okay.

MR. MCDONOUGH[2]: And then I asked him, I said, you want me to pay for it, I'll pay for it if you want me to. He said I don't want you to pay for it, he said. So me and him were in there for, like, a little while talking about that. And he offered me a beer if I stayed there and I said, okay. But after I drink this I got to go home, I said. Because I was already on my way home and that was all I wanted to do. He was asking me about sports and what I like. And I felt uncomfortable there, you know. I just wanted to go home and we were talking football. He went outside again and asked, or he goes, what are we going to do about this window. And I said, if you want me to pay for it, I'll pay for it. And he goes, I'm going to go talk to your father about this, which was his neighbor. I said, well, it's not my dad. He walked in, I asked him what happened, he goes, I'll go back in, we'll talk about this. I was under the - - it was my understanding that all he wanted to do was ask me about what happened and then I could go home, so I went in there hoping I wouldn't have to pay for anything. But I did ask him if I should pay for it and he kept on saying no. At that time I felt uncomfortable because I was under the impression that he was trying to proposition me. Because I asked him if I could use his bathroom and he goes, no, that I could go outside with you and I could watch you. And I said, no. I finished up my beer. Then he goes, what are we going to do about that window? And I said, I already told you I'll pay for it. He goes, I don't want you to pay for it. He then approached me and he put his hand on me. I then - - I then hit him. It happened real, real quick. And then I tried to head for the door and he grabbed me again. Then he hit the couch and

[2]Although the transcript indicates this is still the trial court speaking, it appears to counsel that is a typographical error and it should be McDonough.

that's when I was in fear of my life because of how he was acting towards me. Then the knife was on the floor and I grabbed it and I stabbed him with it.

THE COURT: Okay. How many times did you stab him?

MR. MCDONOUGH: Twice.

THE COURT: Where did this all happed at?

MR. MCDONOUGH: It happened in his trailer.

THE COURT: Okay. In Vermillion?

MR. MCDONOUGH: Yes.

THE COURT: In Clay County?

MR. MCDONOUGH: (Nods head in an affirmative manner.)

THE COURT: Okay. Is that in Clay County?

MR. MCDONOUGH: Yes.

THE COURT: Is the State satisfied with that factual basis?

MS. BERN: Yes.

THE COURT: Okay. Based upon that I will find that there is a factual basis for your plea and based upon that finding I will find you guilty of the offense of First Degree Manslaughter.

P.H. Transcript, pgs. 14-17.

SDCL 22-16-1 defines homicide. Homicide is the killing of one human being, including an unborn child, by another. Homicide is either:

(1) Murder;
(2) Manslaughter;
(3) Excusable homicide;
(4) Justifiable homicide;
(4) Vehicular homicide.

SDCL 22-16-15 defines Manslaughter in first degree. Homicide is manslaughter in the first degree when perpetrated:

. . .
(3) Without a design to effect death, but by means of a dangerous weapon.

In the case at hand, McDonough maintained the same self-defense claim that he had set forth to his attorney and to the police during his initial interrogations. In other words, McDonough, in his statement, set forth possible defenses under SDCL 22-16-34 and SDCL 22-16-35. This is not a proper basis for a guilty plea and the trial court to find a factual basis.

However, the more blatant error in the trial court's finding that McDonough's statement qualified as a factual basis for the guilty plea is the fact there is no homicide. The statement set forth by McDonough outlines what, at best, is a guilty plea and factual basis for Aggravated Assault under SDCL 22-18-1.1. McDonough admitted to stabbing Paulson two (2) times, but the trial court never established in the factual basis, or anywhere in the transcript of the Arraignment and Change of Plea that there was a death.

This is analogous to the *Nachtigall* case. As this Court outlined in that case, "[t]here must be a 'factual

basis for each element of the offense.'" *Nachtigall, 741 NW2d at 220-221.* (Quoting, *Schulz, 409 NW2d at 658.* The element of homicide is extremely important as it is the nucleus of the manslaughter charge. McDonough would only face a charge of petty theft without this element. *See, Nachtigall, 741 at 221.* The trial court never specifically inquired whether the victim in the case was deceased, the key element of the manslaughter charge. *Id.*

"A guilty plea is an admission; however, a guilty plea cannot be accepted without a proper factual basis." *Id.* See also, SDCL 23A-7-2; and 23A-7-14. "In this case, the record lacks any specific evidence permitting a judge to subjectively determine a factual basis for the guilty plea. Although a court may rely on any evidence to establish a factual basis, here the court relied solely on . . . [McDonough's statement which was permeated with a self-defense claim and which did not include the essential element of a homicide]. Neither the State nor . . . [McDonough's] attorney added any facts. There was no transcript of the preliminary hearing and no police report was submitted." *Id.*

"While a factual basis may be gained by different means, a 'conversation between the judge and the

defendant is clearly the best method for establishing a factual basis.'" *Id.* (Quoting, *Schulz, 409 NW2d at 659*).

> It is essential that this suggested colloquy between the judge and the defendant be meaningful. Simple affirmative or negative answers or responses which merely mimic the indictment or the plea agreement cannot fully elucidate the defendant's state of mind. For this reason the trial court should question the defendant in a manner that requires the accused to provide narrative responses. Questions concerning the setting of the crime, the precise nature of the defendant's actions, or the motives of the defendant, for instance, will force the defendant to provide the factual basis in his own words. The court should not be satisfied with coached responses, nor allow a defendant to be unresponsive.
>
> . . . [F]actual admissions from the defendant in his own words and on the record will discourage frivolous post-conviction and appellate attacks on guilty pleas.

Schulz, 409 NW2d at 659.

"If a factual basis fails to meet the statutory standard, the guilty plea must be set aside and the case must be remanded for another plea hearing." *Nachtigall, 741 NW2d at 221.* (See also, *State v. Sutton, 317 NW2d 414, 414 (SD 1982)*). In this case, the factual basis was permeated with self-defense. The factual basis also lacked the essential element of a homicide, therefore it met the factual basis for Aggravated Assault and not First Degree Manslaughter. As in *Nachtigall,* the

statutory violation alone requires reversal of the habeas court.

B. Ineffective Assistance of Counsel.

In *Strickland v. Washington,* 466 *US* 668 (1984), the Supreme Court set forth the now familiar two-part test for determining whether a defendant's conviction should be overturned due to ineffective assistance of counsel. A defendant bears the heavy burden of showing that counsel's representation was so deficient that the defendant essentially was denied the counsel guaranteed by the Sixth Amendment, and that he was prejudiced by counsel's performance. *Id. at 687.*

The Court must scrutinize the effectiveness of counsel's performance with great deference, taking pains to avoid the distortion of hindsight in order to evaluate counsel's conduct from the perspective of counsel at the time. *Id. at 689.* Counsel's performance was ineffective only if, "in light of all the circumstances, the identified acts or omissions, were outside the wide range of professionally competent assistance." *Id. at 690.* The defendant can be said to have been prejudiced by counsel's performance only if there was "a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id at 694.*

To show prejudice when challenging a guilty plea on the ground of ineffective assistance of counsel, a petitioner must show that there is a reasonable probability that but for errors of counsel, he would not have pled guilty and would have proceeded to trial. *Hill* v. *Lockhart, 474 US 52, 59 (1985).* "In determining whether a defendant suffered from ineffective assistance of counsel, [the South Dakota Supreme] ... Court has adopted the two prong test from *Strickland* v. *Washington, 466 US 668 (1984).* "To establish ineffective assistance of counsel, defendant must prove (l) that counsel's representation fell below an objective standard or reasonableness and (2) that such deficiency prejudiced him. Relying on *Strickland, Woods* v. *Solem, 405 NW2d 59, 61 (SD 1987)* held that prejudice exists when there is a reasonable probability that, but for counsel's unprofessional errors, the proceeding would have been different....[Petitioner] must show 'that the counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose results is reliable." *(citations omitted) Id.*

"[A] criminal defendant is entitled to 'reasonably competent assistance' from counsel at each state of the proceedings, including pretrial preparation and investigation. *Cepulonis* v. *Ponte,* 699 *F2d* 573,575 *(lst Cir* 1983) *(Quoting, United States* v. *Garcia,* 698 *F2d* 31,33-34 *(1stCir 1983).*

"If counsel was ineffective, it follows that ... [Kaden's] pleas were involuntary. The *Brady* trilogy *(Brady* v. *United States,* 397 *US* 742 *(1970); McMann* v. *Richardson, 397 US 790 (1970); and Parker* v. *North Carolina,* 397 *US 790 (1970)* makes it perfectly plain that the *sine qua non* to a voluntary plea of guilty is the assistance of counsel 'within the range of competence required of attorneys representing defendants in criminal cases.' *Parker,* 397 *US at* 797-98. Of course, in *Brady, McMann* and *Parker* counsel was found competent and the voluntariness of the guilty pleas upheld; but had counsel's advice been materially incompetent, ... the court would have reached a different result. (In holding Brady's plea voluntary, the court pointed out that Brady "had competent counsel and full opportunity to assess the advantages and disadvantages of a trial as compared with those attending a plea of guilty ...." *397 US at 754*). *Hammond, 528*

F2d at 18-19. "Thus, in order to plead voluntarily, a defendant must know the direct consequences of his plea, including 'the actual value of any commitments made to him.'"

Although counsel's "strategic choices made after thorough investigation of the law and facts relevant to plausible options are virtually *unchallengeable, "Strickland,* 466 *US at 690,* "counsel has a duty to make reasonable investigation or to make a reasonable decision that makes particular investigation unnecessary." *Id. at 691*. Where counsel fails to investigate and interview promising witnesses [and all the evidence], and therefore "has no reason to believe they would not be valuable in securing [defendant's] release," counsel's inaction constitutes negligence, not trial strategy. *United States ex rel. Cosey* v. *Wolff,* 727 *F2d* 656, 658 *n.3 (7thCir 1984).*

Defense counsel is not deficient if he makes strategic choices to limit investigation based on reasonable professional judgments. *Strickland,* 466 *US 690-91.* However, counsel must undertake sufficient investigation to subject the State's case to a meaningful adversarial test. *Id at* 696. When counsel does not develop the defense theory of the case because

he fails to investigate the ...evidence supporting the State's case, the omission cannot be justified as a strategic decision. *Henderson v. Sargent, 926 F2d 706,* 711 *(8thCir 1991).* Rather, that kind of failure is evidence that counsel did not prepare for trial. *Id. at* 711. While reviewing courts presume that trial counsel is effective, that presumption may be overcome if counsel fails to investigate factual or legal defense or sufficiently investigate the facts to discover the defenses. *State v. Jury, 576 P2d 1302 (Wash. 1978).*

1. *Miranda* Violation and Voluntariness of Statements (Failure to File Motion to Suppress).

It appears that Attorney Peterson's failure to file a motion to suppress in this case was based upon the fact that he thought that it was not worth the "work of trying to suppress one admission, when there's a half a dozen others." *C.T., pgs. 53-54, lines 25-1.* Peterson further indicated "it wasn't worth the risk" to file a motion to suppress. *Id. at pg. 56, line 3.* Finally, Peterson stated that he didn't file a motion to suppress because "[t]he state's attorney at that time had a general policy that if you want to plea bargain, then after you've reviewed the case and know where you're at you come and approach the state's attorney about a plea

bargain; but if you're going to file suppression motions and fight this all the way, then they weren't interested in a plea bargain." *Id. at pg. 67, lines 19-25.*

In the case at hand, Peterson focused on the State's case rather than his client's case. An attorney cannot merely have an understanding and awareness of the State's case, but must also have a like perception of his client's position. *Gaines v. Hopper,* 575 *F2d* 1147, 1148 *(5thCir 1978).* In deciding not to file a motion to suppress, Peterson decided not to develop any defense at all. *See, Davis v. Alabama, 596 F2d* 1214, 1218 *(5thCir 1979).* In looking at the statements McDonough made, and the applicable caselaw, it is clear that a motion to suppress may have been successful.

