APPELLANT'S BRIEF

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

No. 28153

BRILEY W. PIPER,

Petitioner and Appellant,

v.

DARRIN YOUNG, Warden South Dakota State Penitentiary

Respondent and Appellee.

APPEAL FROM THE CIRCUIT COURT
OF THE
FOURTH JUDICIAL CIRCUIT
LAWRENCE COUNTY, SOUTH DAKOTA

HONORABLE RANDALL L. MACY
CIRCUIT JUDGE

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TABLE OF CONTENTS

		PAGE
TABLE OF AUTHORITIES		i
PRELIMINARY STATEMENT		1
JURISDICTIONAL STATEMENT		1
STATEMENT OF ISSUES		2
STATEMENT OF FACTS		3
ARGUMENT		5
1.	**Whether Piper's guilty pleas are valid when they were not knowingly and intelligently made in violation of his Constitutional rights to a jury trial.**	6
2.	**Whether the State advanced inconsistent arguments during the separate sentencing hearings of Elijah Page and Briley Piper in violation of the Piper's right to due process such that the arguments should have been admitted as admissions against the state in the re-sentencing of Piper.**	21
	A. Argument made by Lawrence County Prosecutor John Fitzgerald in the trial of Elijah Page.	22
	B. Argument made by Lawrence County Prosecutor John Fitzgerald in the Petitioner's sentencing.	23
	C. Inconsistent prosecutorial arguments are admissible as mitigation evidence by being admissions by a party opponent pursuant to SDCL 19-19-801(d)(2).	24
3.	**Whether Piper was afforded ineffective assistance of counsel in violation of the Sixth, Eighth and Fourteenth Amendments of the United States Constitution.**	29
	A. Whether trial counsel was ineffective and constitutionally deficient by calling expert witnesses who interviewed the Petitioner and essentially relayed Petitioner's admissions of multiple aggravating factors to the sentencing jury.	31

PAGE

B. Whether Petitioner was deprived of due process during voir dire pursuant to Witherspoon v. Illinois and when trial counsel provided ineffective assistance of counsel during voir dire. 35

i. It is a violation of due process to not remove jurors who are pro-death penalty and cannot consider mitigation evidence. 38

ii. It was a violation of due process to not have potential juror Lisa Sagdalen excused for cause, and ineffective assistance of counsel to not appeal this issue. 38

iii. It was a violation of due process to not have potential juror Daniel Carlin removed for cause, and trial counsel was ineffective by not objecting when the trial judge impermissibly interjected into voir dire. 41

iv. It was a violation of due process for the trial judge to excuse juror Monteforte who, while leaning pro-life, had articulated a clear decision to be fair and impartial. 43

C. Whether counsel provided ineffective assistance of counsel by failing to investigate all potential witnesses, failing to adequately object to late witnesses, failing to investigate Tom Curtis, and failing to seek a delay or investigate claims regarding Sister Crowley. 45

i. Petitioner was deprived of his rights to a fair trial and trial counsel was ineffective by failing to make an adequate record to appeal the late endorsement of expert witnesses. 48

ii. Trial counsel was ineffective by failing to adequately investigate any consideration given to Tom Curtis. 51

PAGE

iii. It was a due process violation for the State to not provide an updated criminal history for Tom Curtis. 53

iv. Trial counsel was ineffective for failing to investigate the assertions made by the State during the cross-examination of Sister Crowley. 55

v. The state violated Petitioner's due process rights by misleading the jury about whether Sister Crowley violated prison policy. 57

D. Whether errors were made as to the timing and the advisement to the Petitioner regarding the challenges to Petitioner's guilty pleas before and after the remand arising from Piper II. 58

E. Whether appellate counsel afforded sufficient assistance of counsel for the appeal of the trial court's denial of a mistrial motion following the testimony of inmate privileges. 62

CONCLUSION 63

REQUEST FOR ORAL ARGUMENT 64

CERTIFICATE OF COMPLIANCE 65

CERTIFICATE OF SERVICE 66

APPENDIX

TABLE OF AUTHORITIES

	PAGES(S)
Cases:	
Adams v. United States ex rel. McCann, 317 U.S. 269 (1942)	29
Alford v. United States, 282 U.S. 687 (1931)	46, 47
American Family Ins. Group v. Robnik, 2010 S.D. 69	16
Andres v. California, 386 U.S. 738 (1967)	33, 41
Apprendi v. New Jersey, 530 U.S. 466 (2000)	15
Bayer v. Johnson, 349 NW2d 447 (S.D. 1984)	20
Black v. Class, 1997 S.D. 22	18
Blakely v. Washington, 542 U.S. 296 (2004)	15
Boulden v. Holman, 394 U.S. 478 (1969)	43
Boykin v. Alabama, 395 U.S. 238 (1969)	13, 14, 58
Brady v. Maryland, 373 U.S. 83 (1963)	53, 54
Caldwell v. Mississippi, 472 U.S. 320 (1985)	36
California v. Ramos, 463 U.S. 992 (1983)	36
Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990)	47
Commonwealth v. O'Donnell, 559 Pa. 320, 1999)	60
Dakota, Minnesota & Eastern RR Corp. v. Acuity, 2006 S.D. 72	17
Davis v. Alaska, 415 U.S. 308 (1974)	52
Davis v. Georgia, 429 U.S. 122 (1976)	43
Dillon v. Weber (Dillon II), 2007 S.D. 81	30, 47, 50
Eddings v. Oklahoma, 455 U.S. 104	25, 48
Farmer v. S.D. Dep't of Revenue & Regulation, 2010 S.D. 35	17

PAGES(S)

Cases continued:

Fast Horse v. Weber, 2013 S.D. 74	30
Florida v. Nixon, 543 U.S. 175 (2004)	20
Fisher v. Gibson, 282 F.3d 1283 (10th Cir. 2002)	34, 47
Gideon v. Wainwright, 372 U.S. 335 (1963)	29
Giglio v. United States, 405 U.S. 150 (1972)	27, 54
Gregory v. Solem, 449 N.W.2d 827 (S.D. 1989)	18
Haase v. Weber, 2005 S.D. 23	17
Harrington v. Richter, —— U.S. —— (2011)	30
Harris v. State, 295 Md 329 (1983)	60
Harold v. Corwin, 846 F.2d 1148 (8th Cir. 1988)	40
Higgins v. Renico, 470 F.3d 624 (6th Cir. 2006)	53
Holmes v. South Carolina, 547 U.S. 319 (2006)	12
Hooper v. Mullin, 314 F.3d 1162 (10th Cir. 2002)	34
Hoover v. State, 552 So.2d 834 (Miss. 1989)	27
Illinois v. Rodriguez, 497 U.S. 177 (1990)	13
Interest of J.M.J., 2007 S.D. 1	11
Interest of L.S., 2006 S.D. 76	17
In Re: Pooled Advocate Trust, 2012 S.D. 24	17
Johnson v. Bruflat, 45 S.D. 200 (1922)	13
Johnson v. Zerbst, 304 U.S. 458 (1938)	10, 29
Jones v. United States, 526 U.S. 227 (1999).	15
K & E Land & Cattle, Inc. v. Mayer, 330 N.W.2d 529 (S.D. 1983)	54

PAGES(S)

Cases continued:

Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991)	57
Kimmelman v. Morrison, 477 U.S. 365 (1986)	56
Kromer v. Sullivan, 88 S.D. 567 (1975)	13
Kurtz v. Squires, 2008 S.D. 101 (2008)	26
Lindstadt v. Keane, 239 F.3d 191 (2nd Cir. 2001)	53
Lippold v. Meade Cty. Bd. of Comm'rs., 2018 S.D. 7	17
Lockett v. Ohio, 438 U.S. 586	25, 48
Lodermeier v. Class, 1996 S.D. 134	6
Loop v. Class, 1996 S.D. 107	59
Matter of Hynes v. Tomei, 92 N.Y.2d 613 (1998)	12
McBride v. Weber, 2009 S.D. 14	20
McDowell v. Solem, 447 N.W.2d 646 (S.D. 1989)	30, 36
Monette v. Weber, 2009 S.D. 77	13, 14, 15, 16
Moran v. Burbine, 475 U.S. 412, 421 (1986)	2, 10
Morgan v. Illinois, 504 U.S. 719 (1992)	36, 37, 38, 42
Nachtigall v. Erickson, 178 N.W.2d 198 (S.D. 1970)	13, 14
Napue v. Illinois, 360 U.S. 264 (1959)	57
Nicklasson v. Roper, 491 F.3d 830 (8th Cir. 2007)	37, 42
Parkus v. Delo, 33 F.3d 933 (8th Cir. 1994)	25
Pickens v. Lockhart, 714 F.2d 1455 (8th Cir. 1983)	57

PAGES(S)

Cases continued:

Piper v. Weber, 2009 S.D. 66 (Piper II)	2, 3, 5, 7, 8, 9, 10, 11, 14, 18, 19, 21, 58, 59, 60, 61
Powell v. Alabama, 287 U.S. 45 (1932)	29
Quist v. Leapley, 486 N.W.2d 265 (S.D. 1992)	61
Rodriguez v. Weber, 2000 S.D. 128	55
Roper v. Simmons, 543 U.S. 551 (2005)	2, 25
Ross v. Okahoma, 487 U.S. 81 (1988)	36
Skipper v. South Carolina, 476 U.S. 1 (1986)	25, 48
Smith v. Groose, 205 F.3d 1045 (8th Cir. 2000)	27
Smith v. Illinois, 390 U.S. 129 (1968)	46, 47
Smith v. Phillips, 455 U.S. 209 (1982)	36
Smith v. Secretary, Dept. of Corrections, 572 F.3d 1327 (11th Cir. 2009)	53
State ex rel. Warner v. Jameson, 77 S.D. 340 (1958)	11
State v. Aliberti, 401 N.W.2d 729 (S.D. 1987)	10
State v. Apple, 2008 S.D. 120	61
State v. Anderson, 1996 S.D. 46	62
State v. Birdshead I, 2015 S.D. 77	54
State v. Collier, 381 N.W.2d 269 (S.D. 1986)	54, 58
State v. Davi, 504 N.W.2d 844 (S.D. 1993)	30, 35, 58
State v. Dokken, 385 N.W.2d 493 (S.D. 1986)	30
State v. Fool Bull, 2008 S.D. 11	62

PAGES(S)

Cases continued:

State v. Goodwin, 2004 S.D. 75	2, 14, 15, 61
State v. Hoadley, 2002 S.D. 109	21
State v. Lohnes, 344 N.W.2d 686 (S.D. 1984)	59
State v. Martinez, 132 N.M. 32 (2002)	60
State v. McColl, 2011 S.D. 90	59, 61
State v. Nachtigall, 2007 S.D. 109	58
State v. Neitge, 2000 S.D. 37	13
State v. Outka, 844 N.W.2d 598 (S.D. 2014)	61
State v. Packed, 2007 S.D. 75	12
State v. Page, 2006 S.D. 2	21, 22
State v. Perovich, 632 N.W.2d 12 (S.D. 2001)	30, 36
State v. Phair, 2004 S.D. 88	62
State v. Piper, 2006 S.D. 1 (Piper I)	2, 3, 7, 10, 23, 55
State v. Piper, 2014 S.D. 2 (Piper III)	2, 7, 19
State v. Schmidt, 825 N.W.2d 889	60
State v. Sewell, 69 S.D. 494 (1943)	14, 16
State v. Spiry, 1996 S.D. 14	54
State v. Stuck, 434 N.W.2d 43 (S.D. 1988)	26
State v. Wahle, 521 N.W.2d 134 (S.D. 1994)	61
State v. Webb, 251 N.W.2d 687 (1977)	30, 35
State v. Wiegers, 373 N.W.2d 1 (S.D. 1985)	52

PAGES(S)

Cases continued:

Steiner v. Weber, 2011 S.D. 40	6, 30
Steichen v. Weber, 2009 S.D. 4	18
Strickland v. Washington, 466 U.S. 668 (1984)	3, 20, 29, 30, 33, 41
Strickler v. Greene, 527 U.S. 263 (1999)	54
Sullivan v. Louisiana, 508 U.S. 275 (1993)	15
Sund v. Weber, 1998 S.D. 123	47
Thomas v. Lockhart, 738 F.2d 304 (8th Cir. 1984)	57
Thompson v. Calderon, 120 F.3d 1045 (9th Cir. 1997)	25, 53
Thompson v. Weber, 2013 S.D. 87	54
Tibbetts v. State, 336 N.W.2d 658 (S.D. 1983)	19
United States v. Bakshinian, 65 F.Supp2d 1004 (C.D. Cal 1999)	27
United States v. Cronic, 466 U.S. 648 (1984)	33
United States v. Duke, 50 F.3d 571 (8th Cir. 1995)	57
United States v. Gonzalez-Lopez, 548 U.S. 140 (2006)	20
United States v. Higgs, 353 F.3d 281 (4th Cir. 2003)	28
United States v. Jackson, 390 U.S. 570 (1968)	12, 13
United States v. Kattar, 840 F.2d 118 (1st Cir. 1988)	27
United States v. Salerno, 937 F.2d 797 (2nd Cir. 1991)	27
Wainwright v. Witt, 469 U.S. 412 (1985)	36, 37
Walls v. Bowersox, 151 F.3d 827 (8th Cir. 1998)	34
Walter v. Fuks, 2012 S.D. 62	62

PAGES(S)

Cases continued:

Wayrynen v. Class, 1998 S.D. 111	59
Weddell v. Weber, 2000 S.D. 3	59
Williams v. State, 349 N.W.2d 58 (S.D. 1984)	59
Williams v. Taylor, 529 U.S. 362 (2000)	25, 48
Witherspoon v. Illinois, 391 U.S. 510 (1968)	35, 37, 40, 41, 43
White v. Mitchell, 431 F.3d 517 (6th Cir. 2005)	38
Zant v. Stephens, 462 U.S. 862 (1983)	36

Statutes:

SDCL 19-19-607	52
SDCL 19-19-608	53
SDCL 19-19-609	53
SDCL 19-19-801(d)(2)	25, 26, 27
SDCL 23A-7-4(1)	2
SDCL 23A-13-15	51
SDCL 23A-20-6	39
SDCL 23A-27A-1	25, 47
SDCL 23A-27A-1(3)	31
SDCL 23A-27A-1(6)	31, 32
SDCL 23A-27A-1(9)	31, 32, 33
SDCL 23A-27A-2	25
SDCL 23A-27A-3	47

	PAGES(S)
Statutes Continued:	
SDCL 23A-27-11	2, 18, 19, 59
Constitutions:	
South Dakota Constitution, Article VI, Section 2	5, 63
South Dakota Constitution, Article VI, Section 7	5, 52, 63
United States Constitution, Fifth Amendment	5, 12, 13, 63
United States Constitution, Sixth Amendment	2, 5, 10, 12, 13, 15, 29, 30, 33, 36, 37, 52, 63
United States Constitution, Eighth Amendment	2, 5, 25, 29
United States Constitution, Fourteenth Amendment	3, 5, 25, 29, 36, 37, 38, 63
Other Sources:	
American Bar Association, Guideline 10.8; http://ambar.org/2003Guidelines	60
American Bar Association, Guideline 10.15.1; http://ambar.org/2003Guidelines	60
Anne Bowen Poulin, *Convictions Based on Lies: Defining Due Process Protection*, 116 PENN ST. L. REV. 331, 339 (2011)	55

APPELLANT'S BRIEF

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IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

BRILEY W. PIPER,

Applicant and Appellant,

v. No. 28153

DOUGLAS WEBER (DARIN YOUNG),
Warden, South Dakota State Penitentiary,

Respondent and Appellee.

PRELIMINARY STATEMENT

"R" denotes the lower court's Record, as numbered in the Clerk's Index. Transcript references are as follows: "ST" is the sentencing jury trial; "HT" is the habeas corpus hearing before the habeas trial court. Other transcript references will be by name of the hearing ("Plea TR", for example) or date of the hearing. All references will include the page number after the hearing designation.

JURISDICTIONAL STATEMENT

This is an appeal from a habeas petition filed after a resentencing proceeding for first degree murder. The habeas court denied the Appellant's habeas petition alleging multiple constitutional violations on January 20, 2017. A timely notice of appeal was

filed. This Court ordered a limited remand to fully complete the Certificate of Probable Cause, which resulted in a Second Amended Certificate of Probable Cause, filed on December 4, 2017. This Court has jurisdiction pursuant to SDCL 21-34-13.

Piper's convictions and sentences have been the subject of three previous decisions from this Court. The direct appeal is State v. Piper, 2006 S.D. 1, 709 N.W.2d 783 (hereafter, Piper I). The habeas appeal, which was remanded for a re-sentencing, is Piper v. Weber, 2009 S.D. 66, 771 NW2d 352 (hereafter, Piper II). The direct appeal after the re-sentencing is State v. Piper, 2014 S.D. 2, 842 N.W.2d 338 (hereafter, Piper III).

STATEMENT OF ISSUES

1. WHETHER PIPER'S GUILTY PLEAS ARE VALID WHEN THEY WERE NOT KNOWINGLY AND INTELLIGENTLY MADE IN VIOLATION OF HIS CONSTITTUIONAL RIGHTS TO A JURY TRIAL.

The Court denied Piper's petition.

Most relevant cases and statutes: State v. Goodwin, 2004 S.D. 75, 681 N.W.2d 847; Moran v. Burbine, 475 U.S. 412 (1986); SDCL 23A-27-11; SDCL 23A-7-4(1).

2. WHETHER THE STATE ADVANCED INCONSISTENT ARGUMENTS DURING THE SEPARATE SENTENCING HEARINGS OF ELIJAH PAGE AND BRILEY PIPER IN VIOLATION OF THE PIPER'S RIGHT TO DUE PROCESS SUCH THAT THE ARGUMENTS SHOULD HAVE BEEN ADMITTED AS ADMISSIONS AGAINST THE STATE IN THE RE-SENTENCING OF PIPER.

The Court found in the negative.

Most relevant case: State v. Stark, 434 N.W.2d 43 (S.D. 1988); Roper v. Simmons, 543 U.S. 551 (2005).

3. WHETHER PIPER WAS AFFORDED INEFFECTIVE ASSISTANCE

OF PRIOR COUNSEL IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

The Court found in the negative.

Most relevant case: Strickland v. Washington, 466 U.S. 668 (1984)

STATEMENT OF FACTS

This is an appeal from the habeas court's denial of a habeas petition filed after a jury sentenced the appellant to death. Petitioner originally pled guilty to felony murder and four other non-capital offenses in 2001, before the Honorable Warren Johnson. On the murder charge, Judge Johnson sentenced Petitioner to death. The convictions and death sentence were affirmed on direct appeal in Piper I in 2006.

Petitioner filed a habeas application after his original sentencing. It was heard by the Honorable John Bastian, and habeas relief was denied. Petitioner appealed the decision to this Court. In 2009, this Court reversed the death sentence and remanded for further proceedings, Piper II.

New counsel was court-appointed on August 11, 2009, and the case was assigned to the Honorable Jerome A. Eckrich, Circuit Court Judge for the Fourth Judicial Circuit, Lawrence County 40C00000431. Appendix A: Motion to Withdraw Guilty Plea and Order. Petitioner filed an Amended Motion to Withdraw His Guilty Pleas, which was denied. The case proceeded to a jury sentencing trial in July, 2011. The jury returned its verdict and found the existence of three aggravating factors and sentenced Petitioner to death. Appendix B: Judgment and Sentence. Petitioner appealed to this Court, which affirmed the jury sentence of death on January 8, 2014. State v. Piper, 2014 SD 2, 842 NW2d 338 (S.D. 2017).

Petitioner filed a habeas application on March 18, 2014. Petitioner also filed another Amended Motion to Withdraw Guilty Plea before Judge Eckrich in the original criminal file, Lawrence County 40C00000431. This motion was denied on February 25, 2016. Petitioner appealed this denial of the motion to withdraw guilty plea, which was dismissed by this Court on April 25, 2016.

Petitioner's habeas application was assigned to the Honorable Randall L. Macy, Circuit Court Judge for the Fourth Judicial Circuit, Lawrence County. After a hearing on July 21, 2016, Judge Macy denied habeas relief on January 20, 2017. Appendix C: Court's Findings of Fact and Conclusions of Law. Petitioner filed a timely Notice of Appeal and Judge Macy signed the original Certificate of Probable Cause on February 13, 2017.

Substitute counsel was appointed and reviewed the Certificate of Probable Cause. Determining the original Certificate of Probable Cause was inadequate, substitute counsel sought a limited remand to complete the certificate. A limited remand was ordered by this Court on August 23, 2017.

As substitute judge, the Honorable Eric Strawn, Circuit Court Judge for the Fourth Judicial Circuit, Lawrence County, signed a Second Amended Certificate of Probable Cause on December 4, 2017. All original issues were certified and two additional issues were certified at that time. Appendix D – Second Amended Certificate of Probable Cause. Notice was then provided to this Court that the Certificate of Probable Cause was complete.

This appeal brief raises three issues. The first issue is whether Petitioner's guilty plea was valid when it did not constitute a valid waiver of his right to a jury trial and was

taken in violation of due process. No testimony was taken by the trial court on this matter. The trial court took judicial notice of this Court's decision in Piper II, as well as of the underlying habeas corpus file and the plea transcript from 2001 before Judge Johnson in the criminal file. Such facts as are relevant are fully set out in the Argument section of this brief.

The second appeal issue asks whether the Petitioner's constitutional rights were violated when the State advanced inconsistent arguments in the separate sentencing hearings of the multiple individuals charged with the same murder.

The third appeal issue is whether trial counsel was ineffective and Petitioner was deprived of due process. The reasons include calling witnesses who were catastrophic to the Petitioner's case, errors in jury selection, errors in advisements and for the failure to investigate multiple witnesses or to seek a delay because counsel was unprepared. These arguments center around re-sentencing counsel's ineffectiveness and whether Petitioner's constitutional rights provided under the Sixth and Eighth Amendment were violated. While the original certificate of probable cause framed these issues as issues relating to ineffective assistance of counsel, these claims deprived the Petitioner of constitutional rights which require the sentence be vacated and a new trial ordered.

ARGUMENT

The Fifth and Fourteenth Amendments to the United States Constitution and Article VI, Section 2 of the South Dakota Constitution guarantee that no person may be deprived of liberty without due process of law. The Sixth and Fourteenth Amendments to the United States Constitution and Article VI, Section 7 of the South Dakota Constitution guarantee the accused a trial by an impartial jury.

Habeas corpus can only be used to review (1) whether the court had jurisdiction of the crime and the person of the defendant; (2) whether the sentence was authorized by law; and (3) in certain cases whether an incarcerated defendant has been deprived of basic constitutional rights. Steiner v. Weber, 2011 S.D. 40 ¶4, 815 N.W.2d 549, 551; Lodermeier v. Class, 1996 S.D. 134, ¶3, 555 N.W.2d 618, 622.

1. WHETHER PIPER'S GUILTY PLEAS ARE VALID WHEN THEY WERE NOT KNOWINGLY AND INTELLIGENTLY MADE IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS TO A JURY TRIAL.

A. Procedural history and habeas trial court's ruling.

Before Piper's original change of plea hearing, his attorneys had advised him that his choice of forums for the guilt phase (jury or judge) was also binding as to the penalty phase. He was told that if he pleaded guilty, he could not have a jury decide the punishment. Conversely, if he did not plead guilty but instead had a jury trial as to guilt, he had to be sentenced by a jury if convicted. At the hearing, Judge Johnson did not clearly dispel that misconception.[1] After the court sentenced Piper to death, Piper

[1] The conduct of the plea-entry hearing, in fact, cemented Piper's previous understanding. Appendix E – Plea Hearing**.** Both attorneys had categorically told Piper that the law required that the same guilt forum also be the penalty forum. See HC TR: 1: 28-31, 50-51 [Rensch]; HC TR: 2:46 [Duffy]. Both attorneys told Judge Johnson that as well, at the beginning of the hearing. Plea TR: 3 [Rensch] and 6-7 [Duffy]. The court and prosecutor were unsure, and took a break to consider it. After the break, nothing was said by either to clearly dispel Piper's certainty. As to this issue, the judicial pre-plea advisement ended with explicit confirmation of this legal point. Judge Johnson told Piper "[i]f you plead guilty, all that's left for the Court to do is to pronounce your sentence." (TR: 18). At TR: 22, the court told Piper: "The only consequence of your pleading guilty under the terms that are being proposed is [dismissal of certain charges]. The other consequence would be that you would be waiving your right to have the jury do the sentencing." Finally, immediately before taking the pleas, the court told Piper that if he pleaded guilty, the court would establish a factual basis and "accept those pleas. I will then schedule a sentencing hearing ... [where] I'm going to make a decision as to Count

appealed, claiming in part that our death penalty statutes were unconstitutional because they deprived a pleading defendant of the right to jury sentencing. This Court disagreed in Piper I, and in so doing, told Piper for the first time that the advice he had been given as to his options was mistaken.

Piper I affirmed the sentence. Piper filed his first habeas proceeding, heard by the Honorable John W. Bastian. In that proceeding, Piper did not challenge his guilty plea, but claimed only that his purported waiver of jury sentencing was invalid. After Judge Bastian denied relief, Piper appealed (Piper II). This Court reversed on the ground that the plea-taking court's advisement as to jury unanimity at the sentencing phase was defective. In so doing, this Court, for the second time, told Piper that the advice he had been given, necessary for him to intelligently understand his options, was erroneous. This Court remanded for purposes of a new sentencing hearing.

In the remanded criminal proceedings, Piper moved to withdraw his guilty plea, in part because the misadvice he had received rendered his plea constitutionally invalid. The trial court denied the motion in part, and declined to consider it in part. A jury sentencing was held, and a verdict of death was returned. Piper appealed, claiming that his motion to withdraw his plea should have been granted. This Court disagreed (Piper III), ruling that its remand language in Piper II restricted the lower court's jurisdiction and prevented that court from entertaining Piper's plea-withdrawal motion.

Piper then filed this instant habeas case, and again raised his claim that his guilty plea was constitutionally invalid. The habeas trial court disagreed on the merits of this

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IA, whether it will be life or death ..." (Plea TR: at 24-25). Piper was then called upon to enter his guilty pleas (Id. at 26), which is the only decision he was asked to make. Except for scheduling, nothing further was discussed about the matter.

habeas claim. Court's Findings of Fact and Conclusions of Law 9-28, 32-33, Appendix C. The court also ruled that res judicata barred Piper's claim, because it could have been presented in his first habeas proceeding. Court's Findings of Fact and Conclusions of Law 29-31, Appendix C. Because the habeas trial court is wrong on both counts, this Court must grant habeas relief.

B. On the merits, Piper's pleas are invalid.

This plea-entry colloquy is a confluence of two separate, but connected, misadvisements. The first concerned jury unanimity at the penalty trial, which was the precise issue presented to this Court and decided in Piper II (at ¶¶11-12 [the judicial advisement] and ¶19 [holding]). The second is Piper's certainty, based on what he was told, that the forum for the guilt and the sentencing determinations was legally required to be identical. As this Court said in Piper II, "Defense counsel for Piper offered their interpretation of the statutes [at the plea hearing]. They believed the statutes required the judge rather than a jury to decide if death should be imposed [if a guilty plea was entered]." 2009 S.D. 66 at ¶3. "Piper's attorneys advised him that the statute did not allow for a jury trial on the penalty phase after a guilty plea to first degree murder. . . . Consequently, when Piper entered his guilty plea, he was doing so under counsels' advice that by entering his guilty plea, he was not entitled to a jury on the sentencing phase. The judge's explanation did not clearly dispel that misunderstanding." Id. at ¶17.

Therefore, Piper knew, from the information he was given by his attorneys and by the plea-taking court, that if he exercised his right to a jury trial as to guilt, it was required, by mandatory operation of law, that punishment would be decided by a jury as well, and that any verdict imposing a life sentence would have to be unanimous. In

essence, what this misadvisement told Piper is that to get a life sentence, he'd have to convince one person (the court) or twelve people (a jury). Piper was advised that convincing a jury would be twelve times harder to receive a life sentence, but only if he exercised his right to a jury trial on the guilt phase. Instead, the fact is that to get a life sentence, one person needed to be convinced, either the judge or one of the twelve jurors. His chances of receiving a life sentence were, in truth, twelve times greater with a jury sentencing. But Piper was told just the opposite and was told that the only way to avoid that result was to give up his right to a jury trial on the guilt phase and enter a guilty plea instead.

This Court, in Piper II, held that because of the unanimity misadvice, "Piper's waiver of a jury trial on the death penalty cannot be considered knowing or voluntary." Id. at ¶19. This Court stated: "The fact that one juror has the potential to save a defendant's life cannot be underplayed. *The defendant's plea* cannot be considered knowing and voluntary without a clear explanation and understanding of this concept." Id. (Emphasis added). "[W]e determine that Piper's waiver of his right to jury trial was unconstitutional." Id. at ¶20.

Piper II purported to rule only on the waiver of jury sentencing, which was the only issue before the Court. In reality, Piper's change of plea hearing did not contain any separate waiver of jury sentencing. Rather, this waiver was considered as a consequence of the one formal decision he was called upon to make, which was his plea. This Court's Piper II decision squarely holds that the unanimity misadvice is constitutionally fatal to the waiver. And since there was no separate waiver, but only a single, unitary plea, it necessarily is true that Piper's only formal decision, which followed the fatal misadvice,

the guilty plea itself, "cannot be considered knowing or voluntary" and "was unconstitutional". Id. at ¶¶19, 20. An examination of the law requires this conclusion.

Piper was not advised of his right to a free and independent jury trial on guilt. Instead, he was advised of a jury trial with a price tag attached. The version of a jury trial which he was offered carried mandatory jury sentencing with (he was told) a twelve-times lesser chance of obtaining a life sentence. In truth, the jury trial which the Sixth Amendment and this Court's Piper I and Piper II decisions guarantee, is a trial completely independent of the forum for the penalty (Piper I), and where a penalty jury carries a twelve-times *greater* chance of obtaining a life sentence (Piper II). The jury-trial option made available to Piper, and waived by his plea, was not the jury trial guaranteed by the Sixth Amendment.

Therefore, Piper's plea did not constitute a voluntary, knowing and intelligent waiver of the right that the Constitution guarantees, one which was never explained to him. Waiver is defined as an intentional relinquishment of a "known right or privilege". Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). For a jury trial waiver to be valid, it must be entered "voluntarily, knowingly, intelligently, and with full knowledge of the relevant circumstances and likely consequences." State v. Aliberti, 401 N.W.2d 729, 731 (S.D. 1987). As explained in Moran v. Burbine, 475 U.S. 412, 421, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986) (citations omitted):

> "The [waiver] inquiry has two distinct dimensions. . . . First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."

Piper's plea fails both parts of the Burbine test. First, Piper was never given "a

full awareness of both the nature of the right being abandoned" and its consequences. He was advised only of a version of the right which has now twice been held invalid. Piper was not told of the version which is constitutionally guaranteed. He was not told that a jury trial as to guilt is independent of the penalty forum. "For those unaware of the privilege, the warning is needed simply to make them aware of it – the threshold requirement for an intelligent decision as to its exercise." Interest of J.M.J., 2007 S.D. 1 ¶12, 726 N.W.2d 621 (Miranda privilege against self-incrimination); See also State ex rel. Warner v. Jameson, 77 S.D. 340, 91 N.W.2d 743, 745 (1958), where the defendant was never asked if he wanted counsel, and was never informed of his right to appointed counsel. The Court concluded the obvious: "A voluntary and intelligent waiver of counsel can only be made by one who knows, or has been informed, of his rights in this regard." Since Piper was misadvised about the nature of the right being abandoned, and was not told of the nature of the right which really existed instead, his plea cannot be considered as a knowing and intelligent waiver of the right which really exists.

Second, Piper's plea was not a "free and deliberate choice rather than intimidation, coercion, or deception." (Burbine, supra) The misadvice as to penalty-jury unanimity told him that his chances of obtaining a life sentence were greater with a judge than with a jury, when just the opposite is true. Piper was also told that the only way he could obtain a judge sentencing was to plead guilty. He was told that if he exercised his right to a jury trial and was found guilty, a jury sentencing was mandatory. See Piper II at ¶17. The unanimity misadvice, therefore, taints the guilty plea itself, because the confluence of those two misadvisements has an unconstitutional, impermissibly coercive effect, rendering the plea involuntary.

In United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968), the Court was faced with a federal kidnapping statute which provided for the possibility of a death sentence, but only if the defendant exercised his right to a jury trial. The Court invalidated that portion of the statute. "The inevitable effect of [the law] is, of course, to discourage assertion of the Fifth Amendment right to plead not guilty and to deter exercise of the Sixth Amendment right to demand a jury trial." Id. at 581. "Whatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights. . . . The question is not whether the chilling effect is 'incidental' rather than intentional; the question is whether that effect is unnecessary and therefore excessive." Id. at 582; See Matter of Hynes v. Tomei, 92 N.Y.2d 613, 706 N.E.2d 1201, 1207 (1998) (collecting authorities).

Those cases dealt with statutory schemes, but the identical evil is present here. The plea colloquy's mis-advisements "needlessly chill[ed] the exercise of basic constitutional rights" because they wrongly informed Piper that his chances of a life sentence were worse with a jury, and that the only way to avoid a jury sentencing was by pleading guilty. This transformed the required "free and deliberate choice" into one colored by "intimidation, coercion or deception." (Burbine, supra).

Piper was offered a choice, but with a judicial thumb on the scale. A State cannot restrict a defendant's exercise of a fundamental constitutional right without good reason. The Supreme Court has long adhered to this principle, applying it to a wide variety of State restrictions on a wide variety of constitutional trial rights. See Holmes v. South Carolina, 547 U.S. 319, 321, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) (collecting precedent). This Court agrees. See State v. Packed, 2007 S.D. 75 ¶23, 736 N.W.2d 851.

The misadvice given to Piper "discourage[d] assertion of the Fifth Amendment right to plead not guilty and ... deter[red] exercise of the Sixth Amendment right to demand a jury trial." United States v. Jackson, 390 U.S. at 581. Piper's decision to plead guilty cannot be considered a voluntary waiver of his actual jury trial right.

In Boykin v. Alabama, 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), the Court held that if a guilty plea is not a "voluntary and knowing" waiver of the right to jury trial, "it has been obtained in violation of due process and is therefore void." See Monette v. Weber, 2009 S.D. 77, ¶13, 771 N.W.2d 920 (quoting Nachtigall v. Erickson, 85 S.D. 122, 126, 178 N.W.2d 198 (1970)). "We have been unyielding in our insistence that a defendant's waiver of his trial rights *cannot be given effect* unless it is 'knowing' and 'intelligent'." Illinois v. Rodriguez, 497 U.S. 177, 183, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990) (emphasis added).

Being "void" means that it is "without any force or effect whatsoever." State v. Neitge, 2000 S.D. 37 ¶13, 607 N.W.2d 258 (judicial sentencing action). It is "ineffectual for any purpose. No rights are in any way affected by it, and from it no rights can be derived, and all proceedings founded thereon are invalid." Johnson v. Bruflat, 45 S.D. 200, 186 N.W. 877, 878 (1922) (prior Judgment). Because that is true, a court has no discretion whatsoever "to decide whether a void judgment should be vacated"; rather, a void judgment "must be set aside. It has no force and effect." Kromer v. Sullivan, 88 S.D. 567, 225 N.W.2d 591, 592 (1975).

"What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequences."

Boykin v. Alabama, 395 U.S. 238, 244, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

> "When one accused of a capital offense comes before the bar of a court, unaided by counsel, to tender a plea of guilty, nothing less than the utmost of caution will satisfy the requirements of justice. In such circumstances the law does not contemplate a ceremony empty of substance. Until the court is solemnly persuaded by a painstaking explanation of the rights afforded the accused by the law, and of the extreme consequences his plea may entail, that the accused is acting with volition and understanding, a plea of guilty should not be entered."

State v. Sewell, 69 S.D. 494, 12 N.W.2d 198, 199 (1943).[2] "In a death penalty plea, more so than in other pleas, the trial court has the duty to ensure 'that the defendant truly understands the charges, the penalties, and the consequences of a guilty plea.' " Piper II, 2009 S.D. 66 ¶19 (citation omitted).

The information furnished to Piper by his attorneys and by the plea-taking judge's advisement was considered indispensable to ensure that a guilty plea was constitutionally valid. That information was wrong in two respects, as this Court has held in its earlier Piper decisions. Now that these two mis-advisements have been corrected, the correct advisements are even more indispensable for a capital defendant to understand, *before* he decides whether to exercise his right to a jury trial or, instead, to plead guilty.

> "The importance of canvassing the defendant when he enters a guilty plea is vital. For it is at this juncture that the defendant waives his rights and needs to understand the consequences of his plea."

State v. Goodwin, 2004 S.D. 75 ¶10, 681 N.W.2d 847; See Monette v. Weber, 2009 S.D. 77 at ¶13 (the lower court "failed to make critical inquiries and determinations when the inquiries were most significant -- when Monette changed his not guilty plea to a plea of no contest."). It is baffling to conclude that, even though the previous mis-advisements

[2] The "counseled/uncounseled" distinction was abandoned in Nachtigall v. Erickson, 85 S.D. 122, 178 N.W.2d 198 (1970).

rendered Piper's previous decision unconstitutional, the correction does not allow Piper to now make a constitutionally informed decision.

The reality of this case is that Piper was deprived of the jury trial which he is guaranteed by the Sixth Amendment, because he was not told that it existed (a jury trial on guilt, which did not carry mandatory jury sentencing) and because the tainted jury sentencing he was advised of could only be avoided by pleading guilty. The right to a jury trial is a "constitutional protection[ ] of surpassing importance". Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2358, 147 L.Ed.2d 435 (2000). This right was insisted upon by the Framers not just for the protection of the accused, but for an independent and equally fundamental purpose: to restrict the power of the judiciary, by reserving that power to the people. See Jones v. United States, 526 U.S. 227, 244-48, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999).

> "Our commitment to Apprendi in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary."

Blakely v. Washington, 542 U.S. 296, 305-06, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). Finally, "to hypothesize a guilty verdict that was never in fact rendered -- no matter how inescapable the findings to support that verdict might be -- would violate the jury-trial guarantee." Sullivan v. Louisiana, 508 U.S. 275, 279, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993).

> "The importance of canvassing the defendant when he enters a guilty plea is vital. For it is at this juncture that the defendant waives his rights and needs to understand the consequences of his plea."

Goodwin, 2004 S.D. 75 at ¶10. See Monette, 2009 S.D. 77 at ¶13 (the lower court "failed

to make critical inquiries and determinations when the inquiries were most significant -- when Monette changed his not guilty plea to a plea of no contest.").

To uphold this guilty plea is to trivialize and dilute this Constitutional right of "surpassing importance". A capital defendant, with death as a penalty, is entitled to accurate advice before making the crucial decision to plead guilty. Courts are to exercise "the utmost of caution", giving a "painstaking explanation" of rights and consequences. (Sewell, supra). Here, the advice given to Piper was wrong in two important respects, and it took two appeals to this Court before Piper was finally given accurate information. That information was necessary before he entered his plea, rather than two appeals later. It defies logic to hold, as the habeas trial court did, that Constitutional standards are met by this plea, and reversal must result.

C. Res Judicata does not bar Piper's claim.

The res judicata doctrine covers two situations. First, it prohibits re-litigation of an issue which has been raised and decided in an earlier proceeding. As the habeas trial court recognized (Court's Findings of Fact and Conclusion of Law, #30, Appendix C), that doctrine is inapplicable here, since Piper's claim had not previously been raised in a court jurisdictionally able to decide it. Second, and at issue here (See Court's Findings of Fact and Conclusion of Law, #31, Appendix C), res judicata will sometimes restrict litigation of an issue which should have been raised in the earlier proceeding, but wasn't. See American Family Ins. Group v. Robnik, 2010 S.D. 69 ¶15, 787 N.W.2d 768.

Res judicata is not an inexorable command. "[B]ecause the [res judicata] doctrine bars any subsequent litigation, it should not be used to defeat the ends of justice. Instead, courts 'must give careful consideration to the case at hand before erecting the doctrine's

preclusive bar.' " Interest of L.S., 2006 S.D. 76 ¶22, 721 N.W.2d 83 (Konenkamp, J., lead opinion) (citation omitted). "The strict application of the doctrine of res judicata may be relaxed … where fundamental fairness so requires." Haase v. Weber, 2005 S.D. 23 ¶5, 693 N.W.2d 668. This Court will construe 'the doctrine liberally, unrestricted by technicalities' and because the doctrine bars any subsequent litigation, it should not be used to defeat the ends of justice. Lippold v. Meade Cty. Bd. of Comm'rs., 2018 S.D. 7 ¶28, ___ N.W.2d ___ (quoting Farmer v. S.D. Dep't of Revenue & Regulation, 2010 S.D. 35 ¶7, 781 N.W.2d 655).

Overriding importance is given to one factor: "our interest in reaching the correct legal conclusion." In Re: Pooled Advocate Trust, 2012 S.D. 24 ¶31, 813 N.W.2d 130.[3] No other factors in that case "outweigh[ed] the interests of justice" in reaching that correct legal conclusion. Id. at ¶28.

Even assuming, for sake of argument, that Piper could have challenged his guilty plea in the first habeas proceeding, res judicata does not prohibit his attempt to enforce the Constitution in the current proceeding. It is simply not true that the res judicata doctrine absolutely requires Piper to have made this legal challenge at the very first available opportunity, upon pains of losing it altogether.

Just such a situation was presented in Dakota, Minnesota & Eastern RR Corp. v. Acuity, 2006 S.D. 72, 720 N.W.2d 655. The dispute centered on whether an insurance policy required the insurer to provide coverage for a claim. This was the subject of two separate proceedings, and the appeal issue was whether res judicata prohibited the

[3] That case dealt with the "law of the case" doctrine, but this Court noted that "[r]es judicata and the 'law of the case' doctrine are supported by nearly identical policy considerations." In Re: Pooled Advocate Trust, 2012 S.D. 24 ¶31 n. 6, 813 N.W.2d 130.

insured's claim since the insured could have raised its claim in the first round of litigation. This Court held that res judicata was inapplicable "even though all issues could have been tendered in [the first] cause of action." Id. at ¶24. Here, as there, Piper's later claim "is upon a different cause or demand." Id. at ¶23. While the underlying facts are the same, just as the underlying facts (the interpretation of an insurance contract) were the same in Dakota, Minnesota & Eastern RR Corp., the "cause or demand" is different.

Even if Piper could have challenged the plea in the earlier proceeding, he did not *need to* do so. Rather, he could recognize the legal and practical reasons which dictate that any such claim, should he choose to make it, be deferred to criminal court. As the habeas trial court recognized, Piper consulted with earlier habeas counsel and was told that if he prevailed in his first habeas, he could move to withdraw his plea upon return to criminal court.[4] Appendix C, Findings #22-24. The initial habeas proceeding was not the preferred remedy for Piper's plea challenge, both as a matter of law and as a matter of practical reality.

This Court has long held that the habeas remedy is not a substitute for appeal. Piper II at ¶7, quoting Steichen v. Weber, 2009 S.D. 4 ¶4, 760 N.W.2d 381. This Court has repeatedly expressed a preference that issues be raised and decided in the "main event," which is the criminal proceeding, rather than deferred to habeas review. See Black v. Class, 1997 S.D. 22 ¶29, 560 N.W.2d 544, quoting Gregory v. Solem, 449

[4] But for the particulars of the later remand language in Piper II, this advice was correct. SDCL 23A-27-11 (authorizing a motion to withdraw a guilty plea) is unrestricted as to time and as to availability. Piper cannot be faulted for failing to anticipate that, some two years after his receipt of this legal advice, this Court would include this remand language in Piper II.

N.W.2d 827, 833 (S.D. 1989). If the criminal proceedings are available to raise an issue, the law according to this Court is that the habeas court should not be used instead.

Habeas corpus is an extraordinary writ, and like other such writs (mandamus, prohibition, and the like) it is not to be used where another adequate remedy exists in the normal course of the law. This Court specifically so held in Tibbetts v. State, 336 N.W.2d 658 (S.D. 1983). There, an inmate filed a habeas challenge to a prison disciplinary action which resulted in the loss of his good time credits, in violation of the Constitutional ex post facto prohibition. The issue was a constitutional one, and the issue involved the length of his confinement, so habeas jurisdiction typically would have existed. However, the Court ruled that because Petitioner would not have been entitled to his immediate release, and because of other available remedies to appeal the prison's action, the circuit court was without jurisdiction to issue a writ of habeas corpus under SDCL Ch. 21-27 and declined to consider the ex post facto issue. Id. at 662.

Here, during the first habeas proceeding, another adequate remedy existed in the normal course of the underlying criminal proceeding: a motion to withdraw the plea pursuant to SDCL 23A-27-11. That criminal-court remedy was unrestricted as to time or availability. Such a motion was, at the time of the first habeas trial court proceedings, fully available to Piper, upon victory in the habeas and a return of the case to criminal court. While this Court's remand language in Piper II has now been held (in Piper III) to eliminate that avenue of relief, Piper could not have known that when choosing what issues to present in his first habeas, and which ones to reserve until a return to criminal court. He was entitled to believe, and rely upon, this Court (disapproving habeas as the preferred remedy when others exist in the law) and SDCL 23A-27-11 (which is

unrestricted as to time and availability).

Applying any issue preclusion doctrine today would be to "interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The importance of independent counsel, and how it might affect Piper's choice of pleading versus going to trial, has been recognized by the Supreme Court:

> "Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial."

United States v. Gonzalez-Lopez, 548 U.S. 140, 150, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006). See also Florida v. Nixon, 543 U.S. 175, 187, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004) (though the decision "whether to plead guilty" is defendant's alone, "an attorney must both consult the defendant and obtain consent to the recommended course of action.")

Strict application of the res judicata doctrine bends instead to reaching the correct legal conclusion and promoting the ends of justice. This appeal asks whether the Constitution is to be enforced in a death penalty prosecution. "Courts, above all, must jealously protect the integrity of the [C]onstitution." Bayer v. Johnson, 349 N.W.2d 447, 450 (S.D. 1984). A court's "highest duty is to the Constitution". McBride v. Weber, 2009 S.D. 14 ¶20, 763 NW2d 527 (Konenkamp, J., concurring). This Court will devise its own remedies, even if not provided for by statute, to provide redress for constitutional violations. McBride, 2009 S.D. 14 ¶17 (Konenkamp, J., concurring).

To affirm the trial court, this Court would have to decide that Piper should be forever shackled to the choice that he made in 2001. The 2001 choice was based on erroneous legal advice from his trial attorneys and from the plea-taking judge. This Court has already held to have rendered his earlier choice unconstitutional. And this Court would be doing so to uphold a capital conviction and sentence, where a much higher standard of review is applied. Piper II at ¶6. In light of this, application of the res judicata doctrine to prohibit Piper's claim is erroneous. The trial court's ruling must be reversed.

2. WHETHER THE STATE ADVANCED INCONSISTENT ARGUMENTS DURING THE SEPARATE SENTENCING HEARINGS OF ELIJAH PAGE AND BRILEY PIPER IN VIOLATION OF THE PIPER'S RIGHT TO DUE PROCESS SUCH THAT THE ARGUMENTS SHOULD HAVE BEEN ADMITTED AS ADMISSIONS AGAINST THE STATE IN THE RE-SENTENCING OF PIPER.

Briley Piper, Elijah Page and Darrell Hoadley murdered Chester Allan Poage in Lawrence County in 2001. The same Lawrence County prosecutor prosecuted all three individuals. Elijah Page's sentencing was upheld, and he was executed. State v. Page, 2006 S.D. 2, 709 NW2d 739. Darrell Hoadley received life in prison. State v. Hoadley, 2002 S.D. 109, 651 NW2d 249.

During the sentencing of Elijah Page and the Piper's re-sentencing in 2011, the same Lawrence County prosecutor argued that the person who committed the first act should be given the death penalty. In Page's trial, the prosecutor stated that person was Page. In Piper's trial, the prosecutor stated that person was Piper. As these theories are inconsistent, the statements in Page's trial should have been admitted as an admission by the party-opponent in Piper's trial as all mitigation evidence shall be shown to the jury.

A. Argument made by Lawrence County Prosecutor John Fitzgerald in the trial of Elijah Page.

During the sentencing phase of Elijah Page, the Government (through Lawrence County prosecutor John Fitzgerald) argued that Elijah Page should receive the death penalty because:

> The fact is, the Defendant [Elijah Page] was a man of action in this murder. He's the one that stole the gun that was used in the first acts of aggression. That's when it all started is when he pointed the gun at Chester Allan Poage to facilitate this kidnapping. Nothing would have happened had he not pointed the gun at Chester Allan Poage's head.

Appendix F: Closing Argument in Elijah Page (40C00000430A0). Pg. 946: 5-12**.**

Prosecutor Fitzgerald continued, specifically comparing the actions of Elijah Page and the Petitioner:

> He's [Elijah Page] a man of action. When it was time to kill somebody, he didn't go sit up in the Blazer. He took action. He kicked him, he stabbed him, he stuck him in a freezing creek, he stoned the victim. These were all deliberate choices and all deliberate actions.
>
> *The Defendant is the one that started the assault with pulling the gun.* The Defendant deliberately kicked Chester Allan Poage with his boots until his own foot got sore. He decided to do that. He chose to do that. He's not a follower, he's a doer. He's an instigator, he's an actor. Piper is the mouth, the Defendant's the action.

Appendix F: Page ST: 947-948. (Emphasis added). [5]

This Court gave weight to the significance of who committed the first act relevant in determining whether Page committed torture in this killing. Page, at ¶39 (taking Poage's head in his arms, Page was the first to stab the victim). This Court in Piper I also found the determination of who was the first physical aggressor an important

[5] The testimony of Darrell Hoadley in Piper's sentencing trial corroborates the fact that Elijah Page committed the first act of aggression when he pulled out the gun, put it to the victim's head, and said: "Get the fuck on the floor, bitch." SH: 744-745.

consideration. 2006 S.D. at ¶31,¶39, ¶41. The significance of these facts is illustrated by the prosecutor arguing them during the trial, with the facts magnified when this Court found them significant in the Page decision.

B. Argument made by Lawrence County Prosecutor John Fitzgerald in the Petitioner's sentencing.

In Pipers re-sentencing, Lawrence County Prosecutor John Fitzgerald questioned defense psychiatrist Dr. Ertz about who committed the first act during the murder:

> PROSECUTOR: Well, wouldn't it be kind of significant if *the first person to cause any physical violence was Briley Piper*?
>
> DR. ERTZ: Well, I thought it was more significant who initiated the fact that the plan changed from robbing Allan into doing something else.
>
> PROSECUTOR: Well, it was Briley Piper's plan to rob him in the first place, wasn't it?
>
> DR. ERTZ: Yes.

ST: 1565: 8-15. (Emphasis added).

When questioning defense psychiatrist Dr. Wortzel, Prosecutor Fitzgerald further advanced this position:

> PROSECUTOR: And did your client tell you who was the person who caused the *first physical violence in this case*?
>
> DR. WORTZEL: The first ---
>
> PROSECUTOR: Physical violence, the first assault.
>
> DR. WORTZEL: My understanding – yes.
>
> PROSECUTOR: Who was that?
>
> DR. WORTZEL: My recollection of what he told me was that Page had produced a weapon when they got into the house and that was the initiation of physical force, violence.

ST: 1637: 9-17. (Emphasis added).

Unsatisfied with the witness essentially copying what Prosecutor Fitzgerald argued during the closing argument in Page, Fitzgerald continued:

> PROSECUTOR: Okay. Who had the first physical contact?
>
> DR. WORTZEL: I think – I think he described Page at some point, you know, shoving him or knocking him or something like that.
>
> PROSECUTOR: Okay. *Would it be significant if your client was the first one to render any physical violence in this case*?
>
> DR. WORTZEL: Potentially.
>
> PROSECUTOR: Okay.

ST: 1637: 18-24. (Emphasis added).

In summation, Prosecutor Fitzgerald reminded the jury again in closing argument that he believed the Petitioner was the first to commit any acts that resulted in the death of the victim.

> This murder was the combination of all three of these individuals acting in concert, but I believe the evidence has shown that it was the defendant's idea, at least according to his friend Hadley, to commit robbery and to murder. *And he was the one that did the first act of actual aggression to knock the man unconscious*.

ST: 1807. (Emphasis added).

Based on the inconsistent statements the defense moved for the Admission of the State's Attorney's Prior Trial Statements as an Admission of Party, and as relevant for mitigation purposes. This Motion was denied by the Court. ST: 1721-1730; Appendix G: Order Re: Motions Filed May 20, 2011.

C. Inconsistent prosecutorial arguments are admissible as mitigation evidence by being admissions by a party-opponent pursuant to SDCL 19-19-801(d)(2).

South Dakota statutes mandate mitigation evidence be presented in a death penalty case. SDCL 23A-27A-2 requires that "(4) All evidence concerning any mitigating circumstances" be considered. SDCL 23A-27A-1 provides "the judge shall consider . . . any mitigating circumstances."

United States Supreme Court decisions indicate failure to allow a capital defendant to present mitigation evidence may constitute reversible error. See, e.g., Roper v. Simmons, 543 U.S. 551, 568, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (the Constitution requires that a capital defendant be given "wide latitude" to present mitigating evidence); Williams v. Taylor, 529 U.S. 362, 393, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (noting a capital defendant's "undisputed" and "constitutionally protected right . . . to provide the jury with . . . mitigating evidence"); Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) (improper exclusion of mitigation evidence at capital sentencing hearing was reversible error); Eddings v. Oklahoma, 455 U.S. 104, 110-116 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) (The death sentence must be vacated as a sentence because it was imposed without the type of individualized consideration of mitigating factors . . . required by the Eighth and Fourteenth Amendments in capital cases); Lockett v. Ohio, 438 U.S. 586, 604-05, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (sentencer must be allowed to consider any mitigating evidence).

Confidence in the outcome of the proceeding is undermined by the jury's inability to consider evidence which would have been offered as mitigating evidence at sentencing. Parkus v. Delo, 33 F.3d 933, 940 (8th Cir. 1994); See Thompson v. Calderon, 120 F.3d 1047, 1059 (9th Cir. 1997) (it is well established that when no new significant

evidence comes to light a prosecutor cannot, in order to convict two defendants at separate trials, offer inconsistent theories and facts regarding the same crime);

The initial question is whether the statements made by the prosecutor are considered mitigation evidence. Lawrence County Prosecutor John Fitzgerald constantly portrayed the Petitioner as the "leader" of this group. ST: 1806. Any evidence to the contrary, such as that someone else committed the first act of aggression, is relevant to dispute who the leader of the group was. As a result, the statement made by the prosecutor is proper mitigation evidence. Admitting the prosecutor's statements relevant to relative culpability of Page and Piper, allowing the factfinder a basis to conclude that, if Page was the one who started this, then Piper was less culpable and deserving of a life sentence instead of the death penalty.

While the statements made during Page's closing argument in his sentencing phase are not evidence in Page's trial, the statements are evidence in Piper's trial as admissions by a party-opponent pursuant to SDCL 19-19-801(d)(2). Either the statement must be made by the party in an individual or representative capacity; is one that the party manifested that it adopted or believed to be true; was made by a person whom the party authorized to make a statement on the subject; was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or was made by the party's coconspirator during and in furtherance of the conspiracy. Id.; State v. Stuck, 434 N.W.2d 43, 54 (S.D. 1988); Kurtz v. Squires, 2008 S.D. 101, ¶18, 757 NW2d 407 (the party offering a party-opponent pleading as a statement against interest must be able to show that the party knowingly sanctioned or ratified the admission).

Courts have admitted the Government's inconsistent prior arguments when multiple people have been tried for the same offense. See United States v. Salerno, 937 F.2d 797, 811-812 (2nd Cir. 1991) (opining that government's opening and closing arguments in a prior trial should have been admitted as admissions of party-opponent in a subsequent trial to show inconsistent positions of the government); Hoover v. State, 552 So.2d 834, 838 (Miss. 1989) (prosecutor's inconsistent argument regarding who was the shooter should have been admitted at co-defendant's later trial but no prejudice was found); United States v. Kattar, 840 F.2d 118, 130 (1st Cir. 1988) (concluding the Government, as represented by prosecutor, is considered "party-opponent" of defendant in a criminal case).

As a result, John Fitzgerald's statements in the 2001 trial of Elijah Page must be admitted as admissions by a party-opponent in Piper's trial pursuant to SDCL 19-19-801(d)(2). First, John Fitzgerald was representing Lawrence County and authorized to make these statements. Further, Fitzgerald adopted and believed the arguments he made in Page to be true and this was in the scope of his relationship as the county prosecutor. As a result, the statements in Page qualify as an admission on behalf of Lawrence County. See Giglio v. U.S., 405 U.S. 150, 154, 92 S.Ct.763, 31 L.Ed.2d 104, (1972) (the prosecutor's office is an entity and as such it is the spokesman for the Government); U.S. v. Bakshinian, 65 F.Supp2d 1104, 1106 (C.D. Cal 1999) (prosecutors statement is admission by party-opponent).

The Eighth Circuit has required "an inconsistency must exist at the core of the prosecutor's case against the defendants for the same crime" to admit the evidence in order to prevent a due process violation. Smith v. Groose, 205 F.3d 1045, 1047 (8th Cir.

2000) (finding a due process violation when prosecutor manipulated evidence by using different and conflicting statements from same cooperating witness); See United States v. Higgs, 353 F.3d 281, 326 (4th Cir. 2003) (noting how a due process violation can occur with the use of inherently factually contradictory theories).

Lawrence County Prosecutor John Fitzgerald used the same theory to blame two people for committing the first act of aggression in this murder. According to John Fitzgerald, in 2001, it was Elijah Page.

> He's [Elijah Page] the one that stole the gun that was used in the first acts of aggression. *That's when it all started is when he pointed the gun at Chester Allan Poage to facilitate this kidnapping.* Nothing would have happened had he not pointed the gun at Chester Allan Poage's head.
>
> *The Defendant is the one that started the assault with pulling the gun.* The Defendant deliberately kicked Chester Allan Poage with his boots until his own foot got sore. He decided to do that. He chose to do that. He's not a follower, he's a doer. He's an instigator, he's an actor. Piper is the mouth, the Defendant's the action.

Appendix F**:** Page ST: 946-948. (Emphasis added).

> In 2011, it was Piper:
>
> *And he [Piper] was the one that did the first act of actual aggression to knock the man unconscious*.

ST: 1807. (Emphasis added).

The Government cannot have it both ways. This exact word choice may have differed very slightly with the Government saying the same thing multiple ways, but the argument is the same: the person who started this deserves death. The Government strived to paint both Page and Piper as the one who did the first act, the one who without these actions, this murder would not have occurred.

The Government's core argument was that the Petitioner was the leader and this evidence would clearly rebut that argument. Failing to admit these admissions by the party-opponent violated the Petitioner's due process rights to a fair trial. As a result, this case should be remanded with an order directing the trial court to admit statements made in the Government's closing argument in Elijah Page.

3. THAT PIPER WAS AFFORDED INEFFECTIVE ASSISTANCE OF HIS PRIOR COUNSEL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

In the landmark case of Strickland v. Washington, 466 U.S. 668, 684-686, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984), the Court stated:

> In a long line of cases that includes Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed 158 (1932), Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), and Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause:
>
> Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled. Adams v. United States ex rel. McCann, 317 U.S. 269, 275, 276, 63 S.Ct. 236, 87 L.Ed. 268 (1942); see Powell v. Alabama, supra, 287 U.S. at 68-69.

Id.

The question is whether counsel's representation "amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most

common custom." Harrington v. Richter, 562 U.S. 86, 94 131 S.Ct. 770, 788, 178 L.Ed.2d 624 (2011) (quoting Strickland, 466 U.S. at 690).

South Dakota has adopted the test for ineffective assistance of counsel set forth in Strickland. Steiner v. Weber, 2011 S.D. 40, ¶6, 815 N.W.2d 549. First, the defendant must show that counsel's performance was so deficient that he or she was not functioning as "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that counsel's deficient performance prejudiced the defendant. Fast Horse v. Weber, 2013 S.D. 74, ¶14, 838 N.W.2d 831.

The review for ineffective assistance of counsel is a mixed question of law and fact. Id., at ¶10. To establish ineffective assistance, a defendant must show that counsel's representation fell below an objective standard of reasonableness. Dillon v. Weber (Dillon II), 2007 S.D. 81, ¶7, 737 N.W.2d 420.

The cumulative effect of these errors constitutes a denial of the Petitioner's right to a fair trial. The issues are interwoven and this Court has found that the cumulative effect of errors by the trial court may support a finding by the reviewing court of a denial of the constitutional right to a fair trial. State v. Davi, 504 N.W.2d 844, 857 (S.D. 1993). See McDowell v. Solem, 447 N.W.2d 646, 651 (S.D. 1989) (denying prosecutorial misconduct and ineffective assistance arguments when considered cumulatively); State v. Perovich, 2001 S.D. 96, 632 N.W.2d 12 (S.D. 2001).

Certain constitutional rights are so basic to a fair trial that their infraction can never be treated as harmless error. State v. Dokken, 385 N.W.2d 493, 500 (S.D. 1986). The harmless error rule has never been used to justify unfairness at trial. State v. Webb, 251 N.W.2d 687 (1977) (harmless error rule should never justify unfairness at trial).

With these general principles in mind, Piper asserts multiple claims of ineffective assistance of counsel and violations of his Constitutional rights.

A. Whether trial counsel was ineffective and constitutionally deficient by calling expert witnesses who interviewed the Petitioner and essentially relayed Petitioner's admissions of multiple aggravating factors to the sentencing jury.

The State alleged Piper committed three different aggravating circumstances that would make him eligible for the death penalty. Either the offense was committed for the benefit of the defendant or another, including money; the offense was outrageous or wantonly vile, horrible or inhumane and involved torture; or that offense was committed for the purpose of avoiding or interfering with a lawful arrest. SDCL 23A-27A-1(3), (6) and (9).

Dr. Wortzel, a forensic neuropsychiatrist, was called to testify by the defense regarding his evaluation with the Petitioner. ST: 1608. Dr. Wortzel essentially asked the Petitioner about the facts concerning the murder and relayed to the jury what the Petitioner said. The statements included admissions to all three aggravated factors alleged by the State.

First, Dr. Wortzel essentially admitted the aggravating factor alleged in SDCL 23A-27A-1(3) by stating that the offense was for the benefit of another for the purpose of receiving money:

PROSECUTOR: Doctor, wasn't it true that it was greed that was influencing [Piper] at that point?

DR. WORTZEL: That would be another influence, yes.

PROSECUTOR: Okay. That was the driving influence, they wanted to kill somebody so they could steal his property.

DR. WORTZEL: Well, I think that's misstated, I think they wanted to steal someone's property and it went bad and then they decided they had to kill him, so that's a bit different.

ST: 1647: 14-21.

Second, Dr. Wortzel relayed Piper's admissions regarding torture, essentially admitting the aggravating factor contained within SDCL 23A-27A-1(6):

PROSECUTOR: Did he tell you that he put a tire iron on Chester Allan Poage's ankles while he was forced to drink (acid)?

DR. WORTZEL: Yes, he did.

PROSECUTOR: Okay. And you would – you're a medical doctor, right?

DR. WORTZEL: Yes.

PROSECUTOR: Absolutely. And you would consider that torture, wouldn't you?

DR. WORTZEL: Potentially.

DEFENSE: I object. Excuse me, I object.

THE COURT: Sustained. Sustained. [6]

ST: 1641: 14-25.

Third, Dr. Wortzel relayed the Petitioner's admission to SDCL 23A-27A-1(9) as the Petitioner admitted committing the murder for the purpose of avoiding, interfering with, or preventing a lawful arrest:

PROSECUTOR: So it was pretty clear in your mind, Doctor, from talking to Mr. Piper that this man was murdered so he could be eliminated as a witness against them?

DR. WORTZEL: That's what seems to have led to the murder, yes.

PROSECUTOR: Okay. And that the motivation was for – the murder here, the motivation for the murder was money or property.

[6] Defense counsel did not make a motion to strike.

DR. WORTZEL: Well, again, I think that's sort of putting it a little bit backwards. There was – the robbery was motivated by money, and then when this witness, you know, got involved then the motivation became to obviously not get in trouble and eliminate a witness.

ST: 1655: 8-18.