"No person shall be compelled in any criminal case to give evidence against himself..." *US Const. Art. 5; SD Const. Art. IV § 9; State v. Morato, 2000 SD 149, ¶11.* A voluntary waiver of the Fifth Amendment privilege against self-incrimination depends on the absence of police overreaching. *State v. Stanga, 2000 SD 129, par. 12* (citations omitted). The Miranda warning ensures that a waiver of rights is given knowingly and intelligently "by requiring that the suspect be fully advised of this constitutional privilege, including the critical advice that

whatever he chooses to say may be used as evidence against him." *Id.*

To protect citizens from compelled self-incrimination, the United States Supreme Court has held that whenever a person is subjected to custodial interrogation by a law enforcement officer, the citizen must first be advised of certain constitutional rights. The required advisements include the right to counsel and the right to remain silent. *Miranda v. Arizona, 384 US 436, 444 (1966).* See also, *State v. Thompson, 560 NW2d 535, 540 (SD 1997)* (*Miranda* warnings are necessary whenever a defendant is interrogated in police custody).

To determine whether a citizen is in custody, the court considers how a reasonable person in the suspect's position would view the situation. *Morato, 619 NW2d at 661.* The court looks at the totality of circumstances and asks "whether there [was] a formal arrest or restraint on freedom of movement of the degree associated with a normal arrest." *Id.* (additional citations omitted). The question is whether the citizen was deprived of his or her freedom to leave. The South Dakota Supreme Court has noted that "the initial determination of custody depends on the objective circumstances of the interrogation, not on the

subjective views harbored by either the interrogating officers or the person being questioned." *Thompson, 560 NW2d at 540* (quoting *Stansbury v. California, 511 US 318, 323, (1994)*).

In determining whether an interrogation is custodial, the court should look to several factors including "probable cause to arrest, subjective intent of the defendant, and focus of the investigation . . .[the] nature of the interrogator, nature of the suspect, time and place of the interrogation, nature of the interrogation, and purpose of the investigation." *State v. Branch, 298 NW2d 173, 174 (SD 1980)* (internal citations omitted). Several of these factors support a finding that "[i]nterrogation" has been defined as "either express questioning or its functional equivalent." *Rhode Island v. Innis, 446 US 291, 301, (1980).*

Interrogation includes "words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* In this case, there is no need to parse the officer's behavior. He engaged in express questioning about suspected criminal activity with the obvious intent of eliciting incriminating responses.

The Court must consider, under the totality of the circumstances, several factors when determining if an individual is in custody. Such factors include: whether the suspect knew that he or she was dealing with law enforcement, whether the individual made the statements voluntarily or whether he or she was compelled or coerced into making admissions, and whether the suspect was free to leave. *Id.* Additional factors include whether the location of the questioning was imposing, and whether the suspect was free to move around at his own will during the questioning. See *State v. Aesoph, 647 NW2d 743, 751 (SD 2002).* Further, the court must consider whether the individual was of average intelligence, whether the individual willingly subjected themselves to questioning, see *Bradley v. Weber, 595 NW2d 615 (SD 1999)*; and whether the individual was told that they were under arrest. See *State V. Darby, 556 NW2d 311 (SD 1996).*

In the case at hand, McDonough was interviewed by Agent Rodig on August 15 and 16, 2002. He denied any involvement in the death of Paulson on both occasions. Detective Oswald then goes to McDonough's house to interview him again. Oswald agrees that McDonough was definitely a suspect at the time, but he did not tell

McDonough of the same. *C.T. at pg. 14, lines 20-24.* At this time, McDonough testified that he told Oswald that he wanted an attorney. *Id. at pg. 76, lines 9-23.* Oswald then asked McDonough to come to the Vermillion Public Safety Center. It is undisputed that McDonough reluctantly went. *Id. at pg. 15, lines 2-4.* Oswald drove McDonough to the Safety Center and then turned him over to Deputy Howe. Oswald at no time advised McDonough of his *Miranda* rights.

Deputy Howe interrogated McDonough for approximately two (2) hours. *Id. at pg. 22, lines 11-21.* McDonough was 20 years old at the time and did not have an attorney present. He was in a room at the Public Safety Center with the door closed. During the interrogation, McDonough asked Howe "do I need to be here anymore?" *Id. at pg. 26, lines 3-5.* McDonough also asked if he "should have my attorney here." *Id. at lines 21-24.* During the interrogation McDonough was told of other homicide cases where defendants got as little as two years in prison and also told that the Deputy felt McDonough would receive around ten (10) to twenty (20) years in prison. McDonough was told not to act like a prick and to confess. Finally, McDonough was also lied to and told that they police had lots of

evidence, including DNA evidence that implicated him in the homicide. McDonough, not having been advised of his *Miranda* rights and his will overcome by the Deputy's pressure and tactics, finally confessed to the crime. After securing the confession, the Deputy left the room and talked to his supervisor, the Sheriff. He was told to read McDonough his *Miranda* rights and to secure a written confession. The Deputy complied with the orders. McDonough, after filling out a written confession, was taken back to his house. McDonough was arrested later that day.

In looking at the facts of the interrogation, "a reasonable [person] in the suspect's position would have understood [the] situation" – that he was in custody and not free to leave. *State v. Hoadley, 2002 SD 109 ¶ 24*. Consequently, McDonough was "in custody," requiring the officer to administer to him the *Miranda* warnings. It was a police dominated atmosphere that required the advisement of *Miranda* warnings. The United States Supreme Court explained the necessity of the warnings and noted:

> "For those unaware of the privilege, the warning is simply to make them aware of it–the threshold requirement for an intelligent decision as to its

> exercise. More important, such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere….Further, the warning will show the individual that his interrogators are prepared to recognize his privilege should he chose to exercise it."

People ex rel. J.M.J., 2007 SD 1, ¶ 12, 726 N.W.2d 621 (quoting *Miranda v. Arizona*, 384 U.S. 436, 468, 86 S.Ct. 1602, 1624-25, 16 L.Ed.2d 694, 707 (1966)).

As stated by the United States Supreme Court, *Miranda* "conditioned the admissibility at trial of any custodial confession on warning a suspect of his rights: failure to give the prescribed warnings and obtain a waiver of rights before custodial questioning generally requires exclusion of any statements obtained." *Missouri v. Seibert, 124 SCt 2601, 2608 (2004).* Therefore, Oswald and Howe's failure to advise McDonough of the *Miranda* warnings would have required the suppression of McDonough's statements had a motion to suppress been filed.

The State bears the burden of proving by a preponderance of evidence that a defendant knowingly, intelligently and voluntarily waived his or her *Miranda* rights. *State v. Tuttle, 650 NW2d 20, 26 (SD 2006)* (*citing Colorado v. Connelly, 479 US 157, 168 (SD*

1986)). The state must prove: "(1) the relinquishment of the defendant's rights was voluntary and (2) the defendant was fully aware that those rights were being waived and of the consequences of waiving them." *Id*. at 26 (citing *Moran v. Burbine*, *475 US 412, 421 (1986)*).

When law enforcement fails to administer *Miranda* warnings, a presumption of compulsion is created. *Oregon v. Elstad*, *470 US 298, 307 (1985).* The Court's holding on this issue is unequivocal:

> "[U]nwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under *Miranda*. Thus, in the individual case, *Miranda's* preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm."

Id. This presumption of compulsion is *irrebuttable* for purposes of the prosecution's case in chief. *Id* (emphasis supplied).

In *Satter v. Solem*, the South Dakota Supreme Court emphasized the importance of providing *Miranda* warnings, stating that once law enforcement was "on notice that [the suspect] was or could be involved in some criminal activity…[the officer] should … immediately [give the defendant]" the *Miranda* warnings. The court stated, "[t]he procedure is so simple that there is no excuse for not following it. We prefer to

adhere to the bright line rule, rather than start carving exceptions." *Satter v. Solem*, *434 NW2d 725, 727 (SD 1989)*.

One of the benefits of *Miranda* is that it provides a bright line rule that is easily applied: Detective Oswald and Deputy Howe needed to properly warn McDonough before the interrogation began, and a suppression motion probably would have been successful.

Even if the interrogation of an individual is non- custodial, a statement must be voluntary in order to abide by the requirements of the Fifth Amendment. *Beckwith v. United States*, *425 US 341, 347-48 (1976)*. The factual inquiry of voluntariness centers on: "(1) the conduct of law enforcement officials in creating pressure and (2) the suspect's capacity to resist that pressure." *State v. Tuttle*, *650 NW2d 20 (SD 2002)*. Regarding the second factor, the Court must examine such factors as "the defendant's age; level of education and intelligence; the presence or absence of any advice to the defendant on constitutional rights; the length of detention; the repeated and prolonged nature of the questioning; the use of psychological pressure or physical punishment, such as deprivation of food or sleep; and the defendant's prior experience with law

enforcement officers and the courts." *Id.* Additionally, law enforcement's '"[f]ailure to administer Miranda warnings creates a presumption of compulsion."' *Sattler v. Solem, 434 NW2d 725, 728 (SD 1989)* (quoting *Oregon v. Elstad, 470 US 298, 307 (1985)*).

First, regarding the conduct of Deputy Howe in creating pressure, it is clear he is putting a lot of pressure on McDonough. Deputy Howe, a uniformed police officer, continually tells McDonough that if he admits to the crime, he is looking at around ten (10) to twenty (20) years in prison. Further he tells him that some defendants get as little as two (2) years for homicides. Deputy Howe also lied to McDonough telling him that the police had lots of evidence against him, including DNA evidence. The police had none of that at the time. McDonough had asked for an attorney, was reluctant to go to the Public Safety Center, was driven to the Safety Center by Detective Oswald, was placed in a room with the door shut, did not have his *Miranda* rights read to him, was told he was acting like a prick because he wasn't confessing, was told he could be executed, and was interrogated without an attorney for approximately two (2) hours. This all amounts to an extreme amount of pressure placed on McDonough to obtain an illegal confession.

Deputy Howe's coercive tactics, coupled with McDonough's inability to resist pressure, explain that the admissions were involuntary and therefore inadmissible. This combination, under the totality of the circumstances impaired McDonough's "ability to make an unconstrained, autonomous decision to confess." *Morato, 619 NW2d at 660*. McDonough clearly lacked the "rational intellect and . . . free will" necessary for his admissions to be considered voluntary. *Tuttle, 650 NW2d at 32*.

In the case at hand, it is clear that McDonough, at all times, even during his "factual basis statement" maintained that he had acted in self-defense. Attorney Peterson did no real investigation into the self-defense claim, nor did he "work up" any self-defense defense for McDonough. Attorney Peterson surely could have filed a motion to suppress the statements made by McDonough and could have argued that any subsequent statements were "fruit of the poisonous tree", but Peterson felt that he would not get a plea offer from the State if he attempted to defend McDonough. Had Peterson challenged the statements and been successful McDonough would have had a very strong self-defense case. It is clear that Peterson "did not develop the defense theory of the case because he fail[ed] to investigate the . . . [self-

defense claim and] evidence supporting the State's case – . . . [this] omission cannot be justified as a strategic decision." *Henderson v. Sargent, 926 F2d 706, 711 (8thCir 1991).* Clearly, Peterson's representation fell below the standard of a competent attorney. Further, McDonough maintained that he wanted to go to trial and did not want to accept a plea offer. Peterson also indicated that McDonough was very hesitant to accept a plea offer. It goes to show that McDonough has been prejudiced by Peterson's sub-par performance as McDonough has shown "that there is a reasonable probability that but for errors of counsel, he would not have pled guilty and would have proceeded to trial." *Hill v. Lockhart, 474 US at 59.* Therefore, the habeas court erred when it did not grant the Writ.

2. Failure to Timely File Appeal.

Attorney Peterson never advised McDonough in person after sentencing that he had thirty (30) days to appeal the sentence imposed by Judge Rusch. *C.T. at pg. 80, lines 2-4.* Attorney Peterson also never advised McDonough in writing about his appeal rights after the sentence was imposed. *Id. at pg. 79, lines 9-11.* The first time McDonough had any contact with Peterson after the sentence was imposed he requested that Peterson file

an appeal; unfortunately Peterson never saw him or advised him about his right to appeal until it was too late to appeal. *Id. at pg. 80, lines 17-25.*

"In those cases where the defendant neither instructs counsel to file an appeal nor asks that an appeal not be taken, . . . [the United States Supreme Court] believe[s] the question whether counsel performed deficiently by not filing a notice of appeal is best answered first by asking a separate, but antecedent question: whether counsel in fact consulted with the defendant about the appeal. [The Supreme Court] employs "the term 'consult' to convey a specific meaning – – advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes." *Roe v. Flores-Ortega, 528 US 470*, 478 (2000). "Where appeal is available as a matter of right, a decision to seek or forgo review is for the convict himself, not his lawyer, *Jones v. Barnes, 463 US 745, 751 (1983)*, who owes a duty of effective assistance at the appellate stage, *Evitts v. Lucey, 469 US 387, 396 (1985)*." A lawyer has a duty "to consult with the defendant on important decisions . . . in the course of the prosecution." *Strickland, 466 US at 688.* The decision to

appeal is one such decision. Since it cannot be made intelligently without appreciating the merits of possible grounds for seeking review, and the potential risks to the appealing defendant, a lay defendant needs help before deciding. If the charge is serious, the potential claims subtle, and a defendant uneducated, hours of counseling may be in order. *Flores-Ortega, 528 US at 1003.*

In the case at hand, Attorney Peterson failed to act as effective counsel as he failed to advise McDonough in any fashion of his right to appeal or how to go about the same until it was too late. Further, the second prong of *Strickland* is satisfied as McDonough would have had a very good chance of being successful challenging the factual basis of the plea. See, *State v. Nachtigall, supra.* Appellant hereby also incorporates all arguments set forth under the voluntariness of the plea as set forth in issue one (1) above. Based on the same, the writ should issue.

CONCLUSION

The habeas court erred by finding that the plea in the underlying matter was knowing, voluntarily, and intelligently entered. The trial court below failed to obtain a sufficient factual basis to support a plea of

guilty to Manslaughter in the First Degree as the essential element of a homicide was missing. The habeas court also erred by finding that McDonough's attorney provided effective assistance of counsel. It is clear from the record that McDonough's trial attorney failed to investigate McDonough's self-defense case and only focused on the State's case, thus rendering ineffective assistance to McDonough. Further, Attorney Peterson failed to advise McDonough in any fashion of his right to appeal, which was ineffective assistance as well. Finally, McDonough was prejudiced by the errors of his attorney as he certainly would have gone to trial, but for those errors and/or filed an appeal, which would have most likely been successful. For all those reasons, the trial court erred by not granting the Writ. McDonough respectfully requests this Court reverse the habeas court and grant the Writ, thus vacating the guilty plea entered on November 25, 2002, as well as the Judgment and Sentence imposed on April 14, 2003.

Dated this 25th day of April, 2014.

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Appellant, through counsel, hereby respectfully requests oral argument in the above-entitled matter.

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of April, 2014, a true and correct copy of the foregoing Appellant's Brief was served upon the following person, by emailing the same to the following email address:

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 26914

CHASKE McDONOUGH,

Petitioner and Appellant,

v.

DOUGLAS WEBER, Warden, South Dakota State Penitentiary

Respondent and Appellee.

APPEAL FROM THE CIRCUIT COURT
FIRST JUDICIAL CIRCUIT
CLAY COUNTY, SOUTH DAKOTA

THE HONORABLE STEVEN R. JENSEN
Circuit Court Judge

APPELLEE'S BRIEF

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Notice of Appeal Filed December 5, 2013

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The *habeas corpus* trial court found that McDonough's admission to beating and stabbing Mark Paulson, combined with other proof of Paulson's death, satisfied the elements of first degree manslaughter.

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DID McDONOUGH'S CRIMINAL TRIAL COUNSEL RENDER INEFFECTIVE ASSISTANCE BY NOT FILING AN APPEAL OF McDONOUGH'S SENTENCE?

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The *habeas corpus* trial court found that McDonough's sentence was not unconstitutionally disproportionate.

STATEMENT OF THE CASE

Appellant Chaske McDonough appeals from the decision and order denying his petition for a writ of *habeas corpus* entered by the Circuit Court for the First Judicial Circuit on October 11, 2013, and November 1, 2013.

Citations to McDonough's confession, arraignment, plea, sentencing, and *habeas corpus* transcripts will be denoted herein as CONFESSION, ARRAIGNMENT, PLEA, SENTENCING, or HC TRIAL followed by a jump cite to the corresponding page/line of the transcript. The *habeas corpus* court's memorandum decision, which it incorporated into its findings and conclusions, will be cited as DECISION followed by a jump cite to the appropriate page. Pertinent documents from the settled records below are attached in the appendix hereto for the court's ease of reference.

STATEMENT OF THE FACTS

A beer bottle crashing through a window on Mark Paulson's trailer house late one night came as a harbinger of his imminent death. 20-year-old Chaske McDonough had carelessly lobbed the bottle into the air to punctuate the end to an evening of drinking with friends. CONFESSION at 4/25-5/2-10.

Paulson, who was 49 years old, came out of his trailer and asked McDonough and his friends what had happened. CONFESSION at 5/20, 6/16. Afraid he might end up "paying for [Paulson's] house,"

McDonough initially told Paulson "I don't know." CONFESSION at 5/12-16. After one of McDonough's friends pointed to him, McDonough admitted that he had thrown the bottle. CONFESSION at 5/19.

McDonough has told conflicting versions of what happened next. During his interview with Deputy Sherriff Andy Howe, McDonough first said that after he admitted to tossing the bottle, Paulson was "nice," he "looked like a reasonable man," and didn't "swear" at anyone. CONFESSION at 8/7-13. Paulson said "Just try not to do it again." CONFESSION at 5/22.

Then, someone named Oliver pulled up to the house at this time and asked "Who was the white guy?" CONFESSION at 6/19. According to McDonough, he told Oliver about breaking Paulson's window, and then announced to the group that he was going home "to crash." CONFESSION at 6/23. Thereafter, McDonough said he "went home, shut my door and went to bed. I didn't hear anything that night; I didn't see anything that night. I didn't see who was last with [Paulson]. All I know this one person out there, and that was Oliver." CONFESSION at 6/24-7/2.

Howe bluntly told McDonough that he did not believe this story. He told McDonough that witnesses from the trailer court "put" McDonough inside the trailer after a heated exchange with Paulson. CONFESSION at 17/19. Howe told McDonough that crime scene technicians had gathered fingerprint, blood, hair, skin, carpet fiber, and

other forensic evidence that could put him inside Paulson's trailer. CONFESSION at 11/5-18, 17/18. Howe explained that the forensic evidence was "going to the lab" to be examined, all of which "takes time," which was why Howe was "not going to arrest" McDonough that day. CONFESSION at 22/10-13, 26/15-23.

McDonough started probing Howe for exactly what law enforcement knew. He asked if law enforcement had been inside Paulson's trailer "looking for evidence?" CONFESSION at 11/4. He wanted to know what witnesses are "saying about me." CONFESSION at 12/11. He asked "do you guys have anything on me?" CONFESSION at 14/9. When McDonough asked if they had found his fingerprints inside the trailer, Howe replied "No, not at this point. We don't know whose they are. We're going to compare them" to McDonough's fingerprints from "a serious assault" he had committed in Minnesota. CONFESSION at 23/3-16.

McDonough's thoughts then turned to consequences. He asked "How much time would I be facing?" CONFESSION at 24/12. Howe and McDonough then talked at length about various sentencing scenarios ranging from five years to life to lethal injection. CONFESSSION at 29-41. Howe told McDonough he was not in a position to "make any promises" about McDonough's sentence. DECISION at 13. Knowing what he had done, McDonough said "I'll get life." CONFESSION at 29/15, 31/12.

McDonough then pivoted to a new version of the story. He told Howe that Paulson came out and "was pissed." CONFESSION at 41/25. McDonough's friends supposedly told him that Paulson was a "crazy" Vietnam veteran who was "like, shell shocked or something." CONFESSION at 41/11-21. McDonough allegedly could smell alcohol "leaking off" of Paulson because "he didn't have on a shirt." CONFESSION at 43/9. McDonough's friends supposedly told him that Paulson "probably has a gun" inside his trailer. CONFESSION at 41/13.

At this point, McDonough said he suggested "Why don't we go in . . . in your house and see what happened?" CONFESSION at 43/14. Inside Paulson's trailer, McDonough saw the broken window and allegedly said "sorry, dude, I didn't mean to do that." CONFESSION at 43/18. He said they then went back outside where Paulson started "hollering at" McDonough's friends. CONFESSION at 43/19, 44/6.

McDonough went back inside Paulson's trailer where things supposedly calmed down for a moment. Paulson offered McDonough a beer, which McDonough accepted. CONFESSION at 44/10-15. Paulson allegedly got riled up again and told McDonough first "to get the hell out of his house," then allegedly forced him to stay until they resolved what would be done about the broken window. CONFESSION at 45/4, 46/18. McDonough sat down and had another beer while they talked about the window. CONFESSION at 46/20.

Paulson allegedly suddenly grabbed McDonough by the shirt and held him against the sofa. CONFESSION at 46/24, 47/6. McDonough said "Just let me leave, dude, just let me leave." CONFESSION at 46/25, 47/17. McDonough said he "thought [Paulson] was going to kill me, man." CONFESSION at 46/11. McDonough said he "panicked" and hit Paulson in the head. CONFESSION at 47/9. McDonough was then up and Paulson was allegedly "swinging" at him, grabbing ahold of him, and screaming "What are we going to do about this?" CONFESSION at 47/14-18.

According to McDonough, Paulson had him "down on the ground" and when he got up to get away, Paulson grabbed ahold of him and was "attempting to choke" him. CONFESSION at 49/23. McDonough said he hit Paulson's face four more times. CONFESSION at 50/12. As they were wrestling, they knocked over an end table with a paring knife on it. CONFESSION at 50/18-25. As Paulson was rising back up, McDonough grabbed the knife from the floor and "stabbed him twice in the neck." CONFESSION at 50/25.

McDonough said Paulson laid still on the floor after being stabbed. CONFESSION at 54/18. Instead of calling 911, McDonough stepped over Paulson's body and walked to Paulson's bedroom where he placed a call to his mother. After this call, McDonough went to take Paulson's pulse and found that he was still alive but fading. CONFESSION at 51/22, 54/24; SENTENCING at 55/2. McDonough then "cleaned up"

the crime scene, removed beer cans he had drank from, wiped down surfaces he had touched, tossed the knife in the woods behind Paulson's house, and later discarded his shoes. CONFESSION at 52/13, 60/3, 83/5; SENTENCING at 55/1-16; HC TRIAL at 60/10-14, 91/11-25.

The forensic evidence told a different story. There was "severe damage" to Paulson's face that was inconsistent with McDonough's claim that he only hit Paulson four or five times while they struggled. SENTENCING at 53/16. Blood pattern evidence showed that Paulson was "laying prone or very close to prone when he was stabbed" as opposed to in a kneeling position. SENTENCING at 31/14.

Rather than stabbing Paulson as he was rising up to attack him as he originally said, McDonough was in fact atop Paulson's back "punching him several times in the back of the head" while "Paulson was laying on his stomach." SENTENCING at 56/12-24. This was consistent with the autopsy's report of multiple contusions to the back of Paulson's head. SENTENCING at 57/6-10. Paulson's "head [was] turned to the left . . . so [McDonough] reached around and over in sort of an awkward manner and he . . . stab[bed] him in the neck." SENTENCING at 56/12-24. Despite his claim of being attacked by Paulson and fighting for his life, McDonough did not report that Paulson made threats and he did not have any abrasions, bruises, defensive wounds, or signs of injury on his person. SENTENCING at 60/16; HC TRIAL at 37/19, 59/16.

During his initial interview with Howe, and when questioned again by Howe the next day, McDonough did not claim that Paulson made sexual advances toward him. SENTENCING at 54/3-6, 54/21. Indeed, during his initial confession, McDonough expressly denied having any knowledge of Paulson's sexual gender preference. CONFESSION at 18/9. By the time of his plea hearing, though, McDonough claimed Paulson was "trying to proposition" him, hug him, and coax McDonough into letting him watch him urinate. PLEA at 16/15; SENTENCING at 183/21, 184/3-14.