In addition to Dr. Wortzel, the defense called Dr. Dewey Ertz, a psychologist, who interviewed Piper and admitted SDCL 23A-27A-1(9):

PROSECUTOR: And the reason the group decided that they were going to take [Poage] out in a remote area in the forest to commit his murder was because they wanted to eliminate him as a witness to the crimes they already committed against him first, isn't that true?

DR. ERTZ: I think that was part of the discussion as well.

ST: 1572-1573.

A fair trial is not provided if the evidence is not subjected to adversarial testing:

> The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the *adversarial system* to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

Strickland v. Washington, supra at 685, 686. (Emphasis added).

The adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." Andres v. California, 386 U.S. 738, 743, 87 S.Ct. 1396, 18 L.Ed. 2d 493 (1967). If the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated. U. S. v. Cronic, 466 U.S. 648, 657, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

The defense counsel advocate subjecting the evidence to the adversarial system does not call witnesses who can bolster the Government's case. The Eighth Circuit Court

of Appeals has discussed how calling a witness who could become a witness for the prosecution makes little sense. In Walls v. Bowersox, counsel did not call family members who were unwilling to testify in mitigation in the capital case. 151 F.3d 827, 834 (8th Cir. 1998). The Court noted that "it makes little sense to force unwilling family to testify in mitigation" as the simplest questions would have been more damning evidence than anything presented by the prosecution. Id. As a result, defense counsel should not call a witness who will harm the client's case.

In a similar Tenth Circuit death penalty case, defense counsel's own psychiatrist effectively became a witness for the prosecution. Hooper v. Mullin, 314 F.3d 1162 (10th Cir. 2002), cert. den. 540 U.S. 838 (2003). In Hooper, defense counsel chose to present, as mitigating evidence, the possibility that the defendant might have brain damage and other psychological problems. Id. at 1169. Having made this decision, however, counsel presented the evidence without any further investigation and in an unprepared and ill-informed manner. Id. at 1171. As a result, defense counsel's examination of the two doctors was "disastrous." Id. They were disastrous as "defense counsel's questions 'essentially undermined' petitioner's defense." Id. See Fisher v. Gibson, 282 F.3d 1283, 1291 (10th Cir. 2002) (effective assistance requires attorney to act as meaningful adversary vis-à-vis the state).

As in Hooper, the examinations of these experts were disastrous for Piper. Dr. Wortzel and Dr. Ertz bolstered the State's case by providing testimony which essentially eliminated the need for the Government to call any witnesses to prove the aggravating factors. At a minimum, these experts precisely corroborated the State's allegations.

The disastrous testimony and admissions of all three alleged aggravating factors by two "defense" experts violated the Petitioner's right to a fair trial and constituted ineffective assistance of counsel. These witnesses advocated on behalf of the State, removing the adversary from the adversarial process. These statements cannot be considered harmless as they deprived the Petitioner of the right to a fair trial. State v. Webb, 251 N.W.2d 687 (1977) (harmless error rule should never justify unfairness at trial).

As required to show ineffective assistance, prejudice is apparent as there are few witnesses who could have done a better job summarizing the State's evidence than these two experts who used the Petitioners own statements to do so. Defense counsel, and the defense experts, did not advocate on behalf of the Petitioner but rather made the Government's role easier. This is not the role of an effective advocate in an adversarial system. As a result, these witnesses changed this sentencing trial from taking place within an adversarial system into a unilateral system with defense experts admitting to facts that could be used to impose the death penalty.

B. Whether Petitioner was deprived of due process during voir dire pursuant to Witherspoon v. Illinois and when trial counsel provided ineffective assistance of counsel during voir dire.

Piper received ineffective assistance of counsel and did not receive a fair trial due to errors in jury selection. The cumulative effect of the jury selection process constitutes a denial of Piper's right to due process in addition to showing ineffective assistance of counsel of both trial and appellate counsel. The issues are interwoven and this Court has found that the cumulative effect of errors by the trial court may support a finding by the reviewing court of a denial of the constitutional right to a fair trial. State v. Davi, 504

N.W.2d 844, 857 (S.D. 1993); See McDowell v. Solem, 447 N.W.2d 646, 651 (S.D. 1989) (denying prosecutorial misconduct and ineffective assistance arguments when considered cumulatively); State v. Perovich, 2001 S.D. 96, 632 N.W.2d 12.

A defendant is guaranteed a fair trial before an impartial jury by the Sixth and Fourteenth Amendments. Ross v. Oklahoma, 487 U.S. 81, 85, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988). This right is violated by the inclusion on the jury of a biased juror, whether the bias is actual or implied. See Morgan v. Illinois, 504 U.S. 719, 729, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992) (inclusion of a single biased juror invalidates death sentence); Smith v. Phillips, 455 U.S. 209, 221–24, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982) (O'Connor, J., concurring) (noting that implied bias may violate a defendant's Sixth Amendment rights). The bias need not be evident from voir dire with "unmistakable clarity" because "many venireman simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear.' " Wainwright v. Witt, 469 U.S. 412, 424-25, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985).

In a capital sentencing proceeding before a jury, the jury is called upon to make a "highly subjective, unique, individualized judgment regarding the punishment that a particular person deserves." Caldwell v. Mississippi, 472 U.S. 320, 340 n.7, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) (quoting Zant v. Stephens, 462 U.S. 862, 900, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) (REHNQUIST, J., concurring in judgment). The United States Supreme Court has recognized the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination. California v. Ramos, 463 U.S. 992, 998-999, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983).

In Witherspoon v. Illinois, the United States Supreme Court held:

> [A] sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.

391 U.S. 510, 522, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

Executing a death sentence returned by such a jury deprives the defendant of his life without due process of law and infringes his right to trial by an impartial jury under the Sixth and Fourteenth Amendments. Id. at 518. The Court observed:

> [T]he decision whether a man deserves to live or die must be made on scales that are not deliberately tipped toward death.

391 U.S. at 521-22 n. 20.[7]

In determining whether a prospective juror may be excluded for cause, the Court applies the following standard: Would the individual's views "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985).

General fairness and "follow the law" questions are not enough to detect any potential juror who would automatically vote for or against the death penalty. Morgan v. Illinois, 504 US 719, 734, 112 S.Ct. 2222, 119 L.Ed.2d. 492 (1992); Nicklasson v. Roper, 491 F.3d 830, 837 (8th Cir. 2007) (noting how the deeply rooted nature of juror bias often precludes discovering it through general fairness and "follow the law" type questions). It could be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs about the death penalty would prevent

[7] On May 19, 2011 Judge Eckrich signed an Order Re: Precluding State from "Death Qualifying," which stated specific qualifications. Appendix H.

him or her from doing so. Morgan, 504 at 735. If the voir dire is inadequate, the Supreme Court has held doubt exists as to whether the petitioner was sentenced to death by a jury empaneled in compliance with the Fourteenth Amendment. Id. at 739.

i. It is a violation of due process to not remove jurors who are pro-death penalty and cannot consider mitigation evidence.

A juror who would automatically vote for the imposition of the death penalty without weighing the evidence presented must be removed for cause. Id. at 728-29. The failure of trial court to remove a death-prone juror rises to the level of constitutional error sufficient to grant habeas relief. Id. As result, a capital defendant may challenge for cause any prospective juror who maintains conclusory views. If one juror is empaneled and the death sentence imposed, the State is disentitled to execute the sentence. Id.

The Sixth Circuit has ultimately concluded:

> With a transcript reflecting statements as internally inconsistent and vacillating as these, including numerous statements of strong doubt regarding impartiality and merely a few tentative or cursory statements that she would be fair, Sheppard was simply unbelievable as an impartial juror. Despite the deference usually owed to trial judges, we conclude that nothing about Sheppard's demeanor could cure the weighty concerns raised by her voir dire testimony. Accordingly, we find that the trial judge's failure to excuse Sheppard and the Ohio Supreme Court's finding that the trial court did not abuse its discretion in failing to strike Sheppard were contrary to or an unreasonable application of Supreme Court precedent.

White v. Mitchell, 431 F.3d 517, 542 (6th Cir. 2005), cert. den. 549 U.S. 1034 (2006).

ii. It was a violation of due process to not have potential juror Lisa Sagdalen excused for cause and ineffective assistance of counsel to not appeal this issue.

Potential juror Lisa Sagdalen had discussed the case at length with many friends in law enforcement and held a deep belief that the Petitioner should receive the death penalty before hearing any evidence. ST: 73 – 100. In her juror questionnaire, Ms.

Sagdalen wrote that "Mr. Piper needs to accept the Judge's decision (of death) and that was his choice". ST: 76. When questioned by the defense, Ms. Sagdalen concluded that it was a firmly held belief that the death sentence imposed by Judge Johnson should stand. When asked if she could set aside her preconceived conclusions, she could not say she could throw those conclusions aside. As a result, she admitted she had a pretty firm opinion as to how the case should come out before hearing any evidence. ST: 79. The defense challenged Ms. Sagdalen for cause.

The Government also questioned Ms. Sagdalen and these views were reinforced. Ms. Sagdalen affirmed that there was something she had heard or read that gave her a preconceived notion about what the outcome should be. Perhaps acknowledging the shaky foundation of objecting to this challenge for cause, the Government deferred to the Court regarding this challenge.

While SDCL 23A-20-6 allows the Court to examine potential jurors, this Court intervened and rehabilitated Ms. Sagdalen even after the Government deferred to the Court. The Court intervened and discussed how the media can be wrong. The Court then asked general questions and encouraged Ms. Sagdalen that she could listen to all the evidence and apply the instructions. After being subjected to a lengthy speech by the Court, Ms. Sagdalen was brought back to the center and agreed she could listen to all the evidence and apply the jury instructions with her prior opinions out of her mind. ST: 82. The Court, after rehabbing the potential juror itself, denied the challenge.

The parties then engaged in further questioning of Ms. Sagdalen after the Court intervened. Her friendship of over 30 years with a Pennington County Sheriff's Deputy

was explored, as was her view that the appeal process for death penalty cases takes too long. She was asked:

> DEFENSE COUNSEL: And isn't that really what you're saying, that Mr. Piper should just shut up and sit down and accept the death sentence?
>
> POTENTIAL JUROR SAGDALEN: I guess in a sense.

ST: 87.

At the end of the questioning, the challenge was renewed by the defense and again denied by the Court.

A trial judge's discretion in conducting voir dire is "not without limits". Harold v. Corwin, 846 F.2d 1148, 1150 (8th Cir. 1988). The Court, after realizing the goal of voir dire is to provide the parties a qualified, unbiased, and impartial jury, "should at all times be on guard in its questioning" to assist counsel in the exercise of pre-emptory and challenges for cause. Id. at 1150.

Contrary to the principles governing voir dire, Judge Eckrich interjected himself into the jury selection process to attempt to rehabilitate juror Ms. Sagdalen and interfered with the integrity of the entire proceeding.[8] By deferring to the Court, the Government had essentially agreed that Ms. Sagdalen should have been removed for cause.

Failing to excuse Ms. Sagalden violated the Petitioner's right to a fair trial by having a jury pool stacked against him towards death. As noted in Witherspoon, one juror that should have been removed, but was not, violates the Petitioner's right to a fair trial.

[8] By interjecting into voir dire, Judge Eckrich did the opposite of what he told the parties during a pre-trial hearing when he said that beyond the statutory questions he was not intending to voir dire. ST: 25.

Defense counsel was ineffective for failing to object when the trial court rehabilitated Ms. Sagdalen. Defense counsel did not reassert the challenge. Sitting idle when the jury selection process was sabotaged by the trial court meant that trial counsel did not establish its role in the adversary process. Strickland, supra at 685, 686; Andres, supra at 743.

As Ms. Sagdalen should have been removed for cause, appellate counsel provided the Petitioner with ineffective assistance for failing to appeal this denial. Prejudice is apparent if just one juror should have been removed for cause because they voice general objections to the death penalty or expressed conscientious or religious scruples against the death penalty. Witherspoon, at 522.

iii. It was a violation of due process to not have potential juror Daniel Carlin removed for cause, and trial counsel was ineffective by not objecting when the trial judge impermissibly interjected into voir dire.

Daniel Carlin's niece had been murdered, and he was unhappy with the sentence that was imposed in that murder case. ST: 1221 – 1254. When asked if he were in Mr. Piper's shoes would he want himself sitting on the jury, he responded by saying "probably not." The defense then challenged for cause. The Government asked general questions to rehabilitate Mr. Carlin. Mr. Carlin responded by agreeing with the Government's general questions, and the Petitioner's challenge was denied by the Court.

Following the advisements of the Eighth Circuit about general questions being inadequate, defense counsel then addressed Mr. Carlin about his responses in his questionnaire. Mr. Carlin had written "if you take a life you should be willing to give up yours*!!!*" (Emphasis in questionnaire). ST: 1232. During questioning, Mr. Carlin stated that the defense lawyers would have to talk him out of giving the death penalty, and he

was not sure how that could happen. ST: at 1237. The defense challenged Mr. Carlin for cause again.

The Government responded by bombarding the juror down a path of leading questions, resulting in one-word answers about whether the juror could follow the law. Predictably, the juror followed suit and said he could. The Government then objected to the challenge for cause. The Court responded by asking hypothetical questions regarding the juror's industry and problem solving, and in the end the juror was beaten down and agreed with the Court's general questions that he could follow the law. The Court then denied the challenge for cause.

Together the Court and the Government essentially beat Mr. Carlin into agreeing to be fair and impartial. The Court and the Government together changed the potential juror's views in the jury questionnaire and changed what he had told defense counsel during the initial questioning. Defense counsel did not object or reassert the challenge.

Specific questions are needed to expose the dogmatic beliefs about the death penalty but in this case, Mr. Carlin's beliefs about the Petitioner receiving the death penalty were already known to all parties before entering the courtroom. Mr. Carlin clearly walked into the jury selection process ready to impose the death sentence regardless of the facts and circumstances. A juror in this situation simply cannot follow the law. Morgan, supra at 734. Answering yes or no to general questions is not sufficient. Nicklasson, supra at 837.

As the trial court and prosecutor coerced Mr. Carlin into a corner, trial counsel was ineffective for not objecting when the trial judge impermissibly interjected itself in the jury selection process. Trial counsel failed to object and did not reassert the challenge

when the trial court forced the potential juror in a corner, resulting in an inadequate record to appeal. Prejudice is apparent as just one juror is a violation of due process.

Since Mr. Carlin should have been removed for cause, appellate counsel provided the Petitioner with ineffective assistance for failing to appeal this denial. Prejudice is apparent if just one juror should have been removed for cause because they voice general objections to the death penalty or expressed conscientious or religious scruples against the death penalty. Witherspoon, supra at 522. The Trial Court did not follow its own Order and its failure to excuse Sagdalen and Carlin forced the defense to use precious peremptory challenges and prejudiced Piper's right to a fair and impartial jury.

iv. It was a violation of due process for the trial Judge to excuse juror Manaforte who, while leaning pro-life, had articulated a clear decision to be fair and impartial.

Unless a venireman is irrevocably committed before trial has begun to vote against death, regardless of facts and circumstances that might emerge, he cannot be excluded. Davis v. Georgia, 429 U.S. 122, 123, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976); Witherspoon, supra, at 516 at n. 9. If venireman is excluded though not so committed, any subsequent death penalty cannot stand. Id.

It is entirely possible, however, that a potential juror who has a "fixed opinion against" or who does not "believe in" capital punishment might be perfectly able to follow conscientiously the Court's instructions and to consider the death penalty as an option. Boulden v. Holman, 394 U.S. 478, 484, 89 S.Ct. 1138, 22 L.Ed.2d 433 (1969).

Mr. Monteforte was born Catholic and began his discussion with the defense counsel by stating he was conflicted over the death penalty. ST: 2092-2111. The imposition of death was appropriate but depended on the circumstances. He answered

"sure" when asked if he could temporarily set aside his hesitation with the death penalty and follow the law. Mr. Monteforte said he could fairly consider both the death penalty and life in prison. ST: 2098. Defense counsel then passed for cause.

Upon questioning by the Government, however, the prosecutor dove into whether Mr. Monteforte believed the death penalty served any purpose. According to the prosecutor, if the death penalty served no purpose to Mr. Monteforte he could not judge the death sentence impartially. Mr. Monteforte agreed with this general premise. But when asked specific questions, Mr. Monteforte said he could hear everything out and make some sort of opinion or vote as a juror. ST: 2108. After extensive questioning, Mr. Monteforte did eventually agree one time that his belief would impair his ability to consider the death penalty an appropriate punishment for this murder. The Government's cross-examination essentially had this juror admit one time that his beliefs would impair his ability to be fair. Every other question he answered indicated he could put those beliefs to the side and follow the law.

The defense did not get an opportunity to respond to the Government's motion to excuse Mr. Monteforte for cause.

By failing to object or making any record regarding this erroneous excusal, trial counsel was ineffective in establishing the record for appellate counsel to appeal. Trial counsel did not seek specific answers as required by law, and instead sat back while letting the Government go down a path of general questions that were not sufficient in determining the potential juror's deep-down beliefs. Prejudice is apparent.

Further, general concerns are not sufficient and excluding a potential juror due to general objections violated the Petitioner's right to a fair trial. Trial counsel failing to

object and appellate counsel failing to appeal prejudiced the Petitioner to the point of rendering ineffective assistance of counsel.

In conclusion, the potential jurors in this case were clearly tilted towards death. Multiple pro-death jurors were rehabilitated and not removed while any juror who had any general anti-death penalty views was removed. The trial judge did everything in his power to rehabilitate pro-death jurors, while quickly removing excusing pro-life jurors, once again defying his own Court Order. This was a hanging unconstitutional jury, with predispositions to impose the death penalty.

C. Whether counsel provided ineffective assistance of counsel by failing to investigate all potential witnesses, failing to adequately object to late witnesses, failing to investigate Tom Curtis, and failing to seek a delay or investigate claims regarding Sister Crowley.

Trial counsel and appellate counsel were ineffective relating to assistance when dealing with multiple witnesses called by the State. These issues cumulatively resulted in Piper not receiving a fair trial.

The State presented testimony from correctional officers about their interaction with Piper. These witnesses included Brad Woodward, Heather Veld, Robert Fredrickson, and Keith Ditmanson. ST: 588, 923, 962, 997. In pre-trial discovery, the State failed to provide any address other than "Penitentiary" for correctional officers. Appendix I: Additional Witness Information. This made the witnesses difficult to identify outside the Penitentiary setting, and they could not be contacted without going through the State's counsel. ST: 70. Defense counsel brought this to the Court's attention during a pre-trial hearing, and no continuance was ever requested. ST: 8-15.

Facing these obstacles, defense counsel did not travel to Sioux Falls to talk to the witnesses at the penitentiary. When questioned about this, defense counsel stated:

> ATTORNEY VAN NORMAN: It was frustrating. I didn't go to Sioux Falls and try to run them down. I didn't have an investigator do that or anybody else on my team. This was a fairly massive undertaking at that point in this case, and we were trying to do a number of things simultaneously. Should I have done that? Probably. I didn't have any other choice. Would they have talked to me? That's a different question. And that's with regard to the penitentiary witnesses.

HT: 72: 2-10.

Defense counsel did get the email address for certain witnesses and various members of the defense team talked to the witnesses over the phone. HT: 71. Defense counsel testified during the habeas hearing that the witnesses were "laudatory" of the Petitioner on the telephone but changed their tone at trial. HT: 71. When faced with inconsistent statements, however, defense counsel did not impeach these witnesses with prior inconsistent statements during the sentencing hearing. Failing to be prepared for any changes in testimony is ineffective assistance of counsel.

Initially, the failure by the State to provide usable contact information violated the principles adopted by the United States Supreme Court in Alford v. United States, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1931). The Supreme Court stated that one of the purposes of cross-examining a witness as to his place of residence is to identify the witness with his community so that independent testimony may be sought and offered of his reputation for veracity in his own neighborhood. Id. at 691.

Being provided with a name and address prior to trial is important as it will "open countless avenues of in-court examination and out-of-court investigation." Smith v. Illinois, 390 U.S. 129, 131, 88 S.Ct. 748, 19 L.Ed. 956 (1968). "To forbid this most

rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself." Id.

While the State failed to disclose the information, defense counsel was also ineffective when they failed to make the necessary arrangements to interview these witnesses in person prior to trial. Dillon v. Weber, 2007 S.D. 81, ¶13, 737 N.W.2d 420, 426 (defense counsel's failure to contact alleged perpetrator and failure to explore basis for the State's refusal to prosecute was ineffective); Sund v. Weber, 1998 S.D. 123, ¶28 588 N.W.2d 223 (failure to investigate and present witnesses can be ineffective assistance); Chambers v. Armontrout, 907 F.2d 825, 829 (8th Cir. 1990) (because reasonable counsel would have interviewed the witness, defense counsel's failure to do so can be ineffective assistance). In Fisher v. Gibson, defense counsel conducted an admittedly uninformed and therefore highly reckless "investigation" during trial. 282 F.3d 1283, 1294 (10th Cir. 2002). A decision not to investigate is not reasonable if it is uninformed. Id. at 1296.

As a result, the failure to provide addresses for these Penitentiary witnesses was full of errors. The State violated the Alford and Smith principles by not providing an address for the witnesses. This error was exacerbated when the defense counsel failed to challenge these limitations or exercise the few avenues that were available. When contact was made, defense counsel failed to have an investigator contact the witnesses to have the investigator available to impeach the witnesses if needed at trial.

Prejudice exists as state statutes provide that any mitigating evidence must be presented to the jury. SDCL 23A-27A-1, SDCL 23A-27A-3. Failing to be prepared for impeaching these witnesses with the "laudatory" comments they said on the telephone

prevented all mitigation evidence to be presented to the jury. This prejudiced the Petitioner, as failing to provide all mitigation evidence results in a due process violation. Lockett, supra 604-605, Eddings, supra at 110-116; Skipper, supra; Roper, supra; Williams, supra.

i. Petitioner was deprived of his rights to a fair trial and trial counsel was ineffective by failing to make an adequate record to appeal the late endorsement of expert witnesses.

On January 20, 2011, months before the re-sentencing hearing the defense filed Defendant's Motion to Require Notice of Expert Witnesses at Sentencing Trial. Appendix J: Defendant's Motion to Require Notice of Expert Witnesses at Sentencing Trial. This motion sought the expert's resume, a summary of the proposed testimony, a list of cases in which the expert had testified, a list of the expert's publications, and any specific treatises or other authorities on which the expert opinion may be based. The defense argued that due process required prior notice of any such expert witness so that the defense would be prepared to object to admissibility of any expert testimony. Judge Eckrich signed an Order Regarding Defendant's Motions, which ordered the State file an anticipated sentencing trial witness list. Appendix K: Order Re: Non-Limine Motions filed January 20, 2011.

The State filed a witness list on February 25, 2011, which did not include Dr. Pesce, a Pierre-based psychiatrist, as a witness. Appendix L: Potential Sentencing Hearing Witness List.

On June 22, 2011, nearly four months after the deadline, the State filed an additional witness list which identified twenty-nine potential witnesses. One witness was Dr. Pesce. This was considered "fairly late" by defense counsel. HT: 72:10-13. The

defense had nine days in which to prepare for Dr. Pesce and the additional twenty-eight witnesses before the re-sentencing hearing that started on July 5, 2011.

Another expert witness for the State, Dr. Franks, was listed as a rebuttal witness but called as witness in the State's case-in-chief. ST: 600. Defense counsel did not speak with Dr. Franks and did not have a curriculum vitae for Dr. Franks before the testimony. Defense counsel dealt with this situation by having an "off the record" conversation with Dr. Franks and the doctor's general testimony, and then seemed satisfied and prepared for the cross-examination of the State's expert psychiatric doctor. ST: 697. The defense had not received the reports Dr. Frank had in his possession at that time, as they were only provided to the defense on the morning of this testimony. ST: 698, 499:6-7.

Dr. Pesce testified on July 20, 2011. ST: 448-538. As the defense had not been provided a curriculum vitae, reports, or other information, the Court held a hearing outside the jury to question Dr. Pesce about his expert testimony. ST: 449. This is the classic example of a fishing expedition, as the first questions that both the State and the defense had to ask were basic qualifying questions about when Dr. Pesce was first licensed and in which states. ST: 479. The defense moved to have Dr. Pesce's testimony excluded, and this motion was denied. ST: 487. While the Court had previously ordered all expert opinions be provided, the Court now took a "wait and see" approach and would rely on objections to determine which opinions "run too far afield." ST: 488. Defense counsel objected because the defense had not received reports or had complete notice of Dr. Pesce's testimony. ST: 190. This was overruled. Dr. Pesce testified about Piper's mental condition and antisocial personality disorder. Medical reports were admitted.

At the habeas hearing, defense counsel admitted it never obtained what it had been ordered to receive. The defense never received a curriculum vitae or any reports. Defense counsel testified that "I didn't know a thing about him and really didn't have any idea of what he was gonna say." HT: 72: 17-19. Defense counsel did not ask for a deposition mid-trial. HT: 72: 19-20. "We weren't adequately prepared to confront those people." HT: 73: 13-14.

Once again, failure to interview known witnesses can support a claim of ineffective assistance of counsel. Dillon v. Weber (Dillon II), 2007 S.D. 81, ¶ 13, 737 N.W.2d 420, 426. As a result, defense counsel was ineffective for essentially going on a fishing expedition during the cross examination of an expert in a capital murder case.

Piper's trial counsel also went forward with an expert witness, Dr. Franks, whom it did not have any reports from until the morning of the hearing; and whom it had never received a curriculum vitae. Defense counsel did not object to any of Dr. Frank's testimony, and simply requested a conversation off the record about the general topics of his future testimony (which began later that day).

Trial counsel was not an adversary in this context. Defense counsel could not have critiqued the expert testimony to the degree needed during a capital murder trial. Defense counsel did not make the effort to consult with its own experts regarding this testimony to be prepared for cross-examination. Defense counsel, essentially, "winged" an expert cross-examination in a capital murder trial. "Winging" expert cross-examinations is ineffective assistance of counsel. Prejudice arises when an expert testifies who is essentially immune from any cross-examination because attorneys had no

prior information about the content of the testimony. These expert opinions could also not be shared with Piper's own experts without having the reports before trial.

While trial counsel at least did object to Dr. Pesce, the cumulative nature of letting both Dr. Franks and Dr. Pesce testify without knowing what the experts were going to testify about resulting in a due process violation and an unfair trial.

ii. Trial counsel was ineffective by failing to adequate investigate any consideration given to Tom Curtis.

Tom Curtis was in custody with Piper in May of 2000 while the two were housed in the Lawrence County Jail together. Curtis first testified in the original sentencing hearing, and his life of crime made it easy for the prosecution to find him for the re-sentencing as well. The Government subpoenaed Mr. Curtis from a Utah jail requiring an Interstate Compact subpoena, which is not a simple process. As a result, the State knew that Mr. Curtis had been convicted of crimes since he testified in the first sentencing hearing against the Petitioner. ST: 607. The State did not, however, provide the defense with Mr. Curtis's updated criminal history.

SDCL 23A-13-15 provides a continuing statutory obligation to comply with discovery requests. Defense filed Defendant's Motion for Production of Criminal Rap Sheets of State Sentencing Trial Witnesses on January 20, 2011. Appendix M. The Court granted this motion on February 23, 2011. Appendix K: Order Re: Motions filed January 20, 2011. On May 25, 2011, a Material Witness Certificate Amended was filed noting how Tom Curtis was incarcerated in Utah. Appendix N. Even though defense counsel knew Curtis was in custody, defense counsel did not interview Curtis prior to the jury sentencing trial. HT: 46: 6-8. Defense counsel didn't know where he was, but understood he was in jail in Utah. HT: 46: 12-14.

While Curtis was awaiting sentencing on felony charges, defense counsel had not determined what the maximum penalty was that Curtis was facing and could not cross-examine Curtis on any details about this conviction. ST: 632-633. Without independent knowledge of this information, defense counsel could only rely upon the witness' answers during this cross-examination. Curtis essentially told the jury that he had been wrongfully convicted of eight separate counts of drug distribution, and defense counsel could not impeach Curtis on his "wrongful conviction". ST: 364. Again, by not being prepared the witness could have essentially testified without regard to the truth as there was no way for the defense to critique his testimony.

Curtis testified about Piper seeking to kill guards to escape. ST: 607-654. Neither Curtis nor the State mentioned several rape charges in Utah, in addition to the drug charges, that trial counsel learned about several weeks after the trial. HT: 50:17-23; HT: 52:23-24. While on the stand, Curtis denied any specific deal with Utah in exchange for his testimony and the State did not disclose any promises of leniency in exchange for testimony. HT: 47:3-6.

The rape charges and all updated criminal history should have been disclosed to the defense pursuant to the right to confront one's accusers and impeach their testimony, which is guaranteed under the Sixth Amendment to the United States Constitution, and under South Dakota Constitution Article VI, Section 7. Davis v. Alaska, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) (cross-examiner allowed to impeach and discredit the witness); State v. Wiegers, 373 N.W.2d 1, 10 (S.D. 1985) (holding that defendants are constitutionally entitled to impeach the prosecution's key witness by showing that those pivotal witnesses are biased); See SDCL 19-19-607 (any party may

attack a witness's credibility); SDCL 19-19-608 (witness's character for truthfulness or untruthfulness); SDCL 19-19-609 (impeachment by evidence of a criminal conviction).

iii. It was a due process violation for the State to not provide an updated criminal history for Tom Curtis.

The cumulative effect of the State withholding exculpatory or impeachment evidence can result in a Due Process violation. Smith v. Secretary, Dept. of Corrections, 572 F.3d 1327 (11th Cir. 2009). In Smith, the government did not disclose "motive to testify" information for some of its witnesses. Smith noted:

> [I]t is essential that the process not end after each undisclosed piece of evidence has been sized up. The process must continue because Brady materiality is a totality-of-the-evidence macro consideration, not an item-by-item micro one . . . . Cumulative analysis of the force and effect of the undisclosed evidence matters because the sum of the parts almost invariably will be greater than any individual part.

Id. at 1346-47.

The defense team's failure to adequately prepare to cross-examine Curtis resulted in damaging aggravation testimony. See Thompson v. Calderon, 120 F.3d 1045, 1054 (9th Cir. 1997) (defense counsel's failure to investigate and impeach informant severely prejudiced defendant). The Sixth Circuit Court of Appeals, in the case of Higgins v. Renico, 470 F.3d 624, 633 (6th Cir. 2006) stated:

> A number of courts, including this one, have found deficient performance where, as here, counsel failed to challenge the credibility of the prosecution's key witness. See, e.g., Lindstadt v. Keane, 239 F.3d 191, 204 (2nd Cir. 2001) (finding ineffective assistance of counsel where, among other things, counsel's "failure to investigate prevented an effective challenge to the credibility of the prosecution's only eyewitness").

Id.

In addition to being supportive of ineffective assistance of counsel, nondisclosure of evidence affecting the credibility of witnesses regarding punishment violates due process. State v. Collier, 381 N.W.2d 269, 272 (S.D. 1986).

> A violation of a defendant's due process rights occurs when the State suppresses evidence favorable to the defendant when the evidence is material either to guilt or punishment. State v. Birdshead I, 2015 S.D. 77, ¶ 44, 871 N.W.2d 62 (quoting Brady v. Maryland, 373 U.S. 83, 87 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)). "Such evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " Strickler v. Greene, 527 U.S. 263, 280 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). As the United States Supreme Court noted in Strickler,
>
> > There are three components of a true Brady violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.

Id. at 281-82. See also Thompson v. Weber, 2013 S.D. 87, ¶ 38, 841 N.W.2d 260.

"Prejudicial error is 'that which in all probability must have produced some effect upon the final result and affected rights of the party assigning it.' " State v. Spiry, 1996 S.D. 14, ¶11 543 N.W.2d 260, (quoting K & E Land & Cattle, Inc. v. Mayer, 330 N.W.2d 529, 533 (S.D. 1983)).

The State failed to provide defense counsel with an updated criminal history that included Curtis' Utah convictions and the rape charge. The State knew or should have known that he lied under oath about his Utah criminal history and his motive for testifying. Permitting this type of testimony is a due process violation.

Giglio v. United States is akin to this case. In Giglio, a key witness testified that he was not getting any promises by the Government. 405 U.S. at 151 (1972). This was untrue. Id. The prosecutor trying the case was unaware of the agreement and therefore

did not correct the false testimony. Id. at 153. The Court nevertheless held that the failure to correct the false testimony violated the defendant's rights, strengthening due process protection with a clear rule expanding the ways in which the defendant could satisfy the knowledge requirement. Anne Bowen Poulin, *Convictions Based on Lies: Defining Due Process Protection,* 116 PENN ST. L. REV. 331, 339 (2011).

The failure of defense counsel to investigate all information regarding Tom Curtis is exacerbated as defense counsel should have been on notice from prior Supreme Court opinions regarding the prosecution and witnesses in this case. During the original sentencing hearing in 2001, Tobe Givens testified as a cooperating witness for the Government. Piper I, 2006 S.D. 1, ¶14. The defense questioned whether there was an undisclosed plea agreement between the State and the cooperating witness. The Court determined there was not, but evidence did suggest that the State acted favorably towards Givens after he testified for the Government. Id. at ¶17. This should have been more than enough to put defense trial counsel on notice in this sentencing phase as to the existence of possible deals with all cooperating witnesses. At the minimum, the defense should have requested an updated criminal history.

In the present case, however, the undisclosed evidence was prejudicial to the Petitioner, because it allowed Curtis' damaging testimony to go largely unanswered. The evidence was material, because there was a reasonable probability sufficient to undermine confidence in the outcome. Rodriguez v. Weber, 2000 S.D. 128, ¶19, 617 N.W.2d 132.

iv. Defense trial counsel was ineffective for failing to investigate the assertions made by the State during the cross-examination of Sister Crowley.

Sister Gabrielle Crowley was called by the defense and testified about her relationship with the Petitioner. ST: 1676-1689. Sister Crowley offered spiritual guidance regarding the Petitioner's conversion to Catholicism and is the Petitioner's godmother. ST: 1679. Sister Crowley testified about her in-person conversations with the Petitioner, including the development of his spiritual life and common interests of reading, education and music.

The State questioned Sister Crowley about a letter she wrote to a woman on the Petitioner's behalf. ST: 1686. This letter had never been shown to defense counsel. ST: 1687. The State asserted this letter was written against prison policies, but never introduced those rules or policies into evidence. The defense team did not object to the introduction of the letter offered during the cross-examination of Sister Crowley. While it evidently had not been disclosed before trial, the relevancy of the letter was dependent on whether it violated a prison policy or not. Defense counsel did not seek a delay to research whether this policy existed or take time to talk with the witness about her views regarding violating prison policy. HT: 140-144. Since the policy was never introduced, it is still unclear as to whether this letter was, in fact, in violation of any prison policy. Defense counsel did not re-direct to rehabilitate the witness in any way. ST: 1689. The Government argued in closing argument that this evidence was so powerful, stating the Petitioner "conned" a "true angel" into doing something that he was not allowed to do. ST: 1806.

The duty to investigate derives from an attorney's basic function with a duty to make reasonable investigations or to make a reasonable decision that makes investigations unnecessary. Kimmelman v. Morrison, 477 U.S. 365, 384, 106 S.Ct. 2574,

91 L.Ed.2d 305 (1986); Kenley v. Armontrout, 937 F.2d 1298, 1306-1307 (8th Cir. 1991) (counsel was ineffective when he failed to investigate); Thomas v. Lockhart, 738 F.2d 304, 308 (8th Cir. 1984) (counsel was ineffective where he did nothing beyond reading the police file); Pickens v. Lockhart, 714 F.2d 1455, 1467 (8th Cir. 1983) (counsel was ineffective where he failed to make any investigation and "abdicated all responsibility for defending his client in the sentencing phase").

The defense made no attempt to follow up with questions to Sister Crowley as to *how* she came to believe that she had violated a prison policy. There was no investigation to determine whether the State was telling the truth when the State claimed that Sister Crowley violated prison policy. There was no request for a recess to request more disclosure from the State's attorney or to check with the Penitentiary to determine whether such a policy existed. The lack of objections did not provide an adequate record for appeal. HT: 213: 14-24. Further, habeas trial counsel did not determine whether this prison policy existed or not, and at this time, there is no policy in the record.

It is clearly ineffective assistance of counsel as the combination of factors led to trial counsel to acquiesce to the State to proceed on potentially false claims. By not having the exhibit provided before trial, defense counsel could not have been prepared for this devastating cross-examination.

v. The State violated Petitioner's due process rights by misleading the jury about whether Sister Crowley violated prison policy.

A conviction obtained by a prosecutor's knowing or reckless use of false testimony is contrary to the protections of due process. Napue v. Illinois, 360 U.S. 264, 269, 272, 79 S.Ct. 1173, 3 L.Ed.2d. 1217 (1959); United States v. Duke,

50 F.3d 571, 577-78 & n.4 (8th Cir. 1995) (government has duty to serve and facilitate the truth-finding function of the courts). Further, prosecutorial misconduct implies a dishonest act or an attempt to persuade the jury by use of deception or by reprehensible methods. State v. Davi, 504 N.W.2d 844, 855 (S.D. 1993).

In State v. Collier, 381 N.W.2d 269, 273 (S.D. 1986), the Court noted:

> A request for a short continuance would have afforded him an opportunity to request or move for disclosure from the state's attorney, or interview the witness, or both. Counsel could then have safely cross-examined, or done whatever trial strategy dictated.

Id.

Not being provided with a copy of the exhibit and not being clear whether the policy existed is a violation of due process. The State's deliberately mislead questions that led to the impeachment of Sister Crowley violated Piper's due process. The State chose to try and cast doubt on the credibility of a witness without any basis to do so, and the defense trial counsel did not do anything to determine if the State's accusations of "conning" were true.

D. Whether errors were made as to the timing and the advisement to Petitioner regarding the challenges to Petitioner's guilty pleas before and after the remand arising from Piper II.

If this Court decides Issue #1, that Piper's motion to withdraw his guilty pleas is barred for any reason, counsel was ineffective for failing to make a motion at the first available opportunity.

A plea is void if it is not intelligent and voluntary. State v. Nachtigall, 2007 S.D. 109, ¶9, 741 N.W.2d 216; Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d

271 (1969). Manifest injustice occurs when a plea is entered, and that plea is not considered voluntary. State v. McColl, 2011 S.D. 90, 807 N.W.2d 813. If there is proof that the defendant did not have the correct reasonable expectations from the plea bargain, the plea is considered involuntary. State v. Lohnes, 344 N.W.2d 686 (S.D. 1984).

"When a defendant pleads guilty on the advice of counsel, the attorney has a duty to advise the defendant of the available options and possible consequences." Wayrynen v. Class, 1998 S.D. 111, ¶21, 586 N.W.2d 499. A guilty plea "cannot be a conscious, informed choice if the accused relies upon counsel who performs ineffectively in advising him regarding the consequences of entering a guilty plea and of the feasible options." Id. at 503. "Prejudice exists when there is reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id., ¶23. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Weddell v. Weber, 2000 S.D. 3, ¶26, 604 N.W.2d 274; Loop v. Class, 1996 S.D. 107, ¶14, 554 N.W.2d 189.

Appellate counsel advocated that the plea was not knowing and voluntary to this Court in its briefing in Piper II. Appellate counsel did not, however, make a motion to withdraw the guilty plea on the same grounds. As this motion would have been made after the jury returned a death sentence, the Court can only allow a defendant to withdraw this guilty plea to correct a manifest injustice. SDCL 23A-27-11; Williams v. State, 349 N.W.2d 58 (S.D. 1984). Factors to consider in allowing the withdraw of a guilty plea include: 1) actual innocence; 2) the guilty plea was contrary to the truth; 3) misapprehension of the facts; 4) incorrect advice from counsel; 5) misunderstanding of the guilty plea's effect or mistake or misconception of the nature of the charges; and 6)

the plea was procured by fraud, mistake, misapprehension, fear or improper means. State v. Schmidt, 2012 S.D. 77, 825 N.W.2d 889.

Three of the Schmidt factors are present which would justify the plea be withdrawn at the time it was discovered by an attorney to be invalid. First, there was incorrect advice from counsel. Second, there was a misunderstanding of the plea's effect on the sentencing. Finally, the plea was procured by a mistake regarding the sentencing process.

When arguing the plea was invalid to this Court in the briefing for Piper II, appellate counsel should have recognized that the arguments it was making to this Court would have also justified a motion to withdraw the guilty plea itself. This would have placed the issue directly before the trial Court and signaled to this Court that the correct remedy in this situation would be to vacate *both*, the plea and the sentence. This was not done and is ineffective assistance of counsel.

Appellate counsel in Piper II did not raise the issue of the validity of the guilty pleas themselves. HT: 197: 21-22. The American Bar Association has provided guidance on the duty to assert legal claims in Guideline 10.8. http://ambar.org/2003Guidelines. In addition, Guideline 10.15.1 provides the duties of post-conviction counsel, which include that post-conviction counsel should seek to litigate all issues, whether or not previously presented, that are arguably meritorious.

In remanding for a new sentencing, Piper II specifically citied cases that permitted the defendant to withdraw a guilty plea though this Court did not provide Piper that right. Piper II at ¶18; Harris v. State, 295 Md. 329, 455 A.2d 979, 984 (1983), State v. Martinez, 132 N.M. 32, 43 P.3d 1042, 10-48-49 (2002); Commonwealth v. O'Donnell,

559 Pa. 320, 740 A.2d 198, 213 (1999).

Piper II also cited South Dakota cases which remanded invalid pleas and permitted the defendants to withdraw their guilty pleas and proceed to trial. Id. at ¶22; See Quist v. Leapley, 486 N.W.2d 265, 268-69 (S.D. 1992) (invalid plea reversed and remanded for trial); State v. Apple, 2008 S.D. 120, ¶¶22-23, 759 N.W.2d 283 291 (reversed to allow defendant to withdraw guilty plea because plea was not intelligent and voluntary); State v. Goodwin, 2004 S.D. 75, ¶18, 681 N.W.2d 847, 854 (invalid guilty plea reversed to allow the defendant to withdraw his plea and proceed to trial); State v. Wahle, 521 N.W.2d 135 (S.D. 1994) (if plea is involuntary, trial court should lean toward withdrawing plea).

Further, a showing that the plea was not knowingly and voluntarily entered is one way to prove a manifest injustice to warrant withdrawal of a guilty plea. State v. Outka, 2014 S.D. 11, 844 N.W.2d 598. See State v McColl, 807 N.W.2d 813, 2011 S.D. 90 (manifest injustice occurs when plea is not voluntary); Goodwin, at ¶18 (if defendant enters a plea involuntarily, the trial court's discretion should favor withdrawal of the guilty plea).

There is no valid legal reason that prohibits Piper from being allowed to withdraw his plea. No reason exists for Piper to be treated differently than those cited by this Court. Counsel should have sought Piper to be treated the same and immediately made a motion to withdraw the guilty plea at every possible opportunity. This should have been challenged and failing to do so is ineffective assistance of counsel.

In this case, if this Court rules against the Petitioner in issue #1 above, the failure to challenge the guilty plea was ineffective assistance of counsel when the Court had

vacated the judgment. This Court's findings in Piper II demonstrate the prejudice in this error.

E. Whether appellate counsel afforded sufficient assistance of counsel for the appeal of the trial court's denial of a mistrial motion following the testimony of inmate privileges.

Trial counsel moved in a Motion in Limine to prohibit any discussion of privileges in the Penitentiary. The Judge granted the motion. Lawrence County Prosecutor John Fitzgerald, however, clearly violated the Motion in Limine by asking a witness specifically about television privileges. ST: 558. Defense counsel objected, approached the bench, and the trial court called for a recess.

The defense made a motion for a mistrial. The trial court told the prosecutor that he "stepped over the line." ST: 559. However, the Judge did not grant the mistrial motion. Instead, the Court proposed a curative instruction, which the defense chose to not accept. This issue was not appealed.

Trial courts have considerable discretion in granting or denying mistrials and determining the prejudicial effect of witness statements. State v. Fool Bull, 2008 S.D. 11, ¶10, 745 N.W.2d 380. "Only when this discretion is clearly abused will [the Supreme Court] overturn the trial court's decision." State v. Phair, 2004 S.D. 88, ¶13, 684 N.W.2d 660 (quoting State v. Anderson, 1996 S.D. 46, ¶21, 546 N.W.2d 395). In order "to justify the granting of a mistrial, an actual showing of prejudice must exist." Id. Prejudicial error for purposes of determining whether error constitutes grounds for a mistrial is error which in all probability must have produced some effect upon the jury's verdict and is harmful to the substantial rights of the party assigning it. Id.

Appellate counsel should have appealed this issue as it was meritorious. Walter

v. Fuks, 2012 S.D. 62, ¶22, 820 N.W.2d 761; http://ambar.org/2003Guidelines. A clear intentional violation of a Motion in Limine could be grounds for a mistrial. The trial court clearly believed the questions were inadmissible and granted the Motion in Limine, and this Court should have had the opportunity to review the record to determine whether the denial was an abuse of discretion.

CONCLUSION

Piper's constitutional rights were violated when the State advanced inconsistent arguments in the separate sentencing hearings of the multiple individuals charged with the same murder. The trial court erred in denying Petitioner's motion to withdraw his plea. Next, due process violations occurred and trial counsel was ineffective by calling witnesses who were catastrophic to the Petitioner's case, errors in jury selection, errors in advisements and for the failure to investigate multiple witnesses or to seek a delay in the re-sentencing.

As a result, Piper was deprived of due process of law, the right to a fair trial, and the right to a jury trial, in violation of his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article VI, Sections 2 and 7 of the South Dakota Constitution. The Writ of Habeas Corpus should be issued, Piper's death sentence should be vacated, and the matter remanded to the Circuit Court of Lawrence County for a jury trial on the merits of the case.

REQUEST FOR ORAL ARGUMENT

Counsel for Briley Piper respectfully requests twenty minutes for oral argument.

Respectfully submitted this 9th day of April, 2018.

/s/ Ryan Kolbeck

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Brief is within the limitation provided in SDCL 15-26A-66(b) using Times New Roman typeface in 12 point type. Appellant's Brief contains 18,301 words.

2. I certify that the word and character count does not include the table of contents, table of cases, jurisdictional statement, statement of legal issues, certificate of counsel, or any addendum materials.

Dated this 9th day of April, 2018.

/s/ Ryan Kolbeck

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Attorney for Appellant Briley Piper

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of April, 2018, I electronically filed the foregoing brief and appendix with the South Dakota State Supreme Court Clerk and the original and two true and correct copies of the foregoing brief and appendix were served by United States mail, first class postage prepaid to Clerk of the Supreme Court, 500 East Capitol, Pierre, South Dakota, 57501.

A true and correct copy of the foregoing brief and appendix was served electronically to the Office of Attorney General, Marty Jackley at atgservice@state.sd.us and to John Fitzgerald, Lawrence County State's Attorney, jfitzger@lawrence.sd.us.

Dated this 9th day of April, 2018.

/s/ Ryan Kolbeck

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APPENDIX

Appendix A: (Motion to Withdraw Guilty Plea and Order)

Appendix B: (Judgment of Conviction and Sentence)

Appendix C: (Findings of Fact and Conclusions of Law and Order of Dismissal)

Appendix D: (Second Amended Certificate of Probable Cause)

Appendix E: (Plea Hearing Transcript)

Appendix F: (Elijah Page Sentencing Transcript)

Appendix G: (Order Re: Motions Filed May 20, 2011)

Appendix H: (Order Re: Precluding State from "Death Qualifying")

Appendix I: (Additional Witness Information)

Appendix J: (Defendant's Motion to Require Notice of Expert Witnesses at Sentencing Trial)

Appendix K: (Order Re: Non-Limine Motions filed January 20, 2011)

Appendix L: (Potential Sentencing Witness List)

Appendix M: (Defendant's Motion for Production of Criminal Rap Sheets of State Sentencing Trial Witnesses)

Appendix N: (Material Witness Certificate Amended)

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, Plaintiff,	)	FILE NO. 00-431
vs.	)	DEFENDANT'S MOTION TO WITHDRAW GUILTY PLEAS
BRILEY W. PIPER, Defendant.	)	

Comes now the above-named Defendant, through his attorneys, Michael Stonefield and Robert VanNorman, and moves this Honorable Court for an Order permitting the Defendant to withdraw the five pleas of guilty that he entered in this case on January 3, 2001, for all of the reasons stated below. Defendant further moves this Court to incorporate into this court file, Piper v. Weber, Lawrence County civil file 06-222, the habeas corpus file stemming from Defendant's conviction and sentence in this case, in the consideration of this motion.

Facts surrounding guilty pleas; procedural history

Defendant was charged with five separate crimes, including several alternative counts, from his actions in the death of Chester Poage in March, 2000. The crimes included first degree murder, kidnapping, first degree robbery, first degree burglary, and grand theft. Settled Record of the instant court file, 140-142 (hereafter SR). Just days before his capital murder trial was scheduled to begin in January, 2001, Defendant appeared before Judge Warren G. Johnson, the trial judge in the case, with his attorneys, Timothy Rensch and Patrick Duffy, and entered guilty pleas to every one of the non-alternative crimes in the indictment. Janaury 3, 2001, Change of

plea hearing transcript, 26 (hereafter COP). That Defendant intended to enter guilty pleas clearly came as a surprise to the trial court and to the State's Attorney. COP 2-4. The State persisted with its request that Defendant receive a death sentence for his murder conviction. The parties all agreed that the trial judge would then conduct Defendant's sentencing trial and be the sentencer, rather than have a jury make the decision to impose a life imprisonment sentence or a death sentence. COP 9-10, 22-23.

The sentencing hearing was held, later in January, 2001. At the close of the hearing, the trial judge sentenced Defendant to death on the murder conviction. He further sentenced Defendant to life imprisonment on the kidnapping conviction, and to consecutive, maximum, sentences on the other three convictions. SR 748-751; Sentencing hearing transcript, 482-484 (hereafter SEN). So, Defendant's sentences were death, a separate life imprisonment sentence, and then 60 more years of imprisonment, all consecutive to the life sentence.

In July, 2009, the South Dakota Supreme Court overturned Defendant's death sentence, on an appeal from the denial of a writ of habeas corpus in the habeas trial court. Piper v. Weber, 2009 SD 66, 771 N.W.2d 352. The case was remanded to the criminal trial court to conduct a new sentencing hearing. Id., at ¶ 21, 771 N.W.2d at 360. The Supreme Court's opinion did not address the validity of, or any issues surrounding, any of Defendant's underlying convictions.

The law regarding the withdrawal of guilty pleas

1. A defendant's guilty plea must be both knowing and voluntary to constitute a valid conviction. Parke v. Raley, 506 U.S. 20, 28 (1992). A valid plea must of course include a full

explanation by the court of the Boykin rights, and the court must establish a defendant's knowledge and understanding that a guilty plea is a waiver of those rights. A valid plea also must include more than mere compliance with Boykin. "...[A] plea of guilty is more than an admission of conduct; it is a conviction." Boykin v. Alabama, 395 U.S. 238, 242 (1969). "What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence." Id. at 243-244 (emphasis added).

Factors regarding whether a plea is knowing, voluntary, and intelligent include whether the defendant received incorrect advice from the court, whether the defendant had a misunderstanding of the effects of the plea, and whether the defendant possessed reasonable expectations arising from the government, or from statements of the court. State v. Lohnes, 344 N.W.2d 686, 688 (S.D. 1984); State v. Grosh, 387 N.W.2d 503, 506 (S.D. 1986). Whether a defendant was represented by effective counsel is also a factor in this inquiry: "The focus of whether counsel provided constitutionally effective assistance in the context of a plea is whether counsel provided his client with an understanding of the law in relation to the facts, so that the accused may make an informed and conscious choice between accepting the prosecution's offer and going to trial." Nikolaev v. Weber, 2005 SD 100, ¶ 12, 705 N.W.2d 72, 76. In deciding whether a plea was knowing, voluntary, and intelligent, the totality of the circumstances regarding the plea should be examined. State v. Goodwin, 2004 SD 75, ¶ 11, 681 N.W.2d 847, 852. "The fundamental test is whether the plea of guilty was an intelligent act done with sufficient awareness of the relevant

circumstances and likely consequences." State v. Thin Elk, 2005 SD 106, ¶ 15, 705 N.W.2d 613, 618 (emphasis added).

2. SDCL 23A-27-11 provides a method for a defendant to withdraw pleas of guilty or nolo contendere. It provides:

> A motion to withdraw a plea of guilty or nolo contendere may be made only before sentence is imposed . . . but to correct manifest injustice a court after sentence may set aside a judgment of conviction and permit the defendant to withdraw his plea.

3. Many South Dakota cases have held that the trial court's discretion in considering a pre-sentencing plea-withdrawal motion should be "exercised liberally in favor of withdrawal," unless the prosecution of the defendant would be prejudiced. See e.g. State v. Engelmann, 541 N.W.2d 96 (1995). Absent prejudice, a defendant "...need only state a tenable reason why withdrawal should be permitted, a reason based on more than a mere wish to have a trial." Id., at 100 (emphasis added). "When deciding whether to allow a criminal defendant to withdraw his plea, the trial court must look at the reasons why the plea is sought to be withdrawn and if the request to withdraw is obviously frivolous, the trial court need not grant it." State v. Wahle, 521 N.W.2d 134, 137 (S.D. 1994). If a defendant enters a plea without full knowledge of the consequences, a court's discretion should favor allowing withdrawal. Id.

Reasons to allow Defendant to withdraw his guilty pleas

It is clear from the habeas corpus proceedings concerning Defendant's sentence of death that there were two reasons why he pled guilty to murder plus all of the other charges:

1) based on his attorneys' advice, by entering a guilty plea to capital murder, he would thereby assure himself that he would be sentenced by the trial judge, rather than by a jury, and 2) based on his attorneys' advice, by pleading guilty to all charges, he would demonstrate his remorse for his involvement in Chester Poage's death. Habeas Corpus hearing transcript, 63-66. (hereafter HCH).

The following compelling reasons permit Defendant to withdraw his pleas in this case:

1. Nothing in the many records of this case establishes that Defendant was ever informed, by the trial court or by his attorneys, that he could have a jury trial on the indictment against him and have a jury determine his guilt or innocence, and then have the judge determine his capital murder sentence, if in fact he was found guilty of a count of capital murder. He was not informed of this right by the court at the plea hearing. Further, his attorneys informed him of only two procedural options: 1) guilt-phase jury trial and sentencing by the trial jury; and 2) guilty plea to murder and sentencing by the court. HCH 28-30.

Defendant's pleas thus were not knowing, voluntary, and intelligent. They followed an incomplete and incorrect rights advisement by the trial court, which in turn had followed upon incorrect legal advice on the record from Defendant's attorneys. His purported waiver of his right to jury trial on the murder charge, and on all of the charges he faced, was not a knowing, voluntary, and intelligent waiver of that right, as must occur for a guilty plea to be constitutionally valid. How can a defendant knowingly waive a right if he does not know he has it? Of course, he or she cannot do so. A defendant must have a thorough, correct understanding of a

particular Boykin right before he can validly waive that right, as the Supreme Court's recent decision in Defendant's habeas corpus case makes clear. Piper v. Weber, *supra.*

2. Nothing in the many records of this case establish that Defendant was ever meaningfully informed that the statement he had made to law enforcement officers, on June 9, 2000, in Alaska, would be considered by as part of the basis for accepting Defendant's guilty pleas, or that he would be waiving what he had gained by the earlier suppression of that statement on constitutional grounds. The parties had fought a pre-trial battle before the trial court over the admissibility of several statements made by Defendant to law enforcement. All were inculpatory. Ultimately, three of the statements were suppressed by the trial court. SR 519. They would have been inadmissible at a guilt-phase jury trial, or at a potential jury sentencing trial. However, in establishing a factual basis for Defendant's pleas, the trial court asked defense attorney Rensch if the court could use the suppressed statement of June 9 as part of the factual basis for the plea. COP 34. Of course, the court did not refer to it as a "suppressed statement." Mr. Rensch immediately agreed. The court then asked Defendant if he also agreed. Defendant echoed his lawyer. COP 34.

It is crucial to this issue that we remember Defendant's primary reason for pleading guilty in the first place: he thought that it would assure himself of being sentenced by the trial court, and not by a jury. Without a thorough understanding of the fact that this unlawfully obtained statement now could and would be considered for the factual basis, apparently for all pleas, it is not credible to argue that Defendant knowingly, voluntarily, and intelligently pled guilty to any of

the charges. Nor can it be argued that Defendant knowingly, intelligently, and voluntarily waived his right against self-incrimination, when he merely agreed with one of his lawyer's assertion that this unlawfully obtained statement could be used by the trial court. It appears that the inherent prejudice to Defendant from the admissibility, for plea purposes, of this already-declared unlawfully obtained statement, never occurred to defense counsel. Nothing in the record indicates that the court was going to make the request it did. Nor was there any break in the proceedings, so that Defendant and his lawyers could discuss the issues created by the court's request.

The defense attorneys' failure to make Defendant thoroughly aware of all of the problems surrounding this issue, not the least of which being that the sentencer they were in the process of choosing was fully aware of the contents of all of the unlawfully obtained statements, was egregious ineffective assistance of counsel. This so taints the guilty pleas that it would be a manifest injustice to allow them to have any continued validity.*

3. As has already been stated, just days before his capital jury selection was to begin, Defendant pled guilty to every non-alternative crime he faced. From the records, it appears that no plea bargaining had taken place. Defense counsel had made no effort to obtain a dismissal of

* Judge Johnson ruled at the close of the sentencing hearing that the June 9 statement would not be a part of the sentencing record. SEN 408-10. The plea colloquy makes it clear that Defendant and Mr. Rensch disagreed with the Judge about whether or not Defendant had stabbed the victim. The Judge then, as noted, took notice of the June 9 statement to include in the factual basis for the pleas. Subsequently, at the end of the sentencing trial, during his pronouncement of the sentence, the Judge said that he was not sure that Defendant had stabbed the victim. However, the Judge did refer to denials of stabbing by Defendant and admissions of stabbing, again, in apparent reference to contents of suppressed statements.

any of the charges, in exchange for a plea or pleas to a murder and/or a kidnapping charge. The State's Attorney, at the plea hearing, was taken aback by defense counsels' statements that their client was pleading guilty to everything he was charged with. The State's Attorney did not even have a copy of the indictment with him. COP 2, 4. The court was so surprised it initially asked Mr. Rensch if the parties intended to proceed immediately with the sentencing. COP 3. Such could only have occurred if the State had agreed to drop its death penalty request. Of course, it had not done so and would not do that. COP 3.

So after these pleas, Defendant faced the sentencing court as a five-time felon. The only conceivable rationale for this action was to allow a sentencing argument that Defendant had taken full responsibility for his actions. But such an argument could have been made, and of course is made, every day in hundreds of courtrooms across this country, after a plea bargain has resulted in the dismissal of other charges and/or potential charges. One cannot escape the conclusion that these other, "lesser" charges, of robbery, burglary, and grand theft, were all just an afterthought. What conceivable advantage was gained by pleading guilty to every charge? The answer is that there was no advantage at all.

This kind of "assistance of counsel" was discussed by the State Supreme Court in Wayrynen v. Class, 1998 SD 111, 586 N.W.2d 499. In that case, the defendant met with a lawyer, and confessed to having committed over a dozen recent arson fires. The lawyer told her what her options were -- confess, or keep quiet. When she later told him she wanted to confess, he took her to the prosecutor's office, and she confessed fully, with no legal protection. No plea

(cont'd) SEN 482.

agreement had even been discussed by the attorney, with the prosecutor, before the confession. She soon pled guilty to 15 counts, and was sentenced to 75 years of imprisonment. She was granted habeas corpus relief. The Court observed: "A guilty plea is open to attack on the ground that counsel did not provide the defendant with 'reasonably competent advice.'" Id., at ¶21, 586 N.W.2d at 502. Further, ".. a guilty plea cannot be a conscious, informed choice if the accused relies upon counsel who performs ineffectively in advising him regarding the consequences of entering a guilty plea and of the feasible options." Id. at ¶21, 586 N.W.2d at 503.

At the habeas trial, Mr. Rensch was asked why the defense had not told the State that Defendant was going to enter guilty pleas. Mr. Rensch testified: "I was hoping that he might just sentence him to life right then and there." HCH 130. This "hope" was as forlorn as any hope could be and so without legal basis. This hope as to legal procedure does not reflect reasonably competent advice. All of the facts recited above so taint Defendant's guilty pleas that it would be a manifest injustice to allow them to have any continued validity.

4. At the sentencing, the trial court imposed not only a death sentence for felony murder, but also a life sentence for kidnapping, and maximum, consecutive sentences of 25 years, 25 years, and 10 years for the robbery, burglary, and grand theft convictions. SEN 482-84. The judgment filed in the case wrongly states that only the terms-of-years sentences are consecutive to each other. SR 748-751. A review of the change of plea hearing transcript shows that at no time during that hearing did the court inform Defendant about the possibility of the court imposing consecutive sentences on any of the crimes to which Defendant was pleading guilty.

In Wahle, *supra*, the State Supreme Court said that, if a record contains objective proof that a defendant could have misunderstood the maximum sentence he faced, his plea was entered involuntarily without full knowledge of its consequences. 521 N.W.2d at 137. A maximum penalty advisement is also required by statute. SDCL 23A-7-4(1).

Defendant's guilty pleas thus were not knowing, voluntary, and intelligent. Further, his purported waiver of his right to jury trial on all of the charges he faced was thus not a knowing, voluntary, and intelligent waiver of that right, as must occur for a guilty plea to be constitutionally valid. Boykin, 395 U.S. at 243-244.

5. In State v. Sutton, the State Supreme Court said, "the trial court must be able to determine from its own record that the accused has made a free and intelligent waiver of his constitutional rights before a guilty plea is accepted." 317 N.W.2d 414, 416 (S.D. 1982). In Goodwin, *supra*, a post-sentence motion to withdraw a plea was granted. One of the State Supreme Court's holdings was that the trial court had not made a finding that the defendant had intelligently and knowingly waived his rights at the plea. 2004 SD 75 at ¶ 9, 681 N.W.2d at 851-852.

A review of the change of plea hearing transcript in the instant case shows that the trial court also made no such finding before he accepted Defendant's pleas, at page 34. The acceptance of the pleas occurred immediately after the request to use the suppressed June 9 statement as part of the factual basis.

Further, the record reveals no inquiry of Defendant about whether Defendant agreed to waive his constitutional rights. In Monette v. Weber, 2009 SD 77, ¶ 13-15, ____ N.W.2d ____, this failure by the court contributed to the ruling that the defendant's plea was involuntary.

The trial court's lack of a finding of voluntary, knowing, and intelligent rights waivers, and its further failure to make a specific waiver inquiry of Defendant are additional grounds for finding that the guilty pleas were not knowing, intelligent, and voluntary.

6. Whether valid factual bases were established by the trial court before its acceptance of the pleas also is problematic. "Establishing a factual basis for each element of an offense is essential to a knowing and voluntary plea." State v. Apple, 2008 SD 120, ¶ 18, 759 N.W.2d 283, 289. "...[T]he trial court should question the defendant in a manner that requires the accused to provide narrative responses." Id. at ¶ 18, at p. 290.

The trial court began an inquiry into a factual basis. COP 26. After just four questions, however, attorney Rensch took over, and said he would provide the basis. He then went on for almost three pages of the transcript. COP 27-30. Mr. Rensch's comments did not satisfy the court, however, so several more pages are devoted to Defendant and the court disputing whether Defendant had in fact stabbed Poage. Not until the court's request to include the unlawfully-obtained June 9 statement did the court find a factual basis. COP 30-34.**

** Defendant requests that the Court take judicial notice of the transcript of co-defendant Elijah G. Page's change of plea on January 9, 2001, in criminal file number 00-431. The contrasts between the factual bases established for the guilty pleas in that case, on the same charges as in Defendant's case, are startling, in part, because the details by element per charge are reviewed and found. (If the court wishes to have counsel provide it with a copy of the transcript, or any other transcripts from these voluminous

The factual bases for the robbery, burglary, and grand theft convictions were not established on the record. The robbery was charged as the taking of unnamed personal property, by the three defendants, from Poage's person, against his will. Mr. Rensch said that Defendant committed first degree robbery "...because they took the billfold..." COP 30 (emphasis added). Exactly who of the three, did what actions as to the robbery count, was not established. Nothing in the record even indicates that this act is what the State had in mind when it charged the crime of robbery. No bases for Defendant having done all of the charged elements of a robbery were provided in Mr. Rensch's narrative.

The burglary was charged as the entering in or remaining in Dottie Poage's house, by the three defendants, in the nighttime, with the intent to commit theft. Here, Mr. Rensch's factual basis is "they went back... stole everything in the residence." COP 30 (emphasis added). Obviously, "everything in the residence" was not stolen. Exactly who of the three, did what actions, as to the burglary count, was not established. Further, the element of "in the nighttime" was not established.

Similarly, the grand theft charge lacked a sufficient factual basis. It was charged as the taking of unidentified property of the "Poage family," by the three defendants (Piper, Page and Hoadley), with intent to deprive, of a value of over $500. Here, Mr. Rensch's factual basis was "they... possessed what was in the residence." COP 30 (emphasis added). Again, exactly who of the three, did what, was not established. The value element also was not established.

(cont'd) files, it will do so.)

Again, it is clear that these three felony offenses were treated by the defense attorneys as afterthoughts: the attorneys' position was that "they" (the three defendants) all did everything the State alleged. There was simply no concern accorded, in the giving or the taking of these factual bases, for which defendant did what conduct, specifically, whether perhaps some defendant did not commit certain elements of certain offenses. The existence of every element of every crime was an afterthought. These purported factual bases show the lack of knowing, voluntary, and intelligent pleas.

Defendant did not receive effective assistance of counsel in the entry of these pleas. What conceivable reason justifies Mr. Rensch's decision to provide the factual bases, if a part of the rationale for pleading to every crime was the hope that doing so would be seen as acceptance of responsibility? There is no legally acceptable reason. Judge Johnson clearly had doubts about Defendant's honesty, regarding whether he had stabbed Poage. COP 33. And the judge needed more evidence than what Mr. Rensch had said to find bases, however flawed. COP 34.

7. The entry of all of these guilty pleas in January, 2001, was tainted by several constitutional violations. As Defendant is currently awaiting a jury sentencing on a murder conviction, he does not have a heightened burden to show that he should be able to withdraw his guilty plea to the murder charge. He has shown much more than "a tenable reason" why permission to withdraw that plea should be granted. Engelmann, *supra,* 541 N.W.2d at 100. Moreover, these five guilty pleas were all part of one package. They were and are inseparable from each other. They were all done, at one time, for at most two reasons. If only the murder

plea were allowed to be withdrawn, Defendant would be put into an untenable position. His still-existing kidnapping and robbery pleas would provide the State with already existing, on-the-record proof of an element of two of the three alternative counts of murder. In light of the ineffective assistance of counsel and the other constitutional violations which permeated the entry and acceptance of these pleas, it would be a manifest injustice to allow any of them to remain in effect.***

8. It is not an overstatement to say that few parties in this State's history, at least in the past half-century, have taken part in a more significant plea hearing than the one on January 3, 2001. There was an obligation on every professional to do everything right in this hearing, regardless of how much time it took or how many words had to be spoken. The parties had plenty of time available; weeks had been set aside to try the case to a jury. Yet legal mistake after legal mistake occurred in the short time prior to the hearing and in those few minutes during the hearing. There were many more mistakes made than were addressed in the Supreme Court opinion which reversed the death sentence.

In Piper v. Weber, the State Supreme Court acknowleged that "...we accord higher scrutiny to capital sentencing determinations.... For this reason, in a death penalty plea, more so than in other pleas, the trial court has the duty to ensure 'that the defendant truly understands the charges, the penalties, and the consequences of a guilty plea.'" Piper, ¶ 19, 771 N.W.2d at 360.

*** Consideration also should be given to defense counsel's incorrect legal conclusion – that South Dakota's death penalty statutes do not allow for a jury sentencing after a guilty plea to capital murder – as shown in the direct appeal, State v. Piper, HH 46-68, 2006 SD 1, 709 N.W.2d 783.

In summary, Defendant moves this Court to recognize that "higher scrutiny" declared by the Supreme Court. This motion should be granted, and Defendant allowed the rights to due process of law, to effective assistance of counsel, to jury trial, and against self-incrimination, which were denied him by the entry and acceptance of the guilty pleas in January, 2001.

Dated this 18th day of October, 2009.

Michael Stonefield
Attorney for Defendant
409 Kansas City Street
Rapid City, SD 57701

RVN Dated this 18th day of December, 2009.

NOONEY SOLAY & VAN NORMAN, LLP

Robert Van Norman
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Rapid City, SD 57701
(605) 721-5846

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below, by depositing the same in the U.S. Mail at Rapid City, South Dakota, first class postage prepaid, at his/her/their last known address(es), to wit:

Mr. John Fitzgerald
Lawrence County State's Attorney
90 Sherman Street
Deadwood, SD 57732

Dated this 18th day of ~~October~~ December, 2009.

Robert Van Norman

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF LAWRENCE)

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

****

STATE OF SOUTH DAKOTA,

Plaintiff,

Vs.

BRILEY PIPER,
Defendant,

00-431

ORDER DENYING DEFENDANT'S MOTION TO WITHDRAW GUILTY PLEAS

****

A hearing was held on the 18th day of December, 2009, before the Honorable Jerome Eckrich, Circuit Court Judge, on the Defendants' Motion To Withdraw Guilty Pleas. The State was represented by John Fitzgerald, Lawrence County State's Attorney. The Defendant appeared in person and with counsel, Robert Van Norman and Michael Stonefield. The Court having considered the Defendant's motions, amended motions and attachments and all other matters in the record and having issued it's eight page decision dated November 8, 2010 which is incorporated herein in it's entirety, NOW, THEREFORE,

IT IS HEREBY ORDERED that the Defendants' Motion To Withdraw Guilty Pleas is hereby denied.

Dated this 17 day of November, 2010.

BY THE COURT:

Honorable Jerome A. Eckrich
Circuit Court Judge

Attest:
Clerk of Courts
By:
Deputy

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SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT
By

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STATE OF SOUTH DAKOTA)		IN CIRCUIT COURT
: SS		
COUNTY OF LAWRENCE)		FOURTH JUDICIAL CIRCUIT

****

STATE OF SOUTH DAKOTA,	*	CRI 00-431
	*	COURT'S
Plaintiff,	*	FINDINGS OF FACT AND
	*	CONCLUSIONS OF LAW AND
	*	AMENDED ORDER DENYING
Vs.	*	DEFENDANT'S MOTION TO
	*	WITHDRAW GUILTY PLEAS
	*	
BRILEY PIPER,	*	
Defendant,	*	
	*	

****

A hearing was held on the 18th day of December, 2009, before the Honorable Jerome A. Eckrich, Circuit Court Judge, on the Defendant's Motion To Withdraw Guilty Pleas. The State was represented by John Fitzgerald, Lawrence County State's Attorney. The Defendant appeared in person and with counsel, Robert Van Norman and Michael Stonefield of Rapid City, SD. The Court having considered the Defendant's motions, amended motions and attachments and all other matters in the record and having issued its eight page memorandum decision dated November 8, 2010 which is incorporated herein, the Court now enters the following:

FINDINGS OF FACT

1) On January 3, 2001, the Defendant, along with his attorneys, Timothy Rensch and Patrick Duffy, of Rapid City, SD, appeared before Circuit Court Judge Warren G. Johnson who was the previously assigned trial judge. The trial judge conducted an arraignment on the record on the Indictment filed in this action.

2) The trial judge advised the Defendant of all of his constitutional and statutory rights.

3) Following the arraignment the Defendant plead guilty to the crimes of first degree murder, kidnapping, first degree robbery, first degree burglary and grand theft.

4) At the January 3, 2001, change of plea hearing, the State indicated that it intended to seek the death penalty in accordance with the previous written notice of intent.

5) The trial judge established a factual basis in support of the guilty pleas by asking questions directly of the Defendant, considered the statements of the Defendant's Counsel, Timothy Rensch, at the change of plea hearing, and two Defendant interview transcripts.

6) The first transcribed interview was conducted April 28, 2000 and is 133 pages in length. The second interview was conducted on June 9, 2000 and consists of 345 pages of transcript. The trial judge made these additional 478 pages of transcripts part of the factual basis.

7) The Defendant waived, on the record, any objection to the Court considering the April 28, 2000 and the June 9, 2000 interviews as part of the factual basis.

8) The trial judge had the benefit of seeing, hearing and weighing the credibility of the Defendant.

9) The trial judge found on the record that the Defendant had been regularly held to answer, was represented by competent counsel, understood the nature of the crimes charged, the maximum penalties, and the pleas available, understood the consequences of his plea of guilty, that he was not under duress, nor under the influence of any drug or alcohol and was mentally competent to enter his guilty pleas.

10) The trial judge found a sufficient factual basis in existence and set a sentencing hearing to commence on January 17, 2001.

11) On January 17, 2001, prior to the commencement of the sentencing hearing, the trial judge asked the Defendant if it was still his decision to plead guilty and have the death sentencing hearing conducted before the Court. The Defendant communicated in the affirmative on the record that was his intention.

12) The sentencing hearing was held on January 17, 18, and 19, 2001. At the conclusion of the sentencing hearing Judge Johnson sentenced the Defendant to death on the charge of first degree murder; life imprisonment without parole on the charge of kidnapping; twenty-five years in the S.D. State Penitentiary on the first degree robbery charge; twenty-five years in the S.D. State Penitentiary on the first degree burglary charge which was to run consecutive to the robbery charge; and ten years in the S.D. State Penitentiary on the grand theft charge which was to run consecutive to the sentence on the robbery charge and the burglary charge.

13) The South Dakota Supreme Court affirmed the conviction and the death sentence in the matter of *State v. Piper*, 2006 SD 1 Para 11, 709 N.W. 2d 783 (SD 2000).

14) In a later Habeas action in *Piper v. Weber*, 2009 SD 66, 771 N.W. 2d 352 (SD 2009), the South Dakota Supreme Court vacated Defendant Piper's death sentence and remanded this case to the trial court for a new sentencing proceeding to afford "Piper the right to have a jury decide whether the death penalty should be imposed."

15) Thereafter, the present counsel was appointed and the Defendant filed a motion to withdraw his guilty pleas on October 5, 2009.

CONCLUSIONS OF LAW

1) The court has jurisdiction over both the parties and the subject matter of this action.

2) In determining whether to allow a Defendant to withdraw his admissions of guilty, the court considers the "totality of the circumstances." *Goodwin*, 2004 SD 75, P. 11, 681 N.W. 2d at 852. Factors to be considered under a totality of the circumstances test include "the defendant's age, prior criminal record, whether he was represented by counsel, the existence of a plea agreement, and the time between advisement of rights and entering a plea of guilty."

3) The *Goodwin* rule does not exclude consideration of other pertinent circumstances, such as the timeliness of the request to withdraw a plea or the reasons for withdrawal.

4) The holding in *Goodwin* is that the defendant should be allowed to withdraw his guilty plea "to correct a manifest injustice." Manifest injustice is a situation that is unmistakable or indisputable, unforeseeable, and prejudices the substantial rights of the defendant. *State v. Malone*, 157 P.3d 909, 911-12 (Wash. Ct. App. 2007) and *Meyers v. State*, 164 P.3d 544, 546 (Wyo. 2007).

5) No manifest injustice exists in this action to authorize a withdrawal of the guilty pleas.

6) A sufficient factual basis for each crime is required before acceptance of a guilty plea. A Court may rely on facts in the file record to establish a factual basis even though the facts would not otherwise be admissible at trial. *State v. Nachtigall*, 109 Para. 5, 741 NW 2d 216, 219 (SD 2007). The factual basis may be supplied by, amongst other things, the Defendant himself, his attorney, police reports, motions hearing testimony, or grand jury testimony.

7) The file record in this case includes a sufficient factual basis to support each of the Defendant's pleas.

8) No evidence exists to support the Defendant's contention that the State withheld evidence, specifically Mr. Piper's role as an inchoate Division of Criminal Investigation informer.

9) The findings of facts and conclusions of law specifically incorporate the courts memorandum decision dated November 8, 2010.

ORDER DENYING MOTION TO WITHDRAW GUILTY PLEAS

In accordance with the foregoing Findings of Facts and Conclusions of Law, IT IS HEREBY;

ORDERED that the Defendant's Motion to Withdraw Guilty Pleas is hereby denied.

Dated this 19 day of November, 2010.

BY THE COURT:

Honorable Jerome A. Eckrich
Circuit Court Judge

Attest: Lane Kief
Clerk of Courts

By: _____ Deputy

STATE OF SOUTH DAKOTA)
: ss
COUNTY OF LAWRENCE)

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,
Plaintiff,

VS.

BRILEY W. PIPER
Defendant.

00-431

JUDGMENT OF CONVICTION

(FIRST DEGREE FELONY MURDER)

An Amended Indictment was filed with this Court on the 7th day of September, 2000. The Defendant was arraigned on the Amended Indictment on the 26th day of September, 2000. The Court advised the Defendant of all constitutional and statutory rights pertaining to the charge that had been filed against the Defendant, including but not limited to the right to a jury trial. The Defendant pled not guilty to the charges.

On the 3rd day of January, 2001, the Defendant, the Defendant's attorneys, Tim Rensch and Patrick Duffy, and John H. Fitzgerald as prosecuting attorney appeared at the Defendant's change of plea hearing. The Defendant pled guilty to the charge of Count IA: First Degree Murder - Felony Murder (Class A Felony) (SDCL 22-16-4 and 22-3-3), Count IIA: Kidnapping (Class 1 Felony) (SDCL 22-19-1 and 22-3-3), Count III: Robbery - First Degree (Class 2 Felony) (SDCL 22-30-1 , 2,3 & 6 and 22-3-3), Count IV: First Degree Burglary (Class 2 Felony) (SDCL 22-32-1(3) and 22-3-3), Count V: Grand Theft (Class 4 Felony) (SDCL 22-30A-1 and 22-30A-17(1) and 22-3-3).

On January 19, 2001 following a pre-sentencing hearing conducted before the Honorable Warren G. Johnson, the Defendant was sentenced to death on the First Degree Murder Charge. On

[redacted]

APP I

Count IIA: Kidnapping, the Defendant shall serve life imprisonment without parole. On Count III: Robbery First Degree, the Defendant shall serve twenty-five (25) years in the South Dakota State Penitentiary. On Count IV: First Degree Burglary, the Defendant shall serve twenty-five (25) years in the South Dakota State Penitentiary. On Count V: Grand Theft, the Defendant shall serve ten (10) years in the South Dakota State Penitentiary. These sentences run consecutively.

In Piper vs. Webet, 2009 S.D. 66, the South Dakota Supreme Court vacated the sentence of death on the First Degree Murder charge and remanded the matter to the Circuit Court for a Jury conducted pre-sentence hearing. By Order of the Court, Circuit Court Judge, Jerome A. Eckrich was assigned to these proceedings.

On July 18, 2011 through July 29, 2011 the Court conducted a pre-sentence hearing before a Pennington County Jury. The matter was heard in Pennington County pursuant to the Court's Order changing venue in this matter. The Defendant was personally present and represented by his attorneys, Robert VanNorman and Michael Stonefield of Rapid City, South Dakota and Lawrence County State's Attorney, John R. Fitzgerald appeared on behalf of the State of South Dakota.

On July 29, 2011 the Jury unanimously found the existence of aggravating circumstances as set forth in SDCL 23A-27A-1 subsection (3), (6) and (9) and unanimously imposed a sentence of death in this matter.

Now in accordance with that Jury's recommended verdict, the

Court imposes the following:

S E N T E N C E

On the 5th day of August, 2011, the Court asked the Defendant if any legal cause existed to show why Judgment should not be pronounced. There being no cause offered, the Court thereupon pronounced the following sentence:

COUNT IA: FIRST DEGREE MURDER - FELONY MURDER

IT IS HEREBY ORDERED that the Defendant shall be sentenced to death, said penalty to be inflicted within the walls of the South Dakota State Penitentiary in the manner prescribed by the statutes of the State of South Dakota; and

IT IS FURTHER ORDERED that the week of March 18, 2012 be and the same is hereby appointed as the week within which this death sentence shall be executed; and

IT IS FURTHER ORDERED that the Defendant, Briley W. Piper, is hereby remanded to the custody and control of the Sheriff of Lawrence County, South Dakota to be delivered to the Warden of the South Dakota State Penitentiary at Sioux Falls, South Dakota within ten (10) days from the date hereof for the execution of the sentence for the offenses of First Degree Murder - Felony Murder, to be held by him pending the final determination of the appeals in this matter, which are automatic, and said sentence to be executed upon final determination of said appeals.

IT IS FURTHER ORDERED that the sentences previously imposed on all other counts shall remain in full force and affect.

Dated this 9 day of August, 2011.

BY THE COURT:

Hon. Jerome A. Eckrich
Circuit Court Judge

ATTEST:
Carol Latuseck
Clerk of Courts
BY: Lane Ke-l
Deputy

[redacted]
APP 3

FILED
AUG - 9 2011
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT
By

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT

****

BRILEY PIPER, Petitioner,	*	40CIV14-98
vs.	*	**FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER OF DISMISSAL**
DARIN YOUNG and/or BOB DOOLEY, Warden, Respondent.	*	

****

This matter comes before the Court on the Petition for Writ of Habeas Corpus, filed March 18, 2014. Judgment was entered in *State v. Piper* Lawrence County Criminal file number 40CRI00-431, by Honorable Judge Warren Johnson, in the Fourth Judicial Circuit, Lawrence County, South Dakota. On remand before Judge Eckrich, a Pennington County Jury returned a verdict finding aggravating factors and unanimously recommended a sentence of death July 29, 2011. The Court having considered the testimony, reviewed the Petition, and being fully advised issues the following:

FINDINGS OF FACT

1) Briley Piper ("Petitioner"), along with co-defendants, Elijah Page and Darrell Hoadley, were charged with five separate crimes (first degree murder, kidnapping, first degree robbery, first degree burglary, and grand theft), including several alternative counts, from actions in the death of Chester Allen Poage in March, 2000.[1]

2) In January 2001, the Petitioner appeared before Circuit Court Judge, Warren G. Johnson, with his attorneys, Timothy Rensch and Patrick Duffy.

[1] A complete recital of the underlying facts can be found in *State v. Piper (Piper I)*, 2006 S.D. 41, 709 N.W.2d 783.

Petitioner entered guilty pleas to every one of the non-alternative crimes in the indictment. Neither the Court nor the State was aware of the change of plea until the hearing. The matter was scheduled for jury trial on the issue of guilt the following week.

3) After being advised of his Constitutional and statutory rights, Petitioner plead guilty and admitted to a factual basis for each crime. Petitioner requested the court, not a Jury, determine the sentence of life or death.

4) Following a four-day Sentencing Hearing, in 2001, Judge Johnson sentenced Petitioner to death on the murder conviction, life imprisonment on the kidnapping conviction, and to consecutive, maximum, sentences on the other three convictions. Petitioner's sentences were death, a separate life imprisonment sentence, and then 60 more years of imprisonment, all consecutive to the life sentence.

5) Co-Defendant, Elijah Page, pled guilty in January, 2001, to the murder of Poage and the other charges in connection with the murder. Page opted for a court conducted Death Penalty Sentencing Hearing. Judge Johnson sentenced Page to death for the murder of Poage.

6) Co-Defendant, Darrell Hoadley, pled not guilty and not guilty by reason of insanity to the same charges. Hoadley opted for a jury trial; that trial was conducted in Pennington County, May, 2001. The jury found Hoadley guilty of First Degree Murder and other charges. The Jury found the existence of aggravated circumstances, but was unable to reach a unanimous decision upon a death sentence; therefore, Hoadley was sentenced to life in the South Dakota State Penitentiary.

7) The Petitioner's death sentence was subject to mandatory review by the South Dakota Supreme Court. *See* SDCL § 23A-26A-9. Petitioner appealed

in 2002; however, the South Dakota Supreme Court requested additional briefing after the United States Supreme Court decided *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). *See Piper v. Weber (Piper II)*, 2009 SD 66, ¶ 5771 N.W.2d 352, 355 n*. The Court in *State v. Piper (Piper I)* affirmed Petitioners sentence. 2006 S.D. 1, 709 N.W.2d 783.

8) Represented by attorneys Steve Miller and Steve Bingham, Petitioner filed his first application for Writ of Habeas Corpus in 2006. A hearing was held in 2007 before Circuit Judge, John W. Bastian on Petitioner's amended application for Writ of Habeas Corpus.

9) By Memorandum Decision in 2008, the circuit court denied Petitioner's petition.

10) On appeal the South Dakota Supreme Court in *Piper (II)*, overturned Petitioner's death sentence. 2009 S.D. 66, ¶ 21, 771 N.W.2d 352, 360. The Supreme Court vacated and remanded based on the unanimity requirement of a jury determination and did not reach Petitioner's other issue—ineffective assistance of counsel. *Id.*

11) Attorneys, Robert Van Norman and Michael Stonefield (sentencing trial counsel) were appointed to represent Petitioner. Counsel requested Judge Johnson recuse himself from the action, which he did. Circuit Court Judge, Jerome A. Eckrich III was assigned as the trial judge.

12) Upon remittal and prior to Petitioner's new sentencing hearing, Petitioner filed a motion to withdraw his guilty pleas for felony murder and the other four non-capital offenses. *See State v. Piper (Piper III)*, 2014 S.D. 2, ¶ 5, 842 N.W.2d 338, 342.

13) In 2009, before Judge Eckrich, a hearing was held on Petitioner's Amended Motion to Withdraw Guilty Pleas. *Id.* ¶ 6, at 342. The motion alleged four separate grounds justifying withdrawal of Petitioner's guilty pleas: (1) misadvisement of the options open to Petitioner; (2) failure to advise of consecutive sentences; (3) defective factual basis; and (4) failure to obtain a specific waiver of Petitioner's *Boykin* rights. *Id.* The circuit court denied Petitioner's motion. *Id.*

14) The case proceeded to a jury sentencing hearing in Pennington County in July, 2011. *Id.* The jury returned a unanimous verdict finding the existence of three aggravating circumstances pursuant to SDCL § 23A–27A–1(3), (6), (9), and unanimously recommended a death sentence be imposed. *Id.*

15) In addition to the South Dakota Supreme Court's automatic review of the death sentence pursuant to SDCL § 23A–27A–9, Petitioner in *Piper III* raised two issues: (1) Whether Piper's motion to withdraw his guilty pleas was improperly denied; (2) Whether Piper's sentence was lawfully imposed under SDCL §§ 23A–27A–9 and 23A–27A–12.3. *Id.* ¶ 7, at 342.

16) The *Piper III* Court affirmed the denial of Piper's motion to withdraw his guilty pleas, not on the merits as determined by the circuit court, but because of the limited nature of remand in *Piper II*. *Id.* ¶ 44 at 351. The Court additionally held that Petitioner's death sentence was lawfully imposed by the jury. *Id.*

17) The Petitioner filed for Habeas Corpus relief in March, 2014. Petitioner, represented by Mr. Matt Kinney claimed the following grounds for relief:

A) That Piper's guilty pleas were not made knowingly and intelligently, and do not constitute a valid waiver of his Sixth Amendment right to a trial by jury on the charges against him.

B) That Piper was afforded ineffective assistance of his prior counsel, in violation of the Sixth and Fourteenth Amendments of the United States Constitution, constituting three separate grounds for relief as alleged in Petitioner's Application for Writ of Habeas Corpus. At the hearing, the following issues were raised through examination of previous defense counsel—Van Norman, Stonefield and Miller:

(a) Whether errors were made as to the timing and the advisement to Petitioner regarding the challenges to Petitioner's guilty pleas before and after the remand arising from *Piper II*?

(b) Whether sentencing trial counsel afforded sufficient evidentiary development and objections for the appeal of the trial court's handling of two potential jurors of the venire and the denial of a motion to strike said potential jurors for cause?

(c) Whether appellate counsel failed to appeal the denial of the trial motion to strike for cause the two potential jurors who expressed a preference for a death sentence without giving Petitioner fair and unbiased consideration as a potential juror?

(d) Whether a continuance of the sentencing trial should have been requested by counsel following the inability to investigate and interview state witnesses employed by the Department of Corrections and the burden of preparation placed upon counsel?

(e) Whether appellate counsel afforded sufficient assistance of counsel for the appeal of the trial court's denial of a mistrial motion following the testimony of inmate privileges in the penitentiary?

(f) Whether sentencing trial counsel failed to adequately investigate any consideration given to state witness Tom Curtis for testifying at the sentencing trial?

(g) Whether sentencing trial counsel afforded sufficient evidentiary development to object and/or appeal issues concerning the State's questioning of defense witness Sister Gabrielle Crowley?

18) Petitioner alleges the cumulative effect of counsels (trial and appellate) errors rose to the level of not receiving effective assistance of counsel under Article VI of § 7 of the South Dakota Constitution, thereby depriving Petitioner the right to a fair trial under the U.S. Constitution. Each subject or error is addressed below:

19) Following Petitioner's first habeas corpus proceeding, the South Dakota Supreme Court in *Piper II* held that Petitioner did not validly waive his right to have a jury determine the death penalty. 2009 S.D. 66, ¶ 21, 771 N.W.2d 352, 360 (noting confusion on the impact of the unanimous jury verdict as opposed to the findings of one judge).

20) The *Piper II* Court vacated Petitioner's death sentence and remanded the matter for a new sentencing proceeding that afforded Petitioner the right to have a jury decide whether the death penalty should be imposed. *Id.*

21) Appellate counsel in *Piper II* did not raise the issue of the validity of the guilty pleas. Hearing on Writ of Habeas Corpus transcript, 197:5-8, July,

21-22, 2016, 40CIV14-0098. The issue was discussed with Petitioner and for strategic reasons was not raised. *Id.* 204:6-11.

22) At the July 21, 2016, habeas corpus hearing, Miller testified he advised Petitioner that if Petitioner prevailed on the habeas corpus action, the matter would be remanded to the trial court where the pleas had been entered and at that point faulty advice would be corrected. Miller believed "the rules of criminal procedure gave him an absolute right to move on with his plea." *Id.* 204:13-15.

23) Stonefield's testimony corroborated the content of Petitioner's conversations with Miller that Petitioner understood he could withdraw his guilty plea if the habeas court granted the Writ. *Id.* 124:2-14.

24) Miller believed the withdrawal of the guilty pleas issue "could have been raised as a habeas decision" but was not practical and premature. *Id.* 204:4-7.

25) In the instant action, Petitioner first submitted his Motion to Withdraw Guilty Pleas to the trial court—which was denied. *See* Defendant's Motion to Withdraw Guilty Pleas, October, 5, 2009, 40CRI00-431. Petitioner's challenge to withdraw guilty pleas was addressed on the merits; albeit erroneously by the circuit court in the Memorandum Decision issued by the Court (Judge Eckrich) November, 9, 2010. *See* Memorandum Decision RE: Defendant's Motion to Withdraw Guilty Pleas, November 9, 2010, 40CRI00-431. Following the Denial of the Motion to Withdraw Guilty Pleas, the case proceeded to jury selection.

26) Van Norman and Stonefield spent approximately ten working days examining jurors in open court.

27) Van Norman asked potential juror, Lisa Sagdalen questions whether she formed preconceived opinions regarding the case. Hearing on Writ of Habeas Corpus transcript, 20:22-5, July, 21-22, 2016, 40CIV14-0098. Sagdalen responded with answers stating [Petitioner] should accept the judge's decision if [the judge] sentenced him to death. *Id.* 23:12-16.

28) Sagdalen, as well as all other potential jurors, were individually sequestered so other potential jurors were excluded during questioning. *Id.* 23:21-25.

29) A potential juror by the name of Daniel Carlin expressed his desire to impose the death penalty and being unable to separate his beliefs from fair and impartial deliberations as a juror. *Id.* 127:19-129:10.

30) Appellate counsel did not request review of the trial court's denial of the motions to disqualify Sagdalen and Carlin as potential jurors.

31) At the sentencing trial, the State called witnesses to testify about aggravating circumstances justifying the death penalty. These witnesses were originally disclosed in a pretrial witness list. Approximately three months prior to trial, the State produced an updated witness list with a number of witnesses from the state penitentiary. *See* State's Additional Witness Information, June 24, 2011, 40CRI00-431AO.

32) Addresses and contact information was not disclosed in the lists; defense counsel had to obtain the information from the State. *See id.*

33) At a pretrial hearing defense counsel made the availability of these witnesses an issue. Pretrial Hearing Transcript, 23:4-25, June 17, 2011, 40CRI00-431. The Court (Judge Eckrich) asked the State how long it

would take to prepare for defense counsel a list of 37 potential witnesses, the State replied "a few days." *Id.* 25:18-26:8. The Court asked Mr. Stonefield if the list of additional names and contact information would be satisfactory if delivered by the next Wednesday—the hearing was held on a Friday—Mr. Stonefield stated that would be satisfactory. *Id.* 26:16-24. The list was provided to defense counsel. *See* State's Additional Witness Information, June 24, 2011, 40CRI00-431AO.

34) Prior to trial, defense counsel requested in a motion in limine that the jury not hear about Petitioner's penitentiary privileges. *See* Defendant's Motion to Preclude or Limit Testimony of Specified Witnesses, June 27, 2011, 40CRI00-431AO. The court granted a motion in limine prohibiting the jury from hearing about Piper's penitentiary privileges. *See* Hearing on Writ of Habeas Corpus transcript, 75:9-10, July, 21-22, 2016, 40CIV14-0098.

35) During trial, the State asked a penitentiary employee about Petitioner's television privileges, which immediately was answered in the affirmative before an objection was raised. *Id.* 75:20-5. A mistrial motion was made outside the presence of the jury. *Id.*

36) The trial court denied the mistrial motion. *Id.* at 76:1-8. The issue was not raised on appeal.

37) State witness, Thomas Curtis—an inmate housed with Petitioner in the Lawrence County Jail in 2000—testified at the Sentencing Hearing in 2001 and again in 2011.

38) Information regarding Curtis testifying against other defendants was not disclosed.

39) Defense counsel called Sister Gabrielle Crowley as a mitigation witness based on her establishing a faith-based relationship with Petitioner.

40) During cross-examination, Sister Crowley was asked if she delivered a letter written by Petitioner, to a female inmate housed in the South Dakota Women's Penitentiary. Sister Crowley admitted to violating prison policy prohibiting the facilitation of communication between inmates.

41) Defense counsel did not object nor explore this portion of Sister Crowley's testimony.

42) The issue was not appealed to the South Dakota Supreme Court.

CONCLUSIONS OF LAW

(1) This Court has jurisdiction over the parties and subject matter.

(2) Any Conclusion of Law may be deemed a Finding of Fact or any Findings of Fact may be deemed a Conclusion of Law.

(3) Findings of Fact and Conclusions of Law are required. *See St. Cloud v. Leapley*, 521 N.W.2d 118, 125 (S.D. 1994) (citing *Bell v. Midland Nat'l Life Ins. Co.*, 78 S.D. 349, 359, 102 N.W.2d 322, 327 (1960)) (citing *Craigo v. Craigo*, 22 S.D. 417, 423, 118 N.W. 712 (1908)) ("A failure to make a finding on a disputed material issue requires a reversal of a judgment.").

(4) The review of habeas decisions is "a collateral attack on a final judgment" and thus more restricted than ordinary appeals. *Brakeall v. Weber*, 2003 S.D. 90, ¶ 6, 668 N.W.2d 79, 82; *see Krebs v. Weber*, 2000 SD 40, ¶ 5, 608

N.W.2d 322, 324 (citations omitted) overruled on other grounds by *Jackson v. Weber*, 2001 SD 136, 637 N.W.2d 19.

(5) The recognized standard of review is to determine: "(1) whether the court has jurisdiction of the crime and the person of the defendant; (2) whether the sentence was authorized by law; and (3) in certain cases whether an incarcerated defendant has been deprived of basic constitutional rights." *Id.*

(6) The petitioner has the burden of proving entitlement to relief by a preponderance of the evidence. *Vanden Hoek v. Weber*, 2006 S.D. 102, ¶ 8, 724 N.W.2d 858, 861–62 (citing *Boyles v. Weber*, 2004 SD 31, ¶ 6, 677 N.W.2d 531, 536 (citing *Siers v. Class*, 1998 SD 77, ¶ 10, 581 N.W.2d 491, 494)) (additional citations omitted).

(7) The State has no burden of proof at a habeas corpus proceeding, only the burden of meeting the evidence of the petitioner, who has the burden of proof. *Davi v. Class*, 2000 S.D. 30, ¶ 26, 609 N.W.2d 107, 114 (citing *Siers*, 1998 SD 77, 581 N.W.2d 491).

(8) The Court takes judicial notice of all prior proceedings in file *State v. Briley Piper*, 40C00000431A0; *State v. Piper (Piper I)*, 2006 S.D. 1, 709 N.W.2d 783; *Piper v. Weber*, 2009 S.D. 66, 771 N.W.2d 352; *State v. Piper (Piper II)*, 2009 SD 66, 771 N.W.2d 352; *State v. Piper (Piper III)*, 2014 S.D. 2, 842 N.W.2d 338. In habeas actions a court may take judicial notice of petitioner's prior judicial proceedings. *Jenner v. Dooley*, 1999 S.D. 20, ¶ 15, 590 N.W.2d 463, 470 (citing *Alexander v. Solem*, 383 N.W.2d 486, 489 (S.D. 1986)); *see Boykin v. Leapley*, 471 N.W.2d 165, 167 (S.D. 1991); *Lee v. DeLano*, 466 N.W.2d 842, 843 (S.D. 1991). These materials are "not subject to reasonable dispute" and their "accuracy cannot reasonably be

questioned." SDCL § 19-10-2 transferred to SDCL § 19-19-201(b)(1), (2) (requirements for judicial notice).

WITHDRAWAL OF GUILTY PLEAS

(9) A criminal defendant entering a guilty plea waives three fundamental constitutional rights: the right against compulsory self-incrimination, the right to confront one's accusers, and the right to a trial by a jury. *Rosen v. Weber*, 2012 S.D. 15, ¶ 8, 810 N.W.2d 763, 765 (citing *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274 (1969)).

(10) Trial by jury was scheduled to begin on January 8, 2001. The jury was to determine if Petitioner was guilty or not guilty of all charges. On January 3, 2001, Petitioner advised the court he wanted to enter guilty pleas to all counts. Petitioner had been contemplating a change of plea for about a month. Additionally, Petitioner and his Counsel (Rensch and Duffy) had been discussing a change of plea for about a month. Change of Plea Transcript, 14:17-25, January 3, 2001, 40CRI00-431.

(11) At the Change of Plea hearing, the following took place:

THE COURT (Judge Johnson): You have the right to a jury trial here in Lawrence County by a jury of 12 fair and impartial jurors. You'd have the right to be present and represented by your attorneys, the right to confront and cross-examine the State's witnesses, the right to call witnesses and have subpoenas issued for their appearance. You could testify if you wanted to, but under the Fifth Amendment, you could not be forced to be a witness against yourself. Do you understand these rights?

MR. PIPER: Yes.

THE COURT: is there anything about those rights that you would like me to explain in more detail?

MR. PIPER: No.

THE COURT: You have a right to plead not guilty and persist in that plea even if you know you are guilty. If you plead not guilty, you're entitled to all of these rights.

You also have a right to plead guilty. But if you plead guilty, you give up the right to a trial, the right to confront witnesses, and you give up the privilege against self-incrimination. If you plead guilty, all that's left for the Court to do is to pronounce your sentence. Do you understand that?

MR. PIPER: Yes. Change of Plea Transcript, 17:16-25, 18:1-15, January, 2001.

(12) "[I]t is critical not only that a defendant be advised of his rights relating to self-incrimination, trial by jury, and confrontation, but also that the defendant intentionally relinquish or abandon known rights." *Rosen*, 2012 S.D. 15, ¶ 8, 810 N.W.2d 763, 765 (quoting *Monette v. Weber*, 2009 S.D. 77, ¶ 10, 771 N.W.2d at 924) (citing *Boykin*, 395 U.S. at 243 n. 5, 89 S.Ct. at 1712 n. 5).

(13) THE COURT (Judge Johnson): Do you have any questions about your constitutional and statutory rights that I have explained to you?

MR. PIPER: No. Change of Plea Transcript, 22:1-4, January, 2001.

(14) The Court (Judge Johnson) went through each count with Petitioner and explained the maximum punishment for each count. The Petitioner understood the penalty that could be imposed. *See* Change of Plea Transcript, 10:7-13:23, January, 2001.

(15) Further, the "record must *affirmatively show* ... that the defendant *explicitly waived*" those constitutional rights. *Rosen*, 2012 S.D. 15, ¶ 8, 810 N.W.2d 763, 765 (quoting *Monette*, 2009 S.D. 77, ¶ 10, 771 N.W.2d at 924). (first emphasis in *Monette*, second emphasis added in *Rosen*); *State v.*

Goodwin, 2004 S.D. 75, ¶ 23, 681 N.W.2d 847, 855 (requiring affirmative showing of explicit waiver).

(16) THE COURT (Judge Johnson): Okay. Mr. Piper, have there been any threats or promises made to get you to plead guilty?

MR. PIPER: No.

THE COURT: Are you under the influence of any drugs or alcohol at the present time?

MR. PIPER: No.

THE COURT: Are you taking any type of prescription medication?

MR. PIPER: Yes.

. . .

THE COURT: what effect does that prescription or that drug have on your ability to understand what we're doing here today?

MR. PIPER: None.

. . .

THE COURT: To the best of your knowledge, Mr. Piper, are you mentally competent.

MR. PIPER: Yes.

THE COURT: Is the plea you're about to enter voluntary and of your own free will?

MR. PIPER: Yes.

THE COURT: Do you understand that if you plead guilty, I'm going to find you guilty?

MR. PIPER: Yes. Change of Plea Transcript, 23:3-11, 22-25; 24:12-20, January, 2001.

(17) If there is a question of voluntariness, "[t]he fundamental test is whether the plea of guilty was an intelligent act done with sufficient awareness of the relevant circumstances and likely consequences." *Goodwin*, 2004 S.D. 75, ¶

26, 681 N.W.2d 847, 856 (quoting *Hofer v. Class*, 1998 SD 58, ¶ 26, 578 N.W.2d 583, 588 (citations omitted)).

(18) "[The South Dakota Supreme Court] cannot presume a waiver of these three important federal rights (*Boykin* rights) from a silent record." *Rosen*, 2012 S.D. 15, ¶ 8, 810 N.W.2d 763, 765 (quoting *Monette*, 2009 S.D. 77, ¶ 10, 771 N.W.2d at 925). It is only when the sentencing court "canvass[es] the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence" that the sentencing court "leaves a record adequate for any review." *Id.* ¶ at 766 (quoting *Boykin*, 395 U.S. at 244, 89 S.Ct. at 1712).

(19) THE COURT (Judge Johnson): The Court finds that the Defendant has been regularly held to answer; that he's represented by competent counsel; understands the nature of the crimes charged, the maximum penalties, and the pleas available; that he is not under duress, nor is he under the influence of any drug or alcohol; that he's mentally competent and that he understands the consequence of his plea.

Mr. Piper, before I take your pleas, is there anything you want me to explain in more detail?

MR. PIPER: No. Change of Plea Transcript, 25:6-16, January, 2001.

(20) The circuit court "must be able to determine from its own record that the accused has made a free and intelligent waiver of his constitutional rights before the guilty plea was accepted." *Rosen*, 2012 S.D. 15, ¶ 20, 810 N.W.2d 763, 768 (quoting *Monette*, 2009 S.D. 77, ¶ 6, 771 N.W.2d 920, 923) (citing *State v. Apple*, 2008 S.D. 120, ¶ 10, 759 N.W.2d 283, 287).

(21) The court must look to "the totality of the circumstances when ascertaining whether a plea was made knowingly and voluntarily." *Goodwin*,

2004 S.D. 75, ¶ 11, 681 N.W.2d 847, 852 (quoting *State v. Lashwood*, 384 N.W.2d 319, 321 (S.D. 1986). In examining the "totality of the circumstances" [the court] take[s] into consideration the following factors: the defendant's age; prior criminal record; whether he is represented by counsel; the existence of a plea agreement, *Weiker v. Solem*, 515 N.W.2d 827, 832 (S.D. 1994); and the time between advisement of rights and entering a plea of guilty. *Goodwin*, 2004 S.D. 75, ¶ 11, 681 N.W.2d 847, 852 (citing *Clark v. State*, 294 N.W.2d 916, 919 (S.D. 1980)).

(22) Considering the factors under the "totality of the circumstances": Petitioner at the time of the plea was twenty-years old; had a very minor criminal record; was represented by experienced counsel; proposed the plea; and was advised of his *Boykin* rights at the time he entered the pleas of guilty. *See e.g. Goodwin*, 2004 S.D. 75, ¶ 26, 681 N.W.2d 847, 856–57 (citing *State v. Lohnes*, 344 N.W.2d 686, 688 (S.D. 1984) (noting in determining whether a guilty plea was knowingly and voluntarily entered, we look at the totality of the circumstances).

(23) No evidence was presented at the habeas trial concerning deficiencies in the advisement of rights, actions of counsel, deficiencies in the factual basis for waiver of rights or any other deficiencies at the change of plea hearing.

(24) This Court finds that Petitioner's pleas of guilt before Judge Johnson on January 3, 2001, were made voluntarily, knowingly and intelligently.

(25) In considering whether to grant a motion to withdraw a guilty plea, the trial court should consider the following, nonexclusive factors: (1) whether the defendant asserted innocence; (2) whether the plea is contrary to the truth; (3) whether the defendant misapprehended the facts; (4) whether advice from counsel was incorrect; and (5) whether plea was procured by

misapprehension and improper means via coercion. *See* SDCL § 23A-27-11; *State v. Thielsen*, 2004 S.D. 17, ¶ 17, 675 N.W.2d 429, 433; *State v. Grosh*, 387 N.W.2d 503, 506 (S.D. 1986).

(26) Considering the *Grosh* factors: (1) Petitioner allowed the court at the January, 3, 2001 Change of Plea hearing to use his June 9 statements for a factual basis (Change of Plea Transcript, 34:3-8, January, 2001); (2) the plea is not contrary to the truth; (3) the defendant was aware of the facts; (4) advice from counsel was correct at the time of change of plea regarding the consequences of change of plea on the issue of guilt; (5) the plea was voluntary. *See Grosh*, 387 N.W.2d 503, 506 (S.D. 1986).

(27) "[A] defendant who has pleaded guilty no longer enjoys the presumption of innocence and, on a motion to withdraw the plea, bears the burden of production and persuasion." *State v. McColl*, 2011 S.D. 90, ¶ 10, 807 N.W.2d 813, 816 (quoting *Thielsen*, 2004 S.D. 17, ¶ 19, 675 N.W.2d at 434).

(28) Petitioner fails to meet the burden of production or persuasion. *See id.* Petitioner's Motion to Withdraw Pleas is denied.

(29) Petitioner's Motion to Withdraw Guilty Pleas is barred by the doctrine of res judicata. "It has long been settled law in South Dakota that issues which were raised in a direct appeal are res judicata on a writ of habeas corpus." *Legrand v. Weber*, 2014 S.D. 71, ¶ 28, 855 N.W.2d 121, 129 (quoting *Sprik v. Class*, 1997 S.D. 134, ¶ 20, 572 N.W.2d 824, 828. Furthermore, "[r]es judicata bars the reexamination of those issues substantially raised in the petitioner's direct appeal." *Id.* (quoting *Lodermeier v. Class*, 1996 S.D. 134, ¶ 24, 555 N.W.2d 618, 626).

(30) Prior to the South Dakota Supreme Court's decision in *Piper III*, the validity of Petitioner's guilty pleas had never been raised. Petitioner and his counsel had discussed challenging the guilty pleas but decided not to raise the issue. Both Petitioner and counsel were aware of Petitioner's ability to challenge the guilty pleas and for strategic reasons decided not to.

(31) Although the Motion to Withdraw Guilty Pleas was not timely raised in the prior habeas proceeding or to the Supreme Court; the claim could have been and therefore is barred under the doctrine of res judicata. *See Legrand*, 2014 S.D. 71, ¶ 28, 855 N.W.2d 121, 129; *Ramos v. Weber*, 2000 S.D. 111, ¶ 8, 616 N.W.2d 88, 91 (noting "The doctrine of res judicata disallows reconsidering an issue that was actually litigated or that could have been raised and decided in a prior action.").

(32) The Court finds that the Petitioner was properly advised of his right to a jury trial for determination of guilt. Petitioner was also properly advised of his right to remain silent, right to counsel, and right to cross examine witnesses. *See* Change of Plea Transcript, 18:5-14, January 3, 2001, 40CRI00-431. The only claimed error by Petitioner is that the trial judge misadvised him on the sentencing portion of the proceedings. That advisement was reversed by the Supreme Court and Petitioner exercised his right to a jury trial at sentencing. *Piper II*, 2009 66, ¶ 21, 771 N.W.2d at 360. Petitioner has not presented any new allegations or evidence to claim the advisement at the change of plea hearing was defective.

(33) Petitioner's claim now is that because he was misadvised by the trial court on the sentencing phase of the proceedings, he should as a matter of right be allowed to withdraw his guilty pleas. Petitioner cites no authority for this proposition. Petitioner stated to the trial court, the reason he wanted to change his plea is because he wanted to take responsibility for what he had

done. Change of Plea Transcript, 33:9-12, January, 3, 2001 (MR. PIPER: The reason why I wanted to come and change my plea today is I want to take responsibility for what I did, but I will not now nor ever admit to something I didn't do.).

(34) The Court holds that the Supreme Court's remand in *Piper II* did not authorize a withdrawal of Petitioners guilty pleas.

INEFFECTIVE ASSISTANCE OF COUNSEL

(35) The South Dakota Supreme Court has delineated the standard of review for claims of ineffective assistance of counsel:

> Whether a defendant has received ineffective assistance of counsel is essentially a mixed question of law and fact. In the absence of a clearly erroneous determination by the circuit court, we must defer to its findings on such primary facts regarding what defense counsel did or did not do in preparation for trial and in his presentation of the defense at trial. [The South Dakota Supreme Court], however, may substitute its own judgment for that of the circuit court as to whether defense counsel's actions or inactions constituted ineffective assistance of counsel.

Fast Horse v. Weber, 2013 S.D. 74, ¶ 10, 838 N.W.2d 831, 836 (citing *Boyles v. Weber*, 2004 S.D. 31, ¶ 7, 677 N.W.2d 531, 536) (quoting *Hays v. Weber*, 2002 S.D. 59, ¶ 12, 645 N.W.2d 591, 596).

(36) The Sixth Amendment "right to counsel is the right to the *effective* assistance of counsel." *Rhines*, 2000 S.D. 19, ¶ 12, 608 N.W.2d 303, 307 (quoting *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674, 692 (1984)) (emphasis in original). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Id.* (citing *Strickland*, 104 S.Ct. at 2064, 80 L.Ed.2d at 692-93).

(37) The South Dakota Supreme Court applies a two-prong test to ineffective assistance of counsel claims. *Id.* ¶ 13. In order to meet the burden of proof for a claim of ineffective assistance of counsel, a defendant must prove (1) that counsel's representation fell below an objective standard of reasonableness, and (2) that such deficiency prejudiced the defendant. *Id.*; *Siers*, 1998 SD 77, ¶ 12, 581 N.W.2d at 495; *Sprik*, 1997 SD 134, ¶ 22, 572 N.W.2d 824, 829; *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693.

(38) In regard to the first prong of this test, an objective standard of reasonableness, counsel's errors must be "so serious that [he or she] was not functioning as the 'counsel' guaranteed ... by the Sixth Amendment." *Garritsen v. Leapley*, 541 N.W.2d 89, 93 (S.D. 1995) (quoting *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693))). As a result, "[j]udicial scrutiny of counsel's performance must be highly deferential." *Rhines*, 2000 S.D. 19, ¶ 14, 608 N.W.2d at 307 (quoting *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 694).

(39) A [Petitioner] asking [the South Dakota Supreme Court] to invoke such scrutiny carries a heavy burden:

> Because of the difficulties inherent in making the evaluation, a court must indulge a *strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance*; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered *sound trial strategy.*

Id. (citing *Loop v. Class*, 1996 SD 107, ¶ 14, 554 N.W.2d 189, 192) (emphasis in original) (quoting *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 694-95).

(40) In regard to the second prong of the test, prejudice to the defendant, the Court must focus on whether the result of the proceeding was fundamentally unfair or unreliable, not merely on whether the outcome would have been different. *Rhines*, 2000 S.D. 19, ¶ 15, 608 N.W.2d at 307; *Siers*, 1998 SD 77, ¶ 12, 581 N.W.2d at 495; *Sprik*, 1997 SD 134, ¶ 22, 572 N.W.2d at 829; *Loop*, 1996 SD 107, ¶ 15, 554 N.W.2d at 192; *Hopfinger*, 511 N.W.2d at 847. The law does not entitle the defendant to have his conviction set aside "solely because the outcome would have been different but for the counsel's error." *Id.* ¶ 15 at 307-08; *Lockhart v. Fretwell*, 506 U.S. 364, 369-70, 113 S.Ct. 838, 842-43, 122 L.Ed.2d 180, 189 (1993). Rather, "counsel's errors [must be] so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* (quoting *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693).

(41) During the trial, the State asked a penitentiary employee specifically about Petitioner's television privileges, which immediately was answered in the affirmative before an objection was raised. A mistrial motion was made outside the presence of the jury. The trial court denied the mistrial motion believing it was not egregious enough to grant a mistrial. The issue was not raised on appeal.

(42) To establish ineffective assistance, a defendant must show that counsel's representation fell below an objective standard of reasonableness. *State v. Thomas*, 2011 S.D. 15, ¶ 21, 796 N.W.2d 706, 713; *Dillon v. Weber (Dillon II)*, 2007 S.D. 81, ¶ 7, 737 N.W.2d 420, 424. The question is whether counsel's representation "amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Id.* (citing *Harrington v. Richter*, — U.S. ——, 131 S.Ct. 770, 788, 178 L.Ed.2d 624 (2011)) (quoting *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066, 80 L.Ed.2d at 674).

(43) Trial courts have broad discretion in ruling on a motion for a mistrial, and the lower court's decision will not be disturbed unless we are convinced that there has been a clear abuse of judicial discretion. *State v. Bogenreif*, 465 N.W.2d 777, 783 (S.D. 1991) (citing *State v. McDowell*, 391 N.W.2d 661, 666 (S.D. 1986). Furthermore, there must be an actual showing of prejudice to justify the granting of a mistrial. *Id.*; *McDowell*, 391 N.W.2d 661 at 666 (S.D. 1986); *State v. High Elk*, 298 N.W.2d 87, 89 (S.D. 1980). Petitioner has not established a factual or legal basis sufficient to show actual prejudice. Petitioner's Motion for Mistrial was properly denied.

(44) State's witness, Thomas Curtis testified at the Sentencing Hearing in 2001 and again in 2011. *See* Hearing on Writ of Habeas Corpus transcript, 54:11-23, July, 21-22, 2016, 40CIV14-0098. Sentencing defense counsel did not request an up-to-date criminal history prior to or during trial. *Id.*

(45) "[The South Dakota Supreme Court] ha[s] held that 'standing alone, the fact that defense counsel failed to investigate a witness does not by itself satisfy the prejudice prong of *Strickland*.'" *Fast Horse*, 2013 S.D. 74, ¶ 17, 838 N.W.2d 831, 837 (citing *Boyles*, 2004 S.D. 31, ¶ 31, 677 N.W.2d at 542) (quoting *Siers*, 1998 S.D. 77, ¶ 25, 581 N.W.2d at 497–98).

(46) Sentencing counsel agreed that obtaining complete discovery on a witness (Thomas Curtis) would be effective in an attempt to impeach a State witness to reveal his motives for testifying. *See* Hearing on Writ of Habeas Corpus transcript, 54:11-23, July, 21-22, 2016, 40CIV14-0098. However, in *Piper I* the Court determined, "[i]n this case, the record does not indicate the State failed to disclose any information to the defense." 2006 S.D. 1, ¶ 20, 709 N.W.2d 783, 795.

(47) "[S]peculation about the existence of a witness and what the witness might say is [also] inadequate to undermine confidence in the outcome and to establish the prejudice prong of a claim of ineffective assistance of counsel." *Fast Horse*, 2013 S.D. 74, ¶ 17, 838 N.W.2d 831, 837 (quoting *Fast Horse v. Weber (Fast Horse I)*, 1999 S.D. 97, ¶ 18, 598 N.W.2d 539, 544 (emphasis omitted). Petitioner has failed to establish how having any further criminal history regarding Thomas Curtis would have benefited his case.

(48) When reviewing trial counsel's performance, "it is not [the Court's] function to second guess the decisions of experienced trial attorneys regarding matters of tactics." *Leapley*, 521 N.W.2d 422, 425 (S.D. 1994) (citing *Roden v. Solem*, 431 N.W.2d 665, 667 (S.D. 1988) (quoting *State v. Walker*, 287 N.W.2d 705, 707 (S.D. 1980)). However, the legal counsel guaranteed by the Sixth Amendment requires defense counsel to "investigate and consider possible defenses" and "other procedures" and to "exercise his good faith judgment thereon." *Id.* (quoting *Crowe v. State*, 86 S.D. 264, 271, 194 N.W.2d 234, 238 (1972)). Generally, the making or failure to make motions and objections are trial decisions within the discretion of trial counsel. *Id.* (citing *State v. Anderson*, 387 N.W.2d 544 (S.D. 1986)); *State v. Tchida*, 347 N.W.2d 338 (S.D. 1984). This general rule will not apply, however, where trial counsel's actions cannot reasonably relate to any strategic decision and are clearly contrary to the actions of competent counsel in similar circumstances. *Id.* 425-26.

(49) During cross-examination, Sister Crowley was asked if she delivered a letter written by Piper, to a female inmate housed in the South Dakota Women's Penitentiary. Defense counsel did not object or explore this portion of Sister Crowley's testimony.

(50) When asked if Mr. Stonefield would have done anything different in regard to impeaching or objecting to Sister Crowley's testimony Mr. Stonefield stated, "I – you know, when I reread this and looking at it again now, I handled this really badly. I didn't know what policy [Mr. Fitzgerald] was talking about, but she appeared to – through her answer, I don't know if she really did or not, but I – you know, as with different things when you review work, you see things that could have been done differently. Sometimes maybe they're small; sometimes they're more substantial. If I had this to do over again, I would do it differently I hope. *See* Hearing on Writ of Habeas Corpus transcript, 145:2-146:3, July, 21-22, 2016, 40CIV14-0098.

(51) The test for ineffective assistance is not whether counsel could dream up new trial strategies with the benefit of hindsight. *Rhines*, 2000 S.D. 19, ¶ 21, 608 N.W.2d 303, 309. It is whether counsel pursued a sound strategy at the time of the alleged error. *Id.* (citing *Sprik*, 1997 SD 134, ¶ 23, 572 N.W.2d at 829). Moreover, "every effort [must] be made to eliminate the distorting effects of hindsight." *Id.* ¶ 14 at 307 (quoting *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 694).

(52) Petitioner makes multiple claims of ineffective assistance of counsel combining all prior proceedings. The Petitioner alleges the cumulative effect constituted ineffective assistance of counsel. The alleged errors include: advisement on withdrawal of guilty pleas; denial of qualification challenges to venire; failure to not request a continuance of the jury trial; failure to investigate witnesses; Sister Crowley testimony; failure to raise denial of mistrial from testimony regarding privileges; and Thomas Curtis testimony. Petitioner on a claim of cumulative error must establish he did not receive a fair trial. *See Sprik*, 1997 S.D. 134, ¶ 22, 572 N.W.2d 824, 829; *Fast Horse v. Leapley*, 521 N.W.2d 102, 104 (S.D. 1994); *see also Luna v. Solem*, 411 N.W.2d 656, 658 (S.D. 1987); *Mitchell v. Class*, 524 N.W.2d 860 (S.D. 1994).

Petitioner has failed to meet his burden and the claim for relief on the grounds of ineffective assistance of counsel is denied.

(53) The Court holds all other claims for habeas relief are denied.

Based upon the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED that the Application for a Writ of Habeas Corpus is denied. Counsel for Respondent shall submit a final Order Dismissing and Denying Petitioner's request for habeas relief. Should Petitioner move for a Certificate of Probable Cause such motion will be granted.

Dated this 13th day of January.

BY THE COURT:

Hon. Randall Macy
Circuit Court Judge

ATTEST:
Carol Latuseck
Clerk of Courts
BY:
Deputy Clerk of Courts

FILED
JAN 13 2017
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT
By

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS:	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT
BRILEY WAYNE PIPER,	)	
	)	40CIV14000098
PETITIONER,	)	
	)	Second
vs.	)	AMENDED CERTIFICATE OF PROBABLE CAUSE
	)	
DARRIN YOUNG, WARDEN,	)	
	)	
RESPONDENT.	)	
	)	

This matter having come before the Court on a limited remand, and with a Stipulation between Ryan Kolbeck, attorney for the Petitioner, and John Fitzgerald, attorney for the Respondent, the Court hereby ORDERS:

The parties have stipulated that as successor Judge, this Court can complete the Certificate of Probable Cause as required by the South Dakota Supreme Court's Order of Limited Remand dated August 23, 2017. The trial judge who heard the habeas evidentiary hearing was the Honorable Randall Macy, who is now retired and was not available to preside over the Supreme Court's Order of Limited Remand.

This Court's decision is granted by the standard set out in Slack v. McDaniel, 529 U.S. 473 (2000), Barefoot v. Estelle, 463 U.S. 880 (1983) and Banks v. Dretke, 540 U.S. 668 (2004), as approved by our Supreme Court in Ashley v. Young, 2014 S.D. 66, and as required by our Court in Iannarellie v. Young, 2017 S.D. 71. While the trial Court denied the Petitioner's claims, this Certificate of Probable Cause provides a specific showing of probable cause for each certified issue.

This Court finds probable cause that there is a substantial showing of the denial of multiple constitutional rights as to each issue listed below. These issues indicate potential violations of Article VI, Sections Two and Seven of the South Dakota Constitution and the Fifth, Sixth and Fourteenth Amendments of the U.S. Constitution. As to each issue listed below, it is reasonable that another jurist could have found the Petitioner was denied the right to due process and did not receive effective assistance of counsel, as required by the South Dakota and United States Constitution.

This Court finds that reasonable jurists could debate the correctness of the habeas trial court's, the Honorable Randall Macy, reasons for denying the Petitioner's original petition for habeas relief filed on March 18, 2014. Further, the Petitioner's Amended Petition for Habeas relief, filed September 20, 2017, provides additional issues that reasonable jurists could determine demonstrate the Petitioner was deprived of numerous constitutional rights and are adequate to deserve encouragement to proceed to the South Dakota Supreme Court pursuant to Slack v. McDaniel and Barefoot v. Estelle. This Court adopts the discussion of these issues in Petitioner's Amended Motion for Certificate of Probable Cause, filed on September 20, 2017, and incorporated herein by this reference.

A Certificate of Probable Cause IS HEREBY ORDERED for the following issues.

A) *That Piper's guilty pleas were not made knowingly and intelligently, and do not constitute a valid wavier of his Sixth Amendment right to a trial by jury on the charges against him.*

   a. Probable cause exists for this issue since the South Dakota Supreme Court held and the record demonstrates that the plea-taking judge's advisement or rights and plea consequences did not clearly inform Piper: (1) that the forum for determining guilt (jury trial or guilty plea) was independent of the forum for determining punishment, should Piper be convicted or plead guilty; and (2) of the concept of juror unanimity in the death penalty phase, including the fact that only one juror's vote would be necessary to obtain a life sentence. Piper v. Weber, 2009 S.D. 66, ¶17.

B) *That Piper was afforded ineffective assistance of his prior counsel, in violation of the Sixth and Fourteenth Amendments of the United States Constitution, constituting separate grounds for relief as alleged in Petitioners Application for a Writ of Habeas Corpus.*

   a. Probable cause exists for this issue because, after considering the issues below, a reasonable jurist could determine that sentencing trial and appellate counsel were constitutionally deficient, and that counsel's errors were so serious as to deprive the Petitioner of a fair and reliable trial. Strickland v. Washington, 466 U.S. 668 (1984).

   b. The following issues alleging ineffective assistance of counsel are certified:

      i. *Whether errors were made as to the timing and the advisement to Petitioner regarding the challenges to Petitioner's guilty pleas before and after the remand arising from Piper II?*

         1. Probable cause for this issue is supported by Piper v. Weber, 2009 S.D. 66 (*noted supra*, section A)

vi. *Whether sentencing trial counsel failed to adequately investigate any consideration given to state witness Tom Curtis for testifying at the sentencing trial?*

1. Probable cause for this issue exists due to the Government's obligation to provide exculpatory impeachment information to defendant prior to trial pursuant to Brady v. Maryland, 373 U.S. 83 (1963); U.S. v. Giglio, 405 U.S. 668 (2004); and State v. Collier, 381 N.W.2d 269, 272 (S.D. 1986). Additionally, failure to investigate can constitute ineffective assistance of trial counsel. Sund v. Weber, 1998 S.D. 123; Chambers v. Armontrout, 907 F.2d 825, 829-31 (8th Cir. 1990).

vii. *Whether sentencing trial counsel afforded sufficient evidentiary development to object and/or appeal issues concerning the State's questioning of defense witness Sister Gabrielle Crowley?*

1. Probable cause for this issue exists as a trial counsel's failure to move for a continuance to prepare for testimony weighs against the defendant in a subsequent attack on the admission of testimony. Winckler v. Solem, 688 F.2d 594 (8th Cir., 2982); State v. Collier, 381 N.W.2d 269 (S.D. 1986). Additionally, failure to investigate can constitute ineffective assistance of trial counsel. Sund v. Weber, 1998 S.D. 123; Chambers v. Armontrout, 907 F.2d 825, 829-31 (8th Cir. 1990).

C) *Whether the State advanced inconsistent arguments during the separate sentencing hearings of Elijah Page and Briley Piper in violation of the Petitioners right to due process such that the arguments should have been admitted as admissions against the state in the re-sentencing of Briley Piper?*

a. Probable cause for this issue is supported by U.S. v. Bakshinian, 65 F. Supp. 2d 1104 (C.D. Cal. 1999), as arguments can be considered admissions by a part opponent, and a prosecutor cannot offer inconsistent theories and facts regarding the same crime to convict two defendants at separate trials. Thompson v. Calderon, 120 F.3d 1045, 1058 (9th Cir.). Additional probable cause exists for the reasons outlined in Petitioners Amended Motions for the Issuance of a Certificate of Probable Cause, filed September 20, 2017.

D) *Whether trial counsel was ineffective and constitutionally deficient by calling expert witness, Dr. Wortzel, who interviewed the Petitioner and relayed Petitioner's admissions of multiple aggravating factors to the sentencing jury?*

a. Probable cause for this issue is supported by Hooper v. Mullin, 314 F.3d 1162 (10th Cir. 2002) as a trial attorney's unprepared and ill-informed presentation of witnesses can be considered ineffective assistance of counsel. Additional probable cause exists for the reasons as outlined in Petitioners Amended Motions for the Issuance of a Certificate of Probable Cause, filed September 20, 2017.

It is further ORDERED that Petitioner has met his burden of proof and demonstrated that reasonable jurists could debate whether the Petition should have been resolved in a different manner or that the issues presented are adequate to deserve encouragement to proceed further. Therefore, the foregoing issues are certified and that Petitioner's Motion Seeking Issuance of Certificate of Probable Cause, filed the 20th day of September, is GRANTED.

Dated this 4th day of December, 2017.

Honorable Eric Strawn
Fourth Circuit Court Judge

Attest:
Carla Jatureck
Deputy

FILED
DEC 04 2017
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT
By

STATE OF SOUTH DAKOTA)
)
COUNTY OF LAWRENCE)

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,

Plaintiff,

vs.

BRILEY PIPER,

Defendant.

CHANGE OF PLEA

Crim. 00-431

COPY

BEFORE: THE HONORABLE WARREN G. JOHNSON
Circuit Court Judge
Deadwood, South Dakota
January 3, 2001, at 2:30 p.m.