To bolster his new story that Paulson's sexual advances triggered his alleged PTSD, McDonough claimed during a psychosexual evaluation that Paulson took his shirt off while conversing with McDonough inside the trailer house; McDonough had forgotten that he had previously tried to bolster his original crazed-Vietnam-vet story by telling Howe that he could tell Paulson had been drinking because Paulson was shirtless and reeked of alcohol when he first came out of his trailer. SENTENCING at 183/14; CONFESSION 43/9.

McDonough now appeals claiming that his counsel was ineffective for failing to challenge the factual basis for his plea, failing to move to suppress his confessions, and failing to file an appeal raising the claims he now brings in this petition and challenging his 65-year sentence.

ARGUMENT

A. Standard Of Review

A *habeas corpus* court's findings of fact are reviewed for clear error and its conclusions of law are reviewed *de novo. Thompson v. Weber,* 2013 SD 87, ¶ 37, 841 N.W.2d 3, 11. Claims of ineffective assistance of counsel are mixed questions of law and fact. *Owens v. Russell,* 2007 SD 3, ¶ 6, 726 N.W.2d 610, 614. Thus, a *habeas corpus* court's factual findings regarding counsel's performance are reviewed for clear error, but this court relies on its own judgment of whether defense counsel's actions or inactions were ineffective. *Owens,* 2007 SD 3 at ¶ 6, 726 N.W.2d at 615. When applying the *Strickland* standards summarized in appellant's brief to a guilty plea, a *habeas corpus* petitioner must make a heightened showing that, but for "gross error" on the part of his counsel, he would not have pled guilty. *Owens,* 2007 SD 3 at ¶ 10, 726 N.W.2d at 616.

B. The Record Before The Plea Court Was Sufficient To Supply A Factual Basis For McDonough's Plea To First Degree Manslaughter

According to McDonough, the record before the criminal trial court was not sufficient to establish the elements of first degree manslaughter because he did not acknowledge killing Mark Paulson during the factual recitation portion of his plea proceeding.

McDonough's argument incorrectly assumes that the factual basis for his plea can be met only from his factual recitation. In reality, the

factual basis for a plea may come from "anything that appears in the record." *State v. Nachtigall,* 2007 SD 109, ¶ 5, 741 N.W.2d 216, 219. "[I]t is not necessary that a defendant state the factual basis in his own words." *Nachtigall,* 2007 SD 109 at ¶ 5, 741 N.W.2d at 219.

For example, this court has held that "[r]eading the indictment to the defendant coupled with his admission of the acts described in it is a sufficient factual basis for a guilty plea." *Nachtigall,* 2007 SD 109 at ¶ 5, 741 N.W.2d at 219. The factual basis can be garnered from information supplied by a defendant's own counsel, or even the prosecution. *State v. Thin Elk,* 2005 SD 106, ¶ 22, 705 N.W.2d 613, 619. A judge may also take judicial notice of the contents of the case file to establish a factual basis. *State v. Jacobson,* 491 N.W.2d 455, 459-60 (S.D. 1992).

Thus, in *State v. Van Egdom,* 292 N.W.2d 586 (S.D. 1980), the defendant pled guilty to second degree manslaughter but later challenged the sufficiency of the factual basis for his plea. On appeal, the court affirmed even though Van Egdom did not specifically admit to killing his victim in the factual recitation that he provided to the judge. The element of a homicide had been satisfied by the reading of the information aloud in open court, and Van Egdom's admission to causing the manslaughter by "hit[ting] a guy on a motorcycle with my car." *Van Egdom,* 292 N.W.2d at 588.

Likewise, in *Thin Elk* this court found a sufficient factual basis for the element of premeditation when "the judge advised Thin Elk of the

charge, including the element of premeditation" and both Thin Elk and his attorneys "admitted that there was a factual basis for the premeditation element." *Thin Elk,* 2005 SD 106 at ¶ 21, 705 N.W.2d at 619.

In this case, McDonough was advised at both his arraignment and plea hearings that he had been charged with killing Mark Paulson and at both proceedings he stated that he understood the charge and had no questions about it. ARRAIGNMENT at 5/1-19; PLEA at 9/1-11. The information charging McDonough with first degree manslaughter was read aloud into the record of the plea hearing. PLEA at 8/21; INFORMATION, Appendix at 1. When asked how he pled to the manslaughter of Mark Paulson, McDonough replied "Guilty." PLEA at 11/6; DECISION at 11. When asked what he did to make him guilty of manslaughter, McDonough said he stabbed Paulson twice. DECISION at 11; PLEA at 14/22, 17/1-7; *Van Egdom,* 292 N.W.2d at 588 (defendant established factual basis for second degree manslaughter by admitting he "hit a guy" with his car).

In addition to admitting to the act that killed Paulson, McDonough's case file contained other evidence of Paulson's death sufficient to establish the fact of a homicide, including autopsy testing of Paulson's hair and fingernails and an affidavit from McDonough's counsel asking that the trial be moved to another county because of the publicity surrounding McDonough's confession to killing Paulson.

AUTOPSY REPORT, Appendix at 2; AFFIDAVIT SUPPORTING MOTION FOR CHANGE OF VENUE, Appendix at 4; *Thin Elk,* 2005 SD 106 at ¶ 21, 705 N.W.2d at 619 (defense attorney admissions can form factual basis); *Jacobson,* 491 N.W.2d at 459-60 (factual basis may be gleaned from case file).

The fact of a homicide at the time of McDonough's plea was not a contested or contestable matter. As in *Van Egdom,* the record as a whole herein supports Judge Rusch's finding of a factual basis for McDonough's plea to killing Mark Paulson. *Van Egdom,* 292 N.W.2d at 589.

C. McDonough's Defense Counsel Reasonably Concluded That A Motion To Suppress McDonough's Confession Was Neither Likely To Succeed Nor A Prudent Strategy In Terms Of Negotiating A Favorable Plea

McDonough claims that his defense counsel should have moved to suppress his un-*Mirandized* videotaped confession as the product of either a custodial interrogation or coercion. He further argues that his subsequent post-*Mirandized* admissions to killing Paulson should have been suppressed as the illicit fruit of the videotaped confession. According to McDonough, the failure to file a suppression motion indirectly impugns the "voluntariness" of his plea.[1] The record reflects,

[1] McDonough does not bring a *Boykin* challenge to the voluntariness of his plea. Rather, McDonough muddles *Boykin* and *Strickland,* by arguing that his counsel's alleged ineffectiveness rendered his plea "involuntary." The *Strickland* test takes the influence of counsel's alleged ineffectiveness into account in the form of a "but for" test, not a "voluntariness" test. Thus, to the extent McDonough has framed attacks on his plea in terms of "voluntariness," he really means that "but for" his counsel's effectiveness he would not have pled guilty.

however, that the suppression motion had little likelihood of succeeding – because McDonough was not in custody when he voluntarily confessed – and that there were sound strategic reasons for not filing a gratuitous motion.

1. McDonough Was Not In Custody When He Confessed

A suppression motion was not likely to succeed because McDonough was not in custody when he confessed. *Miranda* warnings are required only when there is a custodial interrogation. *State v. Wright,* 2009 SD 51, ¶ 19, 768 N.W.2d 512, 520. The determination of whether a suspect is in custody is analyzed according to a two-part test: (1) the circumstances surrounding the interrogation; and (2) whether, given those circumstances, a reasonable person would have felt he was not at liberty to terminate the interrogation and leave. The court views the circumstances objectively for whether there was a formal arrest or restraint on freedom of movement to a degree commonly associated with a formal arrest. *Wright,* 2009 SD 51 at ¶ 19, 768 N.W.2d at 520.

The events leading to McDonough's confession commenced when Detective Lowell Oswald made contact with McDonough on the street near his apartment at approximately 5:00 p.m. and asked him to come with him to the police station to answer questions about Paulson's death. HC TRIAL at 14/17, 22/14. McDonough asked if he should have an

attorney and Oswald said he would have to decide that for himself. HC TRIAL at 15/22, 20/3-21/6. Though reluctant, McDonough agreed to accompany Oswald to the station. HC TRIAL at 16/4, 18/17.

McDonough was transported to the station in the front seat of an unmarked Ford Taurus without handcuffs or restraints. HC TRIAL at 19/10-25. Oswald was in plain clothes and had no backup in the car with him. HC TRIAL at 20/4; DECISION at 2, 13. According to Oswald, McDonough was not in custody. HC TRIAL at 19/6, 21/24.

At the station, Oswald turned the interview over to Deputy Howe. HC TRIAL at 16/25. McDonough was told the interview would be videotaped "as much for his protection as it was for the police's protection." HC TRIAL at 16/17.

McDonough was placed in an unlocked interview room. HC TRIAL at 25/5. According to Howe, McDonough was not in custody or under arrest at any time during his interview with Howe. HC TRIAL at 32/14, 33/24, 34/1. McDonough was at all times free to not talk to Howe and free to leave. DECISION at 13; HC TRIAL at 37/23, 38/20-25.

Howe told McDonough "you don't have to stay" right at the outset of the interview. CONFESSION at 2/17. When McDonough said he would stay because Howe would just get a warrant if he did not, Howe

told him that whether a warrant would issue would be decided later. CONFESSION at 3/3. After agreeing to stay, and before he confessed:

- McDonough asked whether he "need[ed] to be here anymore;" Howe told him "it's a matter of whether or not you want to help us." CONFESSION at 16/17.
- McDonough initially denied having anything to do with Paulson's death, but after Howe started pressing McDonough to tell the truth, McDonough asked "You think I should have, like, my attorney here?" Howe responded, "That's up to you." CONFESSION at 20/20.
- Howe told McDonough that forensic evidence from Paulson's trailer was on its way to the state crime lab but, because no lab results were yet available, McDonough would not be arrested that day. CONFESSION at 22/13.
- McDonough asked whether he would be "going to jail today." CONFESSION at 24/5. Howe told him "You're not going to jail. You're walking out of here when we're done here." CONFESSION at 24/6. Howe further explained, though, that he was "not saying you're never going to get arrested." CONFESSION at 24/10.

- McDonough understood that he could get "hammered" at sentencing; "if I did anything," McDonough said, "I'll get life no matter what." CONFESSION at 29/15, 31/12.

Despite being told he was free to leave, and that he could contact a lawyer, McDonough remained in the interview room and confessed. DECISION at 13; CONFESSION at 42-60. After he confessed:

- Howe told McDonough "I'll give you a ride home." CONFESSION at 61/9.
- McDonough asked "What if I killed myself tonight? What would you guys do then? You guys wouldn't have no suspect or anything. I should do that." CONFESSION at 62/22.
- Howe left McDonough alone in the unlocked interview room while he went to confer with his superiors. CONFESSION at 69/22.
- Upon Howe's return, he informed McDonough of his *Miranda* rights and asked him to put his version of Paulson's death in a written statement. CONFESSION at 70/5.
- Howe again left McDonough alone in the interview room while he wrote out his statement. CONFESSION at 75/6.

At the conclusion of the interview, Howe gave McDonough a ride back to his apartment and let him out, free as a bird. HC TRIAL at 35/9-15. Later that same evening, McDonough was arrested at his apartment,

which probably was prudent given McDonough's talk of killing himself that night. HC TRIAL at 36/3; CONFESSION at 62/22.

Interview circumstances such as occurred in this case have not been viewed as custodial.