APPEARANCES:

For the State:

MR. JOHN FITZGERALD
State's Attorney
90 Sherman Street
Deadwood, SD 57732

For the Defendant:

MR. TIMOTHY J. RENSCH
Attorney at Law
P.O. Box 8311
Rapid City, SD 57709
- and -
MR. PATRICK DUFFY
Attorney at Law
P.O. Box 8027
Rapid City, SD 57709

(WHEREUPON, the following proceedings were duly had:)

THE COURT: This is the case of State of South Dakota, Plaintiff, versus Briley W. Piper, Defendant; Criminal Action 00-431. I scheduled this hearing yesterday at the request of Mr. Rensch and also, I guess, on my own because we had some motions that needed to be resolved before we begin jury selection on Monday.

Moments ago, Mr. Rensch indicated that Mr. Piper intended to enter a plea of guilty to Counts IA, IIA, III, IV, and V.

Is that correct, Mr. Rensch?

MR. RENSCH: That's correct, Your Honor.

THE COURT: Is that correct, Mr. Piper?

MR. PIPER: Yes, Your Honor.

THE COURT: Mr. Fitzgerald, is there anybody else that is entitled to be present that should have been notified?

MR. FITZGERALD: What are we doing now, taking a change of plea?

THE COURT: At a minimum.

MR. FITZGERALD: I suppose the mother of the victim has a right to know what's taking place. You know, I had no idea, until you just said that, that that's what this hearing was about. And apparently you just

learned. So I didn't even bring the file or the Indictment over here.

THE COURT: Okay. Did you intend to proceed with sentencing today, Mr. Rensch?

MR. RENSCH: Your Honor, I don't think we can proceed with sentencing today. I think that the statute requires that the Court conduct a hearing to set forth the various factors. But if the Court wants to proceed with sentencing today -- I don't think you can proceed with sentencing today, no.

THE COURT: Well, let me ask you this, Mr. Fitzgerald: Is the State still seeking the death penalty?

MR. FITZGERALD: Yes.

THE COURT: So we would be having a mitigation hearing?

MR. RENSCH: Correct.

THE COURT: Mr. Piper, would you come forward with your Counsel, please.

MR. PIPER: (Complying.)

THE COURT: Mr. Piper, you have previously appeared before me and entered not guilty pleas to the original Indictment, and then there were one or more Amended Indictments. The most recent Amended Indictment is dated September 7, 2000, endorsed a true bill, signed by Mary Ann Oberlander as grand jury foreman. To my knowledge, that is the most recent Amended Indictment.

Is that your understanding, Mr. Fitzgerald?

MR. FITZGERALD: Your Honor, I believe so, but I can tell you by just looking at it.

MR. RENSCH: It's dated September 7.

MR. FITZGERALD: Yeah. And this is the one -- um, yeah, Nathan Whartman's name is on there, but he did not testify. And so yeah, that is the most recent Indictment.

THE COURT: Okay. Mr. Fitzgerald, would you read the Indictment, please.

MR. FITZGERALD: Yes, sure, I will.

(WHEREUPON, the Indictment was read by Mr. Fitzgerald.)

THE COURT: Thank you.

Mr. Fitzgerald, is there a plea agreement in this case?

MR. FITZGERALD: No. As I said, when I came in here, this was news to me. You were the first person, when you announced that within the last five minutes, that this was taking place.

THE COURT: So if he pleads guilty to the --

MR. FITZGERALD: I didn't have the Indictment when you listed off what he was going to plead guilty to. I do now.

THE COURT: If he pleads guilty to Count IIA, which is

the kidnapping, Class 1 felony, does that foreclose the State from going to trial on first degree premeditated murder, and kidnapping - gross permanent physical injury?

MR. FITZGERALD: No.

MR. RENSCH: It does unless they dismiss the charges to which we're willing to plead guilty, because they're in the alternative.

THE COURT: Yes. But I don't know if it's the Defendant's choice to plead guilty to an alternative charge. I've never had this situation, Mr. Rensch, where a defendant came in without a plea agreement and chose to plead guilty to an alternative charge.

MR. RENSCH: Correct. And of course if he pleads guilty to the alternative charge and if there's a factual basis therefor, it would be double jeopardy to attempt to try him on the charge that is charged in the alternative.

It is his right to enter the guilty plea. The State has nothing to say in regards to his right to enter a guilty plea, as was advised to this Defendant at the arraignment in this case.

THE COURT: Let me put it this way: Mr. Fitzgerald, do you have any objection to the Defendant entering a guilty plea to Count IA, first degree felony murder;

Count IIA, kidnapping, class 1 felony; and then the balance of the charges?

MR. FITZGERALD: Could I have a few minutes to consider this?

THE COURT: I think so. Would you like ten minutes?

MR. FITZGERALD: I'd like more like a half hour, but I think that would be enough time.

THE COURT: What I'm getting at is that if he pleads guilty to these charges, we apparently are going to have a penalty trial.

MR. RENSCH: A penalty hearing.

MR. DUFFY: Hearing with you -- May I speak or would you prefer that I not?

THE COURT: I think you better.

MR. DUFFY: Under SDCL 23A-27A-6, "At least one aggravating circumstance required for death penalty imposition. In nonjury cases the judge shall, after conducting the presentence hearing as provided in SDCL 23A-27A-2, designate, in writing, the aggravating circumstance or circumstances, if any, which he found beyond a reasonable doubt. Unless at least one of the statutory aggravating circumstances enumerated in 23A-27A-1 is so found, the death penalty shall not be imposed." So I think upon acceptance of the plea, we would come to you for the sentence.

THE COURT: It was my understanding that the State would have to consent to the waiver of a jury trial in a criminal case. Does anyone understand it differently?

MR. RENSCH: The State doesn't have the right to the jury trial. The Defendant has the right to the jury trial, as was advised to him at the time of the arraignment. Thus, it is his right and his right only to waive.

THE COURT: Do you agree?

MR. DUFFY: I'm looking -- I'm seizing upon, really, the plain language of that statute: "In nonjury cases the judge shall ...," so it's our position that upon the acceptance of the plea, we will come before you for a sentence of life or death.

THE COURT: Do you know, Mr. Fitzgerald?

MR. FITZGERALD: No. Again, that would be something I'd like the opportunity to look into a little bit.

THE COURT: Why don't we take a 30-minute recess, and if you tell me that you don't know or you don't have enough time, then I'll continue it until tomorrow morning. Because quite frankly, it will be a first, as far as I know, of the cases tried in this state since the death penalty was reenacted where there was a guilty plea to a Class A felony and then a sentencing

hearing.

MR. RENSCH: Although there was a case in 1968 out of Yankton that involved the murder of a jeweler and his wife where a person pled guilty and was sentenced by the judge without the benefit of a jury.

MR. DUFFY: There's one other, and I don't mean to reduce this to anecdote, but Mike Butler and Mike Schaffer both represented Mary Galland's brother, I can't think of his last name, on a first degree murder charge in about, oh, I want to guess 1989 in Sioux Falls, and this is -- this is the procedure that was followed. I think Judge Hurd -- I'm 99.99 percent sure Judge Hurd was the sentencing judge.

MR. RENSCH: I should tell the Court, too, tomorrow morning I have a root canal scheduled, but I can sure be here in the afternoon.

THE COURT: Well, we'll take a 30-minute break and then we'll come back and then we'll either do it or we'll reset it.

MR. FITZGERALD: Just for the record, now, I do have this Indictment in hand and we started this proceeding when I didn't have it. He wants to plead guilty to Count IA --

MR. RENSCH: Correct.

MR. FITZGERALD: -- Count IIA --

MR. RENSCH: Correct.

MR. FITZGERALD: -- and then the balance of III, IV, and V?

MR. RENSCH: Correct.

MR. FITZGERALD: Okay. Thank you.

THE COURT: Take a 30-minute recess.

(WHEREUPON, a brief recess was taken.)

THE COURT: When we took the recess, I had made a couple of inquiries as far as the procedure. Mr. Fitzgerald asked for a break. We had a break, and he's since informed me that he was in agreement with the pleas to the charges indicated.

Is that correct, Mr. Fitzgerald?

MR. FITZGERALD: Yes, that is, Your Honor.

THE COURT: Specifically you would agree to guilty pleas to Count IA, first degree murder - felony murder; Count IIA, kidnapping; and then Counts III through V as set forth in the September 7th Indictment. Is that correct?

MR. FITZGERALD: Yes, it is, Your Honor.

THE COURT: Next, the Defense indicated that they would be waiving the right to sentencing by the jury and have the sentencing hearing and sentencing conducted by the Court under the same rules and circumstances as would be done if a jury was to do it.

Is that correct, Mr. Rensch?

MR. RENSCH: That is correct.

THE COURT: Mr. Piper?

MR. PIPER: Yes, sir.

THE COURT: Mr. Fitzgerald, have you agreed to that?

MR. FITZGERALD: Yes, I have, Your Honor.

THE COURT: Mr. Piper, we've had numerous hearings in your case. The Amended Indictment was filed on September 7th. I think you were previously arraigned on it and you were certainly arraigned on the earlier Indictments.

With respect to Count IA, the State would have to prove that on or about 13 March 2000 in Lawrence County that you did, while engaged in the perpetration of a kidnapping, kill Chester Allan Poage, a human being.

Do you understand what the State has to prove?

MR. PIPER: I'm sorry?

THE COURT: Do you understand what the State has to prove under this charge?

MR. PIPER: Yes.

THE COURT: With respect to Count IIA, kidnapping, the State would have to prove that on or about 13 March 2000 within Lawrence County that you did seize, confine, inveigle, decoy, abduct, or carry away Chester Allan Poage and hold or detain him to facilitate the

commission of any felony or flight thereafter or to inflict bodily injury on or to terrorize Chester Allan Poage.

Do you understand what the State has to prove in Count IIA?

MR. PIPER: Yes.

THE COURT: On Count III, robbery - first degree, the State would have to prove that on or about 13 March 2000 in Lawrence County that you intentionally took personal property, regardless of value in the possession of Chester Allan Poage from his person or immediate presence, and against his will, accomplished -- I believe we're missing a word, but I think it's -- by means of force or fear of some immediate injury to his person.

Do you understand what the State must prove in Count III?

MR. PIPER: Yes.

THE COURT: In Count IV the State would have to prove that on or about 13 March 2000 in Lawrence County that you entered or remained in an occupied structure, to wit: the residence of Dottie Sue Poage, Spearfish, with intent to commit the crime of theft. Further, that the offense was committed in the nighttime.

Do you understand what the State has to prove in

Count IV?

MR. PIPER: Yes.

THE COURT: Count V, grand theft, the State would have to prove that on or about 13 March 2000 in Lawrence County that you took or exercised control over property of another, namely property belonging to the Poage family, the value of which exceeded $500, with intent to deprive the owner of the property.

Do you understand what the State has to prove in Count V?

MR. PIPER: Yes.

MR. RENSCH: Your Honor, I'd also like the record to reflect that I've explained to my client that these counts can be proven by aiding and abetting another who's perpetrating the same act, and that if you were aiding and abetting another who was perpetrating that act, you would be chargeable as a principal.

THE COURT: That is correct.

Do you understand that, Mr. Piper?

MR. PIPER: Yes.

THE COURT: Is there anything about aiding and abetting that you would like me to explain further at this time?

MR. PIPER: No.

THE COURT: Count IA is a Class A felony. Should you plead guilty or be found guilty, it is punishable by

either life imprisonment without parole or punishable by death by lethal injection. Do you understand that?

MR. PIPER: Yes.

THE COURT: Count IIA is a Class 1 felony punishable by up to life in prison. Counts III, IV, and -- IV are Class 2 felonies punishable by up to 25 years in prison, a $25,000 fine, or both such fine and imprisonment.

Count V, grand theft, is a Class 4 felony punishable by up to 10 years in prison, a $10,000 fine, or both such fine and imprisonment.

Do you understand the penalty that could be imposed, Mr. Piper?

MR. PIPER: Yes.

THE COURT: I have previously explained your various constitutional and statutory rights, including your right to be represented by counsel at all stages of the proceedings. You exercised that right upon your return from Alaska, and I appointed Mr. Hubbard to represent you. Mr. Hubbard later moved to withdraw, and my recollection is that you agreed with that motion. Is that correct?

MR. PIPER: Yes.

THE COURT: I then appointed Mr. Rensch and, I believe within a matter of days, appointed Mr. Duffy to be your

lawyers, and I believe that was in July of this year -- of 2000. Do you recall that?

MR. PIPER: Yes.

THE COURT: Since then, I appointed, I believe, a private investigator and a private investigator in Alaska. I think there were motions relating to various evaluations which I approved, and I think I have pretty much approved everything that's been requested as far as resources for your attorneys to assist in your defense.

Have you had all the time you've needed to talk to Mr. Rensch and Mr. Duffy?

MR. PIPER: Yes.

THE COURT: Have they answered all of your questions regarding your case?

MR. PIPER: Yes.

THE COURT: Have you had all the time you've needed to discuss the proposal that's being made here today?

MR. PIPER: Yes.

THE COURT: May I ask, Mr. Piper, as best you recall, when did you first discuss this with your lawyers?

MR. PIPER: About a month ago, sir.

THE COURT: And did that include both the possibility of these pleas and the possibility of having the Court deal with the sentencing?

MR. PIPER: Yes, sir.

THE COURT: Have you had all the time you've needed to think about those possibilities?

MR. PIPER: Yes.

THE COURT: The only matters remaining that I understand are the motion for continuance, the motion for change of venue. There is a series of motions in limine that Mr. Rensch filed I think yesterday that we would take up within the next few days or next week, and I believe Mr. Fitzgerald has given notice of some other statements that he intended to offer. Other than that, I think everything is pretty much done on your case.

And for the record, I'd be prepared to say at this point, based upon my review of the jury questionnaires, that I would deny the motion for continuance, deny the motion for a change of venue, and would plan to go ahead with your trial next Monday as scheduled. So to the extent those pending motions are in any way something that's on your mind before you make a final decision here, I just want you to know that that's my -- that would be my intention.

And that's not to say that if we had argument on the motion that I might do something different as far as granting a continuance or reconsider the change of

venue or something like that. Those are still on the table. But if you want a ruling, that's, at this point in time on this record, what my ruling would be.

MR. RENSCH: He's also been -- It's also been explained to him that in the event he enters this guilty plea today, that he would be waiving his rights as they relate to the motions which are pending and which have been -- well, which have not been ruled on prior to trial.

THE COURT: And I think, although I've given you an indication what I would do with those if they were presented, I would probably treat them as withdrawn at this point if you enter these pleas. Okay?

MR. PIPER: Yes, sir.

THE COURT: Is there any question about anything I've explained so far?

MR. PIPER: No.

THE COURT: Mr. Piper, are you fully satisfied with the services of your attorneys?

MR. PIPER: Yes.

THE COURT: Have they done everything that you wanted them to do up to this point?

MR. PIPER: Yes.

THE COURT: Is there anything additional that you want either or both of your lawyers to do before you either

change your pleas today or before you go to trial next week?

MR. PIPER: I don't believe so.

THE COURT: Are you fully satisfied with their services?

MR. PIPER: Yes.

THE COURT: Before I move on, is there anything else you want to comment on about your legal representation?

MR. PIPER: No.

THE COURT: And the reason I maybe overdo it, Mr. Piper, is that if there's anything about the representation that you've had that doesn't suit you, I would rather hear about it now than hear about it later. Okay?

MR. PIPER: Yes, sir.

THE COURT: You have the right to a jury trial here in Lawrence County by a jury of 12 fair and impartial jurors. You'd have the right to be present and represented by your attorneys, the right to confront and cross-examine the State's witnesses, the right to call witnesses and have subpoenas issued for their appearance. You could testify if you wanted to, but under the Fifth Amendment, you could not be forced to be a witness against yourself. Do you understand these rights?

MR. PIPER: Yes.

THE COURT: Is there anything about those rights that you would like me to explain in more detail?

MR. PIPER: No.

THE COURT: You have a right to plead not guilty and persist in that plea even if you know you are guilty. If you plead not guilty, you're entitled to all of these rights.

You also have a right to plead guilty. But if you plead guilty, you give up the right to a trial, the right to confront witnesses, and you give up the privilege against self-incrimination. If you plead guilty, all that's left for the Court to do is to pronounce your sentence. Do you understand that?

MR. PIPER: Yes.

THE COURT: With respect to Count IA, which is a Class A felony, you not only have a jury trial right as to the charge itself as to the issue of guilt or innocence, but you have the right to a jury to determine whether or not the State has proved one or more aggravating circumstances and then for that jury to decide whether the penalty should be life or death. The verdict of the jury would have to be unanimous. And even if the jury found that one or more aggravating circumstances existed, I think it is still within their

province to sentence you to life imprisonment.

Is that your understanding, Mr. Rensch?

MR. RENSCH: Correct.

THE COURT: Mr. Fitzgerald?

MR. FITZGERALD: Yes.

THE COURT: Do you understand that, Mr. Piper?

MR. PIPER: I didn't understand the last part.

THE COURT: Okay. As I understand it, based upon the statutes and the cases so far decided by the Supreme Court of this state concerning the death penalty, that the state of the law is that if you were convicted of either Count I, premeditated murder, or Count IA, felony murder, which is the charge that you intend to plead guilty to today, then we would have a sentencing hearing.

You are proposing that I hold the sentencing hearing rather than the jury hold the sentencing hearing. What you need to understand is that if you have a jury instead of a judge, all 12 jurors must agree on the penalty; and even if the jury found that the State had proved one or more aggravating circumstances --

MR. RENSCH: Those are circumstances with which the jury would be justified in giving you the death penalty if they saw necessary. Aggravating circumstance is

simply something -- The jury must find that it exists in order to impose the sentence of death. If they don't find that that exists, they can't. And if they do find that it exists, they don't have to, but they can.

THE COURT: Do you understand that, Mr. Piper?

MR. PIPER: Yes.

THE COURT: Is there anything you want me to explain in more detail about that?

MR. PIPER: No.

THE COURT: If I do the sentencing instead of the jury, I still have the same situation. I must find one or more aggravating circumstances to be proved by the evidence, and even if I found those to be proved by the evidence, I could sentence you to life imprisonment rather than to death by lethal injection. Do you understand that?

MR. PIPER: Yes.

THE COURT: What is significant about what you're doing here today is that if you waive your right to have the jury do the sentencing, you are trading 12 lay people for one judge to make that call. Do you understand that?

MR. PIPER: Yes.

THE COURT: And if you make that decision, I will hear

the evidence, I will follow the law, and I will make the decision. Is that what you want to do?

MR. PIPER: Yes.

THE COURT: Have you had all the time you've needed to think about that?

MR. PIPER: Yes.

THE COURT: The other types of pleas are that of nolo contendere, or no contest; guilty but mentally ill; and not guilty by reason of insanity.

In your opinion, Mr. Rensch, would these pleas have any application to this case?

MR. RENSCH: No.

THE COURT: I believe there has been an evaluation?

MR. RENSCH: He has been evaluated by a psychiatrist; a report has not been prepared of that evaluation. But he has spoken to one, and I have been advised that there is no issue of insanity as it relates to this case. Or diminished capacity.

THE COURT: Mr. Piper, do you have any questions regarding the elements of the offenses charged, that is, what the State has to prove?

MR. PIPER: No.

THE COURT: Do you have any questions regarding the penalties that could be imposed in this case?

MR. PIPER: No.

THE COURT: Do you have any questions about your constitutional and statutory rights that I have explained to you?
MR. PIPER: No.
THE COURT: Do you have any questions regarding the types of pleas available?
MR. PIPER: No.
THE COURT: As I understand your case, there is no plea agreement here. The only consequence of your pleading guilty under the terms that are being proposed is that Count I, first degree murder premeditated design, would either be dismissed by the State or by the Court. And Count II, kidnapping - gross permanent physical injury, would be dismissed by the State or by the Court in exchange for your plea to Count IIA.
MR. RENSCH: As well as the Count IB, Your Honor, I believe, because he's pleading to the felony murder.
THE COURT: Okay. Count IB would also be dismissed, which is an alternative first degree murder - felony murder charge.
MR. RENSCH: Correct.
THE COURT: The other consequence would be that you would be waiving your right to have the jury do the sentencing. And we've discussed that, Mr. Piper. Is there anything more that you want to tell me about that

or want me to explain to you about that?
MR. PIPER: No.
THE COURT: Okay. Mr. Piper, have there been any threats or promises made to get you to plead guilty?
MR. PIPER: No.
THE COURT: Are you under the influence of any drug or alcohol at the present time?
MR. PIPER: No.
THE COURT: Are you taking any type of prescription medication?
MR. PIPER: Yes.
THE COURT: What do you take, Mr. Piper?
MR. PIPER: Doxepin.
MR. RENSCH: Doxepin, he said.
THE COURT: And who prescribed that for you?
MR. PIPER: County doctor.
MR. RENSCH: County doctor, he said.
THE COURT: Do you know, Mr. Larson?
THE BAILIFF: I believe it was Huguley.
THE COURT: Have you taken that prescription today?
MR. PIPER: No.
THE COURT: What effect does that prescription or that drug have on your ability to understand what we're doing here today?
MR. PIPER: None.

THE COURT: At any time since you've been in custody in Lawrence County have you at any time taken prescription drugs that have affected your ability to communicate with your lawyers or understand what they have been telling you?

MR. PIPER: No.

THE COURT: At any time since you returned from Alaska have you taken any prescription drugs that affected your ability to understand what was going on in court proceedings?

MR. PIPER: No.

THE COURT: To the best of your knowledge, Mr. Piper, are you mentally competent?

MR. PIPER: Yes.

THE COURT: Is the plea you're about to enter voluntary and of your own free will?

MR. PIPER: Yes.

THE COURT: Do you understand that if you plead guilty, I'm going to find you guilty?

MR. PIPER: Yes.

THE COURT: And if I'm satisfied that there's a factual basis for your pleas, I will accept those pleas. I will then schedule a sentencing hearing when the State and yourself can present whatever evidence that you wish me to consider at the time of sentencing. After

that, I'm going to make a decision as to Count IA, whether it will be life or death, and then I will decide as to the sentence to be imposed on the remaining charges. Do you understand that?

MR. PIPER: Yes.

THE COURT: The Court finds that the Defendant has been regularly held to answer; that he's represented by competent counsel; understands the nature of the crimes charged, the maximum penalties, and the pleas available; that he is not under duress, nor is he under the influence of any drug or alcohol; that he's mentally competent and that he understands the consequences of his plea.

Mr. Piper, before I take your pleas, is there anything you want me to explain in more detail?

MR. PIPER: No.

THE COURT: You are making a significant decision today. I can't emphasize how significant this decision is. If you need time to dwell on it, think about it, or discuss it with your lawyers, this is the time to take it. If you want to go ahead, we will go ahead.

MR. PIPER: Go ahead, Judge.

THE COURT: Do you wish to go ahead?

MR. PIPER: Yeah.

THE COURT: Are you in agreement, Mr. Rensch?

MR. RENSCH: I am, Your Honor.

THE COURT: Mr. Duffy?

MR. DUFFY: Yes, sir.

THE COURT: Mr. Piper, to the charge of first degree murder - felony murder as set forth in Count IA, how do you plead?

MR. PIPER: Guilty.

THE COURT: To the charge of kidnapping as set forth in Count IIA, how do you plead?

MR. PIPER: Guilty.

THE COURT: To the charge of first degree robbery as set forth in Count III, how do you plead?

MR. PIPER: Guilty.

THE COURT: To the charge of first degree burglary as set forth in Count IV, how do you plead?

MR. PIPER: Guilty.

THE COURT: To the charge of grand theft as set forth in Count V, how do you plead?

MR. PIPER: Guilty.

THE COURT: Did you on or about 13 March 2000 in Lawrence County engage in the perpetration of a kidnapping?

MR. PIPER: Yes, I did.

THE COURT: During that time did you participate in the killing of Chester Allan Poage?

MR. PIPER: Yes, I did.

THE COURT: What specifically did you do to Mr. Poage?

MR. PIPER: I assaulted him.

MR. RENSCH: Tell him how.

MR. PIPER: I kicked him.

THE COURT: Let me stop you there. At the residence on Third Street, I believe there was testimony in your statement -- one of your statements, that when Mr. Poage was on the floor of the apartment, that he reached out for your foot and you kicked him in the head. Is that correct?

MR. PIPER: Yes, sir.

MR. RENSCH: If you'd like me to, I can provide the factual basis.

THE COURT: All right. If you'd like to do that.

MR. RENSCH: On the evening of March 13th, 2000, my client, along with Eli Page and Darrell Hoadley, ended up at Chester Allan Poage's residence. While they were at the residence, Eli looked around the place, went in the mother's bedroom, Dottie Poage's bedroom, looked at some stuff, went out on the front porch. Briley Piper went out to the front porch. Eli said to Briley, "This kid has some good stuff. Let's steal it."

They concocted a plan whereby they would make it appear as though they were going to do a drug deal with

Chester Allan Poage. They brought Darrell Hoadley into this plan as well, and he was a part of it.

They tricked Chester Allan Poage into getting into his vehicle and going over to Eli Page's house. While at Eli Page's house, Eli Page pulled out a .22 pistol that he had stolen from Dottie Poage's room and put it to Chester Allan Poage's head, made him get to the floor, began to assault him. At that point Chester Allan Poage was saying something and was reaching, and my client kicked him in the face very hard, knocking him out.

They then, all three of them, tied Chester Allan Poage up and sat him in a chair. They talked to him. Conversations took place, some activity took place there in the house. The long and the short of it is they decided they were going to kill him. They loaded him into his own Blazer when he was tied up, and all three of them helped. They walked him to his Blazer.

They drove him to Higgins Gulch. The Higgins Gulch was Darrell Hoadley's idea. When they arrived at Higgins Gulch, Eli Page said, "Let's make him take his clothes off so he can't run away." They corraled him around the back part of the tailgate of the vehicle. He took his clothes off. They took his billfold from him. They took the cards in the billfold. They looked

at the license, everything in his billfold.

Whereupon they escorted Chester Allan Poage down to the edge of the creek. All three of them started to beat Chester Allan Poage. During that time, they knew that it was going to be a killing. Briley Piper engaged in kicking him and beating him during that period of time. That went on for some minutes. Chester tried to run across the stream. Eli brought him back.

Briley goes up to the vehicle. He never stabs Chester Allan Poage, even though he'd made statements to that effect. And I've gone over that in great detail with him to see if he, in fact, stabbed him. In any event, Briley Piper goes up to the vehicle. He doesn't stop it, he doesn't leave, he doesn't try to get help.

The two down by the creek continue stabbing and beating and hurting Chester Allan Poage. Briley Piper comes back down. At that point Chester Allan Poage wants to wash the blood off, wants to get in the vehicle; they don't let him in the vehicle. Piper goes back up to the vehicle. And he hears rock on rock, and Eli and Darrell at that point ended Chester Allan Poage's life with rocks.

Now, some of that may not be perfect. My client

can correct me where I'm wrong, but that's generally my understanding of the factual basis as it relates to the felony murder perpetrated during the course of the kidnapping, satisfies the elements for the robbery because they took the billfold, thereafter they went back to Dottie Poage's residence, stole everything in the residence, which constitutes a burglary, and possessed what was in the residence, which constitutes grand theft.

THE COURT: Mr. Piper, is there anything that Mr. Rensch has just said which you wish to comment on, qualify, or contradict?

MR. RENSCH: And I may not have said it correctly, so it's important that you give the right sequence.

MR. PIPER: No. That's how it happened.

THE COURT: Did you ever stab Chester Allan Poage?

MR. PIPER: No, I did not.

THE COURT: You made statements in the past that you stabbed the victim in the side of the head with a knife.

MR. PIPER: Yes, I did.

THE COURT: Do you recall that?

MR. PIPER: Yes.

THE COURT: I believe the other defendants have made the statement that you did that. That's my

recollection, Mr. Rensch.
MR. RENSCH: I think one of them said he did once. I don't recall exactly. Although other people said that he said that he stabbed Mr. Poage.
THE COURT: I better ask. Did you tell Deputy Brian Dean that you stabbed him in the side of the head?
MR. PIPER: Yes, I did.
THE COURT: Why did you tell him that?
MR. PIPER: I had asked him --
MR. RENSCH: Tell him about the deal.
MR. PIPER: I asked him if there was -- what I would have to do in order for any chance of a deal to be made. I can't remember exactly what he'd said to me, but he felt that I wasn't being honest in what I had told him, and that in order for any chance or hope for the State's Attorney to consider a deal would be -- would be to go back and -- He felt that -- He felt that I had lied to him about stabbing Mr. Poage, and that he felt very secure in the evidence that he did have that I did do it, and that for any chance for the State's Attorney to make a deal would be for me to say that -- to admit that I did, that I did stab him.
THE COURT: Did you ever tell anyone else that you stabbed Chester Allan Poage in the head or anywhere else?

MR. PIPER: No, I didn't.
THE COURT: You need to understand, Mr. Piper, that in the sentencing portion of this case, the State has alleged aggravating circumstances. And I think within the scope of those aggravating circumstances that they have specified, they have the right to introduce evidence that your participation in the killing may have been more than what you've admitted to here today, and I think you need to understand that, that just because you plead guilty, the State is not foreclosed at the sentencing hearing from introducing probably about everything that they had intended to introduce in the case-in-chief if we went to trial on the charges. Do you understand that?
MR. PIPER: Yes, sir.
THE COURT: I didn't say it very well, but what I'm trying to make clear to you is that the fact that you say something didn't happen or you didn't do something that you may or maybe not have previously admitted to doesn't foreclose the State from introducing evidence that you did. Do you understand that?
MR. PIPER: Yes, sir.
THE COURT: And at the close of this factual record or at the close of the sentencing phase, I may find as a matter of fact that you participated in the actual

stabbing. Do you understand that?
MR. PIPER: Yes, sir.
THE COURT: Okay. As far as what Mr. Rensch has said concerning the charges that you've pled guilty to, is there any further comment you wish to make?
MR. RENSCH: Don't just say no so we can get out of here. If there's something you want to clarify, clarify it.
MR. PIPER: The reason why I wanted to come and change my plea today is I want to take responsibility for what I did, but I will not now nor ever admit to something I didn't do.
THE COURT: Apparently you were willing to admit to it back in July.
MR. PIPER: I said that -- Sir, I'm 20 years old. I've never had to deal with anything but traffic violations, and now the State wants to kill me for something, yes, that I was a part of but didn't specifically do. And to be 20 years old, to try to save my own life, I did what I thought I had to do.
MR. RENSCH: Are you talking about when you were speaking to Investigator Dean?
MR. PIPER: Yes.
THE COURT: Okay. Mr. Fitzgerald, at this time is there anything additional you wish to offer for factual

basis?
MR. FITZGERALD: No, Your Honor.
THE COURT: May I use Mr. Piper's statements of August -- excuse me, April 28th and June 9th for purposes of factual basis?
MR. RENSCH: Yes, Your Honor.
THE COURT: Do you agree, Mr. Piper?
MR. PIPER: Yes.
THE COURT: We will be discussing, I'm sure, the factual basis in more detail at the sentencing hearing, but for purposes of your pleas to these charges, I find that there's a substantial factual basis to your pleas and your pleas of guilty will be received.

We spoke in chambers concerning scheduling of the sentencing hearing, and since we had originally intended to begin testimony on September 17th --
MR. RENSCH: January.
THE COURT: I'm sorry. January 17th, that we agree to begin on the 17th and set aside three days if needed.

Is that correct, Mr. Rensch?
MR. RENSCH: Correct, Your Honor.
THE COURT: Mr. Fitzgerald?
MR. FITZGERALD: Yes, Your Honor.
THE COURT: We will reconvene at 9 a.m. on January 17th for the sentencing hearing.

One other thing that was discussed off the record was how you wanted to present your evidence, particularly if you had people from your hometown that you wanted to have in person. I told Mr. Rensch that I would accept the evidence in whatever form that you and he wanted to present it, whether it was in affidavit form or in the form of live testimony. He will discuss that with you in more detail, but that option is available.

And I believe you've agreed as far as affidavits, Mr. Fitzgerald?

MR. FITZGERALD: Yes, I did.

THE COURT: I just want to assure you on the record that if you want those people here live and in person, that's the way it will be. Do you understand?

MR. PIPER: Yes.

THE COURT: Do you have anything further today, Mr. Fitzgerald?

MR. FITZGERALD: No, Your Honor.

THE COURT: Mr. Rensch?

MR. RENSCH: Nothing, Your Honor.

THE COURT: Mr. Duffy?

MR. DUFFY: Nothing further.

THE COURT: Do you have any questions?

MR. PIPER: No.

THE COURT: Court will be in recess.

STATE OF SOUTH DAKOTA)
) SS. CERTIFICATE
COUNTY OF LAWRENCE)

I, Tracy L. Binder, Court Reporter and Notary Public, South Dakota, duly commissioned to administer oaths, certify that I placed the witnesses under oath before the witnesses testified; that the foregoing testimony of said witnesses was taken by me in shorthand, and that the same has been reduced to typewritten form under my supervision; that the foregoing transcript is a true transcript of the questions asked, of the testimony given, and of the proceedings had.

I further certify that I am not related to, employed by, or in any way associated with any of the parties to this action, or their counsel, and have no interest in its event.

Witness my hand and seal at Deadwood, South Dakota, this 4th day of January, 2001.

Tracy Binder
Tracy L. Binder
Certified Shorthand Reporter

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT

COUNTY OF LAWRENCE) FOURTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,
Plaintiff,

vs.

ELIJAH PAGE,
Defendant.

COPY

SENTENCING

Crim. 00-430

Vol. V of V

(Pgs. 821 - 992)

BEFORE: THE HONORABLE WARREN G. JOHNSON
Circuit Court Judge
Deadwood, South Dakota
February 16, 2001, at 9:00 a.m.

APPEARANCES:

FOR THE STATE: MR. JOHN FITZGERALD
- and -
MR. BRUCE OUTKA
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FOR THE DEFENDANT: MR. RANDAL CONNELLY
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- and -
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(WHEREUPON, the following proceedings were duly had:)

THE COURT: I understand that the next witness necessarily has to appear by phone?

MR. CONNELLY: Yes, Your Honor. The cost situation is a result of a family problem that she encountered this week. To get her out here with late notice would have been cost prohibitive.

THE COURT: All right.

MR. CONNELLY: Her name is Trisha Dunham, and she lives in Omaha. And I advised her to call probably within the next five minutes, five to ten minutes.

THE COURT: All right. How many media representatives do I have?

I see three hands. Okay. We're going to reconvene in the jury room in about five minutes to take the call. I will have the same personnel that I had for the hearing on Wednesday, plus the three media representatives.

Court will be in recess.

MR. CONNELLY: Thank you.

(WHEREUPON, the proceedings reconvened in the jury room, awaiting the phone call.)

THE COURT: We'll go on the record.

As I understand it, the next witness is Ms. Trisha

Dunham.

Are you there, Ms. Dunham?

THE WITNESS: Yes.

THE COURT: Can you hear me?

THE WITNESS: Yes.

TRISHA DUNHAM,

having first been duly sworn, testified as follows:

THE COURT: Mr. Connelly is going to question you on behalf of Mr. Page, and then the State's Attorney will have an opportunity to ask you questions.

Go ahead, Mr. Connelly.

MR. CONNELLY: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. CONNELLY:

Q Trisha, can you hear me?

A Yes.

Q Would you tell us what your birth date is?

A January 21 of 1981.

Q All right. And your current age?

A 20.

Q All right. And your social security number?

A 505-08-7778.

Q All right. And what is your current address, Trisha?

A Omaha, Nebraska.

Q All right. Can you name some family members; mother,

father, brothers, sisters.
A Mary Tishy, my mother.
Q All right. And your father's name?
A Rick Dunham.
Q Did you live in the -- Have you ever lived in the Spearfish area?
A Yes, I have.
Q All right. Can you tell us the approximate period of time that you did.
A I'm thinking it was October or -- anywhere from October to December of '98 -- no, '99.
Q All right. Did you live here for a while into the year 2000, that would be January, February of last year?
A Yes.
Q All right. Did you come to know Elijah Page?
A Yes.
Q And can you tell us in your own words how it was that you became acquainted with him?
A He was an ex-boyfriend to my best friend, Natasha Paris.
Q All right. Go on.
A And she -- we both went to a party and he was there, and she introduced me to him.
Q Okay. Did you become acquaintances or friends?

A Yes.
Q Did you for a time stay at the Third Street house of Eli and Preston Willuweit?
A Yes.
Q All right. And how long a period was that?
A Probably anywhere from two to three months.
Q Months or weeks?
A Months.
Q Okay. Where did you stay at the house?
A I slept in the living room on the couch.
Q All right. How would you characterize Elijah Page as far as his personality?
A He was very nice. He was pretty passive, but he was always looking out for everybody else.
Q Okay. Was he violent?
A No, I had never seen him be violent.
Q Did he -- Did he ever get angry?
A Yes, I've seen him get very angry at, um, this guy that had came over to the house; but as much as I have seen him do was tell him to get out, and he went to his bedroom and listened to the radio.
Q All right. Is that what he would usually do when he was angry?
A Yes.
Q Do you remember what he was angry about with that guy?

A Yes. The guy had came over to his house and stole some jewelry, I think it was, out of his house and then tried to lie to Eli about it.
Q Okay. Did you come to know Briley Piper?
A Yes, I did.
Q Tell us about Briley Piper. What kind of a personality did he have?
A He seemed like a very weird guy to me. He was always talking about really violent stories. He always was trying to talk everybody into going out and doing some crazy thing for no reason.
Q Okay. What kind of stories would he tell?
A He would talk about how he was really violent to certain people, how he would slit throats in I think it was Canada -- or, no, Alaska where he was from.
Q How he would slit people's throats?
A Yeah.
Q All right. You say that he would talk people into or try to talk people into things. How do you mean?
A He'd just instigate it, like we should go do this and it would be really cool; and everybody was like, um, why?
Q Okay. Well, did he -- Was he able to talk people into doing things?
A He was able to talk about anybody into doing anything.

Q Okay. When did you first -- Strike that.

As far as Eli, did you know that Eli was going with Misty Guettler?

A Yes, I did.

Q All right. Was he spending time at the Guettlers during the time that you lived there at the Third Street house?

A Yes.

Q All right. Would you see him when he returned home at night?

A Yes.

Q All right. Did you have talks or conversations?

A Yes.

Q All right. You indicated that Eli was passive. What else would you be able to say about him, as far as his personality?

A He was -- He was really kind. He was always trying to help somebody. If they didn't feel good, he would try to make them feel better.

Q Okay. How about his relationship with Misty? Did that seem important to him?

A Yes, that was like number one.

Q Okay. When you discovered or heard anything about this case or Eli's involvement -- Can you just tell me how you heard about it?

A Um, my friend Travis Loll was in jail and he called me collect and he said, "You'll never guess who's in jail," and I said, "Who?" He goes, "Eli." And automatically I was shocked and I said, "For what?" He said, "For murder." And my mouth just dropped, and I said, "You've got to be kidding me." He goes, "No. You'll never guess who else is in here with him," and I said, "Who?" He goes, "Darrell and Piper," and automatically I thought it had to be Piper who got these guys to do this.

MR. CONNELLY: That's all I have. Thank you, Trisha.

THE COURT: Mr. Fitzgerald, you may inquire.

CROSS-EXAMINATION

BY MR. FITZGERALD:

Q Ma'am, who did you hear from that Eli and Piper and Hoadley were in jail?

A Excuse me?

Q Who did you hear --

A Travis Loll.

Q Travis Loll?

A Yes.

Q Okay. And is he a friend of yours?

A Yes.

Q Did Piper talk about violent acts that he and Darrell Hoadley had committed prior to coming out to South

Dakota?

A Yes.

Q Okay. Where had they committed that at?

A Anchorage, I think, is where it was in Alaska.

Q That's where you think it was?

A Yes.

Q No other place was mentioned?

THE COURT: Did you answer?

THE WITNESS: Yes.

Q I didn't hear your answer.

A Oh. Anchorage, Alaska, I think.

Q No other place was mentioned?

A No.

Q And I assume you told the police then about that when you heard it?

A No.

Q Why not?

A I just figured either he was joking or he was really messed up; and I didn't want to get involved, on his bad side.

Q Okay. You lived there in the house with Piper?

A No.

Q Okay. Piper didn't live there, did he?

A No.

Q Eli did?

A Yes.
Q Preston Willuweit did?
A Yes.
Q Were they selling drugs out of that house?
A Not that I knew. They kept it pretty much to themselves.
Q Their drug use or the drug sales?
A All of it with the drugs.
Q Okay. So you never saw anyone using drugs while you were there?
A I seen -- As much as I've seen them do, I knew they would get high once in a while, but that's all I knew.
Q That was Eli and Preston?
A Yes.
Q But you didn't partake. Right?
A No.
Q Did Piper try to encourage them to sell drugs?
A No.
Q Okay. So if they were involved in that, it wasn't with Piper?
A It seemed like when Piper came around, after he started coming around more, that they started talking about doing drugs more often.
Q So you lived there when Piper got there, huh?
A Yes.

Q What crimes did he get you to commit?
A Um, nothing. I hardly would talk to him. I didn't like him.
Q Okay. Did you share that with Eli and everyone else that you didn't like him or didn't trust him?
A I told them that he made me feel really strange when he was around.
Q But you didn't tell them to avoid contact with him, then?
A No. I pretty much tried to stay out of it.
Q So apparently you disliked him but you didn't think he was such a threat to your friends that you warned them to stay away. Is that right?
A After a while of him talking about those stories about hurting people, I would talk to Eli when we had our talks at night and I'd tell Eli that Piper looked like he was up to no good and that I'd probably try to stay as far away from him as I could, that's why I don't talk to him.
Q And so what did Eli say when you warned him of that?
A He kind of just laughed and was like, "I think Piper just talks a lot."
Q Okay. Eli ever talk about doing anything to any animals when you were around?
A No.

Q Never told any stories about that?
A No.
Q Okay. You lived there from what period of time?
A It was around -- I couldn't tell you the exact month. It was around the end of '99 into the beginning of 2000.
Q Okay. When did you move out?
A It was after 2000.
Q Okay. January or February?
A January.
Q When did Piper arrive in South Dakota with Darrell Hoadley?
A I'd have to say it was probably -- I probably started noticing like the beginning of December, maybe.
Q The beginning of December?
A Yes, or the end of November.
Q And you're pretty sure about that?
A I couldn't tell you the exact month.
Q When did you leave, then, the Third Street house?
A Um, probably the second week of January.
Q Where did you go to?
A I moved in with a different friend.
Q Who was that?
A Pat Rankin.
Q Pat Rankin?

A Yes, I think that's his last name.
Q Was that in Spearfish?
A Yes.
Q How did he treat Tasha Paris?
A Eli?
Q Yeah.
A Um, they had their tiffs, but more than likely -- He was just -- They were friends. If she needed anything, he was there for her.
Q Did they violently quarrel?
A No.
Q Did he yell at her?
A No. She would yell at him, though.
Q Okay. So he wasn't verbally abusive to her, then?
A No.
Q And you're a witness to that?
A Every time I'd see them together, yes.
Q All right. So how long did you spend living there at the house with Eli then total?
A Anywhere from close to two months to three.
MR. FITZGERALD: Okay. That's all the questions I have.
THE COURT: Mr. Connelly?
MR. CONNELLY: Thank you, Your Honor.

REDIRECT EXAMINATION

BY MR. CONNELLY:

Q Trisha, are you clear about the dates and the times or is there some haziness or confusion on your part?

A Yeah, I don't really remember like the exact months.

Q All right.

MR. CONNELLY: Thank you. That's all I have.

MR. FITZGERALD: No further questions.

THE COURT: I'm going to hang up at this time, Ms. Dunham. Thank you.

THE WITNESS: Okay.

THE COURT: We'll reconvene in the courtroom in ten minutes.

(WHEREUPON, a brief recess was taken, after which the proceedings reconvened in the courtroom.)

THE COURT: Please be seated.

Mr. Connelly, you may call your next witness.

MR. CONNELLY: At this time, we would call Dr. Fox.

JOHN FOX,

having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CONNELLY:

Q Would you please state your full name and address.

A Dr. John Fox, and my office is on St. Anne Street in Rapid City.

Q And your profession, sir?
A I'm a psychiatrist.
Q All right.
Q Can you tell me how long you've been in practice in Rapid City?
A I've been in practice now in Rapid City for seven years.
Q Can you tell us just a little bit just very generally about your educational background.
A Well, I received a bachelor's and master's degree from Auburn University in Alabama. Went to medical school at the University of Alabama in Birmingham. Was in family practice in the Birmingham area for around eight years and then went back and did a residency in psychiatry at the University of South Alabama.
Q All right. Is there any area in your practice in which you have emphasized or have specialized?
A I've spent a good portion of my work dealing with drug and alcohol problems.
Q All right. Sir, I want to approach, if I may, and ask you if you could just review very quickly what's been marked for identification purposes as Defendant's Exhibit I.
A Yeah, this is my resume or --
Q All right. Great. And is that true and accurate to

the best of your knowledge, sir?

A Yes, it is.

MR. FITZGERALD: I have no objection.

MR. CONNELLY: I would offer I at this point.

THE COURT: Exhibit I is received.

Q Sir, did there come a time when you were requested by me to do some work?

A That's correct.

Q All right. And do some work in regard to the case of State versus Elijah Page?

A Yes, sir, that's correct.

Q All right. And what did we ask you to look at, both in terms of materials and in terms of questions that we had.

A You asked me to look at testimony that Mr. Page gave to some law enforcement officers, and also some audiotapes to listen to regarding his questioning, both in Texas and I believe locally. You also asked me to look at some notes that were made by Dr. Perrenoud regarding his interview with Mr. Page, and some questions generally regarding the effects of drug and alcohol use, as well as childhood dynamics and upbringing, on the behavior that was concerned with the murder of Mr. Poage.

Q And you were aware that Mr. Page was 18 years old,

were you not?
A I was aware of that, yes, sir.
Q Did we also discuss your knowledge or your expertise in relation to, at least generally speaking, characteristics of adolescence, characteristics of teenagers, developmental processes, things like that?
A That's right. We did discuss those things.
Q All right. Do adolescents go through some changes that are dramatic in their life?
A Oh, adolescence is a period of turmoil for everyone that experiences it.
Q All right. What are some of the things that adolescents -- some of the, oh, characteristics, I guess, of adolescence and what people who even have what we call a kind of a normal childhood go through?
A When someone enters adolescence, you know, 12 or 13 years old, they tend to be, you might say, self-centered. They tend to look upon themselves as the center of their world. And as they go through adolescence, they begin to realize that there are other people in their life besides them. Towards the end of adolescence, they begin to look at things from other people's point of view and to begin to have some understanding of how other people feel about things they do themselves, in a normal period of growth and

development.

Also, too, the adolescent, as he begins to develop, is moving toward a position of independence, however. And he begins to question the authority of his parents and other authority figures and begins trying to move toward a position where he makes his own decisions rather than being guided by the decisions of caregivers or parents or people in authority. And this, of course, this period of questioning -- of change and turmoil results in a lot of the conflicts that adolescents have with authority figures or parents, because they're struggling to become independent.

Q Okay. Now, you mentioned that -- or you talked about what they finally develop or exhibit as characteristics toward the end of adolescence. When is the end of adolescence?

A In the late teens, for most people, and that pretty much coincides with the final stages of development of the frontal lobes of the brain as far as anatomical changes go. During that period, too, of change, adolescents tend to exhibit characteristics of impulse control and difficulty in making judgments and also appreciating the consequences of their behavior. Sometimes they tend to be a here-and-now kind of an

individual and not, you know, look forward to the long-term consequences of decisions they might make.

Q Is it -- that is, is the development of these things, including physiological developments, for example, the frontal lobes, is that process something that occurs unevenly in people?

A Oh, of course. And, you know, at the same time, too, there are all the hormonal changes that are going on with both boys and girls, and this causes a real storm for people emotionally.

Q Okay. Now, you've been referring to what we call a normal or conventional-type life, upbringing, childhood. You are not here to vouch for the truth, accuracy, or factualness of anything historically in Elijah Page's background. Is that correct?

A That's correct, sir.

Q And by the way, have you ever been asked to offer any testimony or consult with us in a way that would excuse or justify actions about which you read and heard in that lengthy interview?

A No, I have not. I've hoped to understand some of the action, but not to excuse it or justify it.

Q All right. Have we discussed various or provided various representations to you about things that occurred in Elijah Page's background?

A Yes, sir. You've furnished me with a number of documents that were labeled "time lines" that detailed different periods in his development and different placements where he found himself, which caregivers or parent figures he was with or without, as well as documents of psychological testing from some of the juvenile institutions where he was placed as well.

Q And you also received, in addition to the audios where you could listen to Mr. Page's voice as well as the content of his testimony, as you call it, but also you received notes that were made following numerous hours of contact with Dr. Perrenoud wherein answers were sought or elicited.

A That's correct.

Q If we take a child and we assume that rather than having, again, what we call a normal upbringing, that we put some other factors into the upbringing of that child that could be perhaps characterized as neglect, that could be possibly characterized as abuse, maybe abandonment, rejection, perhaps even some victimization, how would those typically, I guess, in your experience, in your training, affect or could affect that development process of a young person?

A The dynamics behind childhood neglect and abuse essentially center around the fact that children have

an almost instinctual expectation that their caregivers, that is, their parents, are going to treat them well. Any animal has that expectation. When that caregiver does otherwise, is neglectful or abusive, it causes a real intrapsychic type of conflict with that individual. Because part of him thinks this person cares for me and should be caring for me, and yet his experience is that they're either inconsistent with their care or they're brutal and neglectful, and this causes a great deal of turmoil in that individual's mind.

Usually along the line, the young child doesn't come to the conclusion that my parents are bad, but that I'm bad, and that there must be some reason that this parent is rejecting me or treating me this way. As time goes on, this individual may get to a point where he believes that all adults are untrustworthy and not to be respected or not to be trusted. And as a result, he may come to a point where he defies authority and has what are called behavioral problems, and this is a normal expected outcome from this type of treatment. Sometimes, too, the child will develop what was called in the old literature anaclitic depression. That is --

Q Ana --

A Anaclitic. Essentially it means that I just give up and I don't care, you know. They have left me, they have mistreated me, and I simply don't care.

Q Well, is that to say that they pity themselves, they're feeling sorry for themselves?

A I think it goes far beyond that feeling sorry for themselves. They may even come to a point where they don't -- they don't eat. They don't interact. They become totally withdrawn. It's a very serious phenomenon. It's more than just feeling sorry for themselves. It's just a sense of giving up.

It's sort of like experiments that are done with dogs in which they're put into a cage where they're given electric shocks and they can't get away from the shocks. And at first they try to fight and run away and scream, and then after a while they just lie there and get shocked. And so I think that happens with people, too. They get to the point where just nothing matters, just nothing matters.

It's sort of like when you hear Vietnam veterans talk about their combat experience and they talk about having that ten-mile stare and saying, "It just doesn't matter anymore. I just don't care." And I think they just simply give up, feeling like there are no solutions to things, that they're totally

powerless, have no ability to control the outcome of things in their life and just give up.

Q If that situation of rejection, abandonment, or the impression that the child would have that a parent figure does not care whether they exist, and if it is factual that a parent treats that child from zero to, say, five, six, seven years old as if they do not exist, would you say that that's a fair degree of deprivation of the things you've just talked about a child needing?

A Yes, it is.

Q If that continues and there are -- there is transiency on the part of the child and whoever the figures are who are what you are calling caregivers, and that is disruptive, transient, that a person comes into the situation from, say, six or seven to ten or eleven and the conditions do not really change, that there's a continuation of this deprivation of these things we've talked about, would the damage have started and continued while this was happening or does it just show itself later?

A It can work either way. Sometimes if there's maltreatment in the formative years, you know, from birth to six years, the damage is done, and the personality being defined as the way an individual

conceptualizes himself in relationship to the rest of the world and the way he interacts with the world and knows about it, and sometimes those, you know, instill very enduring character traits in an individual, too.

Sometimes, too, the effects of trauma can be delayed. There have been instances where people that were in, you know, the Coconut Grove fire back in the '40s didn't begin to exhibit flashbacks and symptoms of trauma until in the '80s. So it's a variable sort of a thing. But I think with most children, some characteristics become apparent, you know, from the very start.

Q Would -- If we added to this equation a factor of drugs and alcohol from an early age, from the beginning, exposure to drugs and alcohol around these, quote, caregivers, how would that or what would you typically find in the way of a result or a byproduct of that?

A There are a number of things you might expect. Some of it is related to the actual physiological effect of the substances themselves. You know, we're talking about the frontal lobes of the brain that have to do with judgment and impulse control and insight and those sorts of things still myelinating, that is, getting their protective insulation and getting into

their full functional capacity. And if there's substances involved, the physiologic development of the judgment part of the brain is impaired, just because there are toxic chemicals there. Toxic chemicals that can cause persons to have more aggression, disinhibit them, and inhibit the already prevalent impulse control problems that are sometimes present in adolescents.

Another thing that you have is an adolescent that is using substances could be exposed to an environment where there are ill-defined boundaries, parents that permit that sort of thing, or parents that do that sort of thing themselves, which then also introduces the possible dynamic that the parent himself is a substance user, abuser, or addict, and passing on their own genetic information, keeping in mind that the most important determining factor in whether or not an individual becomes alcoholic or addicted is family history and genetics.

And also, too, you know, you have a situation in which parents may be doing these things and permitting a child to do these things, these parents may also have certain personality disorders which have institutional foundations, so they can pass on those characteristics.

So there's a lot of things going on when this young person is using alcohol or using drugs.

Q Let's talk about the -- Let's talk about substance abuse and a little bit of your knowledge on the processes of substance abuse, whether that be alcohol or drugs, whether there's really a difference there, and how that process works, if you are familiar with that.

A Individuals that begin to use substances -- and probably 80, 85 percent of the people in this country use substances, and that may be a glass of wine with Thanksgiving dinner or it may be a quart of wine every day, but around 80 to 85 percent of the people in this country use substances, most predominantly alcohol. Anybody that uses substances usually begins for about the same reason, you know, to socialize with friends, to celebrate, ceremonial purposes, whatever.

Q Entertainment?

A Entertainment, or because everybody else is doing it. People that are not vulnerable to developing substance abuse problems have certain prohibitions against that, you know, they have been told or learned that excess use of substances is not to be tolerated, is illegal, ill-advised, causes dysfunction, and they sort of believe that inner voice that says you stop here, and

85 percent of people that use substances do just that.

There are other people that have the genetic underpinnings for addiction who, after a point, begin to lose control of their ability to regulate their substance use. They undergo certain physiologic brain chemical changes that puts them in a position ultimately where they must use, and they lose their ability to choose. They lose their ability to regulate how much they use, when they use, things of that nature, so that -- therein develops the phenomenon of an addict. Other people, too, may have negative affective states like depression or agitation or psychosis or whatever, and the substances serve a role in modulating difficult-to-bear emotions, such as emotions that might have arisen out of trauma or pain or painful memories. And oftentimes, too, this also creates a type of dependency in that the medication or the substance becomes necessary to keep an individual from being overwhelmed by painful emotional experiences.

Q But if that person is of average intelligence, is able to think at times clearly, is approaching either maturity or the end of adolescence, can read, write, listen to the radio, they can also decide on the basis of the programs, the public announcements of "Just say

no" and discouragement or informational advisements, they can learn and they can process that information regardless of what they have been exposed to and they can say, "I'm just going to say no," can't they?

A Some people can.

Q Can some people not?

A Some people cannot. I mean, one of the predominant features of the phenomenon of addiction is denial, and that is, you know, I'm going to be different. It's going to be different for me. Even long past the point where it's clear to everybody else that it's very -- you know, that it's not different, that it's a problem.

The individual who has problem use continues to ingest those substances long after there's plenty of evidence that that substance use pattern is abnormal. That's why 90 percent of people who have substance problems only get into some sort of treatment with coercion. Because rarely does somebody say, "Well, it's a great day to stop using drugs." There's usually some sort of coercion, either health problems or overt problems with the family.

So people that don't have problems don't have any trouble saying no, but once people have problems, that's a little naive to expect people to be able to

stop that have an addiction problem or personality type of disorder of where that substance has become very necessary for them. And when you ask an addict or an alcoholic to stop using their substance, you're asking them to experience the single greatest loss they will ever experience. You know, they don't -- It's oftentimes been said that alcoholics have a death wish, and yet to the alcoholic, in his mind, his alcohol or his drug is the one thing that consistently gives him comfort. And even though it's hurting him, to him it's the one thing that soothes him and makes him feel better.

Q Thank you. You've had an opportunity to review these materials that were provided to you?

A Yes, sir.

Q You've had an opportunity to listen to some audiotapes of an interview with Elijah Page, and did you listen to those?

A Yes, sir, I did.

Q What did you hear on those tapes?

A I heard a young man who initially appeared not to have a recollection of the events, but as time went on, seemed to be more conversant about the reality of the circumstances and what he had been involved in.

Q Seemed to be becoming more honest with the officers?

A That's correct. More honest or more able, however you want to term it or phrase it. This seemed to be a young man who had not, on the day of the event in question, planned to go out and kill somebody, was exhibiting a very common adolescent trait of not anticipating consequences and just living moment to moment. A person who's judgment was, in all likelihood, affected by persistent chemical use, both in the weeks preceding and the day of the event. Seemed to be an individual, too, who had not premeditated or planned to kill anyone or to be a participant in that, but someone who had gotten caught up in the moment.

Q Let me stop you there. The information that you have about Elijah Page, if you assume that it's true, would you characterize the person about who this information was provided as passive, as a follower, as aggressive, as a leader, what words would come to mind?

A In reviewing all the information, Elijah did not appear to be a leader or a plotter, but one who followed or, you know, would join with others for the purpose of acceptance. And this is oftentimes a characteristic as well of people that have been neglected and the whole phenomena that have been brought up in some of the previous psychological

testing of reactive attachment disorder.

Now, these are people that either have difficulty in forming any relationships at all or will often attach themselves indiscriminately to people who may not be good for them. And so he seemed to be somebody that was following along, from the information that I had received.

Q Would -- Just looking at it hypothetically, given the information you had and assuming the truth thereof, would a person of this nature be more susceptible or suggestible, I guess is sometimes the word, to the influences of other people?

A That's correct. That's correct in assuming that.

Q What if the other people resembled in characteristics, at least some characteristics about authoritarianism, aggressiveness, perhaps manipulativeness, resembled caregiver figures that this person had been subjected to as a child? Wouldn't they reject anyone who even resembled a person like that?

A Well, I think when you're talking about the associates that Elijah had on the evening of the killing, they were all young people like himself and didn't probably typify the traditional sort of authority figures. Keeping in mind, too, that individuals who're abused and neglected oftentimes gravitate towards people to

associate with that may be quite like the people that abused or neglected them. Sometimes there's this phenomenon -- and even Freud described it long ago, that an individual gets back into relationships like this in order to gain a sense of mastery over their situation and play it out differently. Traumatized Vietnam veterans frequently become mercenaries later even though they may have had terrible combat experiences, and the philosophy is that they try to recreate a situation in which they may have had no power and turn it into a situation in which they did.

Q Did you get the impression, listening to the tape, that Elijah was leading this foray, leading this --

A The information that I had did not suggest he was leading this event.

Q You will agree that what you listened to was upsetting, was it not?

A It was quite upsetting.

Q How did you feel listening to that?

A I think the one thing that struck me during all of it is the pain and suffering that the decedent experienced, and the total insanity of the whole situation. It's difficult to really imagine how something like this started and continued. And it appeared to me that most of the participants in this

event didn't know from one minute to the next what they were doing or where they were going.

Q You say most of the participants?

A Uh-huh.

Q Did that include all the participants?

A No, it did not.

Q Why did it not include all the participants?

A Well, it appeared from the testimony I had that Mr. Piper had a leading role in this event, manifested by the description of his involvement and even including the description of some of his activities while incarcerated at a later time. It appeared that of the information I had, he didn't seem to have any regard whatever for the suffering of the decedent. And seemed to be in a position of ordering the other participants around and directing them to do what they did.

Q In the recounting or attempt to recount during this taped interview by Elijah Page, did you notice anything unusual or significant about his behavior, his descriptive tone, his emotional level, anything like that?

A There were a few things. I think when Mr. Poage was initially in the house and when he was first subjected to the firearm and kicked in the head, there was a

comment, I believe, by Elijah that indicated, you know, Was that necessary, or That sure was harsh. And then later when Mr. Piper reportedly told Mr. Poage, How does it feel to know you're going to die, also Elijah seemed to indicate that that seemed to be a harsh sort of statement.

There were also times when Mr. Poage was obviously severely injured but still alive that Elijah had indicated, you know, Can't we just leave him, or, you know, Do we have to do any more, that sort of thing.

Q Now, you don't deny that during your listening to this, that Eli portrayed himself as a very active participant?

A He clearly, despite what he said, continued to participate.

Q And he did not deny that in the tape?

A Did not deny that, no, sir.

Q Do you have experience with what's sometimes called flat affect or numbing, either professionally, educationally, or experientially?

A Well, all of the above.

Q All right. Can you tell us about that briefly.

A Well, a flat affect is one in which little emotion is outwardly displayed. This is a common characteristic of depression where somebody is clearly not

experiencing any joy or is withdrawn or not involved in the things that are going on around them. It's also characteristic of people that engage in a process that's called psychic numbing, and that is a type of withdrawal that people who are oftentimes traumatized have in order to protect themselves against the memories or the pain of trauma.

Oftentimes, as we mentioned a little earlier when we were talking about the role of substances in modulating affect or keeping down painful emotions, sometimes people develop the ability to do that themselves by simply numbing out and not feeling. That's why oftentimes people can repress memories of trauma for many years, and they only come up at some later time during an illness or a traumatic event.

Another phenomenon associated with it is sometimes what's called rage attacks, wherein people that have been traumatized keep down their emotions because they know that if they don't, their emotions will simply get out of control.

Q Do you -- Are you exposed to this or do you see this in patients or clients who are themselves victims at some point in their earlier years?

A Oh, I see it in women who have been sexually abused. I see it in men who have been sexually abused. I also

see it in war veterans who either use a lot of substances or come up with a lot of physical ailments, and all of that psychic pain is directed into physical ailments, back trouble, stomach trouble, headaches, whatever, because it's easier to have that than it is to experience the pain.

Q I'd like to ask you about one other area, and that is what's sometimes referred to as the group dynamic. And I'd like to ask you about this group dynamic and its effect on people, even in situations where there is not a strong, influential sort of powerful leader, when people can get together, when people assemble. Are you familiar with that term?

A Right.

Q Okay. What's moral attitude versus moral behavior?

A Well -- And going back to the group dynamic, especially with adolescents, they're very sensitive to how their peers see them, see them and regard them, and that may be one of the primary motivating factors in the adolescents. And oftentimes they will do things in a group in order to be accepted that otherwise they might not ever do on their own.

Q And that's sometimes whether there's a distinct leader or ringleader or not?

A Or just several people that are going in a particular

direction and they go along.

Q All right.

MR. CONNELLY: Thank you, sir. That's all I have.

THE COURT: Mr. Fitzgerald?

CROSS-EXAMINATION

BY MR. FITZGERALD:

Q Dr. Fox, when did you first become a psychiatrist?

A I went into psychiatry training in 1989. I have been in addiction medicine for probably eight or ten years before that.

Q So you got your board certification as a psychiatrist in 1989?

A No. I went into the training in '89 and got the board -- finished the residency and took the boards in the early '90s, then.

Q So how long then have you been a board-certified psychiatrist?

A I believe I got my board certification in '95, '96, though I was practicing psychiatry several years before that.

Q And you're being paid today, are you not?

A That's correct.

Q How much do you charge per hour?

A My group works that out, but I believe they pay $250 an hour.

Q So you charge $250 an hour for your work on this case?
A That's what I believe my group is charging, yes.
Q Okay. You're part of a medical association?
A Part of a psychiatric group that has a standard forensic fee, yes, sir.
Q How many hours have you spent so far in this case?
A I've spent quite a few. I think probably 12 or 15 hours so far at least.
Q Okay. 12 or 15 hours?
A That's correct.
Q And how much of that time was spent listening to tapes?
A Oh, I would imagine I spent at least about three or four hours listening to tapes. The rest of it reading documents, researching various items that were brought up on the documents, things of that nature.
Q And how much time did you actually spend with Elijah Page?
A I've never interviewed Mr. Page, never asked to interview him.
Q You didn't spend even five minutes with him?
A I was never asked to interview Elijah Page.
Q So sitting here in court, then, this is the longest time you've actually been with him?
A That's right. My time before has been spent with, you

know, documents and descriptions and things, but not with him.

Q Do you feel that it's better or easier for you as a psychiatrist to draw conclusions and give opinions based on watching basically videotape or audiotape versus actually interviewing the subject?

A Well, in my work, I always interview a patient. I think I can draw conclusions about a particular incident and give opinions -- general opinions about things, you know, in other ways.

Q But when you're at your office, you have actual patients come in, don't you?

A Oh, that's true. I always do.

Q What is the purpose of having a patient come in then to see a psychiatrist?

A Well, the main reason I believe is to establish a relationship with that individual. You know, coming up with their diagnosis or a way to treat them probably involves less time than simply creating a relationship of trust between the two of you so that you can work together on an interpersonal basis.

Q Okay. And have you written a report?

A I've not written a report or been asked to write a report.

Q You were not asked to write a report?

A That's right.
Q Is that typical of how psychiatrists operate?
A It's typical to write a report if you've interviewed a patient. But in this case, I was not asked to interview anyone specifically and, therefore, did not generate a report.
Q You were just asked to review documents?
A To review documents.
Q Okay. So I want to make sure I got a list of what you reviewed. Please tell me what you reviewed.
A I don't have a list here with me, but I reviewed the testimony of the DCI agents that interviewed Mr. Page on two occasions in Texas.
Q Just the two occasions that they interviewed him?
A The two in Texas, and I believe there was another interview as well in South Dakota. I reviewed some notes that Dr. Perrenoud had written about his interaction with Mr. Page, but not the formal report. I listened to the tapes, of course, of the interview in Texas.
Q So you read it and listened to it at the same time?
A I read it first, and then listened to it, to the tapes, and followed along with the document, so simultaneously.
Q When did you do that?

A I first did that a few weeks ago. I went through the tapes once and then have glanced back through the documents again when I was trying to generate a response to some of the questions that Mr. Connelly had given me regarding this case.

Q Were those questions put in writing to you?

A They were, yes.

Q Okay. But the responses were not?

A No.

Q So if I've got it right, you listened to two tapes conducted in Texas and one in South Dakota. Is that right?

A That's correct.

Q Okay. What else? Dr. Perrenoud's notes?

A Dr. Perrenoud's notes. I also looked at some psychological testing that was done of Mr. Page in his previous placements in various juvenile facilities as well.

Q Okay. Which ones?

A And I made notes about those things but did not generate a formal report.

Q Do you have your notes with you?

A Yes, sir.

Q Okay. Will you need them to refresh your memory as to what documents you reviewed from the other states?

A Well, I might if you want, you know, more details.
Q I'd like to know. I'm trying to get a list from you of what you actually reviewed.

Dr. Perrenoud's notes. Now, were those written or typed notes?

A It was some typed notes, that's right.
Q I'll show you a 21-page document that's typed.
A Right. That -- that appears to be one of the documents I reviewed, yes.
Q When did you review that, sir?
A I reviewed them several times over the last few weeks, since they were -- since I'd received them.
Q So several times over the last couple of weeks?
A That's correct.
Q I assume then you consulted with Dr. Perrenoud?
A I have met with Dr. Perrenoud. Not specifically for the purpose of doing this, but have discussed with him a few things about his report.
Q When was that?
A Um, I guess about a week ago.
Q And how long did you spend with him in consultation?
A Oh, about an hour. We were talking about a variety of things, but...
Q What else have you reviewed?
A Well, as I said, I reviewed some psychological testing

that was done at the Ozanam Home and I believe another placement as well.

Q Okay. Are you able to tell us the dates of those reports?

A It appears that they were -- One of them was like in '95 and another one was in '96, somewhere thereabouts.

Q Are the dates of those reports critical at all for your opinions here today?

A I think it helps to understand a little bit about Mr. Page and his attitude about things and his level of functioning at some time in the past, yes, sir.

Q Okay. You're familiar, then, with Dr. Schwartz's psychological from June 4 of 1996?

A Yes, sir, I am.

Q Okay.

A I have reviewed that as well, although I didn't receive that until yesterday. I do -- I have reviewed it.

Q Okay. You've reviewed it when, sir?

A I reviewed it yesterday, if it's the document that I'm thinking about.

Q Was that the first time that you saw it?

A Yes, sir, that's correct. I reviewed another psychological report also done around about that time and had access to it maybe a week or two ago.

Q As to Dr. Schwartz's report, then, you're familiar with the fact that they note in 1996 that Elijah Page had a history of shoplifting, shoplifted 500 times, according to his own admission, and he never felt guilty for it. Are you familiar with that?

A I'm familiar that he said that he had shoplifted 500 times.

Q Okay. And so would that indicate some sort of an antisocial behavior in this individual as far back as -- I guess that would be five years ago?

A Well, there's a difference between antisocial behavior and antisocial personality. I think any of us here could engage in antisocial behavior but might not have an antisocial personality. One thing that I am familiar with that struck me on a report I read recently is one in which he evidently took an automobile and then brought it back, and when questioned about that behavior seemed to indicate that he didn't think that the person would mind that he had taken it as long as he had brought it back. But didn't seem to indicate that he didn't care how they felt, he just didn't seem to feel that they would be upset.

Q And then you recall of course they asked him, "Well, what if someone stole a car from you?"

A Then he would have been upset.
Q Been angry and beat him up.
A That's right.
Q Who said that? What report are you referring to?
A That's one of these recent psychological evaluations.
Q Well, let me get back on track here and then you can have an opportunity to explain things.

Did you also note in Dr. Schwartz's report from June of '96 that he had a substance abuse problem at that time?

A I recall that, yes, sir.
Q And do you recall their recommendations, sir?
A I believe the recommendation was that he receive some type of substance abuse treatment.
Q Okay. And that would have been beneficial to him?
A It might have been.
Q And of course he said that he liked to get high and wasn't going to do that. Right?
A That's right.
Q So as far back as five years ago, his problem has been identified, State agencies have attempted to give this person help for that, and he's refused. Is that right?
A That's correct.
Q Okay. You're familiar, then, with the psychiatric

evaluation of Dr. Hart, child psychiatrist, given to Elijah Page?

A I've also reviewed that as well.

Q Okay. And that -- When did you review that?

A I believe that's the one I received -- one of the ones I received yesterday.

Q Okay. Did it note antisocial behavior in there at that point?

A I would have to look at it to tell you that. I don't remember every one of these things.

Q Okay. Sure.

A In the diagnostic area, he mentioned occasionally aggressive delinquent conduct disorder and sociopathic traits.

Q Correct.

A That's correct.

Q What are sociopathic traits?

A Essentially those are traits that someone might exhibit that would indicate that they have a tendency to harm others or do some things that are not socially accepted.

Q Harm others without any feelings of guilt?

A It doesn't -- As I mentioned previously, someone can harm others and have feelings of guilt, and it's only generally the person with the antisocial personality

disorder -- a disorder that could not be diagnosed in a person that age by current convention, you know. The sociopath is one who has a total reckless disregard for others when he performs those acts, though people can exhibit antisocial behavior but not be an overt sociopath.

Q You saw in a further report that another doctor had -- I guess he was a psychologist -- had diagnosed him on an MMPI as a budding sociopath?

A I believe I recall seeing that, yes, sir.

Q Okay. What would that term mean, a budding sociopath?

A It -- Essentially the same thing as the antisocial traits or whatever, is that an individual has engaged in behavior that is harmful to others, and it's kind of a signal that if this process is not interrupted, then somebody can go on to develop a full-blown antisocial personality disorder.

Q Did you read the Ozanam Home discharge of March 26 of '97?

A Yes, I did.

Q Okay. You're aware that they said when they discharged him that Elijah Page had made absolutely no progress and he was in no way committed to making any change in his antisocial behavior, that he runs away, he's aggressive, he's defiant and alienated to all

types of discipline.

A I noticed that, and then I noticed another report written either before or after that that indicated he was an active participant in his care, so it seemed to fluctuate.

Q Sure. Can you tell me where that was at?

A (Perusing documents.)

Q Maybe we'll get back to that.

A Yeah. But it was in one of these placements, it said he seemed eager to learn and participate and things of that nature, so...

Q I also noted in that same discharge that they noted he had no ability to take responsibility for his behavior, he was not ready for treatment, and he was at risk of acting aggressively, also in that discharge of --

A That's correct.

Q -- March 26th of '97?

A That's correct.

Q And did you read in the court report there that's attached of April 9th that they had found that he had at that point run away five times, had a history of stealing, stealing cars, said he was making $600 a week selling drugs, and he feels little remorse for his actions and blames others for the situations he

gets into?

A I read that as well.

Q Okay. They said that he thinks he has no problems and that he's not a good candidate for treatment. They tried multiple placements, sibling visitation, family therapy, and individual therapy, and they had all been unsuccessful at altering his behavior. Did you read that?

A I read that.

Q And they called him a budding sociopath, did they not?

A They did. These are also characteristics that are not at all uncommon among young people in correctional or substance abuse programs.

Q Dr. Perrenoud's diagnosis, you have that report in front of you?

A Right here, yes, his diagnosis.

Q His diagnosis says that he has a substance abuse problem. Correct?

A Uh-huh, that's right.

Q Now, this is -- I don't know how many times that's been reported, but it's been going on now for five years. Correct?

A That's correct.

Q And he has antisocial personality disorder, does he not?

A He didn't diagnose that. He called him adult antisocial behavior, reactive attachment disorder of childhood, and nonspecific personality disorder with borderline antisocial and dependent features.
Q Okay.
A But he didn't give him a diagnosis of antisocial personality disorder.
Q Okay. So then Dr. Perrenoud wouldn't classify him as a sociopath when he saw him?
A At the time, he did not give him that diagnosis, which would seem to me that at least he did not meet all the criteria for that disorder.
Q Okay. Showing some of the signs of it, though?
A Showing some signs of it.
Q Okay. Do psychologists who administer tests sometimes come to different opinions?
A Oh, they do. Psychiatrists and psychiatrists, 60 percent of the time at least, well-trained and renowned individuals will come to different diagnoses about the same individual having examined him extensively.
Q Could the same psychiatrist come to a different diagnosis by examining someone at a different time?
A Oh, certainly. And oftentimes if the interaction between an examiner and a patient is hostile or if the

examiner perceives some hostility or doesn't like the patient, he is more likely to give him a more pejorative diagnosis, such as sociopath or borderline or addict or whatever.

Q And these diagnoses, the labels that are used by psychologists and psychiatrists, they come out of a book, don't they? Is it called a DSM IV?

A Right. They come out of that, which is simply a guideline so that people will have a common language.

Q And these aren't like diseases of the body, are they? These are mind disorders that the psychiatric association periodically votes upon. Correct?

A Oh, that's right, and the criteria are changed from time to time, so if in one edition of the book somebody might have -- meet the criteria for, say, posttraumatic stress disorder, the next edition comes out and they wouldn't, and so people's experience over time for whatever kinds of issues, developments and treatment might change the way these illnesses are categorized. Some diagnoses may even be dropped from the criteria. I know in some of his evaluations he'd be diagnosed as unattached personality, and yet that's not any longer a -- in the diagnostic criteria.

Q Okay. So sometimes the American Psychiatric Association gets together and they meet and they just

vote out certain types of mental illnesses, don't they?

A I think that's what it comes down to, yes.

Q I think --

A That's one of the reasons, too, that some psychiatrists might use older diagnostics, because the ones that they see somebody as having might not fit the current criteria and, as a result, they may qualify their diagnosis saying particular -- say simple schizophrenia and qualify it by saying that that's from DSM II. You know, that was an accepted diagnosis in 1968, but not today, but I think that he meets those particular criteria at this time. There's not a current diagnostic category that contains that in my opinion.

Q Did you note in Dr. Perrenoud's report at Page 11 -- I'll give you a chance to get to it.

A I have it here, yes, sir.

Q Okay.

-- that when Dr. Perrenoud talked to Elijah, he said he didn't feel that intimidated or influenced by Piper. Did you read that in his report?

A That's what he said.

Q Okay. Did you somehow see something different from your watching of the tapes or listening to it?

A I think people can follow others without necessarily being intimidated by them, and there are numerous research studies that have shown people following others and doing a violent or aggressive act that might not have been intimidated by that individual but would respect them as an authority figure.

You know, there have been studies done in which people were asked to administer an electric shock to someone who was an actor, but the person administering the shock didn't know that, and when the person that was seemingly shocked made an error on some sort of puzzle, then the person gave a graduated electric shock, and it went from like 15 volts up to 450.

And simply because someone with a white coat that seemed to be in authority told this person to do it, none of the participants ever discontinued their participation in it, even though the actor was supposedly being shocked.

Or when God told Abraham to kill Isaac, you know, he never questioned, and he just went ahead and prepared to do that. So I think people can follow along without necessarily being frightened that they're going to be harmed themselves.

Q You also then observed in Dr. Perrenoud's written report at Page 12 that Elijah said it was his idea to

tie up Allan at his house?
A It said that it was his idea and may have been shared with Piper.
Q Okay. So that kind of goes against that Piper was influencing him at that time, does it not?
A Well, at least it indicates that maybe Piper didn't direct him to do it, but it may just be a part of going along, too. It's hard for me to know because there seemed to be a lot of inconsistencies in some of the testimony and things of that nature.
Q And it's just fundamental human nature when someone is being accused of a serious crime to a lot of times deny it or try to push the blame on other people. Right?
A That happens.
Q And this individual, Mr. Page, has a history of that, at least in the court reports and the records from the state of Missouri, of trying to take little remorse for his actions and blame others for the situations that he gets into. At least they document that?
A It's a common characteristic of people that have been abused and neglected to lie, to steal, to disrespect authority that we have talked about before. So those behaviors are not surprising in light of his background.

Q Dr. Fox, I did note in Dr. Perrenoud's report that when he was asked about how Allan felt while he was murdering him, he said he couldn't tell how he felt, can't say how Allan felt other than to note that Allan pleaded throughout to be let go. Did you note that?
A I did note that.
Q Okay. Would that indicate to you as a psychiatrist that that person had no guilt feeling at all for what they were doing?
A If that were the circumstance. However, he's also reportedly intoxicated at the time, as were all participants, and had a history of abuse and neglect. And a situation that during a violent episode can cause either numbing of one's senses or cause somebody to erupt into rage. You know, it's like, you know, atrocities or whatever committed during wartime are usually by people who have themselves lost someone close to them, and they're just in a blind rage. And so there's a lot of -- you know, a lot of circumstances going on here.
Q Did this killing sound like an atrocity to you?
A I guess that's one way you could -- you could term it.
Q Is that a fair characterization of it?
A It was a terrible thing.
Q Almost like a war crime.

A In some ways.
Q Yeah. So you say that he was dulled by the drug and the alcohol that he used?
A Could have been.
Q Could have been? Then did you note in the report and -- well, not the report but the transcript and the tape that Elijah told the officers at several occasions that he kicked Allan in the head so much that his foot became sore?
A That's right.
Q Okay. And so can you explain, then, if his senses were dulled, how he would be experiencing pain in his feet from kicking someone in the head?
A Well, alcohol and marijuana are not very good anesthetics, despite what you see on all the western movies. They may actually increase appreciation of pain, so I assume that what we're talking about here is psychiatric or emotional pain versus physical pain, and those --
Q Were you aware that both of the victim's ears were missing?
A I'm aware of that, yes.
Q You're also aware that when Dr. Perrenoud talked to him, Elijah, at Page 14, Elijah believed that he was the one that ultimately did the most physical damage

to Allan. Isn't that true?
A I believe I saw that in there.
Q And that he never considered stopping the assault or rescuing Allan, again at Page 14. Isn't that true?
A I note on Page 14 that he said he never enjoyed his actions, but nobody concerned seemed to make any concerted effort to stop.
Q Did you, from your review of the tape, hear the dialogue surrounding Piper stabbing Elijah in the head -- excuse me, Piper stabbing Allan in the head? I misspoke. Did you hear the dialogue in the tape when Elijah described how Piper had stabbed Allan in the head?
A Yes, sir, I believe I recall that.
Q Do you recall it as Elijah saying that when Piper stabbed him -- Allan -- in the head, Eli made a joke out of it and said, "Oh, that's got to hurt"?
A Yes.
Q And they asked him if he laughed. He said, "No, we didn't laugh. We chuckled about it."
A I recall that, yes.
Q Wouldn't that show an absolute callous disregard for the feelings of another human being?
A Well, I think we still have to go back to the fact that, you know, look at all the dynamics. If somebody

coming up to somebody on the street and doing this. But this is a group dynamic with somebody that's been abused and neglected who's intoxicated. So it's -- it's hard to know. I mean, I see people that are -- have people in the hospital all the time and in treatment that do reckless, illogical things while intoxicated and the next day say, you know, My God, I can't imagine I did that. So I think in the face of the intoxication and the long-term substance use, I don't read a whole lot into that.

Q Wouldn't that be a trait of a sociopath to do something like that?

A It would be if, like I said, that's the only dynamic going on. I mean, it's a trait of a sociopath to live in different places and not hold a job a long time; but simply because somebody did those two things, you wouldn't necessarily call them a sociopath, although those are sociopathic traits.

Q And then you're aware of Elijah's description at Page 187, Lines 1 through 9, of his interview -- and maybe you don't have it in front of you.

A No, sir, I don't have that one.

Q I'll open it up for you.

THE COURT: Mr. Fitzgerald, will this be a good place to take a break?

MR. FITZGERALD: Yeah, this would be fine.

THE COURT: Take a ten-minute recess.

(WHEREUPON, a brief recess was taken.)

THE COURT: Please be seated.

You may continue.

Q Doctor, I'll show you a transcript, State's Exhibit 120-F, and I've opened it for you to Page 187. I'm going to hand you the transcript.

A Yes.

Q Does that look like the record that you read in this case?

A Yes, sir, it does.

Q Isn't it true that Elijah Page describes that Chester Allan Poage escapes after they have tried to bury him nude in the snow?

A That's --

Q And that's true, isn't it?

A That's true.

Q And then he says these words when he's asked. He says, "We're just standing there going, okay. He's getting away. One of us better go after him. And we just sit there and watch him as he's almost to the top of the other side of the hill. Finally I was like, 'Well, fuck it, man, if you guys aren't going to go after him, I will.' So I start running after him."

Is that what he said?
A That's right.
Q Doctor, wouldn't that indicate not a follower's role but actually the role of an initiator in that case?
A You know, this is a group dynamic, and folks are going along, and I think he's -- this could be a situation where he's caught up in the momentum of the group rather than doing something that he might have done on his own, and so it's hard for me to say that he is really initiating an aggressive act but still going on with one that already has pretty good momentum.
Q Okay. So you don't see that comment as initiating action?
A It's initiating action, but keep in mind that the action has already been initiated. You know, this dynamic and this situation already has pretty good momentum, and at this point even though he may be -- you know, even a follower that is doing things would be said to be initiating action.
Q Would you agree at this point the victim has been stripped naked, forced to lay in the snow before he escapes. Is that correct, as you recall?
A That appears to be true, yes.
Q Okay. And Elijah Page could not have been that high because he was the one that was able to chase this

fellow down who was running for his life. Wouldn't that be true?

A Apparently this -- Elijah Page has a long history of substance use and indicates that he can, in other testimonies, ingest large quantities of substances and still function, drive automobiles, do things. So it's not necessarily a characteristic of his intoxication, because if he's a chemical-dependent person, he has a tolerance and would be able to function at higher levels of substances and doses of substances than a non-tolerant, non-addicted person. So the fact that he was able to do this doesn't indicate to me that he doesn't have a high blood alcohol level or whatever, simply that he could be tolerant to the effects physically and could function physically.

Q Okay.

A It's like alcohol-related blackout. Most of those occur at blood levels of like .275, and yet people have been known to perform very complex tasks such as doing surgical operations or even flying high-performance airplanes while so intoxicated, and it's because they're tolerant, even though they may not have the memory for the event.

Q Okay. I'd like you to go to Page 193 of the transcript, Lines 23 through 25.

A (Complying.) 193?
Q 193, yes, sir.
A All right.
Q I'll read the lines and then I'll ask you a question. Is it true Elijah Page said this: "After like a few minutes of arguing about who was going to stick him, I just got frustrated, I was like, 'Fuck it, I'll do it. Give me the knife, fuck it, you know,' and I just walked down there and stabbed him in the neck."

Sir, would that be an indication again of Elijah Page initiating action in this murder?

A It seems to me that he took action in a dynamic that already had momentum, so, you know, he took an active part in this, but I guess it's too many other things going on to say that he initiated that action.
Q When he says, I'm tired of arguing, I got frustrated and I just picked up the knife and I said I'm going to go stick him and he does, wouldn't that be initiating action?
A I think any kind of movement could be initiating action. I guess, as I've explained earlier, a lot of other things could account for that behavior in someone with his history of trauma. So clearly he was a participant, and that -- you know, there's no doubt in that. Whether or not he designed this whole scheme

is another matter. He took an active part clearly here, for what reasons, you know, I can't totally explain that.

Q Would it also be true that he showed no feelings of guilt or remorse when Allan ran off and he got wet chasing him down and then kicked him into the creek naked? Did you see some remorse in watching the tape about that aspect of the case?

A Well, I never watched the videotape.

Q You didn't watch --

A I listened to audiotapes but I never had access to a videotape. And I guess, too, we're talking about some of the other dynamics that we discussed before. The affective disturbances that other people have had that have had his background can cause an apparent lack of remorse, and it's just numbing oneself from the inner emotional consequences of one's actions or things that happened to somebody. So I think a lot of the things that we otherwise might use as indicators of emotion may not be reliable markers under these circumstances.

Q He indicated no problem in making another human being lay in a cold creek for 45 minutes nude, did he, during the tape?

A Well, as I said, I didn't see the tape, but --

Q You read the transcript.

A I read the transcript.
Q He indicated no problem doing that. Correct?
A Well, I think that in -- Sometimes in there he did indicate "Can't we -- can't we stop?" or "Do we have to do anymore?" so it indicates that there were times when he preferred not to continue, but, you know, didn't take an active role in stopping the situation.
Q Doctor, isn't it true that he said that with this victim's dying breath, all he did was ask for mercy?
A That's correct.
Q And he showed him absolutely no mercy. Isn't that true?
A At no time did he -- during the event, did he seem to do that.
Q Okay. He made this fellow lay in a creek. Correct?
A (Nodding head.)
Q He kicked his ears off of his head. Isn't that true?
A Well, a lot of people did that, so I don't know who was the one that actually did it. Like I said, it was a group -- it appeared to be a group effort.
Q This Defendant said that he kicked him in the head so much that his own foot got sore, though. Isn't that true?
A That's what he said.
Q Okay. He said that the man, after he'd been crushed

with rocks on his head, could only mumble and he continued to mumble "Please, let me go, let me live." Isn't that true?

A That's correct.

Q Okay. And he didn't let him live and he didn't let him go, did he?

A Well, I'm not -- As I said, this is a group dynamic and he's not the only participant, so...

Q I realize that.

A You know, he's caught up in that. But he did not stop it or try to stop it from the testimony that I've reviewed.

Q He stabbed a helpless victim in the neck area by his own admissions, did he not?

A He did.

Q And at no time did he try to rescue or stop what was going on, did he?

A He did not.

Q He showed absolutely no guilt during the actions?

A Well, guilt is a feeling.

Q Uh-huh.

A And I'm not sure that one shows that at this time, but there's no evidence that he did anything to stop the course of action.

Q He was the main aggressor as far as the action, was he

not?
A I cannot say that.
Q Was there any part of this murder that he didn't participate in from your reading of the transcript?
A It appears that he participated in every aspect of it.
Q Okay. And you're aware that he's of average intelligence?
A He appears to be, yes.
Q Okay. And you didn't see anything on there that indicated that he was insane?
A I think the reports that I saw did not indicate that he had, you know, insanity in the traditional sense of the word.
Q But this man --
A However, you know, as we have mentioned before, that when people are intoxicated and when they are expressing rage that could have been a product of their previous trauma, they can exhibit insane behavior even though they're baseline, you know. They may also have times where they exhibit very sane behavior, so I think -- in a situation where impaired judgment and reasoning could be a very predictable state of affairs.
Q But at no time during the two-hour ordeal did he stop what he was doing.

A He didn't take action to stop it, though apparently there were times when he said, "Can't we just leave him alone?" And that apparently is the action that he took, but the only action.

Q During the entire murder, the victim was crying for mercy and he showed him absolutely none. Is that correct?

A That's correct.

Q And that would be a trait of a sociopath, would it not?

A A -- When you talk about sociopath, you're talking about enduring, ongoing traits, not an action at the moment. So, you know, that's a trait of adult antisocial behavior, but to diagnose sociopath means that this is an enduring, ongoing trait that somebody exhibits persistently, and there's not evidence that he persistently engaged in aggressive acts.

Q There's five years' worth of documentation, though, that they were seeing a problem developing for a period of time, is there not?

A That's right.

MR. FITZGERALD: That's all the questions that I have.

THE COURT: Mr. Connelly?

REDIRECT EXAMINATION

BY MR. CONNELLY:

Q To correct that, Dr. Fox, there's actually three weeks at the Ozanam Home where they attempt, during a rebellious period in this young 14-year-old's life, to conduct some testing and diagnosis. Isn't that what we're really talking about? Rather than five years of diagnosis and records on that?

A Well, that's right. It's one point in time.

Q A brief three-week period early in the institutionalization in the Ozanam Home, which is one of the multiple, over a dozen places that he stayed in during that time frame, is it not?

A Right. And I guess one has to keep in mind, too, that he probably didn't get up one day and say, "This is a great day to go to the Ozanam Home." That this happened at a point in his life where there was much turmoil and crisis, so it's sort of -- the fact that he's there is a reflection of some crisis-type event which could also be a predictor of responses or behavior.

Q If it were known to you that he was running away from this place and from these other homes at that time, and that that was really the only crime that he had committed during that time, other than his claim to the counselor that he'd shoplifted 500 times --

A Uh-huh.

Q -- that wouldn't surprise you, would it?
A It wouldn't. It's -- Running away is characteristic of someone with his background.
Q All right.
A It looks like he's probably had some pretty good places to run away from.
Q To run away from.
A Uh-huh.
Q And you indicated that it sounds like a lot of teenagers who are sought to be placed in a treatment facility or institution to get help?
A Well, it's -- I think the question came up about teenagers and substances and being in treatment centers. And, you know, one of the concepts, accepted concepts of recovery in substance problems is getting in touch with the concept of powerlessness over substances, and yet this is exactly one of the struggles that a teenager is going through in trying to assert his autonomy and his independence. So it's hard enough for an adult to admit that; it is extremely difficult for a teenager to do that. That's why efforts at intervention in substance problems with teenagers are sometimes so terribly frustrating.
Q Sometimes a person might drink from the age of, say, 13 to the age of 37 and be highly educated and still

not avail himself or herself of treatment. Isn't that correct.

A Well, half the alcoholics in this country have been to college, so it's not a skid-row disease. And intelligence or profession or religious faith or anything else is not a factor on whether or not --

Q So it's just plain selfishness?

A Well, you know, I don't know that I would call it that. I think a person tends to be at the center of his universe when he's afflicted by substances, but I don't know that selfishness would be a necessary character trait that predated the substance use, though. It's a character trait that oftentimes an individual develops as his substance use problem develops.

Q If -- We'll revisit this in a minute. But I'd like to clarify some things. If you have Dr. Perrenoud's notes. Did it appear -- By the way, as you're retrieving that, did it appear that these notes were, although numerous, sketchy and sort of shorthand, even partial sentences?

A Pages 1 through 21?

Q Am I correct that they're just partial sentences?

A That's right. Oftentimes they're just excerpts from Elijah's response to his questions.

Q All right. Is it apparent at Page 12 that there was no previous plan, at least not in Elijah's mind, for this killing?
A It appears from this document and others that there was no plan to kill anybody.
Q Right. Does it appear that it was Piper's idea to rob this house?
A It appears that it was.
Q All right. And that he had at least no previous thoughts of killing Chester Allan Poage?
A From the information I have, there -- that seems to be true.
Q All right. And whoever he indicates tied Allan up, if I told you that in the video -- or the audio that you listened to that he indicated that it was Piper who came up with the idea of tying him up, that could be, could it not?
A It could be. I don't -- I don't recall the details of who tied -- at the time or --
Q All right. And as far as who went across the creek, is it possible that Elijah Page is taking more responsibility than, in fact, he should for various motions or specific behaviors that night?
A I think it's a nature of people that have done harmful acts to others to want to be punished, to sort of

settle things out and to take responsibility for those sorts of things.

Q Is that the nature of some people?

A That's the nature of some people. Freud said people want to be punished.

Q How about all people? Is that the nature of all people?

A Not all people. The nature of some true overt sociopaths is, you know, they always continue to feel that the problem is caused by something other than themselves and are totally mystified by the concept of being punished. I talk to many of those people each week when I see patients at the jail in Pennington County, and, you know, they simply cannot understand why they even have been arrested.

Q Do they manipulate sometimes, lie sometimes to avoid any consequences?

A They sometimes lie when the truth would sound better. It -- That's a common characteristic.

Q Sometimes they even come into the court and lie, do they not?

A Oh, that's true. They -- It doesn't seem to bother them. It's -- It's the reason that sometimes a sociopath can pass a lie detector test with flying colors, because he has no emotional response to

telling a lie. It's -- It doesn't matter one way or the other. It's just however it suits his purpose at that time.

Q Those people, they often -- or is that consistent with what their idea is that they shouldn't be there and hence will, as you say, manipulate and try to use means to escape or evade consequences of their actions?

A Oh, that's right. Oftentimes they escape because they actually feel like they're being persecuted by someone who's just got them wrong.

Q All right. We'll revisit that. On Page 12 does it appear -- Strike that.

Do you have information in reference to this going across the creek that Briley Piper had made a claim that he himself had sent Elijah Page across the creek?

A I don't recall exactly where that might have been.

Q But you're not disputing that you had that information available?

A I can't really recall that information.

Q Okay.

A I would be happy to review it at this time, but I don't -- I don't recall it.

Q All right. If it was indicated that it was -- that Piper was the first one to suggest that Allan be

stabbed at all, period, would that be consistent with your view that Piper was the ringleader in this thing?

A Yeah, it seems that it was his idea to -- to suggest that Allan be stabbed.

Q Piper's idea?

A Right.

Q All right. And I'm not going to pull a sentence out here and there, but I would ask you -- and I'm referring to Page 79, if -- and I'm going to read you a few things -- if this sounds consistent with what you heard while you were listening to the audio. Detective Dean asking, "Now, at this point again is Darrell say it's getting a little carried away, look at this kid, he's freezing?" Mr. Page: "No, we just -- I mean, the way we were, like the more" -- Sir, sir, you don't have to read it all, I'm just -- but please listen, if you would.

A All right.

Q "I mean, like the way we were, like the more -- the more -- like the start -- like the worse and worse it starting getting, like --" The question: "The more you guys didn't care?" Mr. Page: "Yeah, the more --" Question: "The more you got into -- yeah, got into it? Yeah." Mr. Page -- And of course he says something about not putting words in Mr. Page's mouth,

but Mr. Page said, "Yeah, that's exactly right. I mean, the more -- the long -- the worse it got, the more, you know, we were like 'Well, fuck it, you know, we're here at this point, you know, might as well do it.'" Mr. -- Detective Dean says, as he goes on questioning, "The situation is kind of controlling you more than you're controlling the situation?"

Mr. Page, "Yeah, basically like we -- I really can't speak for them, but I'm pretty sure that they were in the same state of mind that I was."

Now, does that sound consistent with what you were attempting to tell us here about group dynamic?

A Right, that the event began to take on some momentum and everybody was just carried along by it. It was sort of like, you know, that sense of hopelessness that we had talked about earlier when children are abandoned. It's just like, "Well, what the heck, you know, we're at a point with this that our options have become rather constricted."

Q All right.

A You know, "What else could we do?"

Q All right. Page 85, Mr. Page indicates -- he's finishing his sentence, "and walked up and like nobody was like really volunteering to like kill him or anything, so" -- and Agent West says, "So you stepped

up to the plate?" Mr. Page says, "Well, basically I was nominated, you know, they're like 'Well, here, you do it.'" "Who said that?" "And Piper handed -- told me to do it. Darrell handed me the knife, and I was like, 'Well, okay,' so I just went up there and, you know, like" --

And then on Page 86 in describing -- trying to describe where he stabbed him, but he's unable to say it because he says he didn't really look as he stabbed him, he said "or toward the back," referring to the neck, "but like from what Darrell told me, he saw where I stabbed him. He was like getting on me because it wasn't anywhere close to like the esophagus," and they talk about whether it was a jab or a cut, a slice. He said, "A jab. I really don't remember like really stabbing him. I remember like afterwards. Didn't look at him until later on. I didn't -- I didn't even really look at him. Just walked up, stabbed him, turned around and walked back, and I was like, 'Here.'" "Next?" And Page answered, "Yeah, I was -- like I did my part." And again on Page 13, Piper is the first to suggest that Allan be stabbed, Piper says to, quote, finish it off. Do you recall that?

A I'm looking at that right now, yes, sir.

Q All right. Now, I'm going to take you back, although you don't have it before you, to Page 193, where Page says, "He was like, 'Please, let me go, I won't say nothing.' He goes, 'I won't say nothing, I don't know you guys, just let me live. Just let me go.' And we're like, 'No.' So after a few minutes of arguing about who was going to stick him, I just got frustrated, I was like, 'Fuck it, I'll do it. Give me the knife, fuck it,' you know. And I just walked down there and stabbed him in his neck."

Now, bearing all these statements in mind, at the plea on Page 37, there is a colloquy between the Court and Elijah Page, and Eli states at Page 37, Line 10: "We sat there and argued about it for a while and then he kept on telling me to do it over and over and over again, and finally I just grabbed the knife and went down there and quickly stabbed him in the back of the neck and then went up and handed them the knife and told them I was done. I did my part and they can do the rest."

Now, do those sound like -- first of all, is that more information with which you can answer the questions about this group dynamic than you have heretofore had?

A Well, I think it's more information that reflects that

this was more of a group dynamic than an individual act of aggression.

Q Eli indicates at Page 14 of the notes of Dr. Mark Perrenoud, "Eli does not believe that they could have left there without Allan being killed - Piper not allow this." Page 14 at the top, sir.

A (Perusing document.) Right.

Q A fourth of the way down Eli indicates, quote, Does not believe that he would have done this without the drugs. Do you see that?

A That's right, yes, sir.

Q I'd like you to go to Page 17, sir. Without reciting specifically the page number -- and I will, if you prefer -- do you recall where Detective Dean says to Elijah Page, "So Eli" -- or "So Piper was making the decisions," something along that line, and Eli says basically he was like a big boss man?

A Right, I remember that.

Q And he went on to state that "Darrell and I" -- "He was telling Darrell and I to do things, and we were doing just about everything he told us to do." Do you recall that?

A Yes, sir, I do.

Q Do you recall the times that you're speaking of generally about Elijah going up to Piper and saying,

"Look, he's gone, he's going to be gone. There's no way he can make it. Can we just go?" Do you recall those multiple times him doing that?

A They went up to the truck and said, "He's gone, let's just leave."

Q And do you recall Piper's response was, "No, we got to make sure he's dead. Finish it." Do you recall during that Detective Dean saying, "So you went down a third time after Piper told you to finish it"? Do you recall that generally?

A I don't remember exactly how many times it was, but it was several times.

Q All right. Do you recall Detective Dean saying, "So it was like you aren't doing your job"? Do you remember that?

A Not --

Q Meaning to Eli, like you weren't doing your job, you better get down there and finish it?

A I remember something like that. Not the exact words. But I'll be happy to review it.

Q With reference to the initiation of this entire tragedy, do you recall Dr. Perrenoud indicating at the top of Page 17 that Eli was depressed, scared, angry. And evidently he was asked what he was angry about, and it says here in a non-complete sentence, "Angry at

Piper for allegations made in court in January. Eli believes that Piper blamed much of what he did on Eli. Considers lies by Piper that the robbery and murder were Eli's idea." Another one of the items he considered a lie by Piper was that Eli stole the gun - Piper took and gave to Eli. The other one is that Eli searched the house. The fourth one is that Piper only sat in the vehicle at Higgins Gulch.

Now, up to that point with both these notes and with the testimony to Detective Dean and Agent West, have you seen anything that appears that Eli is attempting to cast blame unrightfully upon anyone else?

A There seems to be no evidence of that, from the information that I have.

Q Have you gotten the impression from the review of any of these documents that Elijah Page was attempting to cast blame or responsibility for his actions on his bad childhood?

A I never saw that mentioned by Eli.

Q Did you get the impression during any of this that Eli was attempting to cast the responsibility or blame for this on his use of drugs and alcohol, other than in response after 228 pages of interviewing when they were sitting there, around the time he had started

crying during the taping. Do you recall that?
A I remember the time in which he cried and --
Q All right. And I'll clarify my question. It was unfair and compound. Up to that point in time, there had only been moderate inquiry about drug use or alcohol use on the day in question or during the several day or week period --
A I agree with that.
Q -- leading up to this. And then they were sitting there after the heart-to-heart talk about getting it off your chest and does that feel better, and there was a discussion about why, why this -- why this happened. Do you recall that at Page 228?
A If I could take a minute to look at that.
Q I don't think you have it.
A Oh, I have it right here.
Q At 228? I'm going to read you --
A Is this the same document that you have?
Q Yes, yes. All right. All right. I'm going to read you here Line 6, Agent West: "What -- and again, in the context of everybody coming together, so to speak, what was the sole purpose for you killing Allan?"

Mr. Page: "I didn't really have a real purpose in doing it. I mean, I was just --"

Agent West: "You obviously wanted some of his

stuff."

Mr. Page: "I -- I really -- Yeah, I mean, I was wanting his stuff, but, I mean, I never even thought about killing somebody for like a stereo." He goes on to talk about Allan having never done anything to him to serve as a basis for any harm to come to Allan, does he not, at Line 25? He says, "He never done anything wrong to us. I mean, he was always nice, just tried to be our friend and stuff."

Detective Dean asks, "What, he just caught you on a bad day?" and he was not being facetious.

Mr. Page: "We were -- we were really doped up, crank and acid and beer."

Agent West: "From earlier in the night?"

Mr. Page: "Like earlier that -- like all -- all day we like -- I had been cranked up for a couple days and I had been drinking for a couple days and -- and on top of the crank." And then there's some interruption where reference is made to someone else, about how much or whether they had had anything to drink, and then they talk about "Is there a sense of relief in getting this off your chest?"

Now, you heard, Doctor, did you not -- Strike that.

On Page 230 they say, "I know it's tough, but

we're glad you're coming forward. It's all right, Buddy, let it go. It's got to be a relief to get it off your chest."

Do you think that's consistent, sir, with a person sort of participating in or conducting a kind of confessional?

A Well, that appears to be a lot of what that is.

Q Those emotional surrounding circumstances, did they -- do you think those can be considered in determining whether a person is being honest or even remorseful?

A Oh, I think they can. I think that type of remorse is not a typical characteristic of, say, a sociopath. The remorse they have is about getting caught but not about their actions.

Q If I told you that the word "chuckle" as was represented to you had been used some other place in the transcript, that I'm only able to find that at Page 92 where he was -- Eli was asked about whether Piper thought it was amusing that Allan flinched when iodine or something was put in his -- the gash that Piper had caused by kicking him, and Eli said, "We -- We were all chuckling," and then it gets more serious when Piper brought out the knife for the Chinese torture. Is that consistent with this laughter question or this chuckling question that -- Is that

consistent with the information you have from listening to that tape?

A I'm -- Please clarify your question a little bit because I'm not quite sure what sort of response you're looking for.

Q All right. Did you get the impression Eli was laughing and having a good time during this when you listened to that tape?

A No, I really didn't. I -- I got the impression generally, when the real violence got initiated, that he was concerned about it and actually felt it was harsh, and I think there were a couple of statements in the testimony where he indicated that this or that particular event is kind of harsh.

Q For example, at Page 13 where he said they had beat up Allan and this seemed excessive to Eli. Well, the long and the short of this is, sir, you have to consider this as a whole, do you not? When you're examining what a person is recounting for you, what they experienced that night, who was the primary moving force or leader in it, don't you have to examine all of this as a whole?

A Oh, I think you have to look at everything. It's just like in giving a diagnosis of, say, a personality disorder. You know, an interview with a person at one

point in time may not be a reliable indicator of a diagnosis. Having retrospective history and considering all of the dynamic -- It's simply like if I see a patient at the hospital that's intoxicated and has attempted to hurt himself, I don't go into a great deal of length in even interviewing that patient during that intoxication because that interview is often meaningless, and so, you know, I think you have to put together the whole of things.

Q All right. And if a person is attempting to recount something from -- and describe it, and they have a couple people there with them and they're asking questions, both of them, which is tactical, but not unfair, and the person is trying to get it off his chest, he's trying to go along with them and talk to them, for example, the foot being sore, does it make a difference that perhaps in that context a person doesn't just say, Oh, I kicked him so many times it made my foot sore, on the one hand, or on the other hand, one of these two people says, Well, now, a head is awful hard and, I mean, when you kick it, boy, you know, it must have -- it must have hurt, it must have made your foot sore, and the person kind of goes along with it, is there a little difference in the impression that leaves you with about that person?

A Well, it -- it appears that in those types of questions, especially in this case, the Defendant wasn't always volunteering the information, that the detectives sort of set up a certain dynamic and almost anticipated an answer, the way their questions were formulated.

Q Did you get the impression that Elijah Page was manipulating them, that he was maneuvering them somehow, playing games with them?

A I never got the impression that he was in charge of that interview or manipulating anybody in the interview.

Q You've heard information about this other guy, Piper, who you believe was the sort of primary leader in this situation. You've heard information about this guy, haven't you?

A I have.

Q About his attempts to manipulate the system, manipulate the police, the courts, the jail?

A Other inmates. So I've heard a lot of things about that.

Q You didn't happen to get any information to that effect about Elijah Page?

A I haven't gotten that information about Elijah.

Q And by the way, was -- was it ever your purpose in

assisting us to diagnose or treat Elijah Page?
A It never was.
Q When Ozanam said that Eli may have sociopathic traits, they didn't specify which sociopathic traits he had, did they?
A They did not.
Q All right. Now, you told us awhile ago that that could be that a person -- or based on a person having committed a violent act or a person committing like a theft, theft-type act.
A But it's a -- generally based on repeating such acts, not just one isolated act.
Q All right. But without specifying, there was no information upon which -- for them to find that there were any traits towards violence.
A I don't have any information that would lead me to believe there was persistent violence.
Q Or any at that point in time when he was 14, or any --
A I don't have anything that reliably testifies to that effect.
Q And Ozanam did not specify and, to your knowledge, didn't have any either at that time, did they?
A No, just mostly running away and reports of stealing. You know, and it may be helpful to clarify --
Q Yes.

A -- the concept of stealing in adolescents. I mean, sometimes people steal because they have simply a reckless disregard for other's property. The biggest majority of adolescents that I see stealing are looking for attention, want somebody to pay attention and don't really plan to harm anybody but are simply wanting an adult in their life to take notice of them. And sometimes the only way they can get that response is to do something disruptive.

Q And sometimes we might want to get a little rise out of the evaluator or counselor by saying I've smoked marijuana every day since I was ten, or I've stolen, robbed, committed shoplifting 500 times?

A Oh, I see quite a number of patients that claim amounts of drug use that would seem to me to be fatal to them and simply to impress me with how bad they are or whatever.

Q Would it surprise you -- Let me ask about this group dynamic, and then I'm going to sit down. This group dynamic thing that we are talking about, and you perceived that Piper was the leader, but you were asked about intimidation by him. For him to say that he was not intimidated by Eli, would that be consistent with him not trying to make it look like --

A You mean not intimidated by Piper.

Q I'm sorry. I'm sorry. Yeah. Would that be consistent with your belief, after listening to this, that Eli was not responding to these questions in a way that he was trying to make it look like he did this through the intimidation of Briley Piper?

A Oh, I think it's, as we mentioned earlier, characteristic of adolescents not to want to appear powerless, and so I think what would surprise me would have been him saying that he was intimidated by Piper. You know, a response that I'm not -- no, he doesn't scare me, I'm not bothered by him.

Q But it would surprise you if he was one of these manipulators who was trying to make it look like the only reason he participated in any way was because there was some threats being made or he was afraid of Eli. Is that correct?

A Afraid of Piper.

MR. CONNELLY: I'm sorry. I think that means it's time to sit down. Thank you.

THE COURT: Mr. Fitzgerald?

MR. FITZGERALD: I just have a few questions.

RECROSS-EXAMINATION

BY MR. FITZGERALD:

Q You say that you're aware that Piper was a threat while in jail?

A Well, I'm aware that he planned some escape attempt that involved serious injury to guards.

Q Were you aware that Elijah Page sent a threatening letter to one of the female jailers threatening rape?

MR. CONNELLY: Object to the characterization.

THE COURT: Overruled.

A I was told that such a letter had been sent. I never saw the letter or heard much about the circumstances.

Q It is true that Elijah Page did make a joke out of the stab to the ear. Isn't that true?

A Are you referring to the instance where he said, "Ouch, that must have hurt," or something like that?

Q No. I'm referring to the instance where Piper stabbed Allan in the head. Do you remember that incident? Do you remember that Eli's description of it was that he made a joke out of it?

MR. CONNELLY: Page? What Page, Counsel?

MR. FITZGERALD: I'm at Page 203.

A I'm aware of a response like "Wow, that must have hurt." Is that what you mean?

Q Yeah, I'll read it to you and see if you recall this. At Page 203, Mr. Page said, "Yeah, he just stabbed him once." Agent West said, "In his right -- right in the ear here somewhere?" And Mr. Page said, "It was in the ear area, I'm not sure if it was the ear, but it

was around the ear." Agent West said, "You're pretty sure it was the right side of --" Mr. Page says, "Yeah." Agent West: "-- "Allan's head?" Mr. Page says, "Yeah." West: "Okay." Mr. Page -- and Detective Dean: "Somebody made a comment then, didn't they?" Mr. Page said, "Hum?" Detective Dean: "Oh, that's got to hurt." And Mr. Page says, "Yeah." Detective Dean: "That has to -- has got to hurt." Agent West said, "Who said that?" Mr. Page says, "I think it was me. I'm not sure. I --" Agent West said, "Making a joke, right?" Mr. Page says, "Yeah, I was like, 'Oh, that has to hurt. I know that -- Oh, that has to hurt.'" Agent West is laughing. Detective Dean says, "You weren't -- you weren't --" Agent West says, "You were joking about it, though." And Mr. Page says, "Yeah, we weren't like really laughing." Agent West said, "There was a joking tone to it, was there not?" Mr. Page said, "It was -- it was -- yeah, it was made to be a joke, but like none of us were really laughing. We like chuckled a little bit." And he said -- Agent West said, "Yeah, like every now and then" -- So would you agree that Mr. Page did make a joke out of the suffering of the victim?

A It appears that all concerned made a joke about it.

Q Okay. All of the three made a joke out of the suffering of another human being.
A That's true.
Q Okay. And all of the three chuckled with laughter?
A That appears absolutely true.
Q And when you chuckle and you laugh, you usually are displaying emotion of pleasure, wouldn't that be true?
A Well, as was mentioned before, you know, this is in the context of intoxication and other things and may not necessarily indicate an individual who consistently takes pleasure in watching someone suffer. So this is one point in time, but it doesn't appear to indicate an ongoing characteristic; but at this time, that is, it does appear to be true.
Q You're aware of the Blazer incident, are you not, Doctor, in this case? Isn't it true, Doctor, that after the victim had been stabbed twice in the throat and once in the head, he asked permission to go up to his Blazer and warm up?
A That's correct.
Q Okay. And isn't it true that he was told by Piper, Yes, you can, but you got to wash all the blood off yourself?
A That's right.
Q Okay. And isn't it also true that after he washed the

blood off of himself, Elijah Page told him that Piper was a liar, that he was a liar, and that Darrell was a liar, and that he was not going to be allowed to get back into the Blazer. Isn't that true?

A I thought this was an incident where they went up and asked Piper if he was really going to come up and Piper indicated that he couldn't. And then that prompted that response.

Q Okay. That's what prompted it. And then Elijah Page, on his own, kicked this guy in the head and put him back in the creek. Isn't that true?

A Which page are you referring to?

Q We're at 213, Line 19 through 21.

That is true, Doctor, is it not?

A That is true -- From the interview, that appears to be true, yes, sir.

Q He was mocking him, was he not?

A He was asked if he was mocking him, and his response was yeah.

Q Okay. So you'd agree that would be an indication of taunting a helpless, wounded victim, or in his words, mocking someone who was dying.

A At that point, that's true.

Q Okay. Now, he indicated to Dr. Perrenoud, did he not, that he was never threatened nor forced to participate

by Piper?
A He indicates he wasn't threatened, but in other places I think he indicated that he wouldn't have done it if it hadn't been for Piper. But he didn't -- he didn't claim that there was any direct threat to himself by Piper.
Q Well, Doctor, the truth is that when Elijah was asked about why Briley Piper had left the scene of this murder, he said he thought that Piper was a chicken shit, couldn't handle it like he could. Isn't that true?
A I don't recall exactly where that would be.
Q Look at Page 207, Line 11 and 12.
A (Perusing document.) That's what he said. "Honestly, I think he was too chicken shit to stay down there and --"
Q Okay. So when the going got rough, Piper walked away and Elijah Page and Darrell Hoadley killed this guy the whole time that he was pleading and begging for his life. Isn't that true?
A Well, there appears to be some dynamic of control that Piper is still in charge and trying to get somebody else to do his dirty work. Maybe not with overt threats but with other means of manipulation.
Q But when he was asked, he thought that Piper was a

chicken?
A That's what he said, yeah.
Q All right. And it's also true that after this murder, they went to the house and loaded up all sorts of property to steal, didn't they?
A That's correct.
Q And it's also true that prior to this crime being -- or prior to the murder, the Defendant told the police that "I was going to jack this guy." That was the intent was to rob him, to steal from him. Correct?
A That's correct.
Q So it wasn't a meaningless crime, it was a robbery, wasn't it?
A That appears to be the original intention, yes.
Q And Mr. Page fled the state of South Dakota, did he not, after the murder?
A He did.
Q Okay. He returned briefly and then left again. Isn't that true?
A That's what I understand.
Q Okay. He was apprehended by the police March 16th driving the stolen Blazer in Kansas City, they were unaware it was stolen, and he just walked in and out of apparently the jail and got the Blazer back.
A That's right.

Q Okay. He didn't want to get caught, did he?
A Not at the time, he appeared not to.
Q He fled then to Texas, didn't he?
A That's correct.
Q Took the vehicle out on a country road, didn't he -- after he washed it, Mr. Page. Isn't that true?
A Yes, sir, that's true.
Q Went to a car wash, cleaned the inside and outside of that Blazer, and then abandoned it on a country road. Correct?
A That's correct.
Q He wanted to be far away from that vehicle. Correct?
A Seems that was his motivation.
Q Okay. And when he was first caught by the police, he didn't say that he even remembered what had occurred. Correct?
A At first that's what he said. He said he was operating from accounts that somebody else had told him.
Q For at least 40 pages, maybe an hour into the interview, he is still maintaining that "I woke up and I was told by Piper and Hoadley that this is what we'd done." Isn't that true?
A That's true.
Q The fact is, this was a premeditated murder where they

planned to kill Allan at Elijah's house. Isn't that true?

A I can't say that.

Q You want to look at Pages 176 and 177?

A (Perusing document.)

Q Starts about at Line 20 at Page 176, and I'll ask you this question: Isn't it true that they came up and discussed --

MR. CONNELLY: Your Honor, I'd like him to have a chance to review what he's referring to.

THE COURT: He may.

Do you have a line and the page, sir?

THE WITNESS: I do, yes, sir.

THE COURT: Okay.

Q Isn't it true they came up with three different -- they had a discussion, anyways, at Elijah's house of three different methods of murdering Allan. They were going to drown him, they were going to kill him by hitting him in the head with a fire extinguisher, and they were going to slit his throat. Isn't that true?

A Well, it appears on Lines 23 through 25 he said, "I know it's going to end up with us killing him," and that gives me the impression that he sort of felt the momentum of things but rather than, for example, sitting around and planning this ahead of time, it

appears that everybody was just caught up in the way things had started to go.

Q He indicated, Doctor, that they sat down and they actually discussed methods of murdering this man in his -- in Elijah's house. Isn't that true?

A Where is that?

Q Page 177, Lines 12 through 13.

A But on the page before, it appears that he made the statement that it seemed that was the way things were going to go, kind of like it was down there at Higgins Gulch where it seemed like we're at a point of no return with this. Rather than planning ahead of time the whole thing, they got involved in a group -- in a bunch of activities and it seemed like that became the only way out.

Q Doctor, I understand that's your opinion, but isn't it true at Page 177, Line 13, 14, and 15, he said, "And we sat down and we were like -- well, we came up with a couple things."

A That's correct.

Q Isn't that true?

A That's correct.

Q And then as you read through over to Page 178, Lines 4 through 12, they came up with three methods of murdering Allan at Elijah's house. Isn't that true?

A That's correct.
Q And I've correctly stated them, haven't I? Drown him, hit him in the head with a fire extinguisher, or slitting his throat?
A That's correct.
Q Okay. So it was premeditated at least if you want to believe Elijah Page?
A I guess -- I look at a premeditated crime as one in which, you know, people with a sound, sober mind plan something out. And it appears to me that this was kind of a group thing, sort of like a lynch mob might get to be, where people might otherwise have a different type of judgment and activity than they would when they're caught up in the passion of this activity.
Q A horrible outcome for the victim to be outnumbered three to one.
A A horrible outcome.
Q Are you saying that somehow Mr. Page committed this murder as an agent for Mr. Piper?
A It appears from the information that I had that the participants were acting in some way as agents, pretty much as Piper had been referred to as Manson-like, and his followers were sort of his agents. They were fascinated with him for some reason or another, and

were able to do acts in that group that otherwise they might not have initiated on their own. They did the acts just the same, and that's not meant to excuse the acts but to help understand a little bit about how they took place.

Q But you believe that he was an agent -- acting as an agent in this murder?

A I think so. From the information I have, it appears that he would not likely have initiated a solitary act of aggression this extreme on his own without being intoxicated.

Q Um, is it uncommon in group dynamics, as you've talked about, for the participants in a murder to then do a lot of finger-pointing about He did it, no, he did it type of --

A It sort of depends on the dynamics of the group. I mean, like with the Manson situation, I don't think the people in that particular circumstance said He made me do it. Sometimes -- Sometimes there is finger-pointing. Sometimes there is not. That's an individual kind of a thing.

Q It was also true that Dr. Perrenoud, when he talked to Elijah about the crime, said Elijah had no problems of setting a limit at his house that there would be no bloodshed in his own home.

A That's true.
Q So that was done not out of concern for the victim, but because he just didn't want to get his house messy.
A That appears to be the motivation.
Q And all the time that this is going on, how they planned three different methods of murdering this man who's been tied up, he hears it all. Correct?
A That's correct.
Q And that would be a form of mental torture, would it not, for the victim?
A Oh, I think so. It must have been very painful for him.
MR. FITZGERALD: That's all I have.
MR. CONNELLY: May I?
THE COURT: Yes.

REDIRECT EXAMINATION

BY MR. CONNELLY:
Q Sir, if reference to the bloodshed thing was not that Eli was worried about his own house getting messy, but that he didn't want the owner of the house or the actual renter of the house, Preston Willuweit, to be involved in this in any way, wouldn't that seem odd to you that he would show some concern for the co-tenant?
A There -- I believe there may have been a reference to

something like that.
Q Does that strike you as odd?
A But -- There's a lot of information here and I haven't memorized it all.
Q Would it strike you as odd that after Briley Piper kicked Allan Poage in the face, drop-kicked him or kicked him like a football, as you indicated, Eli had a reaction to that like, "That wasn't necessary. What was that about?"
A That was extreme.
Q And after that, Eli talks about trying to straighten the glasses of this poor young man who's been kicked like that, trying to straighten his glasses so that they won't rub in the gash, and that's when Piper starts putting iodine or some substance --
A Something that would burn.
Q Does that seem odd to you?
A Well, it seems -- it seems to indicate that Piper, from the information that I have, was behaving in some sort of a sadistic, way primarily in trying to inflict pain by putting salt on the wound, you might say; but that Eli seemed to be concerned about actually straightening his glasses so that he could see.
Q And that would be consistent with the thing about chuckling, but then as it got more serious -- And it

got more serious when Piper got out this knife, started doing the Chinese torture. Is that consistent? Would it be consistent that at Page 173, Line 16, Mr. Page says, "Yeah, he knew we were -- we were serious, but he -- I don't think he had any idea that we were going to kill him." And it is then asked, "Right?" And Mr. Page starts to explain something and Agent West jumps in and says, "So what you're acknowledging is, is that at that point in time, you guys contemplated killing him?" And Mr. Page ponders that on the audio and says, "I think it like went through our heads, but we didn't really --" "Maybe you didn't talk about it out loud, but independently you were thinking it?"

Now, does it seem that there's any of that that we were talking about earlier about two agents sitting there kind of helping this person along, and does it seem like there's a lot of subjectivity that perhaps wouldn't even be allowed in a court of law?

A Well, it appears that there are a lot of questions that were framed by the agents that led Mr. Page along and suggested what answers might be or might please them.

Q If -- In regard to this commonality among people talking to police, if the -- if the suppression

hearing on November 14, Agent -- or --

MR. FITZGERALD: I'm going to object as beyond the scope.

THE COURT: It would seem to be, Mr. Connelly.

MR. CONNELLY: Well, Your Honor, it was said -- it was suggested that my client was lying and fabricating and attempting to put other -- shift blame on other people, and I'll be very, very brief.

THE COURT: Your objection is overruled. You may continue.

MR. CONNELLY: Thank you.

Q At Line 12, Page 65 where Detective Dean was asked, "Would it be your opinion" -- and we're referring to Elijah Page talking to them at length over numerous, numerous hours, six, seven hours over a several-day period -- "It would be your opinion that he did so without coercion, without promise or express representation that he would receive any benefit, that he waived those rights, cooperated with you and was forthright?" The answer at 16 is "Absolutely."

"When you returned, you conducted an interview on Monday evening, May 1st -- and by the way, that's the interview wherein a further discussion is had about the drug usage and alcohol usage during the time surrounding this event and the week or two preceding

it -- would it be fair to say that his attitude, his demeanor, his composure, everything remained the same, he was cordial, compliant, cooperative?" And the answer is, "Yes, sir."

Question: "Forthright in answering your questions?"

Answer: "By my estimation, yes, sir."

Does the word "forthright" impart or connote a sense of candor to you, Doctor?

Does compliance --

THE COURT: Just a minute. You have to answer out loud, sir.

Q I'm sorry. Yes or no?

A Yes, it does. It seems what he gave the agents, he was being open and honest.

Q And when we talk about this control, that you felt that Piper was still in control throughout these events and trying to get Eli to do his dirty work, let's talk about this going up to the Blazer and asking Piper if it was -- if he really meant that it was okay for this young man to come out of the creek if he washed himself off. Now, is it telling, do you think, that Eli consulted with Piper about it?

MR. FITZGERALD: I'd object, calls for speculation.

THE COURT: Overruled.

A It appears that he consulted with Piper and continued his action based on Piper's response.

MR. CONNELLY: Nothing further. Thank you, sir.

THE COURT: Mr. Fitzgerald?

MR. FITZGERALD: I just have one.

RECROSS-EXAMINATION

BY MR. FITZGERALD:

Q You're not suggesting that Piper was the sadist but Page was not, are you?

A I think there's more evidence that Piper exhibits persistent sadistic behavior than Page, from the information I have.

Q You don't think it was a little sadistic on Mr. Page's behalf to engage in a conversation of methods to murder a tied-up, helpless victim in his presence?

A I don't dispute that there was sadistic behavior exhibited.

Q By Mr. Page?

A Exhibited by everybody at the time, under the circumstances. But as I'd mentioned before, you know, an enduring characteristic of sadism depends on more than just the actions at the moment while intoxicated.

Q And you aren't suggesting that Mr. Page was not sadistic when he was only concerned about getting blood in his roommate's house versus killing this guy,

are you?
A I don't know that I can read all of that into that.
Q It sure would be sadistic to take football kicks to someone else's head, wouldn't it?
A There's no doubt that that's cruel, sadistic behavior, but doesn't necessarily mean that one is a sadist.
Q And it would be sadistic behavior to make a human being lay in snow or in a freezing creek, wouldn't it?
A That's all sadistic behavior.
Q Okay. And it's sadistic behavior to -- when the guy pleads for mercy and make him stay --
MR. CONNELLY: Your Honor, I'm going to object to this. It's just a rehash of --
THE COURT: Sustained.
MR. FITZGERALD: That's all the questions I have.
MR. CONNELLY: None.
THE COURT: You may step down.
We will take a one-hour recess.
(WHEREUPON, a lunch recess was taken.)
THE COURT: Mr. Connelly, you indicated to me during the noon hour that you did not have any further witnesses.
MR. CONNELLY: That's correct, Your Honor.
THE COURT: Does the Defendant rest?
MR. CONNELLY: Yes, we do.

THE COURT: Mr. Fitzgerald, I called you over the noon hour and you said you did not have any rebuttal. Is that correct?

MR. FITZGERALD: That's correct, Your Honor.

THE COURT: Does the State rest?

MR. FITZGERALD: Yes, it does.

THE COURT: You may proceed with your closing.

MR. FITZGERALD: Okay. Your Honor, the State is requesting the death penalty in this case. To receive the death penalty in this state, we must show beyond a reasonable doubt the existence of at least one aggravating circumstance. An aggravating circumstance is a factor that tends to support the imposition of the death penalty to a particular defendant and crime. The standards are set to guide the sentencer; they narrow the type of murders that deserve the death penalty. And now you must weigh the aggravating circumstances against any mitigating circumstances and make an individualized, reasoned judgment as to the appropriateness of the death penalty in this case.

The State only has to prove one, but the State, I believe, has proved five individual aggravating circumstances. Those are depravity, torture, aggravated battery, killing someone for money or property, and murder to eliminate a witness. As the

Court knows in State versus Moeller, the 2000 case, that the Supreme Court defined depravity as corrupt or perverted or immoral state of mind, indifference to life or suffering, committing an aggravated battery or torture on a living human being, or subjecting the body of a deceased to mutilation or serious disfigurement or relishing or gaining a sense of pleasure for the murder.

Torture is defined as when a victim is still alive and conscious, the defendant intentionally inflicts severe, unnecessary physical or mental pain or anguish on the victim. It could include a victim's serious mental anguish in anticipation of serious physical harm.

Aggravated battery is serious physical abuse of a victim that renders a member of his body useless or seriously disfigures his body and, at the time, the defendant had the specific intent to inflict unnecessary pain to the victim.

In this case, the facts support all three, depravity, torture, and aggravated battery upon Chester Allan Poage at the hands of the Defendant beyond a reasonable doubt; and they're all intertwined, so I'll discuss them at once.

It starts when the Defendant pulled a gun and

pointed it at the head of his victim, which rendered him helpless to Piper, who then kicked him in the head unconscious. It continued when he was tied up and he was made to drink some sort of a concoction. The depravity and the torture continued when he was hit and slapped, when he was tied up and helpless.

It continued again when they discussed methods of murdering Chester Allan Poage in front of him while he was tied up and outnumbered three to one. They discussed drowning him, they discussed hitting him in the head with a fire extinguisher, and they discussed slitting his throat in his presence when he was helpless to defend himself and he was outnumbered. That was depraved and that was torture for the victim to suffer through.

And it was only decided not to slit his throat -- it was not out of compassion for him, but it was because Elijah Page, this Defendant, didn't want to make a mess in his house with the blood of his defenseless victim. Didn't want to get Preston Willuweit, his roommate, involved. And that was an act of depravity on behalf of Elijah Page and it was torture for the victim, Chester Allan Poage, to suffer.

The torture and depravity continued when they

forced him into his own vehicle. Tied, he was taken to a remote area of Lawrence County to be murdered, and he knew he was going to be taken up there and murdered because they discussed that. That was depraved and that was torture for the victim.