- McDonough's coming voluntarily to a police station is not indicative of custody. *Wright,* 2009 SD 51 at ¶¶ 5, 22, 768 N.W.2d at 517, 521; *State v Johnson,* 2007 SD 86, ¶¶ 6, 25, 28, 739 N.W.2d 1, 4, 10; *State v. Anderson,* 2000 SD 45, ¶ 77, 608 N.W.2d 644, 666.
- Transporting McDonough to the police station unrestrained in the front seat of a police cruiser indicated that he was not in custody. *Johnson,* 2007 SD 86 at ¶ 26, 739 N.W.2d at 10.
- Expressly informing McDonough that he was not under arrest indicated that McDonough was not in custody. *Wright,* 2009 SD 51 at ¶ 23, 768 N.W.2d at 521; *Johnson,* 2007 SD 86 at ¶ 8, 739 N.W.2d at 5; *State v. Carothers,* 2006 SD 100, ¶ 22, 724 N.W.2d 610, 619.
- Expressly informing McDonough that he was free to leave indicated that he was not in custody. *Wright,* 2009 SD 51 at ¶¶ 7, 21, 768 N.W.2d at 517, 521.
- Placing McDonough in an unlocked interview room without restraints indicated he was not in custody. *Wright,* 2009 SD 51

at ¶ 22, 768 N.W.2d at 521; *Johnson*, 2007 SD 86 at ¶ 28, 739 N.W.2d at 11.

- Informing McDonough that he could contact counsel if he wished indicated that he was not in custody. *Wright*, 2009 SD 51 at ¶ 27, 768 N.W.2d at 522.

The foregoing facts and authorities reveal that a reasonable person in McDonough's position would have felt that he was at liberty to terminate questioning and leave. DECISION at 13. McDonough's counsel, thus, did not have viable grounds to suppress his client's un-*Mirandized* confession because McDonough was not in custody.

2. McDonough Confessed Voluntarily

McDonough claims that, even if he was not in a custodial setting entitling him to either *Miranda* advisements or counsel, his defense counsel should have moved to suppress his confession because it was involuntarily given.

The voluntariness of a confession depends on the absence of police overreaching; confessions are not voluntary if, in view of the totality of the circumstances, law enforcement officers have overborne a suspect's will. *Wright*, 2009 SD 51 at ¶ 32, 768 N.W.2d at 524. This involves an examination of (1) the conduct of law enforcement officials in creating pressure and (2) the suspect's capacity to resist police pressure given: (a) the suspect's age; (b) level of education and intelligence; (c) advisements given or not given regarding the suspect's constitutional rights; (d) the

persistence or duration of the detention and questioning; (e) the presence of psychological pressure or physical discomfort; and (f) the suspect's prior experience with law enforcement officers and the courts. *Wright,* 2009 SD 51 at ¶ 32, 768 N.W.2d at 524. While deception or misdirection by interrogating officers may be a factor to consider, law enforcement is permitted the use of some psychological stratagems in interrogating a suspect. *Wright,* 2009 SD 51 at ¶ 32, 768 N.W.2d at 524.

Applying these standards to the facts of this case does not lead to the conclusion that McDonough's confession is the product of coercion:

- The atmosphere of the interrogation was "relaxed." DECISION at 3. Howe asked open-ended questions, was not overly aggressive, and never yelled or raised his voice at McDonough during the questioning. DECISION at 3, 16. McDonough was not under the influence of alcohol or drugs. DECISION at 13.
- Though Howe pushed McDonough to tell the truth by calling out inconsistencies in his story, asking him if he was going to be "a prick" by continuing to lie about Paulson's killing, informing McDonough (truthfully) that lying would only make his situation worse, and telling him (truthfully) that potentially identifying forensic evidence was on its way to the crime lab, these are not overbearing tactics. DECISION at 16; *Wright,* 2009 SD 51 at ¶¶ 34, 35, 768 N.W.2d at 524. McDonough is no

shrinking violet who confesses to homicide just because someone calls him a bad name.

- While McDonough was only 20 years old at the time, he was no novice to the criminal justice system. *Owens,* 2007 SD 3 at ¶ 15, 726 N.W.2d at 617 (19 years of age).
- McDonough had a high school education. Leslie Fiferman, Ph.D., examined McDonough for the defense and found him "intellectually quite coherent and capable." SENTENCING at 126/5. McDonough's defense counsel considered him a "bright" and "understanding client knowledge wise." HC TRIAL at 65/24-66/11. McDonough thus had the experience and capacity to understand that he was free to leave. *Carothers,* 2006 SD 100 at ¶ 24, 724 N.W.2d at 620.
- Though not expressly advised of his right to counsel or other constitutional rights (because no such advice is required outside of custody), McDonough was told he could have a lawyer if he chose. *Carothers,* 2006 SD 100 at ¶ 24, 724 N.W.2d at 620 (non-custodial suspect not advised of his constitutional rights). McDonough's asking if he should have a lawyer was not the kind of unambiguous and unequivocal demand for counsel that requires questioning to cease. *State v. Aesoph,* 2002 SD 71, ¶¶ 18-23, 647 N.W.2d 743, 752-53; *Wright,* 2009 SD 51 at ¶ 27, 768 N.W.2d at 522. Even McDonough admits that he did

not at any time "specifically ask" for an attorney. DECISION at 13; HC TRIAL at 97/18, 98/24.

- The detention and interrogation was brief, lasting little more than an hour. HC TRIAL at 38/15; *Johnson,* 2007 SD 86 at ¶ 30, 739 N.W.2d at 11(two interviews of 2½ and 3 hours); *Carothers,* 2006 SD 100 at ¶ 24, 724 N.W.2d at 620 (85 minutes). During that time, McDonough never asked for the interrogation to stop and, in fact, assisted Howe in locating the knife afterward. HC TRIAL at 35/24; *Johnson,* 2007 SD 86 at ¶ 30, 739 N.W.2d at 11; *Aesoph,* 2002 SD 71, ¶ 28, 647 N.W.2d at 754.
- McDonough was not subjected to psychiatric pressure or physical discomfort. DECISION at 13; *Johnson,* 2007 SD 86 at ¶ 30, 739 N.W.2d at 11; *Carothers,* 2006 SD 100 at ¶ 24, 724 N.W.2d at 620 (suspect not physically abused or deprived of food or sleep).
- When McDonough had been arrested approximately a year earlier for assaulting his sister, he was read his *Miranda* rights and he refused to make a statement. SENTENCING at 35/14; *Johnson,* 2007 SD 86 at ¶ 30, 739 N.W.2d at 11; *Carothers,* 2006 SD 100 at ¶ 24, 724 N.W.2d at 620 (prior experience with law enforcement). McDonough, therefore, knew that he could refuse questioning, and demonstrated the capacity to resist

questioning when doing so was to his advantage. *Wright,* 2009 SD 51 at ¶ 34, 768 N.W.2d at 524.

The foregoing facts and authorities reveal that Howe's interrogation techniques did not impermissibly overbear McDonough's will. DECISION at 16. McDonough's counsel, thus, did not have viable grounds to suppress his client's un-*Mirandized* confession due to alleged coercion.

3. McDonough's Counsel Had Sound Strategic Reasons For Not Filing A Motion To Suppress

McDonough seems to lose sight of the fact that he stood charged of first-degree murder. His defense counsel, however, never lost sight of the peril facing his client. The mandatory life sentence attached to a first- or second-degree murder conviction colored McDonough's counsel's every consideration of what he could do for his client:

- McDonough's counsel recognized that there "was a strong possibility [that McDonough] could be convicted of murder." HC TRIAL at 43/9-15, 47/23.
- Given McDonough's inability to supply his counsel with viable evidence of self-defense, his use of a level of force out of proportion to the threat that Paulson allegedly posed, and the forensic evidence disproving McDonough's self-defense claim, his counsel, in consultation with his client, concluded that taking the case to trial on a theory of self-defense "wasn't worth the risk." DECISION at 4, 12, 16; HC TRIAL at 41/13, 41/22,

42/21, 43/9, 45/11, 54/19, 56/3, 59/9-18, 60/14, 61/1-7, 62/6, 63/19.

- Second degree manslaughter did not strike McDonough's counsel as either a viable plea option, or a viable lesser included offense at trial, because he doubted that a judge or jury would view stabbing a person in the jugular as merely reckless. HC TRIAL at 46/18, 48/5, 62/17, 63/25.
- At the time of McDonough's trial, the state's attorney had a general policy of not plea bargaining if a defendant filed suppression motions. HC TRIAL at 67/12-25. McDonough would, thus, have lost what little leverage he had if he lost his motion to suppress. When weighing the probability of the success of a suppression motion against the loss of the ability to plead to an offense that did not carry a mandatory life sentence, McDonough's counsel concluded that moving to suppress the confession would be a "very poor risk" for his client. HC TRIAL at 68/8.
- Even assuming that McDonough had prevailed on his long-shot motion to suppress both the videotaped and written confessions, there was no assurance that McDonough's graphic admissions at the time of his arrest at his apartment and the next day would be suppressed as fruit of the poisonous tree given that McDonough had been released for several hours prior

to his arrest, and had been advised of his *Miranda* rights a second time when he was arrested. HC TRIAL at 35/9-15, 36/19, 37/2, 53/21-24; *Hofman v. Weber,* 2002 SD 11, ¶ 12, 639 N.W.2d 523, 527-28.

McDonough's counsel faced a dilemma similar to defense counsel in *Owens v. Russell,* 2007 SD 3, 726 N.W.2d 610. In *Owens* defense counsel had to weigh the value of moving to suppress his client's confession against its utility in keeping his client off death row. *Owens* decided that encouraging a client to take a plea in which the prosecution bargained away greater charges and a death sentence without first filing a motion to suppress could constitute sound strategy. *Owens,* 2007 SD 3 at ¶ 15, 726 N.W.2d at 617. As in *Owens,* McDonough's counsel had to weigh the patent weakness of his suppression (and self-defense) case against "significant independent evidence" implicating McDonough in first-degree murder. DECISION at 4, 16; *Owens,* 2007 SD 3 at ¶ 15, 726 N.W.2d at 617. Though McDonough does not see it now, it was sound strategy and, compared to life without parole, a bargain for McDonough.

D. McDonough Was Not Prejudiced By The Fact That No Appeal Was Filed

McDonough complains that his attorney failed to either appeal his case on his behalf, or to properly advise him to timely file an appeal on his own. According to McDonough, he thereby lost the ability to attack his plea as the "involuntary" product of ineffective representation and to

challenge the length of his sentence. Citing *Roe v. Flores-Ortega,* 120 S.Ct. 1029 (2000), McDonough argues that the loss of an appeal "which would most likely have been successful" requires a writ of *habeas corpus* "vacating [his] guilty plea." But see *Look v. Solem,* 398 N.W.2d 140, 143 (S.D. 1986)(remedy for ineffective failure to perfect appeal is reinstatement of appeal).

Flores-Ortega established "the proper framework for evaluating an ineffective assistance of counsel claim based on counsel's failure to file a notice of appeal." *Flores-Ortega,* 120 S.Ct. at 1032-33. *Flores-Ortega* first ruled that defense counsel's failure to consult with his client about an appeal is not *per se* unreasonable. *Flores-Ortega,* 120 S.Ct. at 1036. Instead, defense counsel must consult with his client about an appeal "when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are non-frivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Flores-Ortega,* 120 S.Ct. at 1036. Adequate consultation requires informing a defendant of his right to appeal, "advising the defendant about the advantages or disadvantages of taking an appeal and making a reasonable effort to discover the defendant's wishes." *Flores-Ortega,* 120 S.Ct. at 1035.

The record reflects that McDonough's trial counsel advised him of both his right to appeal and the process for taking an appeal. HC TRIAL at 49-51. Judge Rusch also advised McDonough of his right to appeal,

and the necessity of filing an appeal within 30 days. SENTENCING at 199/19. To the extent McDonough now claims his counsel never advised him of his right to appeal, the issues he might appeal, or the process for perfecting an appeal, the trial judge had the opportunity to judge the credibility of both McDonough's defense counsel and McDonough himself at the *habeas corpus* proceeding. It was for the trial judge, who is in a better position to observe the conduct, temperament, and demeanor of witnesses, to resolve such conflicts in the evidence. DECISION at 17; *Anderson,* 2000 SD 45, ¶ 78, 608 N.W.2d at 666.

Even if McDonough could demonstrate that his defense counsel failed to meet constitutional consultation obligations, he must further demonstrate prejudice by showing that "there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed."[2] *Flores-Ortega,* 120 S.Ct. at 1038. This showing of prejudice "will turn on the facts of a particular case;" "evidence that there were non-frivolous grounds for appeal" is "highly relevant." *Flores-Ortega,* 120 S.Ct. at 1039. McDonough cannot demonstrate prejudice for three reasons.