They got him out and they stripped him naked. It was deep snow around. They went through his pockets, and the Defendant stole right out of his pockets. All the time Chester Allan Poage knew that they were going to murder him. And they forced him to go and lie down in deep snow naked, and as they did, they all covered him up in snow, and at that time he was begging for mercy, and that was depraved and that was torture for Chester Allan Poage to go through.

And when the victim escaped, the Defendant chased him; and when he did, he got his boots wet and he got his pants wet; and when he recaptured him, he punished him for trying to escape. He punished this victim for trying to do just a real human act, which was Chester Allan Poage ran for his life. He wanted to live. And this is what the Defendant did: He brought him back and he punished him for running off, and the punishment was he forced a naked man to lie down in the freezing stream in a remote area of this county in the wintertime, and that was depraved on behalf of

Elijah Page, and that was torture for Chester Allan Poage to suffer through.

The Defendant admits that he kicked the defenseless victim with his boots on until his own feet were sore from kicking that victim in the head. It's no wonder that the victim, when he was found on April 22nd, didn't have any ears on either his right or his left side of his head. That was an act of depravity and that was torture for Chester Allan Poage to go through.

And he described to the police that he gave Chester Allan Poage full football kicks to his head. As that victim screamed, he would kick him. And all the time the victim begged and he pleaded for mercy; the Defendant showed him absolutely none.

And then after he kicked him in the head for a while, they argued in front of this defenseless man who was outnumbered about who was going to stab him. And that was an act of depravity to do that in front of your victim, and it was an act of mental torture for Chester Allan Poage to endure.

And then it took an action of depravity. He went down to the river, the creek, where Chester Allan Poage was and he put his arm around Chester Allan Poage, and Chester Allan Poage said to him, "What are

you doing?" and he said, "Just sit still," and then he took a knife and he jammed it into the neck of Chester Allan Poage. That was an act of depravity and that was torture for Chester Allan Poage to go through.

This man was part of a group who, when his murder victim was being murdered, was told that "When we're through with you, we're going to go back and fuck your little sister." I don't know what could be more depraved than to tell a defenseless victim of a murder that that's what you plan to do with his family members when you got done murdering him. And Chester Allan Poage knew his sister and his mother were on vacation in Florida at that time, but I can just imagine that he thought that this was a possibility because the murder of himself was so horrible.

When he kicked Chester Allan Poage in the head, the Defendant took no mercy on him. When he'd cry, he would just tell him to shut up and he would kick him even more. It was a continued and it was a deliberate murder when you kick somebody, you stab someone, you try to bury them in the snow, you freeze them to death, try to, and all your victim does is he just pleads to be let to live; and when he can't even really talk anymore, he's still mumbling that he wants to live.

Nothing more depraved than getting pleasure from the torture of a defenseless victim, and that's exactly what the Defendant describes that he did. When Piper stuck him in the head with a knife, the Defendant said, "Oh, that must have hurt," making it a sarcastic joke, and then he chuckled at the suffering of his victim.

And when the victim was stabbed several times and and he was bleeding to death, he was told by Piper that he could go and he could warm up in the Blazer; and Chester Allan Poage thought that he was going to be allowed at least, I'm sure at this point, to die in a warm place. And the Defendant turned it into mocking and taunting, because when he came up after he had washed the blood off of himself and was expecting to be allowed to warm up, the Defendant told him, "Piper's a liar, I'm a liar, and Darrell's a liar, and you're not going to get into this Blazer."

And then he turned that mockery into more violence because he kicked him and kicked him back into the creek, and I would imagine at that point all hope was completely lost for Chester Allan Poage, because after all this, he was laying in the creek again, and now, according to the Defendant, he was just begging for one thing. He said, "I've had enough, just leave me

alone. Let me die in peace." He didn't -- He knew he wasn't going to be allowed to live, but the Defendant wouldn't even do that for him. He continued to victimize him, he continued to torture him.

This murder took two hours, by the Defendant's admission, and all that time, all Chester Allan Poage did was beg and plead for his life, and he was taunted and mocked throughout his murder.

And in this horrible murder, he was grossly disfigured. Chester Allan Poage had both of his ears mutilated from his body while he was alive. They were kicked literally off of his head. I think that torture, depravity, and aggravated battery have been proved as aggravating circumstances beyond a reasonable doubt.

The next one that I want to discuss is killing Chester Allan Poage for getting his money and his property. The whole purpose of this crime was to rob Chester Allan Poage of his property. The Defendant has confessed to that aggravating circumstance. At Page 166, Lines 11 through 17, the Defendant says: "Chester Allan Poage was tied up in a chair and he said, 'What's going on?' and he looks at me, says, 'Why did you do that?' And I said, 'I'm jacking you. I'm jacking you for all your stuff, all your stuff. I

just left your house and I was like, 'Do you think I'm going to leave all that stuff?'" Obviously, the reason that he was murdered was to take all of his property, pursuant to that stated intention.

He participated in tying up Chester Allan Poage so he could be kidnapped in his own Blazer and taken to Higgins Gulch. At Higgins Gulch they stole absolutely everything that he had. They stole money. I think he had a 20-dollar bill in his pocket. They took his wallet, his ATM card. They took his shirt, they took his pants, they took his underwear, they took his coat, and then they forced him, while he was naked -- and I'm sure being threatened -- to give them his Personal Identification Number so they could rob him after -- rob his account after they had left him dead, and then they turned around and they murdered him.

The Defendant even told the police that he was upset that this Defendant -- or that Chester Allan Poage, the victim, wouldn't die quicker so they could get on with robbing his house. And after they murdered him, they stole his Blazer, what did they do? They turned the stereo up loud and then they argued about how they were going to divide up the property that they were going to go steal from his mother's house.

It's a cold-blooded, planned-out murder for profit. The Defendant said when he got to Chester Allan Poage's, after he had murdered this man, Page 124, Lines 7 through 9, said, "Cool, we get all this shit now. This is all ours. So we just packed the Blazer up with all we could."

They didn't murder Chester Allan Poage because they hated him. He even said that Chester Allan Poage didn't do anything wrong. He was always nice, he just tried to be their friend. And what did the Defendant get for taking the life? He got a stereo, he got some of the victim's clothes, and he got the Blazer, and then they split, I guess, $660 that they withdrew from the ATM. I think that circumstance has been proved beyond a reasonable doubt.

The last one that I'm going to discuss at this time, the fifth one, is the murder of a witness to a crime to eliminate him as a witness. Early on after the Defendant pulled the gun and Piper had kicked Chester Allan Poage, they tied him up, he was given some sort of a Chinese torture, made to drink some sort of a concoction of beer and pills, and the murderers were aware that there was going to be a serious consequence to what they had already done if they got caught. And so they discussed at Elijah

Page's house ways that they could avoid this consequence for what they had already done.

In fact, they talked about several different methods of murdering Chester Allan Poage in his presence, and the group decided against murdering him there at the house because there would be too much blood. So they took him to Higgins Gulch where they thought maybe no one would find him for two or three weeks because it was a remote area that the Defendant was familiar with as he had lived there at the Van Horn's house in the Higgins Gulch area.

The Defendant said -- Page 81 of the transcript -- that when they had him in the water, they knew they had to kill him; otherwise, the situation was going to come back to haunt them. They said they could not take the chance, after what they had done to him, that he would tell someone else. That was on Page 82.

Even after they tortured and they brutalized Chester Allan Poage, Chester Allan Poage tried to trade his silence for his life. The Defendant says, on Page 193, when Chester Allan Poage was in the water, he said, "Please, let me go. I won't say nothing. I don't even know you guys. Just let me live." And they murdered him anyways.

I think that's very strong evidence of the

Defendant's intent to eliminate an identifying witness when he was promised that Chester Allan Poage would remain silent if they would just spare his life. But they didn't. They murdered him. I think we've proved that beyond a reasonable doubt.

The Defendant would like the Court to lessen his level of accountability by blaming other people, other things in this case. First reason would be to blame Briley Piper, say that he's kind of a robot for Briley Piper. They claim that Briley Piper is a ringleader. I would agree, but the Defendant is an actor in this murder, a strong actor.

Briley Piper and Elijah Page were not in the Army. Elijah Page was not a private and Briley Piper was not a general. He was not ordered to do anything by a military order. He was not ordered by a military tribunal or military authority to go out and kill somebody. He wasn't going to suffer a court martial if he didn't do what Piper told him to do.

He was not in jail at the time, he wasn't forced to associate with Briley Piper. This was, in fact, his friend. This was someone that he chose to associate with. The Defendant chose to commit the crimes with Piper and with Darrell Hoadley. The Defendant was not brainwashed. He had choices and he

decided what he did. Piper didn't have a gun to his head forcing him to go along. In fact, the only one who had a gun in his hand was the Defendant, and he had used the gun to point it at the head of Chester Allan Poage.

He was not forced and he was not threatened into his actions in this crime. He willingly participated. That's what he told the police. He said neither he nor Darrell had been threatened or forced to do anything in this crime. He decided willingly and voluntarily to commit the acts that the State is requesting that you hold him accountable for and to impose the death penalty upon him for.

He's not some sort of robot that was controlled by Briley Piper. In fact, the Defendant told Dr. Perrenoud that he did not feel that he was intimidated or influenced by Briley Piper. And frankly, if they want to argue that he killed Poage as Piper's agent, that's not a mitigating circumstance at all, Your Honor. In fact, that's an aggravating circumstance. It's spelled out at 23A-27A-1, Subsection 5. Killing someone, a murder as an agent, is an aggravating circumstance and it's not a mitigating circumstance whatsoever.

Their second excuse is to blame his actions on his

bad childhood and his psychological problems. They would like the Court to conclude that his bad childhood somehow lessons his level of accountability. They claim that his parents had failed him, that he was abused, that the State agencies involved failed him, that the Court that oversaw his cases failed him, that everyone involved failed him.

The Defendant has free will. He's not a child, he's an adult. There are plenty of people that have had worse backgrounds but didn't become murderers. Some people with disadvantages actually use their experiences to motivate themselves to accomplish things. The Defendant is like every other human being on this planet with free will. He has the right to decide what to do. He must have responsibility for his free will.

The State agencies, they didn't ignore him. They tried to help. They provided him with the tools, the psychologists, psychiatrists, the therapists, the foster homes, the group homes, the social workers, the guardians. He's described that he just didn't want to listen. Wouldn't try, wouldn't do anything, repeatedly ran away, ignored the help that they tried to give him. And now he wants to use that as a mitigating circumstance.

And I'll just reflect upon some of the reports from what we've obtained from Missouri. Dr. Schwartz, June 4 of '96, says that the Defendant in 1996 has a history of shoplifting, done it over 500 times, denies feeling guilty for stealing. Has a substance abuse problem, but says he enjoys getting high. They find his IQ to be 108 at that time. Find a defiant disorder and substance abuse. They recommend structured foster care and that he attend Narcotics Anonymous and a substance abuse education program.

Psychiatric evaluation, March 7 of '97, by Dr. Hart, child psychiatrist. Says that Elijah Page lacks feelings about his responsibility to others. He agrees to be bound only by the limits that he sets himself. He didn't like anyone telling him what he could or could not do. His diagnosis: Conduct disorder, occasional aggressive trait disorder, sociopathic traits.

The Ozanam Home discharge, March 26 of '97, said that absolutely no progress had been made. Said he was in no way committed to any changes in his antisocial behavior. He runs away, he's aggressive, he's defiant, he's alienated to almost all discipline. He has no ability to take responsibility for his behavior. He's not ready for treatment, and he's at

risk to act out aggressively.

Court report, April 9, '97, to the Missouri Court. Said he'd been in 17 placements since June of '94, 9 foster, 6 shelters, he's run away 5 times, has a history of stealing, steals cars, says he's making $600 a week selling drugs. He feels little remorse for his actions and he blames others for the situations he gets into. His MMPI showed an angry oppositional youth. They characterize him as a budding sociopath. He thinks he has no problems, and he's not a good candidate for treatment because he does not see himself as having any problems. They say that individual therapy has been unsuccessful in altering his behavior. All forms of therapy have failed.

And then Elijah Page came to South Dakota on March 13th of last year, committed murder. Dr. Perrenoud sees the same problems when he diagnosed him on January 26th of this year: Alcohol and drug dependency and adult antisocial behavior. It's a long history of just failing to pay any attention to the people that have tried to help him along the way.

It's the -- I guess the last defense that they take is if you willingly and you voluntarily take drugs, then you're not as accountable as a sober

person. Under this theory, you'd be better off getting high because it would lessen your level of responsibility. And the only proof that he was high is his own words. And he has lied repeatedly in the interview.

For the first 40 pages of the interview, he told the police he couldn't remember what had happened and that he was only retelling the story as told to him by Darrell Hoadley and Briley Piper. He told the police that he had got the gun from the house, Page 158. Though at the change of plea before this Court, he said Piper took the gun at Poage's house and gave it to him. He told the police when he was interviewed April 29th that Chester Allan Poage escaped and they argued about it and he was the one that went and got him. When he came to the change of plea hearing, he said that Chester Allan Poage had escaped, Piper had told him to go get him, and he had at first refused and then he had gone and gotten him. He told the police he was 10 on a scale of intoxication, and when Dr. Perrenoud talked to him recently, he said he was only a five on a scale of being intoxicated.

When you listen to all the details that he gives, blow-by-blow description of a crime, it's very inconsistent with a claim that he was high or

intoxicated. His memory is quite intact about what went on. And then he captured a man who was running for his life. It doesn't seem easy to understand if he was that high, that when Chester Allan Poage was running for his life, that he would have been able to capture him.

But if he was high, Your Honor, no one drugged him. He willingly and voluntarily consumed the drugs and it shouldn't lessen his level of responsibility or accountability in this case. The fact is that there are no mitigating circumstances that override the aggravating circumstances. The Defendant has no defense, no legitimate excuse for his crime. Whatever problems he claims, Chester Allan Poage had nothing to do with the problems that Elijah Page had. Chester Allan Poage was an innocent victim of a criminal act of the Defendant.

It was not the Defendant's bad childhood that killed Chester Allan Poage. It was the acts of the Defendant. He knows right from wrong. He was not insane, he was not mentally ill, he is not mentally incompetent. He's not mentally retarded, he's of average intelligence. He knew exactly what he did. He was not a minor, not a juvenile, he was the age of majority. He was 18 and Piper was 19 on March 13th of

2000. When he committed this crime, he was fully accountable at law for his actions, and he shouldn't be allowed to minimize his responsibility by blaming others.

The fact is, the Defendant was a man of action in this murder. He's the one that stole the gun that was used in the first acts of aggression. That's when it all started is when he pointed the gun at Chester Allan Poage to facilitate his kidnapping. Nothing would have happened had he not pointed the gun at Chester Allan Poage's head.

He was the one that forced him to the floor. And he told Dr. Perrenoud that it was his idea to tie Chester Allan Poage up. This crime all started at the Defendant's house. And when the victim made a valiant effort to try to escape from an overwhelming force, while others debated what to do, the Defendant went into action. He chased Chester Allan Poage down. He recaptured Chester Allan Poage so that they could murder him. And I'll quote from 187, it says that "When Chester Allan Poage escaped, we were just standing there going, 'Okay. He's getting away. One of us better go after him.' And we just sat there and watched him as he almost got to the top of the other side of the hill. Finally, I was like, 'Well, fuck

it, man. If you guys aren't going to go after him, I am.' So I got up and started running after him."

And he caught him and he beat him and he murdered him. When the others debated who was going to stab the helpless victim, this Defendant did not join in the debate, he sprang into action. He grabbed the knife, held the helpless victim's head, and then buried the knife into his throat. And I'll quote again on Page 193 about the stabbing. "After like a few minutes of arguing about who was going to stick him, I just got frustrated. I was like, 'Fuck it, I'll do it. Give me the knife, fuck it, you know.' And I just walked down there and I stabbed him in the neck."

When the victim wanted to warm up, after they had stabbed him, in his own Blazer, the Defendant didn't sit around wondering what to say. He said, "We're all a bunch of liars and you're not getting in the vehicle," and then he proceeded to kick him and kick him and kick him until he was back in the freezing water.

He's a man of action. When it was time to kill somebody, he didn't go sit up in the Blazer. He took action. He kicked him, he stabbed him, he stuck him in a freezing creek, he stoned the victim. These were

all deliberate choices and all deliberate actions.

The Defendant is the one that started the assault with pulling the gun. The Defendant deliberately kicked Chester Allan Poage with his boots until his own foot got sore. He decided to do that. He chose to do that. He's not a follower, he's a doer. He's an instigator, he's an actor. Piper is the mouth, the Defendant's the action.

He told Dr. Perrenoud he believed that ultimately he did the most physical damage to Allan, and I think that's borne out by the evidence. He never considered stopping the assault or rescuing Allan. That's what he told Dr. Perrenoud.

And if you think back about some of the other character evidence that was introduced, you'll see that he takes action all the time. When it was time to go take care of the narc supposedly, Scott Hunter, the Defendant was the one leading the charge. While others were hesitant, the Defendant acted. When the jailer upset him, he wrote a letter to her describing how he was going to anally rape her. When it was time to steal from Russ Olson or Chester Allan Poage, he's right there stealing all he can.

He's brazen. When he was arrested on March 16th, 2000, three days after he'd murdered Chester Allan

Poage, driving Chester Allan Poage's vehicle that he'd stolen from him and the police apprehended him and arrested him on a shoplifting warrant and put him in jail, he didn't miss a beat. He didn't act so nervous that the police were suspicious. They gave him back Chester Allan Poage's vehicle when he got out of jail the next day.

By his own admission, he did the most violence to the victim, Chester Allan Poage. He thought, Page 207, that Briley Piper was a, quote, chicken shit compared to his own ability to murder an innocent, helpless victim.

The crime the Defendant committed on March 13th is outrageous and shocking to the conscience. It's so outrageous, the Defendant has forfeited his own life by committing this act. Imposing the death penalty shows that Chester Allan Poage's life was worth something, and when the Defendant took it in the manner that he did, he deserves to pay the ultimate price himself, and that would be justice. It shows just how sacred life is in our society that when a criminal takes someone's life in this fashion, he pays the ultimate price.

This case is not about what or why the Defendant did what he did. It's not about what he might have

achieved in his life had things been different. It's not about where the Defendant went wrong. It's about the appropriate consequence for what he did on March 13th. The concept that justice requires the people who commit the same quality of a crime get the same punishment.

The Defendant did more action in torturing and mutilating the victim than Piper did in comparison. In comparison to Piper's actions, he is worse. The Defendant told Dr. Perrenoud that ultimately, of course, he did the most physical damage to Chester Allan Poage. The death penalty for this Defendant is proportionate to the punishment that his co-defendant got.

For two hours this Defendant took deliberate steps to end Chester Allan Poage's life in a horrible way. He could have stopped it at any time. Each step, each act was a deliberate, thought-out process. He chose and decided to take each and every one of those acts. Every time the victim cried out in pain and he begged for mercy, he was further tortured and brutalized.

It was like the Defendant had no conscience at all, no feelings of guilt at all for his actions. Chester Allan Poage experienced long and severe torture of his body. He was mentally tortured in the

way that it's hard to imagine by three bullies with weapons who had a defenseless, helpless man under their knives.

The Defendant's punishment should be proportionate to other capital offenses; the co-defendant's crime, Briley Piper, is exactly the same. And justice requires that a defendant pay the ultimate price like Piper has in this case. The law does not mandate mercy; it mandates only justice.

The Defendant has proved by his actions that he's capable of very violent actions without any feelings of guilt. He torture-murdered Chester Allan Poage for two hours without any hesitation. The law does not require that murderers who mutilate and torture victims deserve mercy.

And I'll quote now from the South Dakota Supreme Court in State versus Moeller, the 1996 case, it says that "Leniency may be appropriate when a defendant causes a quick and painless death. But when a murderer dismembers or disfigures his victim with a malicious intent to inflict pain, society is justified in imposing the ultimate punishment of death. The law need not be merciful in the face of brutal and torturous violence." And that's exactly what we have.

When Chester Allan Poage begged for mercy, the

Defendant showed him absolutely none. He described to the police his own mindset at the time that he was murdering Chester Allan Poage as not caring at all for the feelings of Chester Allan Poage. He tortured, beat, mutilated an innocent man for over two hours.

This Defendant is not an animal. He's a human with free will who had choices. He chose and he decided to brutalize his victim. He kicked his victim in the head so many times his own foot got sore. When Piper stabbed the -- When Piper stabbed Chester Allan Poage, the Defendant made a joke about it and sarcastically said, "Oh, that's got to hurt."

And when all hope was gone for his victim and his victim was completely dehumanized, when he'd been beaten and mutilated and stabbed, and he was starting to freeze to death in the creek, and he knew he was not going to make it, with his dying breath he pleaded for only one thing, and that was to be allowed to die in peace, and the Defendant would not even allow him that small amount of humanity, with his dying breath he wanted to be -- and he mumbled "Mercy."

So justice does not require mercy for a torture-murderer like Elijah Page. It calls for the death penalty.

THE COURT: Would Counsel stipulate that at the close

of this hearing, all of the exhibits can be placed in the custody of the sheriff for storage purposes?

MR. CONNELLY: Yes, Your Honor.

MR. FITZGERALD: Yes.

THE COURT: You may proceed.

MR. CONNELLY: Thank you.

Your Honor, may I move the podium?

THE COURT: Yes.

MR. CONNELLY: May it please the Court, Counsel, the Chester Allan Poage family:

Your Honor, I want to state at the beginning that I mean for nothing that I say to in any way trivialize, show disrespect for, insensitivity to, or in any way justify or excuse the actions of my client. That is the last thing I would do is stand here and attempt to justify his actions on that fateful evening.

Your Honor, I also wish to address the Court and I guess disclaim at the outset that I intend for any of my remarks, if I refer to the law as invading the province of the Court or implying that the Court is not already aware of the standards involved in this determination and the law as it regards the guidelines, comparative analysis, what the Supreme Court has said. This Court has been a major factor,

played a major role in those cases, and I don't -- I don't mean to show any disrespect by making declarative statements in regard to the law.

I started out, Your Honor, on this case following a recital of the facts as portrayed by the State's Attorney at the opening of this case, and I told the Court that it might seem rather bold on my part to get up here and attempt to say anything good on behalf of Elijah Page following a recital of something that terrible, that tragic, and I indicated that even if there were anything good to say, it might seem rather bold of me to ask the Court to keep an open mind and to listen to anything we had to say.

The State's Attorney referred on several instances in its remarks here to us using things as excuses, and I don't mind that, but I take issue with the suggestion that we have used anything offered -- offered anything to this Court as a defense. I believe we stated at the outset, and we maintained, we agreed on certain things, and one is that this was a horrible crime. Another is that my client, Elijah Page, is fully accountable and responsible. He's fully culpable. He must be punished.

And we approached this Court, we offered a plea, we offered Elijah Page to provide his account to this

Court, which I believe was substantially consistent with everything else that he had provided up to that point. So I take issue with the suggestion that we have tried to defend these actions.

Mr. Fitzgerald himself concedes that there are standards to guide the sentencer following a review of the presence or absence of any aggravating circumstance. He himself has recited that standard that against those aggravating circumstances must be weighed. These are his very words, "Any mitigating circumstances so that the sentencer can make a unique, individualized, reasoned, moral judgment about the appropriateness of the death penalty as a punishment for a particular defendant." Another way of saying it is that the guiding principles here are to look at the crime itself -- or not only at the crime itself but also at the individual defendant. His attitude, his character, his history. Other relevant personal factors.

This is as set out by the State in Briley Piper's sentencing, and all we asked for at the beginning of this hearing, Your Honor, was a clean slate. I believe that we have had that. I believe that we have been allowed an opportunity to present that in great detail.

I will start, Your Honor, with the same place that I believe, after a recital of these horrible facts, Detective Dean and Agent West started. And that is at Page 228, after hearing Eli's compliant, cooperative, forthright account, to use the words of those individuals back on April 29th, they sat there and, at a point in time that could not be manipulated, could not be orchestrated, they pondered why. They said to Eli essentially, "Can you give us -- Can you name us -- Can you state a reason why?"

Now, if the why to this was just for money, just for property, I don't believe that a question with the depth surrounding it would have been asked or pondered that way. Eli responded and said, "I've never thought of killing anyone for a stereo." It was obvious by the tapes and the transcript and the spirit of that pondering that there was still question marks.

It was only then that the question of drugs was discussed. It was not offered by Eli as an excuse. He was not advancing that as a cause any more than at that point in time he had advanced that Briley Piper was responsible for this, or Darrell Hoadley, or that his childhood or some deprivation in the past was somehow responsible. But that was the first place they went was why.

They didn't, upon the return to Rapid City and ultimately the drive to Deadwood, the agents didn't, whether of their own volition or after consulting with the State's Attorney, they didn't go in and question the veracity of what Eli had said as regards his conduct, Briley Piper's conduct. They went back in after more reflection on this and consultation, and I submit reflection and consultation in a legal sense, and they pressed Eli on one thing. Again, it was the level of, as they put it, partying, meaning someone had, after reflection or after suggestion, considered, "There's got to be more than this."

Of course, I don't know that anyone was fully aware that part of that "more to this" was the breadth and width and depth of Briley Piper and the influence that he was able to prevail or exercise upon people. But that's what they asked. They went through this again.

And then at a grand jury proceeding sometime later, after a recitation of these horrible, terrible facts that no one could listen to without revulsion, and properly so, but after a recital of that, it wasn't the State's Attorney but, at almost the end, it was a grand juror that said -- after a discussion of how much the property was worth -- "And that was the

reason they killed him was for his stuff?" Now, Detective Dean, the witness, said, "That's correct."

So we would assume that his puzzlement would be satisfied. But the juror pressed on and said, "Did he say they were on drugs when they did this?" And the witness: "I asked him that question, and he said that he had been using drugs for a couple days and he felt that he was pretty stoned. He was definitely intoxicated with the effects of drugs." The grand juror pressed on, asking more specifically, "With amphetamine or acid?" And the witness: "He wasn't sure what drugs he had taken that day because they had snorted some prescription drugs provided by Briley Piper, but apparently Briley was not of a mind to let everybody else know what they were going to party with. So he knew he had taken some drugs and he wasn't sure what they were."

That's where I start, Your Honor. I do not start by suggesting that any defense exists for Eli's participation, active participation in this case. But viewing his role in this crime as a first prong of our analysis, I believe, requires, Your Honor, given the pool of death penalty cases that there are that, again, the Court is keenly aware of, that those are instances where lone actions were taken, where they

were, as I believe Dr. Fox put it, self-directed solitary acts of violence.

But I believe given the novelty of this situation that we must -- that it is critical to examine Briley Piper's role and Elijah Page's role in relation to that. And there again, we are not suggesting in a legal culpability sense that somehow Elijah Page is less guilty. Not at all. What we are arguing here is mitigation factors. We are arguing moral culpability, moral accountability, Your Honor.

The State has acknowledged on numerous occasions that Briley Piper was the ringleader in this case. And he was the instigator of this murder. The State has also acknowledged that numerous other events, including the Russ Olson burglary, the Frito Lay truck burglary, that those were incited, that those were instigated by Briley Piper.

It is important, Your Honor, that we look at the relative culpability also in the sense of the group dynamic that was taking place on the evening in question. I submit that but for the presence of Briley Piper, the convergence of or confluence of circumstances somewhat unique in nature, including my client's background, including Briley Piper's influence, including the drug status of these people,

and including the group dynamic and the frenzy or insanity that Briley Piper had worked these people into, that this would not have happened. But I submit that without Eli Page, I believe this probably would have gone on to happen, and that someone else would have been brought into this, would have been recruited by the likes of Briley Piper.

There's no question -- and the State has even presented evidence of this nature -- that Briley's the leader, that he was always the leader, that he did this through big talk, physical intimidation, and utilizing drugs. As several of the cellmates reported, Briley Piper basically prided himself, was boasting about the fact that he not only was capable of manipulating people and getting into their minds, but that he emulated Charles Manson, that he used the same drug that Charles Manson did because he thought and had found that this worked.

I submit that Briley Piper was the leader of, the instigator of the LSD conspiracy, and that the fact that he was able to recruit anywhere from six to ten people, a number of them as investors, apart from Elijah Page, kids who were otherwise not serious troublemakers, not serious problems in the Spearfish community, but who were willing for some inexplicable

reason to become part of very serious criminal activity and who had no -- about whom there is no evidence whatsoever that they are drug addicts or have substance abuse problems.

As Trisha Dunham put it in the teleconference as a witness, she said he could get others to do just about anything. Now, again, we are not standing here blaming Briley Piper, but we do believe in the assessment of, again, as Dr. Fox -- how he put it, that Eli probably wouldn't do a self-directed solitary act of violence. And that is the reason, Your Honor, why I offer this as a consideration, as a circumstance. Apart from -- apart from the group dynamic that would normally be present even in a non-led situation or a situation not involving someone with the capacity and the acknowledged prowess to prevail upon other people and get into their minds, as he put it. These are not excuses, Your Honor, but I think we have to ask how did -- in a community where young people who experience, as we all have, some torrid conditions in our lives as we're going through adolescence, even those of us who have had fairly normal upbringing, how can those people such as Nathan Whartman be -- how can everything that he's about and that his family stands for be usurped, be twisted and

turned around unless Briley Piper does have, to some degree, some very powerful influential capacity.

It is incredible to me that this man, Briley Piper, could come into this town, that he could -- he could invade and, in such a short time, manage to corrupt these people, Calla Richards, Russ Olson himself, to get Russ Olson who we all saw testify here to become involved in an LSD conspiracy, is just beyond my comprehension.

Then we take someone like Elijah Page -- and I don't think I need to recount for the Court or describe in any detail the kind of terror that he himself perhaps was subjected to as a child -- but we take an individual like that who doesn't have the hugs, who never has had the hugs, the affection, psychologically or physically, of a mother figure. In fact, not only was there the absence of this, but there was unbridled, unabashed rejection and treatment in an unfathomable way as if he did not exist.

That alone, without any proactive, without any affirmative action by she herself, the drunken, drugged visitors, assaultive behavior against Eli, even if none of that had happened, would we not ask Isn't this something to consider in terms of whether Eli Page could have been influenced, could have been

unfairly influenced by Briley Piper?

We can fall back each time on him being 18 years old, him having intelligence, him having decision-making power, but the question in this case is not whether Eli Page is not culpable, is not fully responsible in a sense that he should receive one of the two most severe punishments that we know of. The question is: Should or do we need to kill him under the circumstances in which this case not only occurred, but given the circumstances of his involvement?

Your Honor, we went through character, and I would submit that it is uncontroverted that Elijah Page was a man of peace as a general rule, that he did not have a violent criminal history. It is uncontroverted that he was passive, that he was a follower, that he was not a bully, that he did not go around looking for trouble. He did not go around sadistically harming or treating people -- I mean, other than an unsupported, unsubstantiated claim about Scott Hunter. Who, interestingly, my secretary was able to run down and who was more than willing to talk to me over the phone who said, "No, it was not Elijah Page," but the State, government, law enforcement was willing to rely on people under circumstances that I don't need to detail

out for the Court, but circumstances which rendered the veracity of these people, the reliability of this evidence to be so grossly suspect in a case where this man's life is on the line, it is unimaginable.

So I submit that as it stands, even at this point -- And we can say, "Well, why should character matter? His character is sufficiently reflected by the events of the night in question on March 13th." But if we can -- are willing to consider his general life history character as an appropriate factor in making this most critical determination, I submit that these other instances, or lack thereof, are critical, Your Honor.

How many witnesses do we need to present to show that this young man, Elijah Page, exhibited nothing but peacefulness, other than one instance where there was a fight over a remote control, and Allison, his foster sister, got bumped or got struck somehow after Eli had been struck. And it was two kids, 14 years old, she was two years older than Eli, getting into a squabble at home. That does not reflect character -- the character of a bully or sadist or a, as it's been bantered about here, sociopath, which is not the case.

And I submit that there's never been any diagnosis that he's a sociopath. That's a misrepresentation.

But how can it be said that any more evidence would convince this Court that this is a man of peace prior to March 13th than the evidence that we have put on here? I don't know. We not only have a man who's referred to as peaceful and passive in nature, but who's referred to with terms that are usually not reserved for a lot of young men, at least not in my experiences: tender-hearted; gentle; polite; yes, ma'am; no, ma'am; open doors for people. And the evidence shows, without detailing it out, that he was particularly -- particularly decent and kind and gentle to women and young people.

How is it, if it isn't important to make these distinctions about character and personality and history, how is it I keep asking, after Christine Fanger testified, that she can know these people on a fairly brief, limited sense and she can know when she hears that there was a murder, that there was a body found and that it was foul play, she can know in her heart immediately that it was Briley Piper? And how is it that Pam Guettler, after knowing factually that Elijah Page participated in, an active participant, but participated in something this horrible, this terrible, and she can sit here and say I still love him? How does that happen, Your Honor? If there

isn't something so significantly different about these two people that we should at least consider a significantly different penalty, albeit, again, almost equal as severe in nature, but not involving death. And that's all we ask the Court to do is simply consider that.

I'd like to talk about character, too, as regard to post-incarceration character, Your Honor. This letter that was written -- and I do not mean to trivialize the corrections officer's feelings or how she interpreted that. I understand how this could be very upsetting. This could be a matter of grave concern to a corrections officer anytime anything like that's written. But I submit, Your Honor, that it was not -- it was not on the part of an escape plan by someone like Briley Piper who is, over a period of time, recruiting. He's using his powers over days in controlled conditions, not in situations where there's drinking and drugging and he's able to ply them, but he's able to almost recruit somebody, even under those circumstances, into participating in a deliberate, premeditated plan to kill corrections officers in specific ways. He has the plan even detailed, pencils through the necks and breaking their necks.

Now, if he's able, despite the absence of those

other factors that are part of his MO, to recruit a young man -- almost recruit a young man, Marc Payet, under a controlled environment and in a controlled environment, and who probably this Marc Payet would have fully participated had he not had the guidance, the restraint exerted by other older cellmates who knew that this was not only crazy, but dangerous, how does writing this letter, which is the equivalent, really, of a juvenile act of writing it on the wall or yelling it, speaking it, as an outburst, how does that compare to a man who, like Briley Piper, connives and who, even with regard to the specific crime, makes it clear, implicitly at least, that he's taking no responsibility, that he doesn't belong in jail?

You know, I submit there's never been any evidence, written form or otherwise, by Elijah Page, ever, since his arrest in Athens, Texas, that he didn't belong there, that he didn't deserve this, and that it wasn't appropriate.

Your Honor, with regard to acceptance of responsibility, which I also would respectfully submit is a consideration, Elijah Page did not call his father. He didn't -- If you call him that, his biological parent in Texas. He did not have his father get a lawyer. He did -- He made no effort

whatsoever.

He did not resist the arrival of the police, nor did he resist in any fashion the invitation on the part of Detective Dean and Agent West to cooperate with them. In fact, he immediately -- he responded when they said, "Do you know why we're here, why we're really here?" and he mentioned Mr. Poage's name. It was clear that he was, although having some difficulty at first admitting in an unqualified way his culpability, I submit that that is so typical of anyone in that situation to have some -- some reservation about it until they start getting into it. And he didn't -- he didn't take very long to finally come clean and start being, as the officers described him at the suppression hearing, totally compliant and cooperative.

And I submit that we cannot take, Your Honor, individual excerpts from this 240 pages and, in all fairness, have that reflect the attitude that Elijah Page -- and I'm -- I'm again not offering this in any excusing way, but I do not think that that is the proper way to evaluate whether he accepted responsibility that day.

The fact that there may be some discrepancies in the way these things were recited, and given the

climate of -- and I don't mean this disrespectfully but, to some degree, being double-teamed under those circumstances, I just would ask the Court to take that into account in assessing whether he, in spirit, accepted responsibility.

He came into this court, he did not defraud the Court, he did not say ever "I want to come in and plead guilty because Briley Piper is saying bad things about me." I told this Court that when that decision was made, Elijah Page indicated that he wanted to call me -- this would have been perhaps the first phone call that he would have made to me in almost the entire time that I've represented him -- to tell me he wanted to change his plea. We discussed it.

He reflected that he had asked me about this back in September, I believe it was, and that I had, frankly, Your Honor, to some degree, put him off. I'll be candid about that. And indicated to him we would discuss it later.

I asked him if that move on his part was retaliatory, if he was attempting to even the score somehow. He did not even know -- did not have access at that point in time to what Briley Piper had said, but I submit, Your Honor, that nor did he say, "Well, will you help me figure out a way to present this to

the Court?"

Elijah Page came in here unprepared, unrehearsed, and not hiding behind an attorney's version or rendition of a factual basis, Your Honor, and he was willing to go under oath to be examined in any way the Court felt appropriate to provide a factual basis. And importantly, Your Honor, Elijah Page never said, "Well, gee whiz, don't you think we should wait and see what Briley Piper gets?" He never once indicated that he wanted to do that. He came in in a stand-up way and said, "Whatever he gets, I'm pleading guilty."

There was no maneuvering and no manipulation on his part. And I respectfully say to the Court in this regard, so that I don't forget to say it, that I disagree, Your Honor, with an assertion made by an attorney on a previous occasion that because Briley -- and an assertion made today -- that because Briley Piper received the death penalty, Eli Page or anyone else should receive the death penalty. I believed on that day and I believe now that he is a different individual, that he is not in the class of Briley Piper, he's not in the class of Moeller or Anderson or Rhines, cases that, again, I'm not going to go into. This Court is intricately, intimately familiar with the facts of those cases. But the Court is also

familiar with the standards and the spirit of those standards as set out by the Supreme Court. And I believe that Eli Page's character, his acceptance of responsibility, his attitude about this case have never, ever reflected the cold, callous attitude that these people had not only shown historically but shown post-arrest, or post-interrogation, Your Honor.

Remorse. Another factor that I think distinguishes Elijah Page. I believe that all of the to-do about did Elijah show remorse -- well, as we've discussed ad nauseum with the counselors and the experts, people show remorse in different ways. Elijah Page almost had his thumb cut off; and while they were removing the rest of the fingernail and sewing it up, his expression didn't change. That did not mean that he did not feel pain. And if he didn't have tears streaming down his face at any point where he was trying to respond to questions and maintain his composure in a protective way in the jail, that does not mean that he didn't have remorse. And there are even cellmates who say that he expressed remorse. But they don't say he cried. Tobe Givens, Tingley said he felt bad for what he had done and that there was nothing he could do about it at this point.

I'd ask the Court to take into account my client's

youth, and I don't think that I need to reiterate how it is that I would ask the Court to consider that youth, but first of all, courts have historically considered youth as a mitigating factor in sentencing across the board on across-the-board types of crimes, Your Honor.

The Federal system used to have the Youth Offender Act and that applied until people were 25 years old. And I would say implicitly recognizing that uneven maturation level behaviorally that the experts have spoken about.

We know in the state court systems across the country how youth has been considered and how people just prior to being 18 years old are generally considered, that it is a factor. When we add into the equation the limiting, the impairing, the handicapping conditions and influences to which Elijah Page was subjected as he was growing up, I think it's clear that it is particularly appropriate as a factor in determining whether he, just two or three months into the age of 18, a victim of abuse himself, substance abuser, a follower, a person who's personality is such that he was easy prey for the likes of Briley Piper, I submit that that, in conjunction with all these other uncontroverted forces and influences, Your Honor,

should perhaps merit some modicum of consideration for the proposition that a life sentence, spending every day, every hour, every minute of the rest of his life behind walls without windows to reflect upon this is appropriate for a man 18 years old.

Your Honor, at Briley Piper's sentencing hearing four weeks ago, the State's Attorney argued to this Court Briley Piper deserved the death penalty. It was argued and urged at that time, and I believe found to be the case at that time, that it was reserved -- that is, the death penalty was reserved for the worst violators of human rights, that Piper was this and therefore should die.

As further reasons, the Court was urged that this man, Briley Piper, had talked about killing someone on numerous occasions just to see what it would feel like, or to see if it would make him tough enough or toughen him up. That Piper was the worst of these violators of human rights because he was the ringleader in this crime, as the testimony and the evidence showed, that Piper was always the leader of these three.

Specific evidence was presented at that time that Piper laughed and bragged about his crime afterwards, reenacted it not for law enforcement, but reenacted it

for friends at parties or juvenile get-togethers. That Piper blamed others and lied and was evasive when caught and confronted by police. It was submitted that he never truly owned up to his part in the crime. It was argued that he attempted to shift responsibility to others.

As part of the urging that this Court sentence Briley Piper to death, it was gone into in considerable detail that he had planned, after his capture and incarceration, a violent murderous escape and recruited others through money and intimidation into killing guards with specific details about how to kill them, that he'd planned then to kill Elijah Page, that he'd formulated this escape plan for the purpose of committing more killing and was willing to kill to facilitate and complete the plan.

State's Attorney presented evidence that Briley Piper was the worst violator of human rights, that he talked about cancelling and killing people not only with ease but with totally callous indifference to human life. Is the State's Attorney now saying, Your Honor, four weeks later that Elijah Page is also one of this category of people that we would call the worst violator of human rights? Or are we changing the criteria?

Because I believe, Your Honor, that despite aggravating circumstances that existed in those other cases, the Moeller, Anderson, the Rhines, the Briley Piper, that Elijah Page, by the endless chain of character witnesses, some of them put on not even for the purpose of presenting character, presented to this Court over the course of the last couple days, are they in the same category of persons, of peers, about whom a young man like Arthur Guettler would sit here and say he helped me with my homework and told me to stay in school? He was the only one of the boyfriends of my sister that I could get along with, or liked, at least.

Your Honor, there is a conspicuous absence in this courtroom of what one might normally consider to be concerned people when a man's life is at stake. I do not believe there is one person in this courtroom who is a blood relative of Elijah Page. So we have one family losing a son, and another family giving a son away. And it did not start now, Your Honor. It started a long time ago. This man has been alone for a long time. I have not received one phone call from Elijah Page's biological father; and the call I received from his biological parent, because I will not say mother in her case, I had to hang up on

because it was replete with insanity.

But in this courtroom are people, though not blood relatives, though not legal relatives, though not even guardians in any legal sense of the word, who have been here all week to provide support, who would stay here for another week to provide that support, or two or more, because they saw something and they have something inside them that recognized something very good in this young man at an early age.

They were not presented for sympathy. Elijah Page does not deserve sympathy, Your Honor And I'm not asking for it. I don't even know if to say that I'm asking for mercy to stand here and ask that he be sentenced to life in prison without parole. They were presented because I couldn't have prevented them from testifying, Your Honor. There is no snowstorm that could have prevented them from being here. What was touched in them was the same thing that was touched years later.

I don't care what the Ozanam records reflect over three weeks of limited exposure in a home that's highly suspect anyway for its practices and information that I couldn't even cross-examine on. I submit that that is not determinative and that should not carry the day in the Court's considerations of

whether this young man is who these people say he is, that is, the people from Kansas City, the people in Spearfish who knew him prior to crossing paths in the night with Briley Piper.

These people attempted, took the initiative, not because they're busy-bodies, to reach out and pluck this child out of the garbage and were unsuccessful, I submit, through no failure to act on their part and no failure of efforts on their part. At least one of these people asked me, before I came in to make these remarks, if they could make one more statement to the Court.

I'm not trying to move this Court by desperation. I'm trying to say it's reflective of the kind of belief they have that this man does not rise or fall, let me say, to the level of these other people about whom it would be inappropriate to use the descriptive terms I'd like to use. This is the same person -- and they saw the same person years ago as a child -- as the Guettlers did, Christine Fanger.

And if it's submitted at any point during this trial -- during this hearing, Your Honor, that Eli somehow became a user of the church or manipulator or was conning people, I submit that there's not one scrap, not one shred of evidence from people that he

tried to use anyone in the church for anything or the kindness that people were willing to provide to him. In fact, Arthur Guettler said he never asked for anything. Couldn't even give him a ride. Is this a sociopath?

With this decision, Your Honor, everyone, I submit, including Mr. Fitzgerald, Detective Dean, Agent West, who're not here; Mr. Murphy, all the people closely involved in this, are seeking to do what is right here. That's all any of us can do. And I submit, Your Honor, that anybody who's here in urgence of the death penalty is not here for improper reasons, is not here because they want to see someone hurt or killed. If anyone is urging the death penalty or is present in this courtroom for that purpose, it is because they feel it is right, they feel it is just.

But I submit that there is one man who would be very pleased with the death penalty in Elijah Page's case, but not for the right reasons; because he would feel that he had won, even from a distance, and that's Briley Piper.

Briley Piper schemed, if it's any reflection on his character, to get out of Anchorage -- to get out of the jail in Anchorage to kill Elijah Page. He told

somebody over the phone that he was going to do that. He schemed, he plotted over a lengthy period of time, and I'm still not clear as to whether his ultimate goal was to escape or whether it was to kill Elijah Page, but that was at least part of the plan. And I submit, Your Honor, that there are reasons for that.

I submit that it is not because Elijah Page talked that he wanted to kill him, but it is because Elijah Page told the truth, because Elijah Page did not commit a fraud upon this Court and Elijah Page did not and would not stand here and commit a fraud upon the family of Mr. Chester Allan Poage, which I submit Briley Piper sought to do.

Now, if Elijah Page is not distinguishable from a person like that, I have failed in my efforts to show this Court that distinction. All I ask in consideration of this, Your Honor, is to take into account, if you could, all of the circumstances. Not just one. I would ask you to take into account Elijah Page, contrary to what has been suggested by the State, has not offered drugs or youth or deprived childhood or Briley Piper as an excuse ever, not once. I have, on his behalf. Because I know that the "why" question for me or anyone who is familiar with this involves a lot more than just evil, evil of the nature

that the State's Attorney spoke about in talking about Briley Piper at his sentencing. I thank the State's Attorney for not using that word in this case.

The community of Spearfish would have gone on just fine, and I submit, Your Honor, Elijah Page probably would have made it, he probably would have been one of those people that from the ashes or the seeds on the rocks or whatever it is, that manages to survive it all. I say we all, if we are honest with ourselves, have to reflect back and acknowledge that even most of us in this courtroom who have had fairly normal childhoods and upbringings have had difficult, difficult junctions in the road, and most of us have been lucky to make the right decisions. And I believe that Elijah Page, with the people who saw his goodness, the people who reached out to him, the Van Horns, there's others I probably haven't mentioned, but Aaron Neiman, Nathan Whartman, these people who have reached out, I believe that he would have, as he has shown in the past with his positive reaction to those positive people, I believe he would have eventually made it.

He made work every day. He tried to stay sober, tried to have a regular, normal life with the family. He was sitting and watching TV with mom-and-dad-type

figures. The kids in Spearfish would have been fine with Elijah Page, but when Briley Piper came to town, they were all prey, they were all potential victims, and he found a couple who were sheep, not because they were weak but because of where they'd been. And if we have the same feeling about Elijah Page, knowing all that we do and still feel, as the State would urge, that it is appropriate to put him to death, then I submit that a different criteria perhaps is being used in this case than should be under the law.

I just want to say, Your Honor, thank the Court for the opportunity, the length of time, and the courtesy the Court has given us in presenting this information on behalf of Elijah Page. Thank you.

THE COURT: Mr. Fitzgerald, did you have any further comments?

MR. FITZGERALD: Just a few, Your Honor, if I could. The reason for this murder is not in question whatsoever. It was a stated purpose of this Defendant that he had killed or committed the murder to rob Chester Allan Poage of his property. There's not some lurking question as to why this was done. It was motivated by greed. He had a lot of nice stuff at his house. These three saw it as an opportunity to take advantage of him and to steal from his house. And

that's exactly what they did. It's not some big psychological question at this point. It's just a matter of regular greed. He had things and they could rob him and they did.

The only thing I'd like to mention about group dynamics would be this: The group dynamics here were there were three people against one. Chester Allan Poage was greatly outnumbered and he did not have a chance. Not only was he outnumbered, but the people -- the three assailants that murdered him had weapons that they would use against him. They had a gun and they were equipped with knives and they all fed on each other. They all went out there and they committed, as a group, a heinous murder.

I'd like to respond briefly to these allegations that somehow Piper came here and he corrupted a bunch of people into selling drugs. The drug trade feeds on greed. That's why people sell drugs is because they can make money quickly. That was the same thing that got Elijah Page and the rest of them involved in drugs. It was a quick way to make a lot of money. They all had free will, none of them had to participate in this, but they chose to.

And as I said earlier, they continually want to talk about Piper basically urging the killing, and

that he acted as an agent for Piper when he killed him, but honestly, that is not a mitigating circumstances. That is an aggravating circumstance under the law. It's Subsection 5. If you have no concern whatsoever about anyone that you would kill someone because they would pay you money or you would get to share in the robbery proceeds or just simply because you do it because someone tells you to do it, you've acted as an agent, and rather than mitigation, it's an aggravating circumstance.

He has had, from what we have been able to present here in court, a violent history, including assaulting Scott Hunter. They may like you to believe that somehow this didn't occur. However, it would be like when Nate Whartman testified that it was Piper behind the Russ Olson burglary, they now want you to discount his testimony when he says he saw this man leading a group of other young men to go over to Scott's house with the intent to scare him, hurt him, because he was a narc. Ron Bellantino testified he was with Elijah Page when they went over to that house and they assaulted Scott Hunter because he was supposed to have been a narc.

I want to talk about this tender-hearted and polite. Absolute not true. This is the man who on

March 13 went up to a remote area of Higgins Gulch and literally kicked the ears off another human being who had done absolutely nothing to him. This is the man. He's not polite. He's not tender-hearted. He's a murderer.

He discussed the murder of an innocent victim in his own home. And not out of compassion for not doing it in his own home, just because he didn't want to involve his roommate and get a lot of blood in his house, decided to go up to Higgins Gulch. This is the man who, when another man cried for mercy, he showed him no mercy.

He participated in stabbing him and making jokes about the stabbing. Made the man lay in the creek for several -- 45 minutes to over an hour as he froze to death. And all the time the guy was pleading for mercy. You know, it's just absolutely ludicrous to somehow think that sitting beside us here in court is a tender-hearted, polite young man. Not at all. This man was vicious on March 13.

So another side of him that comes out. You see it in the October 27th letter that he writes to the jail. This -- He's not just thinking these thoughts, he has actually acted upon his thoughts. He's in jail for a murder and now he is writing a letter to one of the

jailers, that he hopes that she will read, saying that he wants to anally rape her. This is not a tender-hearted, kind, polite man. He's a murderer.

As I said, this case is not about Elijah Page and what he could have become or what's caused him to be the way that he is. This is about Chester Allan Poage and the appropriate sentence for someone who involves himself in a torture-murder of another human being, who shows absolutely no respect for human life, who would allow a man to plead for hours and show absolutely no mercy. There's no conscience that was present on March 13th. That's all I have.

THE COURT: Mr. Page, would you come forward with your Counsel, please.

MR. CONNELLY: Your Honor, may I have my client -- He would like to read a letter that he wrote --

THE COURT: Yes.

MR. CONNELLY: -- back in August of last year.

THE DEFENDANT: You want me to read it here?

THE COURT: Yes.

THE DEFENDANT: Can I direct it towards the family?

THE COURT: Yes.

THE DEFENDANT: This is a letter I wrote about seven or eight months ago. I wanted to send it to you guys back then, but my lawyer said I shouldn't.

I know I'm the last -- I'm one of the last people you would want to hear from, but please let me say this to you. It may not mean anything to you, but I feel I owe at least this one thing. This is very hard for me, but I will do the best I can. Here it goes: I am sorry for what I did. I wish I could explain how sorry I am. I know that doesn't make up for what I did. I also know that nothing I do will make up for what I did. I don't expect you to forgive me; God knows I wouldn't forgive me. I'm sure you would like an explanation of why I did what I did. I can't speak for the other two, but for myself personally, I cannot give you an answer to that question because I honestly don't know why I did it. I know what I did was wrong. I feel like the biggest piece of shit for it, and I hope I get what I deserve. I don't know what else to say. I don't expect you ever to forgive me, but I just want you to know that my apology is here. And please don't hate my family and friends for what I did. If you hate anybody, hate me.

THE COURT: Mr. Page, do you have anything else you want to say on your own behalf?

THE DEFENDANT: No, sir.

THE COURT: Mr. Page, I wrote some notes, too, most of them last night, the rest of them this morning. I

wanted to explain myself as best I could. But of course I couldn't write the ending because I didn't know what it would be. I knew that the final argument of Counsel would have impact. I knew the evidence this morning would have impact. Because all of it had impact.

I knew when I sentenced Piper that I also would be sentencing you. Although I had a pretty good idea concerning the facts of your involvement, I knew very little about you as a person. You are a separate person entitled to separate consideration. Although you pleaded guilty to the same charges that Piper did, you were entitled to be judged on your actual participation before, during, and after Allan's death. That Piper received a death sentence did not mean that you should receive one.

The State has proved the aggravating circumstances beyond a reasonable doubt. This was clearly a killing for money. You ended up with the Blazer, Allan's most substantial possession. You profited the most from Allan's death. This was a killing to eliminate Allan as a witness to the robbery, burglary, and the theft that was to follow. The offense that you committed involved depravity of mind, it involved torture, it involved an aggravated battery. The State has proven

all of their aggravating circumstances.

Today you need not be concerned by the statements of Briley Piper or that he would blame you or you would be held accountable for things he says that you did. I've relied on your statements to officers, as well as the forensic evidence and other evidence in the case. I have not referred to or relied on the statements of co-defendants in determining your level of participation in this case.

I've considered the evidence in mitigation. I've considered your young age and your background. Your early years must have been a living hell. Most people treat their pets better than your parents treated their kids.

It's also apparent from your background that there was a point in time when people and professional people offered help in the form of foster care, group care, psychological treatment, psychiatric counseling. Some of these people have testified on your behalf. You seem to have learned to say no to people at an early age: No to foster care, no to families that offered you a shelter, and no to experts who offered you treatment.

When you came to South Dakota, people like the Van Horns and the Guettlers and Mrs. Fanger, they opened

up their hearts and their homes to you. Instead, you turned to the company of Briley Piper. It was as if the Van Horns and the Guettlers were not your kind of people, that Briley Piper was your kind of people.

By your own admission, you were a major player in the killing of Allan Poage. You were the man with the gun, the first aggressor. Piper gave you the gun at Allan's house and you put it to Allan's head when you got to your house.

But you were able to say no when Piper wanted to do the killing at your house because you did not want to clean up the mess. You were the person that went after Allan when he tried to run across the creek. You were the only person -- You were the first person to stab him, you were the only person to point a gun, as well as kick, stab, and throw rocks on Allan. You were a major participant from beginning to end.

By your own admission, the kidnapping and killing of Allan took maybe two hours or more. You had lots of chances to change your mind and back out. Had you dropped the gun on the floor and headed out the door and ran down the street, I doubt if Piper would have chased you down. I doubt if he would have gone through with the plan, knowing that a key witness was now on the loose. You had chances to spare Allan's

life. Unarmed and outnumbered, Allan never had a chance.

I cannot say if you are a sociopath or a psychopath or something else. I don't know that I need to know if you are any of those types of personalities. I know what you did and I know what you are. There may have been a follower out there that night, but it wasn't you and it wasn't Piper. In all relevant respects, at least insofar as the kidnapping/killing of Allan Poage, you and Piper were two of a kind.

It is the judgment of the Court that you are sentenced as follows: To the charge of grand theft, 10 years in the state penitentiary.

To the charge of first degree burglary, 25 years in the state penitentiary.

As to Count III, first degree robbery, 25 years in prison. The foregoing sentences will run consecutively.

With respect to Count IIA, kidnapping, it is the sentence of the Court that you be imprisoned for life without parole; to run concurrently with the above sentences.

Finally, as to Count IA, felony murder, you are sentenced to death by lethal injection. I have

scheduled your execution for the week of September 10, 2001.

Your case will be automatically reviewed by the South Dakota Supreme Court and, at his discretion, by the Governor. Mr. Connelly and Mr. Murphy have put their heart, their soul, and their considerable legal talent into your case. I will be hopeful that they would continue with your appeal.

Court will be in recess.

STATE OF SOUTH DAKOTA)

) SS. CERTIFICATE

COUNTY OF LAWRENCE)

I, Tracy L. Binder, Court Reporter and Notary Public, South Dakota, duly commissioned to administer oaths, certify that I placed the witnesses under oath before the witnesses testified; that the foregoing testimony of said witnesses was taken by me in shorthand, and that the same has been reduced to typewritten form under my supervision; that the foregoing transcript is a true transcript of the questions asked, of the testimony given, and of the proceedings had.

I further certify that I am not related to, employed by, or in any way associated with any of the parties to this action, or their counsel, and have no interest in its event.

Witness my hand and seal at Deadwood, South Dakota, this 25th day of April, 2001.

Tracy Binder

Tracy L. Binder
Certified Shorthand Reporter

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STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	FILE NO. 00-431
Plaintiff,	)	
vs.	)	ORDER RE: MOTIONS FILED MAY 20, 2011
BRILEY W. PIPER,	)	
Defendant.	)	

1. Defendant's First Motion to Introduce Other Acts Evidence Regarding Co-Defendant Darrell Hoadley – Stabbing is hereby GRANTED.

2. Defendant's Second Motion to Introduce Other Acts Evidence Regarding Co-Defendant Darrell Hoadley – Death Threats is hereby GRANTED.

3. Defendant's Motion to Prohibit State from Discussion of Allegations it Does Not Intend to Attempt to Prove. The jury will be instructed that statements, arguments, questions, and comments made by the attorneys during trial are not evidence. The jury will be instructed objections are not evidence. An opening statement should not be argumentative, nor should it refer to inadmissible matters.

4. Defendant's Motion for Admission of State's Attorney's Prior Trial Statements as Admissions of Party Opponent was heard and orally decided on June 2, 2011 is hereby DENIED.

5. Defendant's Objection to State's Notice of Intent to Offer Hearsay Statements of Elijah Page is taken under advisement by the Court.

6. Defendant's Motion to Bar Inconsistent Arguments or Presentation of Evidence by the State. Arguments are necessarily limited by the evidence produced at trial. If the evidence does not support an argument, the argument will be barred.

Dated this 1 day of July, 2011.

BY THE COURT:

Jerome A. Eckrich, III
Circuit Court Judge

Attest:
Lane Keil
for Carol Latuseck
Clerk of Court

Appendix G

FILED
JUL - 1 2011
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	Crim. 00-431
Plaintiff,	)	
vs.	)	ORDER Re: PRECLUDING STATE FROM "DEATH QUALIFYING"
BRILEY PIPER,	)	
Defendant.	)	

Defendant, through his attorneys, brings a motion to preclude the State from "death qualifying" potential jurors in his sentencing trial. In reviewing the authority cited by the Defendant in his motion, it is the Court's conclusion that the Constitution requires that potential jurors be willing and able to carefully and conscientiously listen to the evidence produced at trial, follow the instructions from the Court, follow the juror's oath, and come to a just decision. *E.g., Lockhart v. McCree*, 476 US 162 (1986). Those jurors who state that they would not be able to listen to and carefully consider the evidence before coming to a decision on whether to impose the death sentence, those who have firmly held beliefs as to the validity of the death penalty, or those whose opinions on capital punishment would "substantially impair" their duties as a juror, may be eligible candidates for "for cause" removal. *See Morgan v. Illinois*, 504 US 719, 728 (1992); *Wainwright v. Witt*, 469 US 412, 424-26 (1985); *Witherspoon v. Illinois*, 391 US 510, 519-22 (1968).

However, the fact that a potential juror favors the imposition capital punishment in general or favors life imprisonment in general, does not per se exclude that juror from serving in this sentencing trial. "[T]he quest is for jurors who will conscientiously apply the law and find the facts." *Wainwright*, 469 US at 423. "Prospective jurors come from many different

Appendix H

backgrounds, and have many different attitudes and predispositions. But the Constitution presupposes that a jury selected from a fair cross section of the community is impartial, regardless of the mix of individual viewpoints actually represented on the jury, so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case." *Lockhart*, 476 US at 183-84. "[A] juror may not be challenged for cause based on his views about capital punishment unless those views would *prevent or substantially impair* the performance of his duties as a juror in accordance with his instructions and his oath." *Adams v. Texas*, 448 US 38, 45 (1980) (emphasis added). After all, "'[a] man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him . . . and can thus obey the oath he takes as a juror." *Lockart*, 476 US at 180 (quoting *Adams*, 448 US at 45; *Witherspoon*, 391 US at 519).

Based on the foregoing, it is hereby ORDERED:

That the members of the jury in Mr. Piper's sentencing trial must be "willing to temporarily set aside their own beliefs in deference to the rule of law" and conscientiously consider the evidence presented at trial when coming to a sentencing decision. *Lockhart*, 476 US at 176, 183-84.

Dated this 19 day May, 2011.

BY THE COURT:

Hon. Jerome A. Eckrich
Circuit Court Judge

ATTEST:
Clerk of Courts for Carol Latusek

Deputy

FILED
MAY 19 2011
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT
By

2920

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she served true and correct copies of the foregoing ORDER Re: PRECLUDING STATE FROM "DEATH QUALIFYING" in the above entitled matter upon the persons herein next designated all on the date below shown, by depositing a copy thereof in the United States Mail at Deadwood, South Dakota, postage prepaid, in envelopes addressed to said addressees, to-wit:

Mr. John Fitzgerald
States Attorney
90 Sherman Street
Deadwood, SD 57732

Mr. Robert Van Norman
Attorney for Defendant Briley Piper
P.O. Box 8030
Rapid City, SD 57701

Mr. Michael Stonefield
Attorney for Defendant Briley Piper
409 Kansas City Street
Rapid City, SD 57701

which addresses are the last addresses of the addressees known to the subscriber.

Dated this 19th day of May, 2011.

Lane Keil
Clerk

FILED
MAY 19 2011
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT
By

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
: SS
COUNTY OF LAWRENCE) FOURTH JUDICIAL CIRCUIT

****

STATE OF SOUTH DAKOTA,
Plaintiff,

vs.

BRILEY PIPER
Defendant.

00-431
ADDITIONAL WITNESS INFORMATION

****

Comes now the State of SouthDakota by and through their attorney, John H. Fitzgerald, Lawrence County State's Attorney's Office and hereby provides the following additional contact information:

Don Baum	Avera McKennan Behavioral Health 2412 S. Cliff Ave. Sioux Falls, SD 57105 322-4098
Brooke Beckham	South Dakota State Penitentiary P.O. Box 5911 Sioux Falls, SD 367-5051
Derrick Bieber	South Dakota State Penitentiary P.O. Box 5911 Sioux Falls, SD 367-5051
Jessica Cook	South Dakota State Penitentiary P.O. Box 5911 Sioux Falls, SD 367-5051
Dr. Christopher Davidson	South Dakota State Penitentiary P.O. Box 5911 Sioux Falls, SD 367-5051
Keith Ditterson	South Dakota State Penitentiary P.O. Box 5911 Sioux Falls, SD 367-5051

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JUN 24 2011
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
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By

3140

Appendix I

John Durso	Unknown, last worked at Fort Meade VA but no longer there
Robert Frederickson	South Dakota State Penitentiary P.O. Box 5911 Sioux Falls, SD 367-5051
John Erpenbach	Avera McKenna S. Cliff Ave. Sioux Falls, SD 57105 322-4098 322-5700
Cliff Fantroy	South Dakota State Penitentiary P.O. Box 5911 Sioux Falls, SD 367-5051
Robert Frederickson	South Dakota State Penitentiary P.O. Box 5911 Sioux Falls, SD 367-5051
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Kim Johnson	South Dakota State Penitentiary P.O. Box 5911 Sioux Falls, SD 367-5051
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Ulises Pesce	Capitol Counseling Clinic P.O. Box 148 Pierre, SD 57501 224-5811
Donna Reit	1015 West 4th St. Sioux Falls, 57104 (recently retired)
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Dr. Manish Sheth	San Deigo, California
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Heather Veld	South Dakota State Penitentiary P.O. Box 5911 Sioux Falls, SD 367-5051
Jennifer Wagner	South Dakota State Penitentiary P.O. Box 5911 Sioux Falls, SD 367-5051
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Dated this 22 day of June, 2011.

John H. Fitzgerald
Lawrence County State's Attorney
90 Sherman Street
Deadwood, SD 57732

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF LAWRENCE)

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,
Plaintiff,

vs.

BRILEY WAYNE PIPER,
Defendants.