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[2] A court need not determine the sufficiency of counsel's performance before examining whether the petitioner was prejudiced by alleged deficiencies. *Jenner v. Dooley,* 1999 SD 20, ¶ 13, 590 N.W.2d 463, 469 (1999). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed." *Strickland v. Washington,* 104 S.Ct. 2052, 2069 (1984).

First, McDonough's case did not provide non-frivolous grounds for appeal. He had no viable *Boykin* or self-defense claims, and no grounds for suppression worth risking a murder trial. The time for withdrawing his plea had passed by the time he learned he would be sentenced to 65 years. SDCL 23A-27-11. Also, moving or appealing to withdraw the plea he had just entered would only have put McDonough in the Groundhog Day situation of re-choosing between a murder trial or a manslaughter plea, assuming the prosecutor would again offer a manslaughter plea.

Second, McDonough did not preserve his claims for appeal. In *Flores-Ortega,* the defendant had "not obviously waived any claims of error" and, therefore had a "right to appeal" his claims, which was lost by appellate counsel's ineffectiveness. *Flores-Ortega,* 120 S.Ct. at 1036, 1040-41, n. 1. In contrast to Flores-Ortega, McDonough did not preserve his attacks on his plea in the trial court by appropriate objections or a motion to withdraw his plea. *Wright,* 2008 SD 118 at ¶¶ 14-15, 759 N.W.2d at 279-80. McDonough, thus, lost no "right to appeal" his plea.

Third, McDonough's would-be grounds to appeal his plea stem from the alleged ineffectiveness of his counsel – *i.e.* but for his counsel's failure to advise him of the alleged deficiency in the factual basis for his plea, of the potential lesser included offense of second-degree manslaughter, or to file a motion to suppress – McDonough would not have pled guilty. *Habeas corpus*, rather than direct appeal, is the proper

forum for such ineffectiveness claims and McDonough has raised them herein. *State v. Hannemann,* 2012 SD 79, ¶ 12, 823 N.W.2d 357, 360.

McDonough had no "right to appeal" plea challenges that (1) were not preserved at trial and (2) were actually ineffectiveness claims that cannot be raised on direct appeal; consequently, he has suffered no prejudice from his trial counsel's alleged failure to appeal his plea. *Flores-Ortega,* 120 S.Ct. at 1036, 1040-41, n. 1.

The same is true of McDonough's would-be sentencing appeal, but for a different reason. By virtue of *not* challenging his sentence on direct appeal, *res judicata* does not bar McDonough from challenging it here. *Ramos v. Weber,* 2000 SD 111, ¶ 8, 616 N.W.2d 88, 91. McDonough suffers no prejudice bringing the claim now because the same "gross disproportionality" test applies to all sentencing challenges whether brought on direct appeal or in *habeas corpus. Ganrude v. Weber,* 2000 SD 96, ¶ 7, 614 N.W.2d 807, 809. Thus, McDonough has not been prejudiced by a loss of opportunity to challenge his sentence before an appellate tribunal.

Turning to the merits of McDonough's challenge to the constitutionality and proportionality of his sentence, this court has said that it:

> [E]mploy[s] very limited principles in [its] constitutional review of sentences. These principles include giving substantial deference to the legislature's broad authority to determine the types and limits of punishment; and the notion that the Eighth Amendment does not mandate adoption of any one penological theory.

> Consequently, a sentence within the statutory maximum will rarely be disturbed.

State v. Iannarelli, 2008 SD 121, ¶ 12, 759 N.W.2d 122, 125. Thus, McDonough's 65-year sentence is presumptively proportionate because it is less than the statutory maximum punishment of life imprisonment that the legislature has assigned to first degree manslaughter. SDCL 22-16-15(3); SDCL 22-6-1(3).

To assess a challenge to proportionality, this court first determines whether the sentence appears grossly disproportionate on its face. *State v. Larsen-Smith,* 2011 SD 93, ¶ 5, 807 N.W.2d 817, 819. This entails an examination of the conduct involved, and any relevant past conduct, with utmost deference to the legislature and the sentencing court. *State v. Bruce,* 2011 SD 14, ¶ 29, 196 N.W.2d 397, 406. A sentencing court should also acquaint itself with the defendant's "general moral character, mentality, habits, social environment, tendencies, age, aversion or inclination to commit crime, life, family, occupation, and previous criminal record." *State v. Bonner,* 1998 SD 30, ¶ 19, 577 N.W.2d 575, 580. If these considerations fail to suggest gross disproportionality, the review ends. *Bonner,* 1998 SD 30 at ¶ 17, 577 N.W.2d at 580. "It is a rare case in which the threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." *Iannarelli,* 2008 SD 121 at ¶ 12, 759 N.W.2d at 125; *State v. Garber,* 2004 SD 2, ¶ 13, 674 N.W.2d 320, 323 (appeals attacking proportionality of a sentence are rarely successful).

If a sentence does appear grossly disproportionate on its face, this court performs an intra- and inter-jurisdictional analysis. It also considers "the gravity of the offense and the harshness of the penalty, and the effect of this type of offense on society and other relevant factors. *Bonner,* 1998 SD 30 at ¶ 13, 577 N.W.2d at 579.

An analysis of McDonough's conduct in light of these principles does not lead to an inference or finding of gross disproportionality. DECISION at 11.

1. The Conduct Involved

Paulson was on his stomach, on the floor, with McDonough on his back, already severely beaten about the face, and with McDonough still punching the back of his head when McDonough grabbed the paring knife and strained himself sideways to stab Paulson twice in the deadliest point in the human anatomy. SENTENCING at 56/12-24. McDonough did not stab to wound or intimidate or incapacitate. McDonough's selection of the jugular as his target suggests the formation of an intent to kill in the instant before he stabbed Paulson, conduct which has led to a conviction for first-degree murder in similar cases. *State v. Owen,* 2007 SD 21, 729 N.W.2d 565 (forming the intent to inflict lethal stab wound to throat in the last instant sufficient to sustain conviction for first-degree murder even if defendant did not intend to kill victim when he entered his house); SDCL 22-16-5.

2. McDonough's Past Relevant Conduct

Paulson's killing was the culmination of a life of "escalating violence." SENTENCING at 192/3.

- In 1998, at age 16, McDonough beat a mentally handicapped sixth grader in the face for allegedly looking at his girlfriend. SENTENCING at 39/2, 40/1-11, 44/25.
- Again at age 16, McDonough kneed a 10-year-old girl in the stomach and smashed ice in her face. SENTENCING at 40/17-24, 181/2.
- In 1999 at age 17, McDonough set fire to two trailer houses in a densely populated trailer park and watched them burn. SENTENCING at 39/8, 41/1, 49/1, 181/8.
- In high school, McDonough exhibited a pattern of disruptive and aggressive behavior, including incidents where he kicked a student on the school bus, bit another student who tried to protect his victim, and scratched and cut another student on the forearms during class. SENTENCING at 43/10-17.
- At age 18, McDonough was convicted of simple assault for attacking and threatening a female student in the school lunch room. SENTENCING at 181/12.
- The next year, at age 19, McDonough's ex-girlfriend obtained a protection order against him after threatening her by saying "I

don't care if you're pregnant, I'm still going to kick your ass." SENTENCING at 181/18.

- True to his word, McDonough soon thereafter beat his 9-month-pregnant sister (while she was holding her infant child) so badly that she was "bleeding from both eyes" and "her nose," "her lip was cut in several places," and he ended up "breaking a bone in her face." SENTENCING at 33/7, 34/7-14.

Despite a reputation for frequent fighting and "throw[ing] the first punch," McDonough tended to blame the victim. SENTENCING at 46/7. McDonough's mother, too, "was always trying to present him as not being the first, as the instigator, but more as defending himself." SENTENCING at 44/22. Nevertheless, McDonough himself described how he would "track down others who have offended him or his friends," such as the special education sixth grader who dared to look in the direction of McDonough's girlfriend. SENTENCING at 44/23.

3. McDonough's General Moral Character

Despite his own victimization as a child, McDonough dedicated his adolescence and early adulthood to victimizing others. McDonough's defense counsel retained Scott Pribyl, Ph.D., to evaluate McDonough psychologically but the results were so damning that Pribyl testified for the prosecution at McDonough's sentencing.

First, McDonough was not truthful with Pribyl. SENTENCING at 8/17. McDonough tended to "fake" or "magnify" psychological

symptoms, and minimize his culpability for Paulson's death. SENTENCING at 9/19-25, 11/13. McDonough told Pribyl he did not think he had done anything wrong. SENTENCING at 11/13.

Second, Pribyl's testing showed McDonough to be a "Type C profile," which is a designation reserved for "the most difficult of offenders" for rehabilitation purposes because they are "distruthful, cold, irresponsible, unstable, tend to have antisocial aggressive or hostile attitudes, [and] engage in violent crimes against other people." SENTENCING at 13/18. Pribyl diagnosed McDonough with "antisocial personality disorder with paranoid and dependent traits." SENTENCING at 17/11.

Third, despite reported incidents of sexual abuse as a child, Pribyl did not place much mitigating weight on McDonough's alleged PTSD. SENTENCING at 21/7, 126/15. McDonough's late PTSD reporting is suspect given that he was psychologically evaluated at the ages of 12 and 16 and neither evaluation revealed symptoms or traits of post-traumatic stress disorder. SENTENCING at 45/21, 150/1. According to Pribyl, "[t]here's a lot of PTSD folks that don't get into the trouble that Chaske gets into with assaultive behavior, arson, and now homicide." SENTENCING at 17/23, 22/6.

Fourth, Pribyl felt that McDonough posed "a high risk of future violence," at least until he got "tired and in [his] mid-life range . . . turned around." SENTENCING at 19/15, 20/14.

Ultimately, McDonough's most relevant moral or psychological trait may be his practiced dishonesty. Throughout his adolescence, McDonough, with his mother's encouragement, developed a habit of blaming his victims. He also feigned psychological symptoms to both Pribyl and Fiferman. Both of these manifestations of dishonesty are on display here. First he subtlely blamed Oliver for Paulson's death by saying that the "one person out there" with Paulson before he was killed "was Oliver." CONFESSION at 7/3. When that did not stick, he tried to frame Paulson as some kind of assaultive, drunken, crazed Vietnam vet who put him in fear for his life. CONFESSION at 41/20, 46/11. Later he claimed Paulson triggered his alleged PTSD with unwanted sexual advances. PLEA at 16/15. In reality, McDonough killed Paulson because he did not want to pay for a broken window. CONFESSION at 5/12-16. The picture of McDonough's moral character is not one of a person misjudged at sentencing.

4. Court's Sentencing Rationale

McDonough's criminal defense counsel told him to expect a sentence of sixty to sixty-five years, and McDonough knew there was "no cap" on his sentence when he pled. HC TRIAL at 65/9, 66/19, 71/4, 94/15; DECISION at 4. Counsel's prediction proved prescient. At sentencing, Judge Rusch told McDonough that the "neglect, physical abuse, [and] sexual abuse" he suffered as a child mitigated against a life

sentence. SENTENCING at 190/20, 191/21. Judge Rusch, however, identified three concerns that militated against further leniency:

- Judge Rusch was troubled by McDonough's escalating "history of violence," which he openly feared would lead to McDonough killing some other person if he were released too soon. SENTENCING at 191/25, 192/14.
- Judge Rusch was also concerned with McDonough's efforts to conceal his involvement in the crime by cleaning up the crime scene and disposing of evidence, which evidenced that McDonough knew that killing Paulson was not justified. SENTENCING at 192/23.
- Judge Rusch seemed most concerned, however, with McDonough's steadfast dishonesty. SENTENCING at 193/13. Before pronouncing sentence, Judge Rusch detailed the numerous discrepancies in McDonough's varying accounts of what happened, and the incompatibility of the forensic evidence with McDonough's claims of self-defense. SENTENCING at 193/7-196/25. Judge Rusch believed that McDonough's failure to honestly state "what happened between you and Mark Paulson" bode ill for his swift rehabilitation. SENTENCING at 193/18, 197/2.