00-431

CERTIFICATE OF SERVICE

The undersigned, Lawrence County State's Attorney hereby certifies that on the 22nd day of June, 2011 he served a copy of the Additional Witness Information upon the named below by faxing a copy in Deadwood, SD, addressed to:

Mr. Robert VanNorman
Attorney at Law
PO Box 8030
Rapid City SD 57709-8030

Mr. Michael Stonefield
Attorney at Law
409 Kansas City Street
Rapid City SD 57701

whose address is the last known address of addressee known to the subscriber.

Lawrence County State's Attorney

FILED
JUN 24 2011
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT
By

3144

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, Plaintiff,	)	CRIM. NO. 00-431
vs.	)	DEFENDANT'S MOTION TO REQUIRE NOTICE OF EXPERT WITNESSES AT SENTENCING TRIAL
BRILEY W. PIPER, Defendant.	)	

Comes now the defendant, Briley W. Piper, through his court-appointed attorneys, Robert Van Norman and Michael Stonefield, and respectfully moves this Honorable Court for its Order requiring the State's Attorney to provide to the defense, written notice of any expert witnesses the State intends to call at the sentencing trial in this case plus the expert's resume, a summary of his or her proposed testimony, a list of cases in which the expert has testified, a list of the expert's publications, and any specific treatises or other written or recorded authorities on which the expert's opinion(s) may be based. In support of this motion, defendant states the following:

The rules of evidence and case law interpreting those rules limit to a degree the admissibility of expert witness testimony. Defendant requests prior notice of any such expert witnesses so that he may object to the admissibility of any such expert testimony in full or part, if appropriate, and so that the Court may rule on any such objection prior to trial.

WHEREFORE, to maintain the impartiality and fairness necessary to satisfy due process in a capital murder case, and to prevent violations of defendant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and defendant's rights under the similar provisions of the South Dakota Constitution, defendant requests that this motion be granted.

Defendant further moves for an Order setting a date by which this discovery be provided, enough in advance of trial to allow for a fair opportunity to investigate such testimony and object in writing or through a presentation of evidence.

Dated this 17th day of January, 2011.

NOONEY SOLAY & VAN NORMAN, LLP

Robert Van Norman.
Attorney for Defendant Piper
P.O. Box 8030
Rapid City, SD 57701

Dated this 17th day of January, 2011.

Michael Stonefield by RVN
Michael Stonefield
Attorney for Defendant Piper
409 Kansas City Street
Rapid City, SD 57701

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	FILE NO. 00-431
Plaintiff,	)	
vs.	)	ORDER RE: NON-LIMINE MOTIONS FILED JANUARY 20, 2011
BRILEY W. PIPER,	)	
Defendant.	)	

A. For Court's entry of written orders on previously granted defense motions.

The Court adopts and ratifies prior orders of the Court as set forth in the Defense's motion.

B. For declaration that Court orders regarding previously granted Defense motions remain in effect.

1. For discovery as to mitigation is hereby GRANTED.

2. Consideration of Witnesses is hereby GRANTED.

3. Individual Voir Dire. This Court previously granted this motion by ORDER dated May 20, 2011.

4. Protection of the Community Language is hereby GRANTED.

5. Street Clothes is hereby GRANTED.

6. Restraints. The situation (procedural posture, courtroom, etc.) is different than a decade ago. Mr. Piper will be equipped with an unobtrusive stun belt.

7. Motion for Production of Criminal Rap Sheets. The Court previously entered an ORDER dated May 20, 2011 granting this motion with conditions which was modified by an ORDER dated July 1, 2011.

8. Motion for Production of Criminal Rap Sheet & Other Documents on Chester Poage. See 7.

9. Motion to Require Notice of Hearsay Testimony to be used at Sentencing

FILED
JUL - 1 2011
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT
By

Trial. This Court previously entered an ORDER dated February 23, 2011 granting this motion.

10. Defendant's Motion to Require Notice of Expert Witnesses at Sentencing Trial. This Court previously entered an ORDER dated February 23, 2011 granting this motion.

C. Defendant's Motion for Court's Declaration that Court Orders Suppressing Certain Defendant's Statements Remain in Effect is hereby GRANTED.

Dated this 1 day of July, 2011.

BY THE COURT:

Jerome A. Eckrich, III
Circuit Court Judge

ATTEST:
Clerk of Court
By: Jan Carol Latuseck
Deputy

(SEAL)

FILED
JUL - 1 2011
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT
By

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF LAWRENCE)

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

****

STATE OF SOUTH DAKOTA,
Plaintiff,

vs.

BRILEY PIPER,
Defendant.

00-431

POTENTIAL
SENTENCING HEARING
WITNESS LIST

****

Comes now the State and discloses the following names of potential witnesses for trial in the case in chief:

1) Denise Asheim

2) Tom Curtis

3) Brian Dean

4) Jeff Duex

5) Mel Edelman

6) Chad Evans

7) Christine Whartman Fanger

8) Gary Fillingham

9) Tobe Givens

10) Marty Goetsch

11) Dr. Habbe

12) Darrell Hoadley

13) Pat Humphrey

14) Ross Johnson

15) Jennifer Kroger

16) Russ Olson

17) Natasha Paris

Appendix L

18) Dottie Poage

19) Samantha Poage

20) Chris Reitsma

21) Calla Richards

22) Tammy Richards

23) Rex Riis

24) Randall Rosenau

25) Ron Sjerven

26) Kandi Smith

27) Kenneth Tingley

28) Jason Tysdal

29) Pat West

30) Nathan Whartman

31) Dorothy Wolf

Dated this 25th day of February, 2011.

State's Attorney

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, Plaintiff,	)	CRIM. NO. 00-431
vs.	)	DEFENDANT'S MOTION FOR PRODUCTION OF CRIMINAL RAP SHEETS OF STATE SENTENCING TRIAL WITNESSES
BRILEY W. PIPER, Defendant.	)	

Comes now the defendant, Briley W. Piper, through his court-appointed attorneys, Robert Van Norman and Michael Stonefield, and respectfully moves this Honorable Court for its Order requiring the State's Attorney to provide to the defense, current criminal record or "rap" sheets on each person the State intends to call as a witness at the sentencing trial in this case. In support of this motion, counsel state the following.

1. These documents contain information that has considerable value to the defense as potential impeachment evidence of the State's witnesses. Impeachment by conviction is allowed by statute. SDCL § 19-14-12.

2. Defendant and his attorneys lack the ability and access to acquire these documents. The State's Attorney has the necessary ability to obtain and access these documents.

3. Any such documents which may have been provided to defendant's previous counsel in 2000 or 2001 are now outdated.

4. The Court should set a deadline for production for one month before the start of trial on July 5, 2011, in order for the defendant's attorneys to properly prepare to use any such documents.

WHEREFORE, to maintain the impartiality and fairness necessary to satisfy due process in a capital murder case, and to prevent violations of defendant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and defendant's rights under the similar provisions of the South Dakota Constitution, defendant requests that this motion be granted and that compliance by the State be required no later than one month before the start of trial on July 5, 2011.

Defendant further moves for an Order setting a date by which this discovery be provided.

Dated this 17th day of January, 2011.

NOONEY SOLAY & VAN NORMAN, LLP

Robert Van Norman
Attorney for Defendant Piper
P.O. Box 8030
Rapid City, SD 57701

Dated this 17th day of January, 2011.

Michael Stonefield by RVN
Michael Stonefield
Attorney for Defendant Piper
409 Kansas City Street
Rapid City, SD 57701

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, Plaintiff,	)	FILE NO. 00-431
vs.	)	ORDER REQUIRING STATE TO PRODUCE CRIMINAL RECORDS OF STATE'S WITNESSES
BRILEY W. PIPER, Defendant.	)	

The above Defendant, Briley W. Piper, through his court-appointed attorneys, Robert Van Norman and Michael Stonefield, having previously filed a Motion for Production of Criminal Rap , Sheets of State Sentencing Trial Witnesses, dated January 17, 2011 and the matter having come on for hearing on January 28, 2011 and May 6, 2011, and the Court having heard the arguments of counsel and having given this matter all due consideration, and on June 29, 2011, having reconsidered; good cause appearing; now, therefore, it is hereby

ORDERED that the portion of the Order and Request for Disclosure of Criminal Records of State's Witnesses that required the records to be reviewed *in camera* is hereby vacated. It is further

ORDERED that State's Attorney Fitzgerald produce to counsel for Mr. Piper before the close of business on Friday, July 1, 2011, the criminal records (NCIC or Triple I reports) for each witness he intends to call at trial and any additional witnesses who have been identified in the Defendant's earlier motion of January 17, 2011 and the Order and Request for Disclosure of Criminal Records of State's Witnesses, filed May 20, 2011.

FILED
JUL - 1 2011
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT
By _____

3198

State v. Briley W. Piper
Order Requiring State to Produce Criminal Records of State's Witnesses

Dated this 1st day of July, 2011.

BY THE COURT:

Honorable Jerome A. Eckrich, III
Circuit Court Judge

ATTEST: Jane Kief
Clerk of Courts
By: Jo Carol Latuseck
Deputy

FILED
JUL - 1 2011
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT
By_____

STATE OF SOUTH DAKOTA) : SS	IN CIRCUIT COURT
COUNTY OF LAWRENCE)	FOURTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, Plaintiff,)	00-431
vs.)	**MATERIAL WITNESS CERTIFICATE**
BRILEY PIPER, Defendant,)	AMENDED

This Court reviewed the Application For Material Witness Certificate Regarding the above Defendant from Lawrence County (Deputy) State's Attorney, John H. Fitzgerald, and being fully advised in the premises, NOW, THEREFORE, certifies as follows:

1. That Thomas Curtis is a material witness in the prosecution of the above Defendant which is now pending before this Court and for which a jury trial is scheduled to begin July 5, 2011. Witness' is requested starting July 18, 2011 through July 22, 2011.
2. That said individual is now incarcerated in the Uintah County Jail, Vernal, Utah.
3. That the State of Utah has made provisions in its law for commanding said witness to attend and testify in criminal prosecutions commenced in South Dakota.

Based upon the foregoing this Court requests that said witness be brought before a Judge of a Court of record in the State of Utah in a proceeding to compel the attendance of said witness at a jury trial in the above entitled matter.

Dated this 25 day of May, 2011, at Deadwood, South Dakota.

Circuit Court Judge

ATTEST: Lane Keil
Clerk of Courts

By: _____
Deputy

FILED
MAY 25 2011
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT
By _____

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 28153

BRILEY WAYNE PIPER,

Petitioner and Appellant,

v.

DARIN YOUNG, Warden, South Dakota State Penitentiary

Respondent and Appellee.

APPEAL FROM THE CIRCUIT COURT
4th JUDICIAL CIRCUIT
LAWRENCE COUNTY, SOUTH DAKOTA

THE HONORABLE RANDALL L. MACY
Circuit Court Judge

APPELLEE'S BRIEF

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Notice of Appeal Filed February 27, 2017

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
JURISDICTIONAL STATEMENT	1
STATEMENT OF LEGAL ISSUES	2
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	3
ARGUMENT	
1. The *Habeas Corpus* Court Properly Denied Relief On Piper's Claim That The Resentencing Court Had Improperly Denied His Second Motion To Withdraw His Guilty Plea	19
2. Piper Was Not Improperly Denied The Opportunity To Present Evidence Of Alleged Prior Inconsistent Statements	38
3. Piper's Counsel Were Not Ineffective	49
a. No Ineffectiveness In Expert Preparation	50
b. No *Voir Dire* Deficiencies	54
c. No Error Ineffective Witness Investigations	59
d. No Misadvice Re: Withdrawal Of Guilty Plea On Remand	72
e. Appellate Counsel Was Not Ineffective	72
CONCLUSION	73
CERTIFICATE OF COMPLIANCE	79
CERTIFICATE OF SERVICE	79
APPENDIX	
HCT07 I Transcript Excerpts	001
HCT07 II Transcript Excerpts	035
HCT16 Transcript Excerpts	053
Amended Motion to Withdraw Guilty Plea	093
Order Dismissing Appeal of Motion To Withdraw Guilty Plea	105
Page Sentencing Transcript Excerpt	106
Piper *Voir Dire* Transcript Excerpt	112

TABLE OF AUTHORITIES

STATUTES CITED:	**PAGE**
SDCL 21-27-16.1	68
SDCL 23A-27A-1	47
SDCL 23A-27A-6	21, 25, 29
SDCL 23A-27A-12.1	64
CASES CITED:	
Armstrong v. Kemna, 534 F.3d 857 (8th Cir. 2008)	61, 62, 69
Bounds v. Delo, 151 F.3d 1116 (8th Cir. 1998)	66, 71
Brady v. Maryland, 373 U.S. 83 (1963)	68
Brecht v. Abrahamson, 113 S.Ct. 1710 (1993)	48
Cochrun v. Solem, 397 N.W.2d 94 (1986)	20
Crutchfield v. Weber, 2005 SD 62, 697 N.W.2d 756	39, 70
Fretwell v. Norris, 133 F.3d 621 (8th Cir. 1998)	60, 65
Hall v. Luebbers, 296 F.3d 685 (8th Cir. 2002)	66
Hirning v. Dooley, 2004 SD 52, 679 N.W.2d 771	62, 71
Hooper v. Mullin, 314 F.3d 1162 (10th Cir. 2002)	52, 53
Jones v. Class, 1998 SD 55, 578 N.W.2d 154	40
Kimmelman v. Morrison, 477 U.S. 365 (1986)	66
Landry v. Lynaugh, 844 F.2d 1117 (5th Cir. 1988)	66
Ledford v. Warden, Georgia Prison, 818 F.3d 600 (11th Cir. 2016)	50
Lockhart v. McCree, 476 U.S. 162 (1986)	55
Madetzke v. Dooley, 2018 SD 38, — N.W.2d —	39
McDowell v. Solem, 447 N.W.2d 646 (S.D. 1989)	50
McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985)	65

Miller v. Young, 2018 SD 33, —N.W.2d— 41, 49, 50, 68, 69

Piper v. Weber, 2009 SD 66, 771 N.W.2d 352 3, 24, 25

Pryor v. Norris, 103 F.3d 710 (8th Cir. 1997) 42, 73

Randall v. Weber, 2002 SD 149, 655 N.W.2d 92 42, 50

Rhines v. Weber, 2000 SD 19, 608 N.W.2d 303 21

Ring v. Arizona, 536 U.S. 584 (2002) 21

Ross v. Oklahoma, 487 U.S. 81 (1988) 55, 56

Smith v. Groose, 205 F.3d 1045 (8th Cir. 2000) 46

Schell v. Walker, 305 N.W.2d 920 (S.D. 1981) 41

Scott v. Jones, 915 F.2d 1188 (8th Cir. 1990) 66

Siers v. Class, 1998 SD 77, 581 N.W.2d 491 59

Simmons v. South Carolina, 512 U.S. 154 (1994) 73

Smith v. Illinois, 390 U.S. 129 (1968) 60

Smith v. Murray, 477 U.S. 527 (1986) 40

Spillers v. Lockhart, 802 F.2d 1007 (8th Cir. 1986) 61, 66

State v. Anderson, 2005 SD 22, 693 N.W.2d 675 40, 41

State v. Bailey, 1996 SD 45, 546 N.W.2d 387 23

State v. Biays, 402 N.W.2d 697, 701 (S.D. 1987) 44

State v. Birdshead, 2015 SD 77, 871 N.W.2d 62 46, 49

State v. Cobb, 479 N.W.2d 879 (S.D. 1992) 29

State v. Danielson, 2012 SD 36, 814 N.W.2d 401 64

State v. Darby, 1996 SD 127, 556 N.W.2d 311 39

State v. Davi, 504 N.W.2d 844 (S.D. 1993) 50

State v. Fool Bull, 2009 SD 36, 766 N.W.2d 159 72

State v. Goodwin, 2004 SD 75, 681 N.W.2d 847 22, 24, 28

State v. Hoxsie, 1997 SD 119, 570 N.W.2d 379 39, 68, 70

State v. Kaufman, 2016 SD 24, 877 N.W.2d 590 22

State v. Moore, 678 N.E.2d 1258 (Ind. 1997) 33

State v. Piper, 2006 SD 1, 709 N.W.2d 783 3, 11, 16, 21, 26, 31, 32

State v. Piper, 2014 SD 2, 842 N.W.2d 338 3, 22, 39

State v. Rhines, 1996 SD 55, 548 N.W.2d 415 56, 73

State v. Shaw, 2005 SD 105, 705 N.W.2d 620 46

State v. Stanley, 2017 SD 32, 896 N.W.2d 669 42

State v. Thielsen, 2004 SD 17, 675 N.W.2d 429 23, 24, 36, 37

Strickland v. Washington, 466 U.S. 668 (1984) 26, 27, 54, 69

Tafero v. Wainwright, 796 F.2d 1314 (11th Cir. 1986) 48

Tennard v. Dretke, 124 S.Ct. 2562 (2004) 48

Thompson v. Weber, 2013 SD 87, 841 N.W.2d 3 68

United States v. Baxter, 128 F.3d 670 (8th Cir. 1997) 29

United States v. Buck, 661 F.3d 364 (8th Cir. 2012) 24, 74

United States v. Cheatham, 899 F.2d 747 (8th Cir. 1990) 61

United States v. Cruz, 643 F.3d 639 (8th Cir. 2011) 31

United States v. Davis, 583 F.3d 1081 (8th Cir. 2009) 30, 31

United States v. Davis, 406 F.3d 505 (8th Cir. 2005) 50

United States v. Dominguez Benitez, 542 U.S. 74 (2004) 33-35, 38

United States ex rel. Partee v. Lane, 926 F.2d 694 (7th Cir. 1991) 62

United States v. Young, 470 U.S. 1 (1985) 64

Uttecht v. Brown, 551 U.S. 1 (2007) 57, 58

Wainwright v. Witt, 469 U.S. 412 (1985) 56

Ward v. Whitley, 21 F.3d 1355 (5th Cir. 1994) 61

Williams v. Norris, 612 F.3d 941 (8th Cir. 2010) 47, 48

Williams v. State, 349 N.W.2d 58 (S.D. 1984) 31

Witherspoon v. Illinois, 391 U.S. 510 (1968) 58

OTHER AUTHORITIES

21 Am.Jur.2d Proof of Facts 101, §2 46

21 Am.Jur.2d Criminal Law §§670-72 23

PRELIMINARY STATEMENT

Citations to Briley Wayne Piper's sentencing *voir dire* and eleven-volume sentencing hearing transcripts will be referenced as *VOIR DIRE* and SENTENCING I-XI respectively, followed by a jump cite to the corresponding page/line of the transcript. Citations to Piper's plea hearing transcript contained in petitioner's appendix will be referenced as PLEA. Trial exhibits are referenced as EXHIBIT followed by citation to the exhibit number. Citations to Piper's April 28, 2000, confession to law enforcement (Trial Exhibit 174) are referenced as CONFESSION with citation to the corresponding page/line of the transcript. Citations to Piper's two-volume 2007 *habeas corpus* trial transcript and one-volume 2016 *habeas corpus* trial transcript will be referenced as HCT07 I/II and HCT16 respectively followed by a jump cite to the corresponding page/line of the transcript. Cited pages from the HCT07 and HCT16 transcripts are attached in the appendix hereto. The *habeas corpus* court's findings of fact and conclusions of law, which are contained in petitioner's appendix, are referenced as FOF/COL followed by citation to the subject paragraph.

JURISDICTIONAL STATEMENT

Piper appeals from the denial of *habeas corpus* relief following the resentencing court's denial of his motion to withdraw his plea and the jury's imposition of the death sentence. This court has jurisdiction pursuant to SDCL 21-27-18.1 and SDCL 15-26A-3.

STATEMENT OF LEGAL ISSUES

DID THE *HABEAS CORPUS* COURT IMPROPERLY AFFIRM THE RESENTENCING COURT'S DENIAL OF PIPER'S SECOND MOTION TO WITHDRAW HIS GUILTY PLEA?

United States v. Dominguez Benitez, 542 U.S. 74 (2004)

State v. Bailey, 1996 SD 45, 546 N.W.2d 387 (S.D. 1996)

State v. Goodwin, 2004 SD 75, 681 N.W.2d 847

United States v. Davis, 583 F.3d 1081 (8th Cir. 2009)

The *habeas corpus* court denied Piper relief on his claim that he should have been permitted to withdraw his guilty plea.

WAS PIPER IMPROPERLY DENIED THE OPPORTUNITY TO PRESENT EVIDENCE OF ALLEGED INCONSISTENT PROSECUTORIAL ARGUMENTS?

State v. Shaw, 2005 SD 105, 705 N.W.2d 620

State v. Birdshead, 2015 SD 77, 871 N.W.2d 62

State v. Biays, 402 N.W.2d 697 (S.D. 1987)

Smith v. Groose, 205 F.3d 1045 (8th Cir. 2000)

The *habeas corpus* court denied Piper relief on his claim that he was denied an opportunity to admit alleged prior inconsistent statements.

WERE PIPER'S COUNSEL INFFECTIVE?

Miller v. Young, 2018 SD 33, —N.W.2d—

Ross v. Oklahoma, 487 U.S. 81 (1988)

State v. Rhines, 1996 SD 55, 548 N.W.2d 415

Siers v. Class, 1998 SD 77, 581 N.W.2d 491

The *habeas corpus* court denied Piper relief on his claim that his appellate or resentencing counsel were ineffective.

STATEMENT OF THE CASE

The State of South Dakota charged Briley Wayne Piper with the March 2000 murder of Chester Allan Poage. After an initial plea of not guilty, Piper changed his plea to guilty and waived sentencing by a jury.

The court sentenced Piper to death. This court affirmed Piper's conviction and sentence in *State v. Piper,* 2006 SD 1, 709 N.W.2d 783 (*Piper I*).

Piper filed an application for writ of habeas corpus, claiming that his waiver of a jury sentencing was not knowing and voluntary. The trial court denied the writ. This court granted the writ in *Piper v. Weber*, 2009 SD 66, 771 N.W.2d 352 (*Piper II*), and remanded for a jury resentencing.

At his resentencing, Piper moved to withdraw his guilty plea. The sentencing court denied the motion. Piper was again sentenced to death by a jury following a ten-day resentencing trial in July 2011. The sentencing court's denial of Piper's motion to withdraw his guilty plea and Piper's sentence were affirmed on appeal. *State v. Piper*, 2014 SD 2, 842 N.W.2d 338 (*Piper III*) Piper now appeals from the *habeas corpus* court's denial of his motion to withdraw his plea and his petition to be relieved of his death sentence due to alleged errors in the resentencing proceeding and ineffectiveness of resentencing counsel.

STATEMENT OF FACTS

The composition of the court has changed since this case was last before it, so the infamous circumstances of young Chester Allan Poage's horrific murder at the hands of Piper and his cohorts – Elijah Page and Darrell Hoadley – bear repeating.

Compared to his dissolute druggie "friends" Piper, Page and Hoadley, Poage was materially well-off. He owned a "nice" three-year-old

Chevrolet Blazer with a high-end stereo system, a TV, a Sony PlayStation, a home stereo and a computer. SENTENCING II at 239-40, 245-46, 350/18; SENTENCING V at 838/4. Piper, Page and Hoadley wanted these things for themselves. From this naked envy and blind greed, Piper, Page and Hoadley hatched a plot to rob their friend of his belongings by robbing him of his life.

The plan came to fruition on the bitter cold winter night of March 12-13, 2000. It would be Poage's last.

On that night, Allan Poage was a tall, slight 19-year-old weighing only 149 pounds. SENTENCING I at 110/8. He was living with his mother in Spearfish, South Dakota, while he tried to put some drug-related run-ins with Kansas authorities behind him. SENTENCING II at 214/11. Since his father's death in 1996, Poage had seemed like a "lost soul" to his mother. SENTENCING II at 276/19. She was "very close" to her son and tried to help him through the ordinary confusion of his adolescent years and his grief over his father's death. SENTENCING II at 206/4, 280/21.

Though he was working toward an education and a career, Poage's efforts to kick drugs were not entirely successful. He became involved in the local drug scene with his "friends" Piper, Page and Hoadley, ages 19, 18 and 20 respectively.[1] Piper and Hoadley were unemployed and dealing LSD and other drugs for money. SENTENCING II at 346/11-24.

The night he was murdered, Poage gave a friend, Nathan Whartman, a ride to work. SENTENCING II at 351/20; SENTENCING V at 738/24. Piper, Page and Hoadley came along for the ride. SENTENCING II at 352/16; SENTENCING V at 739/3.

After dropping Whartman off, the four went to Poage's house where they played video games on Poage's PlayStation. SENTENCING V at 739/18. Page and Poage took some opiate-based pain pills early in the evening, but nobody in the group was high that night because they could not find a drug "factory" to sell them stimulating drugs. CONFESSION at 60/1. While at Poage's house, Piper, seeing his friend's material possessions, "had the idea to rob the guy." SENTENCING VI at 907/20. Piper and Page conceived of a plan to rob the house.

Piper enlisted Hoadley to participate in the plan while the two stood outside Poage's home smoking cigarettes. "We should jack this

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[1] As between Piper, Page and Hoadley, Piper was the Type A personality, the group leader. SENTENCING VI at 1009/18. Page "looked up to" Piper, who was manipulative and could "get anybody to do anything." SENTENCING II at 345/12, 394/23, 420/12, 432/22; SENTENCING IV at 630/17; SENTENCING V at 760/23, 761/6, 797/22, 799/9-11; SENTENCING VII at 1104/18, 1107/21. Piper was "very good" at "manipulating and conning people." SENTENCING VII at 1182/16. Page's friend Misty McKee tried to get Page to stay away from the "manipulating and conning" Piper. SENTENCING VII at 1180/10-16. According to Hoadley, Piper was manipulating Page during the murder. SENTENCING VI at 915/16. Prison staff and mental health personnel were alert to Piper's manipulative tendencies. SENTENCING VI at 945/17, 971/6, 973/13; EXHIBIT 176. Piper even succeeded in manipulating a nun to contact a female inmate at another South Dakota prison on his behalf, all in violation of institutional rules and the objectively reasonable boundaries of any sincere friendship with the nun. SENTENCING IX at 1686/22-1688/9; EXHIBIT 178.

dude, take his shit," Piper suggested. SENTENCING V at 741/8-23; SENTENCING IV at 621/12; SENTENCING VI at 906/16. Hoadley told Piper that "[i]f you guys start something, you know I got your back." SENTENCING V at 743/17. Piper and Hoadley discussed how, if they were "gonna try to rip off Allan," then they "couldn't just like, leave him somewhere tied up . . . where [Poage] could like point [them] out." CONFESSION at 73/5. That would not do. "Let's fucking kill [Poage]," Piper suggested. SENTENCING 741/25-742/8.

The trio lured Poage back to a ramshackle house where Piper, Page and Hoadley all lived, did drugs, dealt drugs and partied. SENTENCING II at 311/23, 330/16, 332/25, 346/12, 377/5; SENTENCING V at 743/6. Page then pulled a .22 pistol he had stolen from Poage's house and ordered Poage to "[g]et the fuck on the floor, bitch." SENTENCING V at 743/25, 830/6. From the floor, "flat on his belly," Poage protested. "Why are you doing this," he asked, "[w]hy are you guys doing this?" SENTENCING V at 744/19, 745/23, 746/7; CONFESSION 14/11.

Piper told Poage to "[s]hut the fuck up," and "kicked him square straight in the face." CONFESSION at 12/5. Piper's combat boot-clad foot struck Poage's face with such force that it broke out one of his teeth down to the gums, battered his eye bloody and knocked Poage unconscious. SENTENCING V at 749/16; CONFESSION at 38/20; EXHIBIT 46, 48. Poage's face "immediately swelled up" as he lay

"twitching on the floor." SENTENCING II at 318/15, 367/18, 368/20; SENTENCING IV at 621/24; SENTENCING V at 747/1.

Piper and Page tied Poage's feet and hands with speaker wire and a dog leash. They propped him up in a chair. SENTENCING II at 318/25; SENTENCING V at 746/12, 748/16; SENTENCING VII at 1079/10. After he regained consciousness, Piper and Page openly discussed how they would kill Poage while he sat there listening helplessly. SENTENCING V at 751/15. "Man, were gonna fucking kill this dude and take all his shit, dude," Page exclaimed excitedly. "He's got some nice shit up in his house." SENTENCING V at 750/3. Poage again asked "What's going on?" Page responded "I just told you what the fuck is going on. I'm taking your shit. I'm jacking you, fool." SENTENCING V at 833/17; CONFESSION at 16/10.

With Poage sitting there listening, Piper and Page discussed the best way to kill him. Piper or Page suggested slitting Poage's throat, but ruled that method out because there was already "a fucking shit load of blood" on the floor and they did not want to have to clean up more. SENTENCING I at 135/8-17; SENTENCING II at 367/19; SENTENCING V at 758/21-25; SENTENCING IX at 1572/6; CONFESSION at 61/17. The group contemplated other options: "Well, we can either, you know, stab him, or throw him in a mine shaft, or drown him or something." SENTENCING V at 752/2.

As he sat there listening to Piper and Page discussing how to kill him, bleeding from his scalp, and spitting up blood, Poage begged his "friends" not to kill him. Page found a knife that "wasn't that sharp" to kill Poage with. "Hey, if you wanna get that sharper, you know, you're gonna have to get a . . . gonna have to get a . . . sharpening thing," Piper told Page. Page said, "I don't got one." "Well you know the bottom of a coffee cup works pretty good," suggested Piper. Page "went and got a coffee cup and started grinding away" at the knife blade while Poage watched. CONFESSION at 39/8-15.

Poage again implored his "friends" to tell him "[w]hy are you guys doing this?" SENTENCING V at 746/7, 830/16; SENTENCING VII at 1080/3; CONFESSION at 89/19. Page punched him in the face and told him to "shut up." SENTENCING VII at 1081/4.

Page then mixed up a concoction of crushed pills, hydrochloric acid, and stale beer to poison Poage. SENTENCING V at 755/7-25; SENTENCING VII at 1080/12; CONFESSION at 10/14. When Page poured the acid into the beer "it fizzed, it made smoke come right off the top of it." CONFESSION at 10/20; SENTENCING VI at 912/19. Piper held a tire iron to Poage's feet for ten or fifteen minutes while Page or Hoadley forced the rancid, fuming poison down Poage's throat. SENTENCING II at 319/13; SENTENCING VII at 1080/23. It did not kill him. Poage begged his "friends" not to make him drink more because his "stomach hurt." SENTENCING V at 755/25; SENTENCING VI at 913/2.

Piper told Poage "[y]ou're going to die tonight." SENTENCING V at 762/3.

Piper, Page and Hoadley decided that it would be best to kill Poage in a remote location. They loaded Poage into his own Chevrolet Blazer. SENTENCING VII at 1081/14. Piper warned Poage "[i]f you try anything I'm going to knock your head to the concrete." Piper drove to a gas station and then to the Higgins Gulch parking lot at the remote trailhead to Crow's Peak. Along the way, Poage begged his "friends" to spare his life. SENTENCING IV at 623/8; SENTENCING VI at 917/4. Poage kept asking "[w]hy are you doing this?" Page said, "[y]ou ask me one more time I'm gonna knock you the fuck out." When Poage asked again, Page "elbowed and punched" him. Poage did not ask again after that. CONFESSION at 88/6-16.

From Higgins Gulch, the nearest house was three miles away. Air temperature that night was around 26º and approximately 12 inches of snow lay on the ground. SENTENCING I at 164-65, 178-80; SENTENCING V at 764/2; EXHIBITS 23, 26, 90. As Piper attempted to park, the Blazer briefly got stuck in the deep snow. SENTENCING V at 764/8.

At Higgins Gulch, Piper, Page and Hoadley pulled Poage out of the truck. For Page's gratification, they forced Poage to strip to nothing but a tank-top T-shirt and his socks and shoes. SENTENCING V at 765-16; SENTENCING VII at 1081/21. Page was "pretty weird like that. He likes

. . . he likes guys. He likes naked guys." CONFESSION at 44/3. Page told Hoadley to "bump the music while [Poage] took his clothes off" so he could "enjoy himself" watching Poage strip. CONFESSION at 45/13.

Poage was confused, wondering why his "friends" were doing this to him. SENTENCING VII at 1082/8. While stripping, Piper and Page threatened Poage with sexual assault. "Suck my dick!" screamed Piper. SENTENCING V at 766/11-768/11; SENTENCING IV at 624/4. "You're gonna suck all our dicks." Page told Poage that he was going to summon some mutual acquaintance named Russell to come to the gulch "to rape your ass." CONFESSION at 46/16. Piper laughed out loud at this. CONFESSION 46/19, 47/1.

They removed Poage's wallet from his pants. CONFESSION at 21/17. Piper coerced Poage into disclosing his ATM card PIN by threatening to rape and kill his mother and sister after they killed him if he refused. SENTENCING V at 768/19. Poage complied.

Piper, Page and Hoadley marched Poage through fifty feet of "knee-high up" deep snow to the banks of the creek where they pushed him to the ground. CONFESSION at 21/12. There Poage lay "on the ground getting the ever living shit beat out of [him]" by Piper and Page. CONFESSION at 59/5. The group buried Poage in the deep snow "like a friggin' squirrel . . . [a] little rabbit going into his hole" expecting him to die of hypothermia. CONFESSION 22/1; SENTENCING V at 781/22, 782/19; SENTENCING IX at 1582/19.

When Poage did not oblige them by dying, Piper kicked him further. Piper relished the opportunity to "see what it was like to kill someone" so much that he laughed throughout, and taunted his victim with sarcastic comments like "Ah, that's gotta hurt" and "Ohh, like, that would suck." PLEA at 14/6-18; SENTENCING II at 324/24, 325/4; SENTENCING V at 777/10-778/19, 780/20, 791/2, 791/23; SENTENCING VI at 1034/6; SENTENCING VII at 1083/12; SENTENCING IX at 1574/11; *Piper I,* 2006 SD 1 at ¶91, 709 N.W.2d at 816-17; CONFESSION at 38/5, 46/5, 58/13, 76/17. Piper admitted kicking Poage hard with his combat boots but was not "keeping score" of the number of times he kicked him. SENTENCING V at 856/2; CONFESSION at 58/12; *Page,* 2006 SD 2 at ¶63, 709 N.W.2d at 761.

While Piper and Page entertained themselves by inflicting agonizing pain on Poage, Poage begged them for his life. SENTENCING II at 371/25. Poage got up and tried to run away. SENTENCING II at 321/9; SENTENCING V at 770/10. As he ran, Piper yelled at him to stop "or he was going to have Eli [Page] chase him down." SENTENCING II at 321/21, 336/12; SENTENCING V at 771/5. Page dragged Poage back, now angered that Poage had caused him to get his feet wet in the chase. SENTENCING V at 772/13. "Look what you did, asshole," Page said to Poage, referring to his wet feet. SENTENCING V at 847/5. Piper told Poage to "behave." SENTENCING V at 774/19.

Piper attempted to break a branch off of a tree to club Poage with. SENTENCING V at 772/21, 773/8. When that failed, they threw Poage down into the frigid creek waters and "kicked the heck out of him." SENTENCING IV at 625/2.

Poage continued begging for his life. "Take anything," he said, "I'll give you anything you want, just let me live." SENTENCING IV at 625/6. Piper stood on Poage's neck as Page tried to drown him. SENTENCING II at 320/21; SENTENCING V at 776/7; SENTENCING IV at 626/10. This too failed.

Then Piper, Page and Hoadley took turns stabbing Poage with a pocket knife. SENTENCING II at 320/9; SENTENCING V at 775/15, 778/18, 848/1-20, 900. Piper stabbed Poage in the head, piercing his skull and penetrating into his brain; Page stabbed Poage in the neck severing part of his jugular vein; Hoadley stabbed Poage in the ear. "That looks like it hurts," laughed the three of them about the stab wounds they had just inflicted. SENTENCING V at 780/20. Poage was "begging, begging for his life." SENTENCING IV at 626/10. Poage was "screaming his head off, wailing." CONFESSION at 62/4, 76/17. Though Page's and Piper's stab wounds were mortal injuries, they failed to kill Poage immediately. SENTENCING I at 130/22, 136/4-9.

But Poage knew he was killed. "Leave me alone, let me die here alone, just go away," he said to his tormentors, "I can't move anyways." SENTENCING V at 779/14. Indeed, by this time Poage was monstrously

mutilated. Piper and Page had kicked Poage's head so badly that they kicked both of his ears clean off and exposed the skull underneath. Poage's eyeballs were red from internal bleeding and his eye sockets bloodied and swollen; Poage's broken-out front tooth formed a jagged stump along his gums. SENTENCING I at 113-53; EXHIBIT 46. A blow to the back of Poage's head ripped a four-by-six-inch patch of skin from his scalp, exposing the underlying skull. SENTENCING I at 146/7; EXHIBITS 42, 43. Poage's brain was bleeding. SENTENCING I at 142-43; EXHIBIT 34.

Poage asked to return to his Blazer to bleed to death in warmth. SENTENCING II at 322/11, 323/12; SENTENCING IV at 625/16. "Who's Blazer," Page asked, "you mean *my* [Blazer], bitch." SENTENCING V at 784/20, 785/2, 853/1-25. Page kicked Poage again and again, saying "[y]ou need to work on your listening skills. I told you this is my fuckin' Blazer you fuckin' punk." SENTENCING II at 371/21, 854/5, 855/24; SENTENCING VII at 1084/15. Defeated, Poage asked "[c]an I go up and sit in y'all's Blazer." CONFESSION at 78/3. "No," Page replied, "[w]hat are you stupid? You're gonna get blood everywhere." CONFESSION at 78/4.

In a cruel jest, Piper pretended to grant Poage's request to die in the Blazer on the condition that he first rinsed himself clean of blood in the icy creek. SENTENCING VI at 916/17. Poage complied. SENTENCING V at 783/23, 853/9. But when he crawled back toward

his truck, Piper, Page, and Hoadley grabbed him and beat him further. SENTENCING II at 323/19; SENTENCING V at 784/3. Piper and Page said "Yeah, like we're gonna let you go into the fucking Blazer all bloody and shit and getting blood all over our fucking car." SENTENCING VI at 916/8.

His hopes of any comfort in his last moments dashed, Poage tried to hold his tormentors to their word to let him die in the Blazer. "You said I could go to the truck if I washed off," Poage said. Page mocked him. "Have I ever lied before?" Page asked the group. Piper or Hoadley reply "Yeah," and "laugh." CONFESSION at 78/13. "Well you know," said Page to Poage, "I'm . . . I'm pretty sure I lie. I don't know, Darryl, do I lie?" Hoadley said "Yeah, I'm pretty sure you do." And Page said "Well I'm not sure, but I think Darryl lies, too. And I'm not real quite sure, but I'm pretty absolutely so fucking positive Piper lies. So you're pretty much screwed." CONFESSION at 78/22.

Piper felt that leading Poage to believe that he could spend his dying moments in the Blazer was "a big joke." SENTENCING VII at 1084/16. Instead of showing even a hint of mercy, Page kicked Poage "over and over and over again." SENTENCING V at 855/24. While Poage "wailed" in agony as he was having his life kicked out of him, Page told him "to work on your listening skills. I said shut the fuck up." SENTENCING V at 856/17.

Piper went back to the truck to warm himself as Poage lay near death in the creek. Poage was "wailing, just wailing out . . . crying." CONFESSION at 22/14. Page screamed "Shut the fuck up! Somebody's gonna hear you! Shut the fuck up!" and proceeded to kick Poage some more. CONFESSION at 22/15. Poage remained alive.

Page complained that he could not kick Poage further because his feet hurt too much. SENTENCING V at 857/21; *Page,* 2006 SD 2 at ¶ 6, 709 N.W.2d at 747. Hoadley threw rocks at Poage's head. Then he and Page dropped large, bowling ball-sized rocks on Poage's head, crushing his skull. SENTENCING II at 320/22; SENTENCING V at 786/4-20, 858/1-859/10; SENTENCING VII at 1085/10-19. Poage lay half in the creek, immobile.

Hoadley determined that Poage's heart had stopped when "the hole in his throat" stopped "gurgling blood." SENTENCING V at 859/3; CONFESSION at 22/20. Poage died half submerged in the creek. According to Piper, the "whole show ended at 3:30." CONFESSION at 55/10. Poage had survived approaching death for what must have seemed like an eternity as he endured personal humiliation and breathtaking physical abuse at Piper's hands. SENTENCING V at 774/1, 859/10; CONFESSION at 55/13, 57/7, 59/5; *Page,* 2006 SD 2 at ¶ 62, 709 N.W.2d at 761.

"All right, let's get the fuck out of here," Hoadley said. He and Page joined Piper back in the truck. Piper drove the group from Higgins Gulch

to Poage's house. Along the way, they each called dibs on items of Poage's property. Hoadley called dibs to the PlayStation. Piper kept Poage's ATM card. Page laid claim to the Blazer.

The trio "ransacked" Poage's mother's home. SENTENCING II at 217/14. In addition to Poage's electronics and personal effects, they stole his mother's pocket watch collection, coin collection, heirloom items like her deceased husband's woodworking tools, driver's license and social security card, jewelry, video camera, music CDs and other "petty items." SENTENCING II at 223-44; *Piper I*, 2006 SD 1 at ¶31, 709 N.W.2d at 799.

The group poured a pile of white drywall powder on the kitchen counter to lead Poage's mother and law enforcement to believe that her son had stolen her property and bolted from town in some drug-fueled fit of rage. SENTENCING II at 236/23, 238/5, 290/3.

After cleaning out Poage's house, the group drove into Wyoming and then to Missouri to visit Piper's sister, but she turned them away. While wheeling around the west in the Blazer stolen from their victim, Piper robbed Poage's bank account of money. CONFESSION at 30/10; SENTENCING II at 325/18; SENTENCING V at 768/19; SENTENCING VII at 1086/4; EXHIBIT 91. In Cheyenne, Wyoming, Piper and Hoadley pawned Poage's TV for $30 or $40. Piper took a hundred-year-old gold pocket watch to an antique collector shop where Hoadley sold it for $10. Piper was disappointed in Hoadley's negotiating skills because he "was

gonna get like fifty dollars" for the watch. CONFESSION at 26/18-28/2. From Missouri they drove to Rapid City where they continued looting Poage's account.

In Rapid City, the group met up with Hoadley's girlfriend, Calla Richards, at the mall. SENTENCING II at 356/10. Piper bought himself a pair of silver loop earrings. SENTENCING II at 358/8, 376/20. Page left Piper and Hoadley with Richards and went to Texas in Poage's Blazer. SENTENCING II at 357/21. Piper and Hoadley returned to Spearfish with Richards and one of her friends. Piper generously bought the group dinner at a restaurant with money from Poage's account.

Once back in Spearfish, Piper and Hoadley started bragging about the murder. SENTENCING II at 320/9, 370/2. During a car ride with Jeff Duex and Richards, Hoadley and Piper boasted of having killed someone. SENTENCING II at 312-15. Poage's belongings – CD changer, PlayStation, video game cartridges, coins, watches - were conspicuously displayed at Piper's home for visitors like Duex and Richards to see. SENTENCING II at 316-17, 337/18, 360/12.

Piper and Hoadley reenacted the murder for Richards. They described how they kicked Poage and threw the rocks at him. During the reenactment, Piper was "excited" and "laughing." According to Richards, "he was really into the story, bragging about it . . . kind of like [he] just wanted to prove like that he's a bad ass." SENTENCING II at 370/3,

370/11. Piper's behavior "made [Richards] feel ill, so [she] left the room." SENTENCING II at 367/23, 414/25.

In a "nonchalant," even "cocky," tone, Piper talked openly of killing Poage to steal all the "loot" strewn around the room. SENTENCING II at 317/24, 319/25, 322/1; CONFESSION 9/19. To Duex, Piper appeared "unremorseful"; murdering Poage "didn't seem to bother" Piper. SENTENCING II at 320/3. Piper "didn't seem to really care" as he described to Duex how Poage had begged for his life. SENTENCING II at 322/21. Piper "acted like [deceiving Poage into believing he could die in the warmth of the Blazer] was funny . . . like he thought that was comical." SENTENCING II at 325/13.

Piper's indifference to Poage's murder was consistent with prior conversations with Duex, Hoadley, and Christine Whartman in which he stated on three separate occasions "he would like to know how it was to kill someone." SENTENCING II at 324/24, 325/4; SENTENCING VI at 1034/6. When Hoadley and Piper were in Oregon prior to coming to Spearfish, Piper talked "nonstop for hours and hours, almost – over a day, about how neat it would be to kill somebody." SENTENCING V at 791/23, 792/2.

On April 22, 2000, a nearby landowner found Poage's body in the creek at Higgins Gulch. He was clothed in nothing but the T-shirt, socks, and shoes he stripped down to before his murder. By then, Piper had fled to his parents' home in Alaska.

After his arrest, Piper continued bragging about his exploits to fellow jail inmates, and also planned his next murder. While in jail in Lawrence County awaiting trial, Piper acted like "the big guy, big tough guy for killing somebody." SENTENCING IV at 626/19. When recounting his crime to his cellmate Ken Tingley and fellow inmate Thomas Curtis, Piper "didn't seem like he cared" about killing Poage. SENTENCING VII at 1076/19. Piper displayed "no remorse, nothing," according to Curtis. "I mean, almost like someone just took the garbage out and just come back in the house, it was just like he didn't even care." SENTENCING IV at 622/21.

Piper still does not care. He told a penitentiary psychologist that "guilt is an emotion he does not feel." SENTENCING IX at 1598/18, 1599/19. Piper "said he had no regret or sense of responsibility for the crime, only irritation with the court and the system." SENTENCING IX at 1659/19. Piper says his only "regret is the fact that [he] allowed [himself] to get caught." SENTENCING IV at 725/10.

ARGUMENT

1. The *Habeas Corpus* Court Properly Denied Relief On Piper's Claim That The Resentencing Court Had Improperly Denied His Second, Amended Motion To Withdraw His Plea Of Guilty To Murdering Chester Allan Poage

According to Piper, the *habeas corpus* court erred in failing to grant him relief on his claim that he should have been allowed to withdraw his guilty plea due to "misadvice" by the court and his counsel concerning his trial and sentencing options.

a. Piper's Claim Is Barred By *Res Judicata*

Though he attaches his first motion to withdraw his plea in his appendix and not his second, it is his second, amended motion to withdraw his guilty plea that is in issue in this appeal. AMENDED MOTION TO WITHDRAW, Appendix 093. As explained in Piper's brief, he filed a second motion to withdraw in 2015, which was denied on February 25, 2016. Piper's appeal of the denial of his second motion was dismissed on April 25, 2016. PIPER BRIEF at 4; ORDER DISMISSING APPEAL OF AMENDED MOTION TO WITHDRAW, Appendix 105.

Piper's first *habeas corpus, Piper II,* disposed of his first motion to withdraw, which was brought on the theory that the judicial misadvice deprived Piper of a jury *sentencing.* HCT16 a 197/12, Appendix 053. Here, Piper's second motion seeks to withdraw his waiver of a guilt phase jury *trial.*

The record reflects that attorney Steve Miller was aware of the trial court's faulty sentencing advice before he filed the first *habeas corpus* petition. HCT16 at 202/11, Appendix 053. Miller concedes that Piper's claim for "withdrawal of the guilty plea could have been raised as a *habeas*" claim but "for legal reasons" he did not make it at that time. HCT16 at 203/10, Appendix 053. Indeed, according to Miller, Piper did not bring a claim for withdrawing his jury trial waiver in his first *habeas corpus* because he "certainly would have lost." Piper decided to "preserve

it for later because . . . state law gave him the opportunity to raise it after sentencing." HCT16 at 201/7, Appendix 053.

The *res judicata* doctrine applies to *habeas corpus* proceedings. *Cochrun v. Solem,* 397 N.W.2d 94, 96 (1986). As stated in *Rhines v. Weber,* 2000 SD 19, ¶59, 608 N.W.2d 303, 316, issues raised in a direct appeal are "*res judicata* on a writ of *habeas corpus*." Because Piper's second motion to withdraw was rejected on direct appeal, any *habeas corpus* claim in regard the denial of his motion to withdraw by the resentencing court is barred by *res judicata.* SDCL 21-27-16.1 (claim which could have been brought in initial *habeas corpus* petition barred from subsequent petition by *res judicata*); *Rhines,* 2000 SD 19 at ¶59, 608 N.W.2d at 316; FOF at ¶21; COL at ¶31.

In addition, Piper's present claim that he did not knowingly and intelligently waive his right to a jury trial is also subject to *res judicata* on its merits. *Piper I* told Piper that his counsel's interpretation of SDCL 26A-27A-6 was wrong and that he did not have to plead guilty in order to secure a court sentencing. *Piper I,* 2006 SD 1, ¶51, 709 N.W.2d at 804. Having been formally advised that, per *Ring v. Arizona,* 536 U.S. 584 (2002), sentencing is independent of a plea, it was incumbent on Piper to thereafter assert his present claim that he had been denied the opportunity to choose his plea forum independent of his sentencing forum. Piper could have raised his present claim in his first state *habeas corpus* proceeding. As discussed below, Piper did not do so for strategic

reasons. FOF at ¶¶ 21, 24. Accordingly, Piper's claim can be dismissed as barred by *res judicata.*

b. Piper's Claim Is Precluded By *Kaufman*

Piper's claim is a circumvention of *State v. Kaufman,* 2016 SD 24, 877 N.W.2d 590, which ruled that the denial of a motion to withdraw a plea after judgment is not appealable. ORDER DISMISSING APPEAL OF AMENDED MOTION TO WITHDRAW, Appendix 105. It logically follows that no inferior court can exercise review jurisdiction over a motion to withdraw a guilty plea if this court cannot. *Piper III,* 2014 SD 2, ¶ 10, 842 N.W.2d 338, 343 (South Dakota judiciary structured as tiered system). Thus, the *habeas corpus* court had no jurisdiction to review the resentencing court's denial of the motion to withdraw.

c. Piper's Claim Fails Even On Its Merits

Despite procedural impediments to Piper's claim, this court should address and dispose of it on its merits because not doing so will simply punt the issue to the federal *habeas corpus* court. In federal *habeas corpus* review, this court's decisions are entitled to deference and affirmed unless they are contrary to or an unreasonable application of clearly-established constitutional law. Absent a reasoned decision on the merits, the federal court's constitutional leeway is far less constrained.

The withdrawal of a guilty plea after the imposition of sentence is permitted only to correct manifest injustice." There is no absolute right to withdraw a guilty plea. *State v. Goodwin,* 2004 SD 75, ¶ 4, 681

N.W.2d 847, 849 (S.D. 2004); *State v. Bailey,* 1996 SD 45, ¶ 11, 546 N.W.2d 387, 390-91 (S.D. 1996). Manifest injustice "is a term relating to some fundamental flaw in the proceedings which results in a miscarriage of justice or is inconsistent with the demands of due process; manifest injustice is an extremely high standard, which permits a defendant to withdraw a guilty plea only in extraordinary cases." 21 Am.Jur.2d Criminal Law § 670. Manifest injustice describes a situation that is unmistakable or indisputable, unforeseeable and prejudices the substantial rights of the defendant. 21 Am.Jur.2d Criminal Law § 672.

This court reviews a trial court's refusal to permit a defendant to withdraw his guilty plea for abuse of discretion. Such abuse is "discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence." *Bailey,* 1996 SD 45 at ¶ 11, 546 N.W.2d at 390-91; 21 Am.Jur.2d Criminal Law § 672.

Piper bears the heavy burden of proving manifest injustice by clear and convincing evidence. 21 Am.Jur.2d Criminal Law § 671; *Bailey,* 1996 SD 45 at ¶ 13, 546 N.W.2d at 391. He must show a persuasive reason to withdraw that is more than the mere desire to have a trial. *Bailey,* 1996 SD 45 at ¶ 13, 546 N.W.2d at 391; *State v. Thielsen,* 2004 SD 17, ¶ 15, 675 N.W.2d 429, 433 (S.D. 2004). The manifest injustice standard exists "to prevent a defendant from testing the weight of potential punishment, and then withdrawing the plea if he finds the sentence unexpectedly severe." *Goodwin,* 2004 SD 75 at ¶ 4, 681 N.W.2d

at 849. Having previously tested whether the court might sentence him to life "on the spot" if he pled guilty, Piper was not entitled to liberal treatment of his motion. HCT07 I at 130/7, Appendix 001.

This court looks to the totality of the circumstances to determine whether a guilty plea was knowingly and voluntarily entered, and judges the defendant's knowledge or alleged pressures to plead by objective standards. *Thielsen,* 2004 SD 17 at ¶ 22, 675 N.W.2d at 434. "When a defendant has entered a knowing and voluntary plea of guilty at a hearing at which he acknowledged committing the crime, the occasion for setting aside a guilty plea should seldom arise." *United States v. Buck,* 661 F.3d 364, 371 (8th Cir. 2012).

Reduced to its essence, Piper claims that the plea court's jury unanimity misadvisement (which secured him a jury resentencing in *Piper II*) also tainted his plea decision because he pled guilty to avoid a jury sentencing on the mistaken belief that the plea and sentencing forums had to be the same. Piper rests this theory on a sentence from *Piper II* commenting that his plea "[could] not be considered knowing and voluntary without a clear explanation and understanding of [the] concept [that one juror has the potential to save a defendant's life]." *Piper II,* 2009 SD 66 at ¶ 19, 771 N.W.2d at 359. But Piper's premise that *Piper II* indicts the validity of his entire plea collapses in light of clarifying language stating that "without an adequate explanation by the judge that one juror could, in effect, choose life, *Piper's waiver of a jury trial on the*

death penalty [could] not be considered knowing or voluntary." *Piper II,* 2009 SD 66 at ¶ 19, 771 N.W.2d at 359.

Piper's argument also fails to appreciate a material, qualitative difference between the error found in *Piper II* and the error claimed here. In *Piper II*, the error was *judicial* misadvice; here the claimed error is *attorney* misadvice.

In regard to the former, Piper does not point to any affirmative *judicial* misadvice to the effect that Piper's plea and sentencing forums had to be identical. Piper cites only to statements by his attorneys advocating for a court sentencing trial as the basis for his alleged misunderstanding. PLEA at 6/15-7/18. Piper's attorneys' statements sowed confusion in the courtroom, with both the judge and the prosecutor uncertain if a plea of guilty mandated a court sentencing. PLEA at 6/15-7/18. Piper concedes that his attorneys' took the position that the plea and sentencing forums had to be the same in order to "assure himself that he would be sentenced by the trial judge, rather than by a jury." AMENDED MOTION TO WITHDRAW at 6, ¶ 4.A, Appendix 093.

Since both Piper and the state had agreed that Piper "would be waiving the right to sentencing by the jury and have the sentencing hearing and sentencing conducted by the court," the court's subsequent sentencing advisements were formulated simply to reflect the agreement, not to endorse or affirm Piper's counsel's position that the plea and

sentencing forums had to be the same. PLEA at 9/21, 18, 22, 24-26. The *court* never advised Piper that the plea and sentencing forums had to be the same.

Thus, the misadvice (if any) here is that of Piper's counsel. *Piper I,* 2006 SD 1, ¶51, 709 N.W.2d at 804. This is a problem for Piper because this "misadvice" was actually a strategy cooked up by his counsel to *force* the trial court to conduct the sentencing hearing. HCT07 I at 107/20-21, 129/18-24, 130/8, Appendix 001; HCT07 II at 45/9, Appendix at 035. Admitting the possibility that the statute might allow split sentencing would not have assured Piper of the desired court sentencing. In order to "assure . . . that he would be sentenced by the trial judge, rather than by a jury," Piper's counsel took the position that SDCL 23A-27A-6 *required* the court to sentence Piper if he pled guilty. AMENDED MOTION TO WITHDRAW at 6, ¶4.A, Appendix 093. Counsels' "erroneous advice" was a deliberate trial strategy contrived to gain Piper an advantage at sentencing. Strategic decisions by counsel such as these are "virtually unchallengeable" in *habeas corpus* proceedings. *Strickland v. Washington,* 466 U.S. 668, 690 (1984).

The "misadvice" being that of counsel and not the court is a problem for Piper in another way: Piper affirmatively waived any claim of ineffective assistance of counsel in regard to the advice to plead guilty in his first *habeas corpus* proceeding. HCT07 II at 10/14, Appendix at 035 (advising court that he was "not alleging ineffective assistance of counsel

when it comes to the issue of pleading guilty"). The record reflects that Piper waived the claim as part of a strategy to prevent disclosure of certain embarrassing information discovered by his attorneys' investigation that would have lost its privileged status had Piper claimed ineffective plea advisements by his counsel. HCT07 II at 10/8, 11/1, 18/21, 19/16-21, 20/2, 21/1, 21/13, Appendix at 035. Piper wanted to limit his waiver of attorney/client privilege to his appellate counsel who did not have knowledge of the embarrassing facts Piper wanted to contain. HCT07 I at 96/13, 124/23, Appendix 001; HCT16 at 197/12, Appendix 053. Again, this strategic decision is unchallengeable here. *Strickland,* 466 U.S. at 690.

Piper tries to make his counsel's misadvice that of the court by arguing that the court should have dispelled his counsel's "misadvice." Piper, however, cites no authority for the proposition that a court must confront and correct a defense counsel about his/her strategy or advocacy in regard to matters collateral to the requisite *Boykin* advisements before a defendant may knowingly and intelligently enter a guilty plea.

But, Piper's present claim fails even on its merits.[2] Piper's contention that this misadvice rendered his plea unknowing and

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[2] Piper's current argument is the mirror opposite of his position in *Piper II.* In *Piper II*, Piper claimed that judicial misadvice denied him the opportunity to split his case between a guilty plea to the court and a jury sentencing, the so-called "Option C." HCT07 I at 30/9, 51/11, 182/10, Appendix 001. In *Piper III,* Piper claimed that his counsels' misadvice

involuntary is incorrect for two reasons: (a) because the trial court properly advised Piper of his jury trial rights, which Piper then waived knowingly, intelligently, and voluntarily and (b) because his trial counsels' alleged misadvice caused Piper no prejudice.

With respect to the propriety of the court's advisements in regard to his guilty plea, the record reflects that Piper was fully and appropriately advised of his *Boykin* rights in regard to the consequences of his guilty plea. This court has held that "a plea of guilty cannot stand unless the record in some manner indicates a free and intelligent waiver

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denied him the opportunity to split his case between a jury trial as to guilt and a court sentencing. Piper now finally admits that he pled guilty to "assure himself that he would be sentenced by the trial judge, rather than by a jury," despite having claimed in *Piper II* that he had been robbed of a jury sentencing. AMENDED MOTION TO WITHDRAW at 6, ¶ 4.A, Appendix 093. But this admission is in furtherance of a new disingenuous claim that his counsel's misadvice robbed him of a guilt-phase jury trial. In reality, as he explained in his amended motion, Piper *wanted* to plead guilty to "demonstrate his remorse." AMENDED MOTION TO WITHDRAW at 6, ¶ 4.B, Appendix 093. In other words, according to Piper himself he pled guilty not out of any mistaken belief about his sentencing options but because he wanted to "demonstrate his remorse" in mitigation of a death sentence. HCT07 I at 124/1, Appendix 001. Piper is not taking consistent positions with this court. Also, Piper's current misadvice of counsel claim is inconsistent with the position he took in *Piper II,* which was that his trial counsel had *not* been ineffective for advising him to plead guilty. HCT07 II at 10/14, 19/17, Appendix 035. Piper took this position in order to prevent his counsel from divulging highly embarrassing facts that they had learned about Piper in their investigation of the case that were not known to law enforcement or the prosecution. HCT07 I at 60/15, 64/18, Appendix 001; HCT07 II at 19-28, Appendix 035; HCT16 at 197/12, Appendix 053. Piper willingly, enthusiastically even, pled guilty to appear remorseful (though he wasn't) and then willingly waived any challenge to his decision to plead guilty in order to protect himself from embarrassment.

of the three constitutional rights mentioned in *Boykin* – self-incrimination, confrontation, and jury trial – and an understanding of the nature and consequences of the plea." *Goodwin,* 2004 SD 75 at ¶ 6, 681 N.W.2d at 850; COL at ¶¶ 12, 22, 32. Since courts cannot divine when a defendant may have been misadvised by counsel, proper instructions by the court suffice to advise a defendant of his rights where counsel may have failed to do so.

For example, in *State v. Cobb*, 479 N.W.2d 879 (S.D. 1996), a defendant pled guilty to felony murder believing, based on his counsel's erroneous advice, that he could revisit his plea if he prevailed on a post-conviction appeal of the court's pre-trial orders. Cobb moved to withdraw his plea after learning he could not appeal the pretrial orders. The *Cobb* court found that counsel's erroneous advice was not grounds to permit Cobb to withdraw his plea where there was no error in the trial court's advisements concerning the consequences of the plea. *Cobb*, 479 N.W.2d at 881; *United States v. Baxter,* 128 F.3d 670 (8th Cir. 1997) (defendant could not withdraw guilty plea based on trial counsel's misadvice that he would receive 15-year sentence when court properly advised him of the consequences of his plea).

Cobb governs this case as well because the record reflects that the trial court properly advised Piper of his rights (1) to "a jury trial . . . as to the charge itself as to the issue of guilt or innocence," (2) to be represented by counsel, (3) to be present during court proceedings, (4) to

confront witnesses against him, (5) to subpoena witnesses on his behalf, (6) to remain silent, and (7) against self-incrimination." The court also expressly informed Piper of the maximum penalties applicable to the charges against him. PLEA at 13, 17, 18; HCT07 I at 28/13, 155/1, Appendix 001. The record, thus, reflects proper advisements by the trial court regarding the consequences of pleading guilty.

The record also reflects that the court expressly advised Piper that there were two components to his proceedings – a determination of guilt followed by sentencing. Piper knew that, as a consequence of pleading, all that would remain was a sentencing hearing that could result in sentences of either imprisonment for life or death by lethal injection. PLEA at 13/2, 18/14, 19/14, 20/16, 22/22, 25/2; HCT07 I at 88/14, Appendix 001. Thus, Piper knew that plea advisements pertained to the consequences of his pleading guilty while sentencing advisements pertained to a separate and distinct sentencing phase.

With respect to Piper's claim that his plea was premised on the erroneous advice that the sentencing forum could not be independent of the plea forum, the two-part *Strickland* test applies to challenges to guilty pleas based on ineffective assistance of counsel. *United States v. Davis,* 583 F.3d 1081, 1091 (8th Cir. 2009). To prevail, Piper must show (1) "that counsel's representation fell below an objective standard of reasonableness" and (2) "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have

insisted on going to trial." *Davis,* 583 F.3d at 1091; *United States v. Cruz,* 643 F.3d 639, 642 (8th Cir. 2011).

Piper cannot meet either element of this test.

In order to invalidate a guilty plea, appellant must show "gross" error on the part of counsel in recommending that he plead guilty. *Williams v. State,* 349 N.W.2d 58, 62 (S.D. 1984). Piper's counsel did not grossly "misadvise" him about the existence or non-existence of an "Option D" (a guilt-phase jury trial and sentencing by the court) because the question of whether the trial and sentencing forums had to be identical had not been settled at the time of Piper's plea. *Piper I,* 2006 SD 1, ¶51, 709 N.W.2d at 804; HCT07 I at 29/22, 30/6, 99/5, 100/6, 107/5-25, 122/4-13, Appendix 001; HCT16 at 204/4, Appendix 053 (Miller conceding that Rensch and Duffy's "advice could have been considered reasonable based on the way the statutes [we]re worded"). Had Piper's counsel overlooked settled law on the question of splitting the trial/plea and sentencing forums, one might argue that their advice was both erroneous and objectively unreasonable.

But the question of whether or not SDCL 23A-27A-6 permitted splitting the guilt and sentencing forums between the jury and the court was not settled until *Piper I. Piper I,* 2006 SD 1, ¶51, 709 N.W.2d at 804; HCT07 I at 29/22, 30/6-18, 112/5, 191/16, Appendix 001; HCT07 II at 24/16, Appendix 035 (trial counsels' advice that plea and sentencing forums be the same a "fair reading" of statute). Thus, Piper's trial

counsel cannot be faulted simply for "misinterpreting" the statute when their interpretation was reasonably consonant with the statute's language and not contrary to prevailing constitutional law, particularly when any "misinterpretation" was strategically formulated to assure that Piper would be sentenced by a dispassionate court.[3] HCT07 I at 112/4, Appendix 001.