The sentencing transcript, thus, reflects that Judge Rusch gave McDonough's family life and social environment, previous criminal

record, and general moral character appropriate consideration in arriving at a 65-year sentence. *Bonner,* 1998 SD 30 at ¶ 19, 577 N.W.2d at 580; DECISION at 11.

5. Proportionality With Other Offenders

Though no proportionality review is required in this case (because McDonough's sentence is not disproportionate on its face), a comparison of the facts of McDonough's case with other reported cases challenging a first degree manslaughter sentence reveals that his 65-year sentence is not cruel or unusual:

> *State v. Lemley,* 1996 SD 91, 552 N.W.2d 409 (350-year sentence for beating, strangling, and robbing a man not excessive where defendant was eligible for parole at age 64).
>
> *State v. Henjum,* 1996 SD 7, 542 N.W.2d 760 (45-year sentence imposed for killing roommate after night of drinking).
>
> *State v. Holloway,* 482 N.W.2d 306 (S.D. 1992)(121-year sentence for stabbing and killing man in a drunken confrontation was within statutory limits).
>
> *State v. Iannarelli,* 2008 SD 121, 759 N.W.2d 122 (130-year sentence imposed for bludgeoning disabled wife to death).
>
> *State v. Pulfrey,* 1996 SD 54, 548 N.W.2d 34 (life sentence imposed on schizophrenic who caused fatal internal injuries to girlfriend during violent domestic argument).
>
> *State v. Larsen-Smith,* 2011 SD 93, 807 N.W.2d 817 (121-year sentence for killing motorist in drunken vehicular flight from police not excessive in light of defendant's prior history of five DUIs).
>
> *State v. Milk,* 2000 SD 28, 607 N.W.2d 14 (sentence of life without parole imposed on defendant who stabbed incapacitated victim multiple times).
>
> *State v. Knecht,* 1997 SD 53, 563 N.W.2d 413 (75-year sentence imposed for killing of aggressor in a bar fight).

State v. Ramos, 1996 SD 37, 545 N.W.2d 817 (life sentence for shooting and killing girlfriend during drunken domestic argument not excessive where defendant did not exhibit potential for rehabilitation).

With the exception of Henjum, McDonough received a lighter sentence than all of the foregoing defendants, which is a reflection of Judge Rusch individualizing McDonough's sentence to his relative youth and the unfortunate circumstances of his upbringing. Also, like Lemley, McDonough is parole eligible at an age that should allow him two or three decades of life as a free man.

However, like Larsen-Smith and Ramos, but unlike Henjum, McDonough had a prior record of escalating violence that led inevitably to the death of another person. Like Holloway, Pulfrey and Ramos, McDonough's crime is the product of alcohol-induced violence. Like Milk, McDonough had already incapacitated his victim by the time he stabbed his neck. When compared to these other manslaughter defendants – Holloway, Milk, Ramos and Knecht in particular – McDonough's 65-year sentence is not disproportionate to his crime or the sentences imposed on others for the same offense.

CONCLUSION

McDonough has failed to make a convincing case that, but for his counsel's alleged errors, he would not have pled guilty. Challenging the factual basis for his plea before the trial court (or on appeal), filing a flimsy motion to suppress, or pursuing a long-shot second-degree

manslaughter conviction at trial all carried an unacceptable risk that McDonough would be convicted of murder and sentenced to life without parole. McDonough has failed to demonstrate that his counsel committed any error in helping him escape this fate let alone gross error.

Where McDonough should be grateful that he is not, like Lance Owen, incarcerated for life without the possibility of parole, he instead complains that he got a raw deal. Without intending to, McDonough's complaints reinforce the wisdom of Judge Rusch's sentence. Twelve years into his 32.5-year minimum and McDonough still slanders his victim, still fails to take responsibility for his crime, still lies about the circumstances of Mark Paulson's death, still malingers psychiatric symptoms, and still feels no remorse for his victim. This suggests that McDonough continues to pose "a high risk of future violence," and that his sentence is both proportionate to his crime and appropriately individualized to a defendant who persists in trying to justify murder.

Dated this 20th day of May 2014.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the typeface and volume limitations provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in proportional 12 point type. Appellee's Brief contains 8,345 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2010.

_____
Paul S. Swedlund
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 20th day of May 2014 a true and correct copy of the foregoing brief was served on Manuel J. de Castro via e-mail at decastrolawofficepllc@yahoo.com.

_____
Paul S. Swedlund
Assistant Attorney General

IN THE SUPREME COURT

STATE OF SOUTH DAKOTA

No. 26914

CHASKE MCDONOUGH,

Petitioner and Appellant,

vs.

DOUGLAS WEBER, Warden of the
South Dakota State Penitentiary,

Respondent and Appellee.

Appeal from the Circuit Court
First Judicial Circuit
Clay County, South Dakota

The Honorable Steven R. Jensen
Circuit Court Judge

APPELLANT'S REPLY BRIEF

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Notice of Appeal filed December 5, 2013

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IN THE SUPREME COURT

STATE OF SOUTH DAKOTA

No. 26914

CHASKE MCDONOUGH,

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vs.

DOUGLAS WEBER, Warden of the
South Dakota State Penitentiary,

Respondent and Appellee.

PRELIMINARY STATEMENT

Petitioner and Appellant, Chaske McDonough, will be referred to throughout this brief as “McDonough" or "Petitioner". The Appellee, Douglas Weber, Warden of the South Dakota State Penitentiary, will be referred to as "State".

The transcript of the Arraignment Hearing will be referred to as "A.H." The transcript of the Arraignment and Change of Plea Hearing will be referred to as "P.H." The transcript of the Sentencing Hearing will be referred to as “S.H.” The transcript of the Motion Hearing will be referred to as “M.H.” The transcript of the Court Trial

(habeas hearing) will be referred to as "C.T." All transcript citations shall be followed by the appropriate page and line number(s).

JURISDICTIONAL STATEMENT

A Complaint was filed on August 17, 2002, charging Chaske McDonough with Murder in the Second Degree contrary to SDCL 22-16-7. An Indictment was filed on August 29, 2002, charging Chaske McDonough with the crimes of Murder in the Second Degree contrary to SDCL 22-16-7, or in the alternative Murder in the Second Degree contrary to SDCL 22-16-9. Mr. McDonough entered a "not guilty" plea at his Arraignment on August 30, 2002.

On November 25, 2002, Mr. McDonough entered a "guilty" plea to an Information charging, Count 1: Manslaughter in the First Degree contrary to SDCL 22-16-15(3), with the State dismissing the remaining charges. The Honorable Arthur L. Rusch pronounced sentence on April 14, 2003. Judgment and Sentence was filed on April 14, 2003.

On October 15, 2004, McDonough filed a pro se Petition for Writ of Habeas Corpus.

A Provisional Writ of Habeas Corpus was filed on December 5, 2012 and a Return of Writ of Habeas Corpus was filed on January 31, 2013. An Amended Provisional

Writ of Habeas Corpus was filed on June 4, 2013 and an Amended Return of Writ of Habeas Corpus was filed on June 27, 2013.

An August 30, 2013 the trial court considered Petitioner's Amended Application for Writ of Habeas Corpus via a Court Trial. On October 10, 2013 the trial court issued a Letter Decision denying Petitioner's Amended Application for Writ of Habeas Corpus. Findings of Fact and Conclusions of Law were filed on November 1, 2013. An Order Granting Certificate of Probable Cause was signed by the trial court on November 8, 2013 and filed on November 12, 2013. Notice of Appeal was timely filed on December 5, 2013.

This Court has jurisdiction pursuant to SDCL 15-26A-3.

STATEMENT OF LEGAL ISSUES

1. The trial court erred by finding a sufficient factual basis and a knowing, voluntary, intelligent plea of guilty to First Degree Manslaughter.

The trial court found that the guilty plea entered was knowing, voluntary, and intelligent and that there was a proper factual basis to support the same.

Gregory v. State, 325 NW2d 297 (SD 1982)
State v. Nachtigall, 741 NW2d 216 (SD 2007)
State v. Schulz, 409 NW2d 655 (SD 1987)

2. The trial court erred by finding that Appellant was afforded effective assistance of counsel at the trial court level.

The trial court found that Appellant's trial counsel rendered effective assistance of counsel even though he failed to file a motion to suppress statements and failed to file an appeal on Appellant's behalf.

Miranda v. Arizona, 384 US 436 (1966)
Roe v. Flores-Ortega, 528 US 470 (2000)
Strickland v. Washington, 466 US 668 (1984)

PROCEDURAL STATEMENT

A Complaint was filed on August 17, 2002, charging Chaske McDonough with Murder in the Second Degree contrary to SDCL 22-16-7. An Indictment was filed on August 29, 2002, charging McDonough with the crimes of Murder in the Second Degree contrary to SDCL 22-16-7, or in the alternative Murder in the Second Degree contrary to SDCL 22-16-9. Mr. McDonough, assisted by Clay County Public Defender Phillip Peterson, entered a "not guilty" plea at his Arraignment on August 30, 2002.

On November 25, 2002, Mr. McDonough entered a "guilty" plea to an Information charging, Count 1: Manslaughter in the First Degree contrary to SDCL 22-16-15(3), with the State dismissing the remaining charges. After a lengthy Sentencing Hearing the Honorable Arthur L. Rusch pronounced sentence on April 14, 2003. Mr. McDonough was sentenced to eighty-five (85) years in the South Dakota State Penitentiary, with twenty (20) years suspended on various terms and conditions. Judgment and

Sentence were filed on April 14, 2003.

On October 15, 2004, McDonough filed a pro se Petition for Writ of Habeas Corpus. On October 21, 2004 the Honorable Steven R. Jensen appointed attorney James E. McCulloch to represent Mr. McDonough with respect to the Petition for Writ of Habeas Corpus. Nothing substantive happened that counsel can see until a Stipulation and Order for Withdrawal was signed by the Petitioner, the State, Attorney McCullough, and Judge Jensen; the same being filed on August 3, 2011.

Attorney Ron J. Volesky of Huron was retained to represent the Petitioner. A Provisional Writ of Habeas Corpus was filed on December 5, 2012 and a Return of Writ of Habeas Corpus was filed on January 31, 2013. A Motion for Leave to Amend Pleadings was filed on June 4, 2013. An Amended Provisional Writ of Habeas Corpus was filed on June 4, 2013 and an Amended Return of Writ of Habeas Corpus was filed on June 27, 2013.

An August 30, 2013 the trial court considered Petitioner's Amended Application for Writ of Habeas Corpus via a Court Trial. On October 10, 2013 the trial court issued a Letter Decision denying Petitioner's Amended Application for Writ of Habeas Corpus. Findings of Fact and Conclusions of Law were filed on November 1,

2013. An Order Granting Certificate of Probable Cause was signed by the trial court on November 8, 2013 and filed on November 12, 2013. Notice of Appeal was timely filed on December 5, 2013.

STATEMENT OF FACTS

Appellant hereby incorporates the previously set forth Statement of Facts from Appellant's Brief as if set out in full.

LEGAL ANALYSIS

Appellant hereby incorporates the Legal Analysis section from Appellant's Brief as if set forth in full.

1. Standard of review.

This Court's standard of review for habeas decisions is well settled:

> "[The South Dakota Supreme Court's] review of habeas corpus proceedings is limited because it is a collateral attack on a final judgment. The review is limited to jurisdictional errors. In criminal cases, a violation of the defendant's constitutional rights constitutes a jurisdictional error. The [petitioner] has the burden of proving he is entitled to relief by a preponderance of the evidence.
>
> The findings of fact shall not be disturbed unless they are clearly erroneous. A claim of ineffective assistance of counsel presents a mixed question of law and fact. The habeas court's conclusions of law are reviewed de novo."

Owens v. Russell, 726 NW2d 610, 614-615 (SD 2007)

(Quoting *Vanden Hoek v. Weber, 724 NW2d 858, 861-62 (SD*

2006)).

2. Issues.

A. The trial court erred in finding that the Guilty plea was constitutionally entered.

"Before accepting a guilty plea, a court must be subjectively satisfied that a factual basis exists for the plea. The court must find a factual basis for each element of the offense. The factual basis must appear on the record." *State v. Schulz, 409 NW2d 655, 658 (SD 1987).* "The factual basis may come from 'anything on the record.'" *Nachtigall, 741 NW2d at 219* (quoting, *Schulz, 409 NW2d at 658*). "It is not necessary that a defendant state the factual basis in his own words." (citation omitted).

SDCL 23A-7-14 (Rule 11(f)) states:

> "The court shall defer acceptance of any plea except a plea of nolo contendere until it is satisfied that there is a factual basis for the offense charged or to which the defendant pleads."

"In cases where defendants proclaim their innocence while at the same time pleading guilty, the factual basis to support such pleas must be strong." *Gregory v. State, 325 NW2d 297, 299 (SD 1982).* This Court noted in *Gregory,* that a denial "of acts constituting essential elements of the offense raises further question of

whether the defendant fully understood the nature of the offense charged." *Id.*

"The factual basis requirements in SDCL 23A-7-2 (Rule 11(a)) and SDCL 23A-7-14 (Rule 11(f)) were 'designed to protect these core considerations by ensuring that a guilty plea is entered voluntarily and intelligently.'" *Nachtigall, 741 NW2d at 220.* (Quoting *Schulz, 409 NW2d at 658*). "Without an adequate factual basis, the trial court cannot assure itself and this Court the guilty plea was voluntarily and intelligently entered." *Id.*

"While a factual basis may be gained by different means, a 'conversation between the judge and the defendant is clearly the best method for establishing a factual basis.'" *Id.* (Quoting, *Schulz, 409 NW2d at 659*).

The State contends that this case is analogous to *State v. Thin Elk, 705 NW2d 613 (SD 2005)* with respect to the establishment of the factual basis. The clear distinction between the cases is that in *Thin Elk,* the trial court inquired as to both defense attorneys as to whether they believed there was a sufficient factual basis and the trial court also relied on the prosecution's rendition of the facts setting forth the factual basis, after the defendant agreed with the facts

as set forth. The facts as set forth by the prosecution also included that defendant "shot . . . [the victim] three times in the head and killed him." *Id. at 619.* In the case at hand, McDonough set forth his version of the events and his attorney was never asked if he felt there was a sufficient factual basis for the plea.

The State also argues that "McDonough's case file contained other evidence of Paulson's death sufficient to establish the fact of a homicide, including autopsy testing of Paulson's hair and fingernails and an affidavit from McDonough's counsel asking that the trial be moved to another county because of the publicity surrounding McDonough's confession to killing Paulson." *Appellee's Brief, pg. 11.* This argument fails because the trial court never incorporated any of this into the record at the change of plea hearing and most certainly did not "take judicial notice of the contents of the case file to establish a factual basis" as insinuated by the State. *Appellee's Brief, pg. 10.* (Quoting, *State v. Jacobson, 491 NW2d 455, 459-60 (SD 1992)*).

This Court has noted that "[i]f the defendant cannot or will not admit to the facts establishing elements of the crime, the trial court may admit transcripts [of testimony], [oral testimony, other sworn statements, or

tangible evidence] which will satisfy [the court] of the existence of the factual basis for the plea." *Gregory, 325 NW2d at 299.* Again, none of this was done in the case at hand and it is clear that McDonough's rendition of facts was riddled with a valid defense of self-defense.

The State argues that *State v. Van Egdom, 292 N*W2d 586 (SD 1980) is controlling on this issue. However, in *Van Egdom* the trial court questioned the defendant in order to obtain the factual basis and further, the defendant never set forth a self-defense case in the answers he gave to the trial court's questions. In *Van Egdom*, the defendant was charged with second degree manslaughter for being intoxicated when he drove his vehicle at 50 mph into an individual stopped on a motorcycle. There never could have been a self-defense claim or a justifiable homicide claim in *Van Egdom.* In the present case, McDonough had maintained from his initial interrogation through the statements he made at the time of his plea that he had acted in self-defense. With that said, the statements set forth by McDonough at the time of his plea, are not an appropriate factual basis for the trial court to have adjudicated McDonough guilty of First Degree Manslaughter.

This case is much like *State v. Spirit Track, 272 NW2d 803 (SD 1978).* In that case, this Court reversed the denial of petitioner's application for post-conviction relief, finding that there was not a sufficient factual basis for his plea. In *Spirit Track,* petitioner did not admit to the acts which constituted the crime for which he was charged. *Id. at 805.* Also, the trial court did not admit any sworn testimony, police reports, handwritten statements, oral testimony, or other material which would have satisfied the trial court of a factual basis for the plea. In the case at hand, McDonough as well did not admit to all the acts which constituted the crime for which he was charged, as he maintained a self-defense argument and further, did not admit to causing the death of Paulson by means of a dangerous weapon without the design to effect the death.

"If a factual basis fails to meet the statutory standard, the guilty plea must be set aside and the case must be remanded for another plea hearing." *Nachtigall, 741 NW2d at 221.* (See also, *State v. Sutton, 317 NW2d 414, 414 (SD 1982)*). In this case, the factual basis was permeated with self-defense. The factual basis also lacked the essential element of a homicide, therefore it met the factual basis for Aggravated Assault and not

First Degree Manslaughter. As in *Nachtigall,* the statutory violation alone requires reversal of the habeas court.

B. Ineffective Assistance of Counsel.

In *Strickland v. Washington,* 466 *US* 668 (1984), the Supreme Court set forth the now familiar two-part test for determining whether a defendant's conviction should be overturned due to ineffective assistance of counsel. A defendant bears the heavy burden of showing that counsel's representation was so deficient that the defendant essentially was denied the counsel guaranteed by the Sixth Amendment, and that he was prejudiced by counsel's performance. *Id. at 687.*

To show prejudice when challenging a guilty plea on the ground of ineffective assistance of counsel, a petitioner must show that there is a reasonable probability that but for errors of counsel, he would not have pled guilty and would have proceeded to trial. *Hill* v. *Lockhart, 474 US 52, 59 (1985).* "In determining whether a defendant suffered from ineffective assistance of counsel, [the South Dakota Supreme] ... Court has adopted the two prong test from *Strickland* v. *Washington, 466 US 668 (1984).* "To establish ineffective assistance of counsel, defendant must prove (l) that counsel's

representation fell below an objective standard or reasonableness and (2) that such deficiency prejudiced him. Relying on *Strickland, Woods* v. *Solem, 405 NW2d 59, 61 (SD 1987)* held that prejudice exists when there is a reasonable probability that, but for counsel's unprofessional errors, the proceeding would have been different....[Petitioner] must show 'that the counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose results is reliable." *(citations omitted) Id.*

Where counsel fails to investigate and interview promising witnesses [and all the evidence], and therefore "has no reason to believe they would not be valuable in securing [defendant's]release," counsel's inaction constitutes negligence, not trial strategy. *United States ex rel. Cosey* v. *Wolff,* 727 *F2d* 656, 658 *n.3 (7thCir 1984).*

1. *Miranda* Violation and Voluntariness of Statements (Failure to File Motion to Suppress).

It appears Peterson felt "it wasn't worth the risk" to file a motion to suppress. *C.T. at pg. 56, line 3.* Also, Peterson stated that he didn't file a motion to suppress because "[t]he state's attorney at that time had a general policy that if you want to plea bargain, then

after you've reviewed the case and know where you're at you come and approach the state's attorney about a plea bargain; but if you're going to file suppression motions and fight this all the way, then they weren't interested in a plea bargain." *Id. at pg. 67, lines 19-25.*

In looking at the statements McDonough made, and the applicable caselaw, it is clear that a motion to suppress may have been successful.

To protect citizens from compelled self-incrimination, the United States Supreme Court has held that whenever a person is subjected to custodial interrogation by a law enforcement officer, the citizen must first be advised of certain constitutional rights. The required advisements include the right to counsel and the right to remain silent. *Miranda v. Arizona, 384 US 436, 444 (1966).* See also, *State v. Thompson, 560 NW2d 535, 540 (SD 1997)* (*Miranda* warnings are necessary whenever a defendant is interrogated in police custody).

Interrogation includes "words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* In this case, there is no need to parse the officer's behavior. He engaged in express questioning

about suspected criminal activity with the obvious intent of eliciting incriminating responses.

In the case at hand, the State argues that the atmosphere of the interrogation was "relaxed" and that the officers did not use overbearing tactics. *Appellee's Brief, pg. 19.* This is not the case.

Deputy Howe interrogated McDonough for approximately two (2) hours. *C.T. at pg. 22, lines 11-21.* During the interrogation, McDonough asked Howe "do I need to be here anymore?" *Id. at pg. 26, lines 3-5.* McDonough also asked if he "should have my attorney here." *Id. at lines 21-24.* McDonough was told not to act like a prick and to confess. Finally, McDonough was also lied to and told that they police had lots of evidence, including DNA evidence that implicated him in the homicide. McDonough, not having been advised of his *Miranda* rights and his will overcome by the Deputy's pressure and tactics, finally confessed to the crime. After that he was read *Miranda* rights and told to write out a confession, which he did. He was later arrested. In looking at the record, the atmosphere of the interrogation is anything but relaxed. It was a police dominated atmosphere that required the advisement of *Miranda* warnings.

As stated by the United States Supreme Court, *Miranda* "conditioned the admissibility at trial of any custodial confession on warning a suspect of his rights: failure to give the prescribed warnings and obtain a waiver of rights before custodial questioning generally requires exclusion of any statements obtained." *Missouri v. Seibert, 124 SCt 2601, 2608 (2004).* Therefore, Oswald and Howe's failure to advise McDonough of the *Miranda* warnings would have required the suppression of McDonough's statements had a motion to suppress been filed. It also would have required suppression of the written statement as that was "fruit of the poisonous tree."

Even if the interrogation of an individual is non-custodial, a statement must be voluntary in order to abide by the requirements of the Fifth Amendment. *Beckwith v. United States, 425 US 341, 347-48 (1976).* The factual inquiry of voluntariness centers on: "(1) the conduct of law enforcement officials in creating pressure and (2) the suspect's capacity to resist that pressure." *State v. Tuttle, 650 NW2d 20 (SD 2002).* Additionally, law enforcement's '"[f]ailure to administer Miranda warnings creates a presumption of compulsion."' *Sattler v. Solem,*

434 NW2d 725, 728 (SD 1989) (quoting *Oregon v. Elstad, 470 US 298, 307 (1985)*).

McDonough clearly lacked the "rational intellect and. . . free will" necessary for his admissions to be considered voluntary. *Tuttle, 650 NW2d at 32*.

Attorney Peterson was ineffective for not filing a motion to suppress statements, therefore, the habeas court erred when it did not grant the Writ.

2. Failure to Timely File Appeal.

The first time McDonough had any contact with Peterson after the sentence was imposed he requested that Peterson file an appeal; unfortunately Peterson never saw him or advised him about his right to appeal until it was too late to appeal. *Id. at pg. 80, lines 17-25.*

In the case at hand, Attorney Peterson failed to act as effective counsel as he failed to advise McDonough in any fashion of his right to appeal or how to go about the same until it was too late. Further, the second prong of *Strickland* is satisfied as McDonough would have had a very good chance of being successful challenging the factual basis of the plea.

CONCLUSION

The habeas court erred by finding that the plea in the underlying matter was knowing, voluntarily, and

intelligently entered. The habeas court also erred by finding that McDonough's attorney provided effective assistance of counsel. McDonough respectfully requests this Court reverse the habeas court and grant the Writ, thus vacating the guilty plea entered on November 25, 2002, as well as the Judgment and Sentence imposed on April 14, 2003.

Dated this 9th day of June, 2014.

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Appellant, through counsel, hereby respectfully requests oral argument in the above-entitled matter.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served two (2) copies of **Appellant's Reply Brief** upon the persons herein next designated all on the date below shown first-class postage prepaid to said addressee, to wit:

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