Nor can Piper show prejudice due to "misadvice" by his counsel. In the context of ineffective advice of counsel in connection with a defendant's decision to plead guilty, prejudice requires a "show[ing of] not only a willingness to go to trial but for counsel's errors, but a reasonable probability that the result (a conviction) would have been

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[3] With respect to Piper's claim that he did not voluntarily relinquish a *known* right because he supposedly believed that a guilt phase jury trial came with the "price tag" of having to convince twelve people to give him life, the habeas record conclusively shows otherwise. The record is clear that Piper's counsel explained to him that "in order for [the jury] to sentence him to death they would have to have a unanimous decision in that regard." HCT07 I at 108/10-20, 109/10, Appendix 001; HCT16 at 203/10, Appendix 053. Piper was told that if the defense "hung one of the 12, the sentence would be life." HCT07 I at 108/10-20, 109/10, 144/15, Appendix 001. Piper knew that "if one [juror] was against [death] . . . that death would not be imposed" and "life without parole" would be imposed instead. HCT07 II at 30/16-19, Appendix 035. Piper's counsel deemed him a "highly intelligent" individual who "understood" that one hung juror would equate to a sentence of "life without parole." HCT07 II at 30/8-22, 31/4-22, Appendix 035. Even knowing that one juror was all that was needed to assure him of a life sentence, Piper did not see "comfort in [those] numbers." Piper felt that the grisly evidence of an earless, disfigured victim left naked to decompose in a creek "could hurt him badly with 12 people," but "it might not hurt him as bad in front of a judge." HCT07 II at 45/9, Appendix 035; HCT07 I at 99/23, Appendix 001. Thus, the circumstances as a whole in this case show that Piper's decision to forego a jury trial as to guilt was *not* based on a misconception that he would have to convince twelve jurors to give him a life sentence. HCT07 II at 45/9, Appendix 035.

different." *State v. Moore,* 678 N.E.2d 1258 (Ind. 1997), cited in *Piper I,* 2006 SD 1, ¶60, 709 N.W.2d at 807. Piper's failure to object to his counsels' plea advice or the voluntariness of his guilty plea prior to his second *habeas corpus* petition also places this case within a stricter analytical framework. *United States v. Dominguez Benitez,* 542 U.S. 74 (2004).

Piper is miles short of making the requisite showing of prejudice because he has freely admitted that he never wanted a guilt-phase trial and that he had no hope of an acquittal on the murder charge.

In *Dominguez Benitez,* the defendant pled guilty believing, based on his counsel's advice, that he would qualify for a sentence reduction. The trial court failed to advise Dominguez Benitez that he could not withdraw his plea if his counsel was wrong. When the PSI unearthed a criminal history that made Dominguez Benitez ineligible for a sentence reduction, he sought to withdraw his plea. The district court denied the motion, but the 9th Circuit Court of Appeals reversed on the ground that the trial court's failure to advise Dominguez Benitez that he could not withdraw his plea had rendered the plea unknowing and involuntary.

The United States Supreme Court reversed. The court held that Dominguez Benitez could not withdraw his plea because he could not "demonstrate that he would not have pleaded guilty if the [judicial advisement] violation had not occurred." *Dominguez Benitez,* 542 U.S. at 80. It criticized the 9th Circuit's formalistic analysis, which looked simply

at whether each box on the list of advisements had been checked. This approach did "not allow consideration of any record evidence tending to show that a misunderstanding was inconsequential to a defendant's decision, or evidence indicating the relative significance of other facts that may have borne on his choice regardless of any [advisement] error." *Dominguez Benitez,* 542 U.S. at 84. Nor did the 9th Circuit's approach examine record evidence showing that Dominguez Benitez "did not intend to go to trial," that his written plea agreement informed him that he could not withdraw his plea, or the role that "the overall strength of the government's case" played in the plea decision. *Dominguez Benitez,* 542 U.S. at 84.

So too for Piper. Like Dominguez Benitez, Piper claims his plea was involuntary because of the interplay of judicial and representational misadvice. As in *Dominguez Benitez,* where the advisement that he could not withdraw his plea was expressly stated in the written plea agreement, Piper received proper jury unanimity advice from his counsel. HCT16 at 223/2, Appendix 053; Note 3, *supra*; *Dominguez Benitez,* 542 U.S. at 78. Like Dominguez Benitez, Piper never wanted a jury trial for well-documented strategic reasons. *Dominguez Benitez,* 542 U.S. at 77, 84-85. The sentencing court even commented on the ultimate wisdom of Piper's strategy:

> When you pled guilty . . . and waived the jury at your sentencing, I was a little surprised by your decision, and I would say at that time I questioned the wisdom of your decision. After what I've

> heard these last three days, I understand the reasons for your decision. You could not afford to have a jury see the evidence in this case.

INITIAL SENTENCING III at 481/7-13. Having twice confessed to Poage's murder, and desirous of feigning remorse, "one can fairly ask [Piper] what he might ever have thought he could gain by going to trial." *Dominguez Benitez,* 542 U.S. at 85; COL at ¶ 33. Just as with his counsels' alleged forum splitting misadvice, Piper cannot show that, but for the judicial sentencing misadvice, he would not have pleaded guilty and would have insisted on a trial by jury.

Because of Piper's understanding of the two distinct phases of his proceedings, his claim that the judicial *sentencing* misadvice "infected" his decision to enter a *plea* as to guilt, takes the holding of *Piper II* too far. The record shows that Piper's counsels' advice did not leave him with a deficient understanding of his sentencing options that "coerced" him to plead guilty. At the time he entered his guilty plea, Piper's counsel had properly advised him that one hung juror at sentencing would cause him to receive a sentence of life without parole. See Note 3 *supra*; *Dominguez Benitez,* 542 U.S. at 84 (no error in court's failure to advise defendant he could not withdraw his plea when defendant had been so informed in his plea agreement). Piper waived his right to a jury trial *knowing* that it did not come with the "price tag" of a sentencing jury that would have to unanimously agree on a life sentence.

Piper and his counsel *wanted* to plead guilty "because the facts were very bad" for Piper. HCT07 I at 63/9, Appendix 001. Just the acts that Piper himself admitted to – torture and laughter with homosexual overtones - presented a "terrible, terrible" fact pattern that made the question of guilt an "empty one" in Piper's counsels' estimation. HCT07 I at 63/14-17, 64/18, Appendix 001. The bad facts meant that Piper was "never" going to "win the murder case." HCT07 I at 67/24, Appendix 001. Piper's lawyers did not believe they could win and Piper "did not believe [he] could" win. HCT07 I at 67/25-68/1, Appendix 001. At the time of Piper's plea, the evidence of his guilt was so "overwhelming" that acquittal was out of the question. HCT07 I at 67/24, Appendix 001; HCT07 II at 35/8, 41/19, Appendix 035; *Thielsen,* 2004 SD 17 at ¶ 20, 675 N.W.2d at 434.

Jury sentencing was also out of the question. HCT07 I at 99/17-25, 129/22, Appendix 001. Given "the things a jury would hear," Piper's counsel felt that "a jury would be more likely to put [Piper] to death." "The last thing [Piper's counsel] wanted was a jury to decide the death penalty issue because [they] didn't feel that [a jury] would be able to view things in a measured, calm way that [they] thought a judge would be able to do." HCT07 I at 64/10, 94/18, 117/13, 129/23, Appendix 001. Counsel's concern was that:

> [A] jury of 12 people who had not seen the kind of photographs, until you have a murder case or a case of incredible violence, the first time you see pictures and the first time you hear a story of the violence of this magnitude, it is numbing and my concern was

> that I had on one hand a trained jurist [who was] . . . no stranger to violent crimes. My concern was that the effect of the violence of this case would not be well received by a jury.

HCT07 II at 43/8, Appendix 035. Though he claimed otherwise in *Piper II,* Piper never wanted to face a jury at sentencing. HCT07 I at 94/18, 123/22, Appendix 001.

Instead, Piper and his defense team felt that a court sentencing was advantageous because (a) the court's past experiences with "very graphic, very bloody, very horrific" murder cases might lead the judge to view the nauseating evidence that would come in in Piper's case in a more detached manner than a lay jury, and because (b) the judge might give greater consideration to Piper's age, his background, his prompt acceptance of responsibility, and expression of remorse. HCT07 I at 64/6, 65-66, 68/1-9, 69, 94/13-25, 112/9, 124/1, Appendix 001; HCT07 II at 42/23, Appendix 035. Piper believed a solitary, dispassionate judge would be "more receptive" to the leniency he sought. HCT07 I at 117/13, 123/23, Appendix 001.

The record shows that Piper's counsels' "misadvice" (either alone or in combination with the court's misadvice) did not drive Piper to plead guilty. "[I]t was [Piper's] choice to plead guilty" so he could reap the benefit of "being the first [of the three co-defendants] to come forward and plead guilty" before a judge whose "reasoning" at sentencing would not be "fueled by emotion." HCT07 I at 68/4, 69/23, Appendix 001; *Thielsen,* 2004 SD 17 at ¶ 20, 675 N.W.2d at 434.

To claim that Piper would have opted for a guilt-phase jury trial had he known that the sentencing jury did not have to vote unanimously for a life sentence, or that he could split his forums, is not supported by a scintilla of evidence in the record. *Dominguez Benitez* instructs that defendants do not get to withdraw a guilty plea by crying wolf – claiming they were deprived of process they never wanted when their elected process does not net the desired result. *Dominguez Benitez,* 542 U.S. at 85. Piper knew that it took only one juror to hang a death sentence. HCT07 II at 30/16-31/4, Appendix 035; HCT16 at 223/2, Appendix 053; Note 3, *supra.* He would not have elected a guilt-phase jury trial but for his counsels' alleged misadvice about forum splitting and, therefore, he suffered no prejudice. Without a showing of prejudice, there was no error in denying Piper's motion to withdraw his plea.

2. Piper Was Not Improperly Denied The Opportunity To Present Evidence Of Alleged Inconsistent Statements

Piper claims his rights to due process were violated because he was prohibited from impeaching alleged inconsistencies between the state's closing argument in the Page case and its closing argument in his case. Piper's claim is barred by *res judicata,* fails to meet the standards of ineffective assistance of appellate counsel and fails to establish error by the trial court in precluding the "impeachment" in light of the fact that the state's arguments were not actually inconsistent.

a. Res Judicata Bars Piper's Claim Because He Did Not Raise It On Direct Appeal

Piper's claim that the trial court violated due process by foreclosing his "impeachment" is the type of evidentiary ruling that must be challenged on direct appeal.

"*Habeas corpus* is not a substitute for direct review." *Crutchfield v. Weber*, 2005 SD 62, ¶ 8, 697 N.W.2d 756, 759; *Madetzke v. Dooley*, 2018 SD 38, ¶ 9, — N.W.2d — ("errors and irregularities in the proceedings of a [trial] court . . . are not reviewable [in *habeas corpus*] though they may have been grounds for reversal on direct appeal"). A party's "[f]ailure to raise and brief an issue on appeal waives . . . review of the issue." *State v. Hoxsie*, 1997 SD 119, ¶ 14, 570 N.W.2d 379, 382; *State v. Darby*, 1996 SD 127, ¶ 44, 556 N.W.2d 311, 322.

Attorneys Michael Stonefield and Robert Van Norman selected Miller to handle the appeal because of his reputation as a skilled appellate lawyer. HCT16 at 179/16, Appendix 053. Miller discussed various potential appeal issues with Stonefield and Van Norman but elected to not challenge the exclusion of the "impeachment" evidence because he "chose to appeal only what [he] appealed for the reason" of selecting the strongest issue. HCT16 at 218/24, 219/17, Appendix 053. That issue was the denial of Piper's motion to withdraw his plea. *Piper III,* 2014 SD 2, 842 N.W.2d 338. Miller's evaluation revealed "no issue that was even arguably close to the strength of the [plea] issue . . . and

that's why [he] chose to raise only the issue that [he] did." HCT16 at 217/9, Appendix 053. "[W]here [Miller] thought [he] had choices, [he] found nothing that had even close to the arguable merit of" the plea issue "and that's why [he] decided to go with that" and abandon lesser issues. HCT16 at 217/15, 218/15, Appendix 053.

Miller's decision fell "within the 'wide range of professionally competent assistance'" afforded to counsel. *Jones v. Class,* 1998 SD 55, ¶ 30, 578 N.W.2d 154, 163. Miller's "process of winnowing out weaker claims on appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith v. Murray*, 477 U.S. 527, 536 (1986). Miller sensibly decided to appeal only the argument he felt was strongest. *Jones*, 1998 SD 55 at ¶ 29, 578 N.W.2d at 163.

Because a direct attack on the trial court's impeachment ruling "*could have* been properly raised and determined" on appeal, Piper's due process claim is barred by *res judicata*. *State v. Anderson*, 2005 SD 22, ¶ 22, 693 N.W.2d 675, 682 (emphasis added).

All *res judicata* elements are satisfied here. Piper's claim here is identical to the issue raised in his May 20, 2011, Motion for Admission of State's Attorney's Prior Trial Statements as Admission of Party Opponent filed in the resentencing. The trial court entered an order denying Piper's motion on July 1, 2011, 16 days prior to the start of his resentencing.

The parties and interests here and at sentencing are identical.[4] And the direct appeal in *Piper III* afforded Piper a full and fair opportunity to challenge the circuit court's ruling. *Anderson*, 2005 S.D. 22, ¶ 22, 693 N.W.2d at 682.

Since all four conditions precedent are satisfied, *res judicata* bars Piper from litigating the due process component of his claim in *habeas corpus.* He *could have* raised his due process claim on direct appeal but, for strategic reasons, he chose to not pursue it. *Anderson*, 2005 SD 22 at ¶ 22, 693 N.W.2d at 682.

b. Reframing His Due Process Claim As Ineffective Assistance Of Appellate Counsel Does Not Salvage The Claim

Piper seeks to circumvent the *res judicata* bar on his due process claim by reframing it as a "failure" of his appellate counsel to raise the issue on direct appeal. To succeed on this claim Piper "must prove that [appellate] 'counsel's representation fell below an objective standard of reasonableness' and 'that such deficiency prejudiced [him].'" *Miller v. Young*, 2018 SD 33, ¶ 25, —N.W.2d—. To establish deficient

[4] Though Piper's opponent here is the warden rather than the state, "[t]his court has not required that 'strict privity' be established . . . ." *Merchants State Bank v. Light*, 458 N.W.2d 792, 794 (S.D. 1990). Instead, when "determining the conclusiveness of prior judgments, the courts look beyond the nominal parties, and treat all those whose interests are involved in the litigation and who conduct and control the action or defense as real parties, and hold them concluded by any judgment that may be rendered." *Merchants State Bank*, 458 N.W.2d at 794; *Schell v. Walker*, 305 N.W.2d 920, 922 (S.D. 1981)(holding that the interests of parties were the same as those in prior litigation because both cases revolved around "rural Pennington County taxpayers seeking relief from the taxing authority").

performance Piper "must overcome the presumption that, under the circumstances, the challenged action might be considered sound . . . strategy." *Randall v. Weber*, 2002 SD 149, ¶ 6, 655 N.W.2d 92, 96. Piper must also show that the failure to raise the issue on direct appeal prejudiced him. To prove prejudice, Piper must show a "reasonable probability that an appeal of this issue would have been successful and that the result of the appeal would thereby have been different." *Pryor v. Norris*, 103 F.3d 710, 714 (8th Cir. 1997).

As discussed above, Miller strategically jettisoned weak issues in order to concentrate on the plea issue. HCT16 at 217/9-15, 218/15-24, 219/17, Appendix 053. Miller's reasoning was hardly deficient. *Smith*, 477 U.S. at 536.

Even assuming the error of Miller's ways, demonstrating the requisite prejudice from Miller's strategy requires proof of a "reasonable probability that an appeal of this issue would have been successful and that the result of the appeal would thereby have been different." *Pryor*, 103 F.3d at 714. To do so, Piper would need to establish that the trial court abused its discretion in excluding the "impeachment" evidence. *State v. Stanley*, 2017 SD 32, ¶ 21, 896 N.W.2d 669, 677.

The trial judge did not abuse his discretion in denying Piper's motion. First, the prosecutor's arguments in Page were not evidence. HCT16 at 151/9, Appendix 053. Second, as Piper's counsel himself admitted, the evidence in two cases is bound to be different based on the

rules of evidence and who the defendants are. HCT16 at 185/11, Appendix 053. Piper's claim here fails to account for differences in the evidence in the two cases that negate the "inconsistency," *i.e.* evidence in the Page case that he was the initial aggressor *vis-à-vis* evidence in Piper's case that demonstrates that he was the initial aggressor. Finally, as discussed below, the prosecution's arguments in Page were not actually "inconsistent" with its arguments here. Evidence in the Page case and here shows that both Page and Piper simultaneously initiated different forms of aggression against Poage in the early stages of the kidnapping and assault.

c. The Subject Arguments Are Not Sufficiently Inconsistent To Qualify As Impeaching Or Mitigating

The supposed "inconsistency" identified by Piper is attorney Fitzgerald's "argu[ment] that the person who committed the first act should be given the death penalty." PIPER BRIEF at 21. According to Piper, "[i]n Page's trial, [Fitzgerald] stated that person was Page. In Piper's trial, [Fitzgerald] stated that person was Piper." PIPER BRIEF at 21. This characterization of Fitzgerald's arguments in the two cases greatly overstates the alleged "inconsistency."

Piper's premise – that Fitzgerald argued that only the initial aggressor deserved a death sentence – is erroneous. Piper's assertion that Fitzgerald's arguments were "inconsistent" to a degree that they qualify as impeachment is also incorrect. And Piper's contention that he has been denied an opportunity to present "mitigating evidence" is belied

by the settled precept that the arguments of counsel are not evidence. C.f. *State v. Biays*, 402 N.W.2d 697, 701 (S.D. 1987).

While Fitzgerald certainly argued that participation in the initial acts of aggression was a consideration for imposing the death sentence in both the Page and Piper cases, he did not argue that *only* the initial aggressor deserved a death sentence. Nor did Fitzgerald confine his meaning of the term aggression to physical assault as Piper does here. The meanings of "aggression" and "aggressive" are broader than physical assault. "Aggression" means "an offensive action . . . an unprovoked attack . . . the practice of making attacks or encroachments." "Aggressive" means "marked by combative readiness . . . driving forceful energy or initiative . . . obtrusive energy . . . a disposition to dominate in disregard of other's rights . . . a fighting disposition." Webster's New Collegiate Disctionary (7th Ed. 1967). Piper certainly committed one or more of these acts of aggression, not all of which entail physical violence.

The record reflects that multiple initial acts of aggression were occurring simultaneously within the space of mere moments – the pulling of the gun, ordering Poage to the floor, ganging up on and dominating Poage, exhibiting a fighting disposition, binding Poage with speaker wire. The records of the trials of Page and Piper reflect that both participated in the initial acts designed to force Poage into submission. Page was not the lone aggressor, as reflected in Poage's imploring question "Why are you *guys* doing this?" Uniquely, however, it was Piper

who inflicted the initial serious injury when he kicked Poage in the face, breaking a tooth and knocking him temporarily unconscious.

This reality is reflected in Fitzgerald's arguments when viewed as a whole, rather than in the cherry-picked construct of Piper's argument. During his closing arguments in both cases Fitzgerald continually reiterated what "they" – Piper, Page and Hoadley – did to Poage. PAGE SENTENCING at 930-32, Appendix 106. At Page's sentencing Fitzgerald acknowledged that the kidnapping/murder "start[ed] when [Page] pulled a gun and pointed it at the head of his victim, which rendered him helpless to Piper, who then kicked him in the head unconscious." PAGE SENTENCING at 929-30, 946, Appendix 106. Fitzgerald described Page indefinitely as "*a* man of action in this murder," rather than definitely as *the* man of action. PAGE SENTENCING at 946, Appendix 106. Page's active participation included the facts that he "stole the gun that was used in the first acts of aggression." PAGE SENTENCING at 946, Appendix 106. By referring to plural *acts*, Fitzgerald did not limit the aggression perpetrated against Poage to a single act by a single actor. PAGE SENTENCING at 946, Appendix 106. Rather the *acts* started with Page pointing the gun at Poage "to facilitate [the] kidnapping" and simultaneous physical assaults by Piper and Page. PAGE SENTENCING at 946, Appendix 106.

At Piper's sentencing, Fitzgerald argued that "[t]his depraved, torturous murder started when [Page] held a gun to Chester Poage,

ordered him to the ground and then this man here [Piper] kicked Chester Allan Poage in the head with his combat boots." SENTENCING XI at 1794/10. Fitzgerald also stated that Piper "was the one that did the first act of actual aggression to knock the man unconscious." SENTENCING XI at 1807/ 21.

There is no impeachment-caliber inconsistency or mitigation value in these arguments. While statements need not be "diametrically opposed" for impeachment purposes, the subject arguments are "inconsistent" only if it was "unlikely" that Fitzgerald would have made his Page argument if he "believed the truth" of his Piper argument or if Fitzgerald's Page and Piper arguments represent "inconsistent beliefs." *State v. Shaw,* 2005 SD 105, ¶36, 705 N.W.2d 620, 631; 21 Am.Jur.2d Proof of Facts 101, §2; *State v. Birdshead,* 2015 SD 77, ¶36, 871 N.W.2d 62, 76 (trial courts have "considerable discretion in determining whether testimony is 'inconsistent' with prior statements"). "The important point is the [existence of] clear incompatibility" between Fitzgerald's Page and Piper arguments. 21 Am.Jur.2d Proof of Facts 101, §2.

In view of the expansive definition of "aggression," there is no "clear incompatibility" between the substance of, or beliefs underlying, Fitzgerald's arguments in Page and Piper. Page and Piper certainly jointly participated in the "first *acts* of aggression" as argued in Page. Piper certainly committed the "first act of *actual* aggression," as argued in Piper, which Fitzgerald explicitly distinguished from general acts of

aggression as viciously kicking Poage unconscious. As the Eighth Circuit recognized "we do not hold that prosecutors must present precisely the same evidence and theories in trials for different defendants. Rather, we hold only that the use of inherently factually contradictory theories violates the principles of due process." *Smith v. Groose*, 205 F.3d 1045, 1052 (8th Cir. 2000). Fitzgerald's arguments and theories were by no means "factually contradictory."

Fitzgerald argued consistently in the Page, Piper and Hoadley proceedings that all three participated in torturing and murdering Poage. Fitzgerald consistently represented that Page, backed by Piper, set the events in motion by pointing a gun at Poage and Piper then piled on. Fitzgerald certainly never argued that only the person who initiated the aggression toward Poage deserved to be sentenced to death. To the contrary, Fitzgerald sought death for all defendants on the grounds of multiple aggravating factors (murder for pecuniary gain, torture, elimination of a witness) which were amply proven by the circumstances of the murder wholly independent of who committed the first act of aggression. SDCL 23A-27A-1(3), (6) and (9). Fitzgerald certainly did not confine his eligibility criterion to who started it as Piper suggests.

Given the lack of any genuine inconsistency, the mitigation value of Piper's "impeachment" evidence was nil. As in any case, "relevance marks the outer limit of admissibility for purported mitigating evidence" in a death penalty case. *Williams v. Norris,* 612 F.3d 941, 948 (8th Cir.

2010). According to *Tennard v. Dretke,* 124 S.Ct. 2562, 2570 (2004), "the meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding than in any other context . . . . Relevant evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value." *Lockett,* 98 S.Ct. at 2965 n. 2.

Despite the significant function of mitigating evidence in a capital sentencing proceeding, its exclusion "is amenable to harmless error analysis" because it can "be quantitatively assessed in the context of other evidence presented in order to determine" the effect its exclusion had on the trial. *Brecht v. Abrahamson,* 113 S.Ct. 1710, 1717 (1993). The exclusion of mitigating evidence is harmless if it was "not likely [to] have affected the . . . sentence" in light of the evidence as a whole. *Williams,* 612 F.3d at 948; *Skipper,* 106 S.Ct. at 1673 (exclusion of mitigating evidence harmful when "it appears reasonably likely that . . . it may have affected the . . . decision to impose the death sentence"); *Tafero v. Wainwright,* 796 F.2d 1314, 1321 (11th Cir. 1986)(exclusion of mitigation family evidence did not raise "a substantial likelihood" of actual prejudice to warrant reversing his death sentence).

Under the particular facts of this case, there was no error in excluding Piper's "impeachment" evidence because: (1) it was not grounded in a genuine "inconsistency," (2) it did not rebut any statutory aggravator, (3) it would have entailed a mini-trial on whether the

evidence in the Page case was inconsistent with the evidence in the Piper case, (4) it would have invited further evidence and argument emphasizing Piper's role in planning and initiating the murder, and (5) its mitigating value was vastly outweighed by the aggravating evidence. Thus, exclusion of Piper's "impeachment" evidence for mitigation purposes was harmless because it was not reasonably likely to have secured him a life sentence.

There being no actual "inconsistency" in the theory or beliefs underlying Fitzgerald's arguments in Piper and Page, the trial court certainly did not abuse its discretion in excluding Piper's "impeachment" evidence, nor was Piper's appellate counsel ineffective for not raising such a flimsy issue on appeal. *Birdshead,* 2015 SD 77 at ¶ 36, 871 N.W.2d at 76.

3. Piper's Counsel Were Not Ineffective

Piper "shoulder[s] a heavy burden of proof in [his] ineffective assistance of counsel claim." *Miller*, 2018 SD 33 at ¶ 25, —N.W.2d—. He "must prove that 'counsel's representation fell below an objective standard of reasonableness' and 'that such deficiency prejudiced [him].'" *Miller*, 2018 SD 33 at ¶ 25, —N.W.2d—. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper function of the adversarial process that the trial cannot be relied upon as having produced a just result." *Miller*, 2018 SD 33 at ¶ 25, —N.W.2d—.

This Court presumes "lawyers are 'competent unless otherwise shown and the reasonableness of counsel's performance is evaluated from counsel's perspective at the time in light of all of the circumstances.'" *Miller*, 2018 SD 33 at ¶ 25, —N.W.2d—. Counsels' performance is not to be judged from the perspective of hindsight because the luxury of time would allow criticism of each and every trial attorney's performance. *See Ledford v. Warden, Georgia Diagnostic and Classification Prison*, 818 F.3d 600, 647 (11th Cir. 2016). Also, Piper "must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Randall*, 2002 SD 149 at ¶ 6, 655 N.W.2d at 96.

A criminal defendant is not constitutionally entitled to a perfect trial; he is guaranteed the right to a *fair* trial. *State v. Davi*, 504 N.W.2d 844, 857 (S.D. 1993); *McDowell v. Solem*, 447 N.W.2d 646 (S.D. 1989). Likewise, "[t]he Constitution does not guarantee the best representation, especially when measured through the lens of hindsight, but rather effective representation." *United States v. Davis*, 406 F.3d 505, 510 (8th Cir. 2005).

a. No Ineffectiveness In Expert Preparation

Piper called neuropsychiatrist Dr. Hal Wortzel and psychologist Dr. Dewey Ertz to testify in mitigation. Dr. Wortzel identified multiple "mitigating" factors in Piper's case. Dr. Wortzel testified that Piper's 19-year-old brain "[w]asn't fully encoded," making him more impulsive and

less attuned to the consequences of his actions. SENTENCING IX at 1613/5, 1614/8-11. Dr. Wortzel added that "if you take a young person who is already prone to immaturity, impulsiveness, not considering consequences, and then you add in substance abuse . . . that makes for a setting where highly impulsive, poorly considered actions might transpire." SENTENCING IX at 1615/4. Dr. Wortzel opined that Piper was genetically pre-disposed to antisocial behavior. SENTENCING IX at 1622/12-25, 1623/1-9. According to Dr. Wortzel, Piper was "not wired optimally or wired poorly even for societal expectations . . . and abiding by rules." SENTENCING IX at 1623/7. Dr. Wortzel further opined that the "arbitrary dispensing of discipline" that Piper allegedly experienced growing up did not help him "learn right from wrong or learn consequences," compounding the "serious behavioral issues" Piper displayed. SENTENCING IX at 1618/19, 1619/12-25. Finally, Dr. Wortzel opined that "this thing [the murder] happened because of group dynamics." SENTENCING IX at 1626/25. According to Dr. Wortzel, Poage died as the result of "an unfortunate sort of culmination . . . of these three personalities, their interaction that night, sort of simultaneously fueling each other on." SENTENCING IX at 1627/8.

Dr. Ertz testified that Piper was cannabis dependent in his adolescence, exhibiting behaviors consistent with heavy use of marijuana and LSD, including weight gain. SENTENCING VIII at 1513-14. According to Dr. Ertz, Piper's behavior in adolescence typified the

"inattention" and "difficulty" maintaining "expected standard behaviors" in the presence of others of a person afflicted with ADHD. Dr. Ertz opined that Piper exhibited certain ADHD symptoms that overlap with conduct disorder, such as impulsivity and "inattention" to the rights of others and that, if Piper did have conduct disorder, it was an inherited, genetic trait. SENTENCING VIII at 1515/10, 1521/6-13, 1531/16; SENTENCING IX at 1622/12. Dr. Ertz testified that Piper's ADHD and the "harsh" corporal punishment Piper allegedly experienced as a child made it "very difficult for [him] to learn prosocial . . . behaviors." SENTENCING IX at 1537/10. Dr. Ertz opined that Piper exhibited remorse through "non-verbal behavior," "facial expressions, movement, [and] sometimes needing to pace" when he discussed the murder, though Piper never expressed remorse to Dr. Ertz (or anyone else). SENTENCING IX at 1548-49, 1571/11.

In the context of a murder of such gross inhumanity, Drs. Wortzel's and Ertz's explanations for Piper's behavior (however flimsy) were clearly indispensable to his case for a life sentence. Yet, Piper claims that his counsel were ineffective for calling the doctors because, on cross-examination, they affirmed the factual predicates for the three aggravating factors with which Piper was charged.

Piper cites *Hooper v. Mullin,* 314 F.3d 1162 (10th Cir. 2002), for the proposition that calling the doctors was so grossly irresponsible as to deprive Piper of a genuinely adversarial trial. *Hooper* hardly proves

Piper's point. Defense counsel in *Hooper* was ineffective because he called a hostile psychiatric witness at sentencing despite never having spoken with him about his testimony, knowing that his testimony could be more aggravating than mitigating and knowing that it could open the door to other damaging psychiatric testimony in rebuttal. *Hooper,* 314 F.3d at 1168. Hooper's defense counsel's unpreparedness exacerbated the witness' inherent unhelpfulness.

In contrast to *Hooper,* Piper's counsel conferred with Drs. Wortzel and Ertz prior to trial and elicited beneficial mitigation testimony from them on direct examination. On cross-examination the doctors acknowledged that Piper had admitted the predicate facts of the aggravating factors to them (just as he had in his confession). HCT16 at 108/18-110/3, Appendix 053. Defense counsel knew that the aggravating facts "weren't particularly contested" in light of Piper's confession. HCT16 at 111/9, Appendix 053. Piper had admitted to killing Poage to steal his belongings, to torturous acts, to wanting a thrill kill and to killing Poage so as not to leave a witness to the planned theft. HCT16 at 111/25, Appendix 053; CONFESSION at 73/5 (eliminating a witness), 9/19, 16/10, 30/10 (pecuniary gain), 12/5, 46/16, 46/19, 47/1, 58/12, 59/5 (torture). So defense counsel had Piper candidly discuss the aggravating factors with the doctors as part a strategy to present expert witnesses who could talk "knowledgeably" about the case. HCT16 111/2, Appendix 053.

Unlike in *Hooper,* Piper's counsels' decision to call Drs. Wortzel and Ertz was not uninformed. Knowing that they could not elicit mitigating testimony from the doctors without opening them up to cross-examination about the aggravating evidence, defense counsel had to decide whether the doctors should appear knowledgeable or unknowledgeable to the jury. The credibility of the doctors' mitigation testimony depended on them appearing knowledgeable. The harm of proffering unknowledgeable experts certainly outweighed any harm that resulted from openly acknowledging aggravating facts to which Piper had already admitted in his confession. CONFESSION at 73/5, 9/19, 16/10, 30/10, 12/5, 46/16, 46/19, 47/1, 58/12, 59/5. Such strategic decisions are "virtually unchallengeable" in *habeas corpus* proceedings. *Strickland,* 466 U.S. at 690 (1984).

b. No *Voir Dire* Deficiencies

Piper asserts error in the trial court's denial of his motion to remove Jurors Sagdalen and Carlin for cause and the granting of the state's motion to remove Juror Monteforte for cause. These are claims that could have been brought on appeal from his sentencing. As discussed above, attorney Miller testified that he did not challenge the *voir dire* process on appeal because he chose to appeal only Piper's strongest issue. HCT16 at 217/9-15, 218/15-24, 219/17, Appendix 053. Consequently, Piper's *voir dire* challenges are now barred by *res judicata.*

Having elected to waive his *voir dire* challenges on direct appeal, Piper seeks to resurrect the issues as "ineffectiveness" claims – as in his counsel supposedly just "sat back" and let the prosecutor have his way with prospective jurors in *voir dire.* The *voir dire* transcripts reflect otherwise.

Preliminarily, Piper attacks the practice of "death qualifying" the jury as a violation of his right to due process. As observed in *Lockhart v. McCree,* 476 U.S. 162, 173-74 (1986), "death qualifying" a jury is permitted:

> "Death qualification" . . . is carefully designed to serve the State's concededly legitimate interest in obtaining a single jury that can properly and impartially apply the law to the facts of the case at both the guilt and sentencing phases of a capital trial.

Thus, "death qualification" does not *per se* violate jury trial rights as Piper suggests.

Piper's counsel concedes that Judge Ekrich took the chore of selecting a jury very seriously. HCT16 at 173/22, Appendix 053. Both sides received the statutory 20 strikes plus one extra. HCT16 at 32/2, 170/4, Appendix 053.

But Piper complains that he had to expend two of his peremptory strikes to remove Jurors Sagdalen and Carlin after the court denied his motion to remove them for cause. However, "[a]ny claim that the jury was not impartial . . . must focus not on [Sagdalen or Carlin], but on the jurors who ultimately sat." *Ross v. Oklahoma,* 487 U.S. 81, 86 (1988). In *Ross,* the court "reject[ed] the notion that the loss of a peremptory

challenge constitutes a violation of the constitutional right to an impartial jury." *Ross,* 487 U.S. at 88. Indeed, peremptory challenges exist "to cure erroneous refusals by the trial court to excuse jurors for cause." *Ross,* 487 U.S. at 90. Since Piper has not shown that "an incompetent juror [wa]s forced upon him" by his use of peremptories to remove Sagdalen and Carlin, he has not demonstrated any violation of his constitutional right to an impartial jury.

Piper further argues that the trial court improperly removed Juror Monteforte for cause over his religious scruples against the death penalty. It is true that prosecutors may not strike jurors simply for expressing conscientious or religious scruples against capital punishment or who oppose it in principle. *State v. Rhines,* 1996 SD 55, ¶41, 548 N.W.2d 415, 430. A prospective juror may be excused only if his views on capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Rhines,* 1996 SD 55 at ¶41, 548 N.W.2d at 430, quoting *Wainwright v. Witt,* 469 U.S. 412, 424 (1985). Thus, it is appropriate to excuse a juror for conscientious objection to the death penalty if "the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." *Rhines,* 1996 SD 55 at ¶51, 548 N.W.2d at 432 quoting *Wainwright,* 469 U.S. at 426.

For example, in *Uttecht v. Brown,* 551 U.S. 1 (2007), the trial court struck a juror whose "ambiguous" and "equivocal" responses to questions about whether he could impose a death sentence over his personal opposition to capital punishment called his ability to impartially perform his duties as a juror into question. *Uttecht,* 551 U.S. at 7. In affirming, the *Uttecht* court stated that a juror may be properly stricken "even in the absence of clear statements from the juror that he or she is impaired." *Uttecht,* 551 U.S. at 7. Despite the juror's "assurances that he would consider imposing the death penalty and would follow the law," the trial judge drew a "reasonable inference from his other statements that in fact he would be substantially impaired" in his ability to function as a juror in a capital case. *Uttecht,* 551 U.S. at 18.

The *voir dire* of Monteforte reveals that his conscientious objection either to the death penalty, or to being tasked with such life-or-death decision making (or both), rendered him unable or unwilling to faithfully and impartially apply the law. Monteforte, who is a practicing Catholic, stated he does not believe in the death penalty and felt "conflicted" about being involved in the case. *VOIR DIRE* at 2094/22, 2095/22, 2105/11, Appendix 112. Despite assurances that he would follow the judge's instructions and would be capable of returning a sentence of either life or death, Monteforte was "uncomfortable" being in the position of "hold[ing] someone's fate in my hands." *VOIR DIRE* at 2098/23, Appendix 112. Monteforte said he "d[id not] see how" justice or any purpose was served

by the death penalty." *VOIR DIRE* at 2106/7-23, 2110/3, Appendix 112. Monteforte questioned whether he could dispense with his beliefs even after he had "all the facts." *VOIR DIRE* at 2107/25, Appendix 112. Moneteforte agreed that he could not "judge impartially the appropriateness of the death sentence when [he had] already avowed that it serves no purpose." *VOIR DIRE* at 2108/6, Appendix 112. When asked if his "belief seriously impair[ed his] ability to consider the option in this case of the death sentence as the appropriate punishment for this murder," Monteforte said "it would." *VOIR DIRE* at 2110/15, Appendix 112. Monteforte said "I just don't think an eye for an eye is the way to go for this." *VOIR DIRE* at 2110/21, Appendix 112.

By *Uttecht's* standards, Monteforte was properly excluded for cause. Monteforte expressed stronger and more candid reservations against sitting in judgment of a capital defendant than did the juror in *Uttecht.* Even assuming Monteforte was open to *considering* the death penalty against his principles, his *voir dire* answers certainly reflect an attitude toward the death penalty that would have substantially impaired his ability to fairly and impartially determine the penalty. *Uttecht,* 551 U.S. at 7, 18; *Witherspoon v. Illinois,* 391 U.S. 510, 522 n. 21 (1968). There were no "objectionable" questions asked by the prosecution during *voir dire* and no magic spell for rehabilitating Monteforte that defense counsel "sat back" and failed to cast. The trial court's exclusion of

Monteforte for cause was appropriate under *Wainwright, Witherspoon, Uttecht* and *Rhines* no matter what Piper's counsel did or did not do.

c. No Ineffective Witness Investigations

Piper argues he received ineffective assistance from his trial counsel because they failed to investigate or adequately prepare to cross-examine certain witnesses, namely penitentiary personnel, the state's experts (Drs. Pesce and Franks), Piper's cellmate (Tom Curtis) and Sister Gabrielle Crowley, a nun who regularly visited Piper on death row. Piper also claims that the state impaired his investigation of penitentiary personnel and Curtis in violation of his due process right to a fair trial. Piper is grasping at straws.

"Standing alone, the fact that defense counsel failed to investigate a witness does not by itself satisfy the prejudice prong of *Strickland*." *Siers v. Class*, 1998 SD 77, ¶25, 581 N.W.2d 491, 497. "To establish prejudice . . . a petitioner must show that the witness would have testified and that their testimony would have *probably* changed the outcome of the trial." *Siers*, 1998 SD 77 at ¶25, 581 N.W.2d at 497 (emphasis original).

i. Piper's Counsels' Investigation Of Penitentiary Witnesses Was Not Ineffective

According to Piper, his counsel failed to personally interview penitentiary witnesses, or have an investigator do so, prior to trial. Piper claims his counsel were not adequately prepared to impeach the witnesses as a result. Piper also claims that the state impaired his

counsels' investigation by not providing more detailed contact information for the penitentiary witnesses.

As with most of Piper' claims, the "due process" component could have been brought on direct appeal if he believed the issue was meritorious. As discussed above, Piper's appellate counsel abandoned these lesser claims because he believed that only the plea claim was sufficiently meritorious. Piper's due process claim is thus barred by *res judicata.*[5]

The ineffectiveness component of Piper's claim alleges that his attorneys were unprepared to impeach penitentiary witnesses with allegedly "laudatory" comments that they made to counsel over the phone or to otherwise effectively cross-examine them. However, "[t]his is not a case where 'counsel failed to make *any* investigation whatsoever' resulting in a 'total abdication of duty.'" *Fretwell v. Norris*, 133 F.3d 621, 627 (8th Cir. 1998)(emphasis in original). Rather, Piper's counsel attempted to contact the penitentiary witnesses, and spoke with some of them, prior to trial. SENTENCING VI at 946/5-12, 949/21-23, 950/18-20, 976/7-16, 1010/9-14. Piper cannot blame the state for the fact that

[5] The record reflects that appellate counsel correctly evaluated Piper's due process claim as lacking in merit. The state did not prohibit Piper from cross-examining the witnesses on any mater related to any witness' residency or reputation. *Smith v. Illinois*, 390 U.S. 129, 131 (1968)(due process violated only if defendant prohibited from asking witness his name and where he lives). Also, the state provided more than just "penitentiary" for contact information, including e-mail addresses and telephone numbers. Piper's counsel attempted to contact the witnesses, some of whom responded and some did not. HTC16 at 70/4, 70/23.

some witnesses did not return Piper's counsels' calls or e-mails. HCT16 at 70/4, 70/23, Appendix 053; *United States v. Cheatham*, 899 F.2d 747, 753 (8th Cir. 1990)("No constitutional violation occurs when a witness chooses of her own volition not to be interviewed by the defense"); *Ward v. Whitley*, 21 F.3d 1355, 1362 (5th Cir. 1994)(failure to interview potential witnesses was reasonable where witnesses were uncooperative in past efforts to elicit information).

Other than wanly suggesting that personal interviews by counsel or an investigator could have yielded amunition for more effective cross-examination, Piper has failed to identify how his counsels' performance was deficient. While Stonefield lamented that he "hadn't talked to all of the prison workers," he did not identify who they should have interviewed but did not. HCT16 at 73/13, 159/19, Appendix 053 (referring vaguely to an inability to confront "those people"). Such vague and conclusory ineffectiveness claims, unsupported by specific facts or evidence, do not supply the requisite proof of deficient performance. *Spillers v. Lockhart*, 802 F.2d 1007, 1010 (8th Cir. 1986).

Nor has Piper identified what beneficial testimony further investigation by his counsel or an investigator would have produced or what effect the testimony could have had on the outcome of his trial. *Armstrong v. Kemna*, 534 F.3d 857, 868 (8th Cir. 2008). "[A] habeas court cannot even begin to apply *Strickland*'s standards to . . . a claim [that certain testimony should have been presented] unless and until the

petitioner makes a 'specific, affirmative showing as to what the missing evidence or testimony would have been.'" *United States ex rel. Partee v. Lane*, 926 F.2d 694, 701 (7th Cir. 1991). Without such a showing, "it is . . . nearly impossible to determine whether [Piper] was prejudiced by any [alleged] deficiencies in counsel's performance." *Armstrong*, 534 F.3d at 868. Thus, Piper has not shown that evidence that could have been produced by further investigation of the penitentiary witnesses "would have *probably* changed the outcome of the trial." *Hirning v. Dooley*, 2004 SD 52, ¶ 14, 679 N.W.2d 771, 776 (emphasis original.)

Because Piper has not shown either deficient performance by counsel or that he was prejudiced by such performance, his ineffective assistance of counsel claim regarding the investigation of penitentiary witnesses fails.

ii. Piper's Counsels' Cross Examination Of Two State Expert Witnesses Was Not Ineffective

Piper claims his counsel failed to adequately prepare for the testimony and cross-examination of two of the state's expert witnesses, Dr. Ulises Pesce and Dr. Ronald Franks.

Dr. Pesce is a psychiatrist who held 13 treatment sessions with Piper at the penitentiary. SENTENCING III at 491/7-8, 494/4-20. Dr. Pesce testified regarding his credentials as a psychiatrist, his sessions with Piper, and the medications he prescribed to Piper.

Piper claims that Dr. Pesce was disclosed "fairly late" as a witness for resentencing and that his trial counsel only had nine days to prepare

for his testimony. Piper also claims that his counsel were never provided Dr. Pesce's records or *curriculum vitae* (CV) or any other information about Dr. Pesce.

In reality, the record reveals that Piper had far longer than nine days to prepare for Dr. Pesce's testimony. The state provided the defense with copies of Dr. Pesce's session notes in May of 2011, two months prior to the start of the resentencing trial. SENTENCING III at 446/10-13, 468/4-5. Piper's counsel conceded during his *habeas corpus* testimony that he "didn't feel like [the state was] hiding discovery at all." HCT16 at 93/12, Appendix 053; SENTENCING III at 477/16-25.

Solicitous of the defense's objections (however unfounded), the court limited Dr. Pesce's testimony to "what can fairly be gleaned from [his] reports themselves." SENTENCING III at 487/19-23, 488/11-13, 490/4-7. Dr. Pesce's resulting testimony was nothing but a recounting of the notes of his sessions with Piper. SENTENCING III at 446/10-13, 468/4-5, 487/19-23.

Piper's proper recourse for the "erroneous" admission of Dr. Pesce's testimony was to challenge the court's evidentiary ruling on direct appeal. As discussed above, Piper did not allege due process or evidentiary errors on appeal for the strategic purpose of focusing his appeal on his plea claim. HCT16 at 217/9-15, 218/15-24, 219/17,

Appendix 053. Consequently, his complaint in regard to the admission of Dr. Pesce's testimony is barred by *res judicata.*[6]

And, as with his other claims, Piper attempts to overcome the *res judicata* bar on his Dr. Pesce claim by reframing it as an ineffective "failure" to interview or depose Dr. Pesce prior to trial.

Contrary to Piper's allegation, attorney Van Norman did make several attempts to contact and interview Dr. Pesce but was unable to do so because Dr. Pesce was unavailable (to both the state and the defense) for approximately one month prior to trial because he was visiting family. SENTENCING III at 446/18-19, 477/7-11. Piper's counsel could not conduct a discovery deposition of Dr. Pesce because depositions are only permitted in criminal proceedings when "exceptional circumstances" require a witness' testimony to be "preserved for use at trial." SDCL 23A-12-1. No exceptional circumstances warranted a deposition because Dr. Pesce was available to testify at trial.

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[6] Piper's assertion that his counsel failed to make an adequate record to appeal the admission of Dr. Pesce's testimony does not overcome *res judicata*. A timely objection is all that is necessary to preserve an issue for appeal. *United States v. Young*, 470 U.S. 1, 13 (1985). Attorney Van Norman objected to Dr. Pesce's testimony throughout the proceedings as well as immediately prior to his testimony. SENTENCING III at 487/19-23, 490/4-7. These objections were sufficient for purposes of preserving the issue for appeal. *State v. Danielson*, 2012 SD 36, ¶ 28, 814 N.W.2d 401, 410 ("Generally, parties must object to specific court action and state the reason underlying their objection so that the circuit court has an opportunity to correct any error"). Even assuming Piper's counsel "failed" to preserve the issue for appeal, Piper has not demonstrated that the outcome of his appeal would have been different had the issue been "properly preserved."

Despite unsuccessful efforts to contact and interview Dr. Pesce prior to trial, Piper's counsel was able to question Dr. Pesce before he testified during a hearing on Piper's objection held outside the presence of the jury. SENTENCING III at 448-487. Thus, "[t]his is not a case where 'counsel failed to make *any* investigation whatsoever' resulting in a 'total abdication of duty.'" *Fretwell*, 133 F.3d at 627.

Again, Piper does not identify specific evidence or impeachment that would have been discovered through further contacts with Dr. Pesce, or how it would have changed the outcome of the trial. Given that Piper's counsel succeeded in limiting Dr. Pesce's trial testimony to the content of session notes that had been provided to them well in advance of trial, Piper has failed to demonstrate either deficient performance or prejudice sufficient for *Strickland* relief. SENTENCING III at 446/10-13, 468/4-5; *McCleskey v. Kemp*, 753 F.2d 877, 900 (11th Cir. 1985).

With regard to Dr. Franks, the state had initially identified him as a rebuttal expert. SENTENCING IV at 599/2-7, 601/4-16. Defense counsel informed the state that the expert witness whom Dr. Franks had been retained to rebut, would not testify until July 27, 2011. SENTENICNG IV at 601/17-19. But since Dr. Franks was scheduled to have surgery on July 28, 2011, in Alabama, the state was instead compelled to call Dr. Franks in its case in chief. SENTENCING IV at 601/15-22. In light of the changed timing of Dr. Franks' testimony,

Piper's counsel elected to conduct an interview of Dr. Franks before he testified. SENTENCING IV at 601/24-25.

Piper now faults his counsel for "wing[ing]" the cross-examination of Dr. Franks rather than objecting to its admission. These allegations are conclusory on several levels: Piper (1) does not identify the basis for a viable objection; (2) does not identify how the court abused its discretion in accommodating Dr. Franks' surgery schedule; and (3) does not identify how his counsel's interview of Dr. Franks resulted in a deficient cross-examination. Conclusory allegations of this nature are insufficient to meet *Strickland* standards. *Spillers*, 802 F.2d at 1010; *Bounds v. Delo*, 151 F.3d 1116, 1119 (8th Cir. 1998); *Landry v. Lynaugh*, 844 F.2d 1117, 1120 (5th Cir. 1988).

Piper claims that the combined errors of allowing Dr. Pesce and Dr. Franks to testify resulted in an unfair trial. However, two invalid claims cannot be combined to create a showing of prejudice to satisfy *Strickland*. *Hall v. Luebbers*, 296 F.3d 685, 692 (8th Cir. 2002)("a habeas petitioner cannot build a showing of prejudice on a series of errors, none of which would by itself meet the prejudice test"). "[E]ach habeas claim must stand or fall on its own." *Scott v. Jones*, 915 F.2d 1188, 1191 (8th Cir. 1990).

Piper has failed to demonstrate the kind of "gross incompetence" of his counsel's handling of Drs. Pesce and Franks necessary to secure *habeas corpus* relief. *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986).

iii. No Due Process Error Or Ineffective Assistance Of Counsel In Connection With The Testimony Of Tom Curtis

In regard to witness Tom Curtis, Piper argues that the state violated his right to due process by not providing defense counsel with Curtis' updated criminal history or any recent cooperation agreements to use as impeachment.

Tom Curtis was Piper's cellmate in the Lawrence County Jail while Piper awaited trial on the charge of murdering Poage. According to Curtis, Piper was "a pretty noisy, big-mouth cellmate" who "made a number of admissions in his presence." HCT16 at 45/21, Appendix 053.

Piper tried to enlist Curtis in an escape plot to kill two guards on a trip to the jail library and take their keys. SENTENCING VII at 1076/19, 1087/8-1088/24. Piper's plan called for Curtis to kill a male guard while Piper planned to kill a female guard either by strangling her from behind or stabbing a pencil into her throat. SENTENCING IV at 615/20.

Piper now claims the state violated his right to due process by not providing his attorneys with Curtis' updated criminal history for use as impeachment. The due process component of Piper's Curtis claim is waived because he did not raise it on direct appeal.[7] *Hoxsie*, 1997 S.D. 119, ¶ 14, 570 N.W.2d at 382.

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[7] There is no doubt that the *Brady* rule requires the disclosure of impeachment evidence in the prosecutor's possession that would assist the defense in cross-examining an adverse witness. SDCL 19-19-609; *Thompson v. Weber*, 2013 SD 87, ¶ 38, 841 N.W.2d 3, 12; *Brady v. Maryland*, 373 U.S. 83, 87 (1963). But Piper has presented no evidence

Again, Piper attempts to circumvent *res judicata* by claiming an ineffective "failure" of his counsel to adequately investigate whether Curtis' testimony was influenced by any cooperation agreement.

The most obvious flaw in Piper's logic is that Curtis' testimony at his resentencing in 2011 was exactly the same as his testimony at his initial sentencing in 2001. HCT16 at 95/14, Appendix 053. When Curtis' earlier and later testimony is identical, it cannot be said that intervening events in Utah influenced him to assist the government. Under the circumstances, there is nothing to "impeach" with evidence of intervening events.

Nor has Piper identified impeaching evidence of convictions or a cooperation agreement that his counsel failed to discover. *Lane*, 926 F.2d at 701; *Armstrong*, 534 F.3d at 868. Piper merely speculates that Curtis had convictions in Utah beyond those that were known by his counsel and used as impeachment. HCT16 at 50/22, 52/23, 101/24, Appendix 053; COL at ¶ 47. The existence of a cooperation agreement with Utah authorities is equally speculative. HCT16 at 51/23, Appendix

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to establish that the state suppressed Curtis' "updated" criminal records, or that "updated" records contained impeachment material. HCT16 at 51/15, Appendix 053. Piper's counsel conceded that he "didn't feel like [the state was] hiding discovery at all" and produced no documentation that Curtis had been convicted of a rape charge. HCT16 at 93/11, Appendix 053. Piper's counsel also acknowledged that the state had provided Curtis' South Dakota "rap sheet." HCT16 at 94/23, Appendix 053. Consequently, it cannot be said that any "due process" error occurred, namely that the state possessed something impeaching that it failed to disclose and that the outcome of Piper's sentencing was changed as a result. *Miller*, 2018 SD 33 at ¶ 25, — N.W.2d at —; *Thompson*, 2013 SD 87, ¶ 42, 841 N.W.2d at 13.

053. Curtis testified that he received nothing but his previously-disclosed South Dakota plea deal, and "[n]othing whatsoever" from Utah, in consideration for his resentencing testimony. SENTENCING IV at 609/15-611/6, 635/2-5; HCT16 at 102/21, Appendix 053. Piper's counsel concede that they have no evidence of a cooperation agreement with Utah authorities. HCT16 at 52/3, 216/23, Appendix 053.

Under the circumstance, it can hardly be said that Piper's counsels' performance was objectively deficient or that Piper was prejudiced. *Miller*, 2018 SD 33 at ¶ 25, — N.W.2d —. Piper does not identify what useful evidence would have been found or how the outcome of his resentencing probably would have been different if only his counsel had dug deeper. *Lane*, 926 F.2d at 701; *Armstrong*, 534 F.3d at 868. Consequently, Piper has failed to make the requisite showings of deficient performance and prejudice necessary to obtain *Strickland* relief. *Strickland*, 466 U.S. at 697.

iv. No Due Process Error Or Ineffective Assistance Of Counsel In Connection With The Testimony Of Sister Gabrielle Crowley

Piper called Sister Gabrielle Crowley to testify to Piper's alleged intellectual and spiritual growth while in prison. SENTENCING IX at 1676-1685. The mitigating impact of this testimony was blunted on cross-examination when Crowley admitted that Piper had persuaded her to write and deliver a letter to a female inmate in another facility in violation of a penitentiary policy against "prisoner-to-prisoner

communication." HCT16 at 145/14, 165/18, Appendix 053. It turns out, Piper's ostensible "spiritual growth" was just his method of manipulating a nun to convey a proscribed communication. SENTENCING IX at 1688/1.

Piper complains that the state's cross-examination of Sister Crowley violated his due process rights because there was no foundation for her testimony that her facilitation of a prisoner-to-prisoner communication violated penitentiary rules. SENTENCING IX 1686/2-17, 1687/7-16, 1688/6-9.

Once again, the "due process" component of Piper's Sister Crowley claim is barred by *res judicata* because challenges to a trial court's evidentiary rulings, if not brought on direct appeal, are waived. *Hoxsie*, 1997 SD 119, ¶ 14, 570 N.W.2d at 382; *Crutchfield*, 2005 SD 62, ¶ 8, 697 N.W.2d at 759. And, again, Piper reframes his due process challenge as an ineffectiveness claim in an effort to circumvent his own waiver.

First, there is no basis for Piper's allegation that Sister Crowley's testimony lacked foundation. Sister Crowley testified that, as a result of training that she attended at the penitentiary in order to volunteer as a spiritual counselor to inmates, she learned of restrictions against prisoner-to-prisoner communications. SENTENCING IX at 1685/19-1686/7. Indeed, the letter that Sister Crowley wrote and sent to the other inmate explains that she is writing on Piper's behalf because he is not allowed communicate with another inmate. SENTENCING IX at

1688/9. Also, veteran Correctional Officer Keith Ditmanson testified that inmates are not allowed to communicate with other inmates through third parties. SENTENCING VI at 1008/8-12. The foundation for the rule violation was more than adequately established in the record before Sister Crowley testified.

To circumvent the *res judicata* bar, Piper reframes the issue as ineffective "failure" of his counsel to investigate and verify the existence of the subject policy and object to questions about the policy to preserve the issue for appeal. Piper has presented no evidence that the written policy in effect at the time would have either contradicted Sister Crowley's or Ditmanson's testimony or provided a sound basis for a foundational objection. Nor has Piper shown that introduction of the written policy in effect at the time would probably have altered the outcome of his resentencing. *Hirning*, 2004 SD 52 at ¶ 14, 679 N.W.2d at 776; *Bounds*, 151 F.3d at 1119.

On the contrary, Piper himself, when permitted to ask questions of a witness at his resentencing, admitted that "clearly inmates writing to one another is a violation and is not allowed." HCT16 at 165/18, Appendix 053. Obviously, Piper's counsel were not ineffective for failing to obtain a written copy of a policy just to verify that it says exactly what Sister Crowley, Ditmanson and Piper himself say it says.

d. No Unknowing Or Involuntary Plea

Piper's attack on the alleged involuntariness of his plea is addressed *supra.*

e. No "Failure" To Preserve Prison Privileges Issue For Appeal

Piper claims ineffective assistance of appellate counsel for not appealing the denial of a motion for mistrial. The motion resulted from a prosecutorial question about access to television that broached the limits of an order in *limine* excluding evidence or argument regarding privileges available to inmates serving life sentences. SENTENCING III at 558/1-559/23. Piper asserts that attorney Miller was ineffective for failing to raise the denial of the mistrial motion on direct appeal.

As discussed *ad nauseum* herein, Miller's strategic decision to ride his strongest horse into the appeal arena – the plea issue – was hardly ineffective. HCT16 at 217/9-15, 218/15-24, 219/17, Appendix 053. Nor can Piper demonstrate prejudice from Miller's chosen strategy. "Prejudicial error must be shown for a trial court to grant a motion for a mistrial." *State v. Fool Bull*, 2009 SD 36, ¶ 34, 766 N.W.2d 159, 167. For error to be prejudicial it must "in all probability . . . produce some effect upon the final result and affected rights of the party assigning it." *Fool Bull*, 2009 SD 36 at ¶ 34, 766 N.W.2d at 167. In the *habeas corpus* context, prejudice requires proof of a "reasonable probability that an appeal of this issue would have been successful and that the result of the appeal would thereby have been different." *Pryor*, 103 F.3d at 714.

Here, it cannot be credibly argued that the fleeting reference to television privileges would have changed the outcome of Piper's resentencing trial or his direct appeal. First, the "brief" reference to the potential television privileges available to lifers hardly outweighed the mountain of egregious aggravating evidence. Second, the effect of the reference was undoubtedly nil given that jurors are already generally aware that inmates serving life sentences are not housed in lockdown 24/7, deprived of the ordinary pastimes of life like socializing with other inmates, TV, radio, family visits and hobbies. Indeed, it may be the very essence of the "moral choice" between life and death that the jury was tasked to make whether Piper deserved any amenities of ordinary prison life after the crime he committed. *Simmons v. South Carolina,* 512 U.S. 154, 172 (1994); *Rhines,* 1996 SD 55 at ¶ 175, 548 N.W.2d at 454.

Given that "[p]rison life [i]s an appropriate topic of discussion when weighing the alternatives of life imprisonment and the death penalty," the trial court did not abuse its discretion in finding no prejudicial error in a "brief" reference to television privileges, particularly when the evidence of several aggravating factors was (in Piper's counsel's own words) "overwhelming." *Rhines,* 1996 SD 55 at ¶ 175, 548 N.W.2d at 454; SENTENCING III at 559/11-18; HCT07 II at 35/8, Appendix 035.

CONCLUSION

Piper wants to withdraw his guilty plea because he wants the delay that would come with a new trial and a third sentencing – not because he

is actually innocent, and not because he stands any chance of acquittal. According to *Bailey,* a new-found desire for a trial is not grounds to withdraw a guilty plea. Where, as here, guilt is beyond question, "the occasion for setting aside a guilty plea . . . seldom arise[s]." *Buck,* 661 F.3d at 371.

Piper's counsels' advice to plead guilty was objectively reasonable given the "overwhelming" evidence of Piper's guilt. Pleading guilty in the hope of appearing remorseful was the only card Piper had to play. HCT07 I at 124/1, Appendix 001. The fact that his cold-blooded demeanor and obvious insincerity tripped up his long-shot gamble for leniency is not grounds to grant Piper a reprieve from his guilty plea.

Nor did Piper's counsels' advice cause him prejudice. The record does not reflect that the sentencing misadvice caused Piper to plead guilty. Piper and his counsel based the decision to plead guilty on a strategy decision that was not driven by mathematical odds (or a misapprehension thereof), but by their belief that the horror and emotion of the case would play worse with a lay jury than with a dispassionate judge.

Given the opportunity, Briley Wayne Piper will kill again – a guard, a medical care provider, a counselor. Piper must serve his death sentence both for the sake of justice for Allan Poage and for the sake of protecting Piper's future victims. Piper's death sentence comports with statutory mandates and also serves society's interests in justice,

deterrence, and carrying out its ultimate punishment with dignity. Accordingly, this court may, in good conscience, affirm Piper's just and due death sentence.

Dated this 8th day of June 2018.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that appellee's brief is within the 100-page limitation set by the court's February 9, 2018, order and in compliance with the typeface and volume limitations provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in proportional 12-point type. The word processing software used to prepare this brief is Microsoft Word 2010.

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Assistant Attorney General

CERTIFICATE OF SERVICE

Undersigned counsel certifies that on this 8th day of June 2018 a true and correct copy of the foregoing brief was served by United States Mail, first class, postage prepaid, on Ryan Kolbeck at Kolbeck Law Office, 505 W. 9th Street, Suite 203, Sioux Falls, SD 57104.

Paul S. Swedlund
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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 28153

BRILEY WAYNE PIPER,

Petitioner and Appellant,

v.

DARIN YOUNG, Warden, South Dakota State Penitentiary

Respondent and Appellee.

APPEAL FROM THE CIRCUIT COURT
4th JUDICIAL CIRCUIT
LAWRENCE COUNTY, SOUTH DAKOTA

THE HONORABLE RANDALL L. MACY
Circuit Court Judge

RESPONDENT'S APPENDIX

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Notice of Appeal Filed February 27, 2017

APPENDIX

HCT07 I Transcript Excerpts	001
HCT07 II Transcript Excerpts	035
HCT16 Transcript Excerpts	053
Amended Motion to Withdraw Guilty Plea	093
Order Dismissing Appeal of Motion To Withdraw Guilty Plea	105
Page Sentencing Transcript Excerpt	106
Piper *Voir Dire* Transcript Excerpt	112

STATE OF SOUTH DAKOTA)
: IN CIRCUIT COURT
COUNTY OF LAWRENCE) FOURTH JUDICIAL CIRCUIT

****

BRILEY PIPER,

Petitioner,

vs.

DOUGLAS WEBER, Warden, South Dakota State Penitentiary,

Respondent.

CIV.06-222
HABEAS CORPUS HEARING
(Vol. 1 of 2)

****

BEFORE: THE HONORABLE JOHN W. BASTIAN, Circuit Court Judge at the courthouse in Deadwood, Lawrence County, South Dakota on the 17th day of April, 2007.

****

APPEARANCES:

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regard to those issue that are at issue today.
A Yes, your Honor.
Q (BY MR. MILLER) I don't know or have a recollection of what the last question was, but just starting with a new one, at some point during your representation, then, between July of 2000 and the change of plea in early January of 2001, did you have discussions with Briley Piper about what procedural options were available to him?
A Yes.
Q What advise did you give him?
What options did you tell him about, to rephrase it?
A First option that I explained to him was that he had a right to a jury trial on the charges and that related to the murder count where death was a possible penalty; if he was convicted at trial, he had the right to go on to a sentencing jury trial where a jury would decide whether he should get life or death.
Q Were there any other options you told him about?
A Yes, I also explained to him a number of times during this period that you're talking about that if he were to plead guilty to the charge, plead guilty to the charge of murder, that he would then be waiving his right to a sentencing jury trial; he would be sentenced by a judge.
Q And were there any other options you told him about?
A No.

Q So for everyone's reference, I'm going to refer to these two options as A and B.

My understanding is that then you told him he had options A or B at that point?

A Correct.

Q Now, what choice, what was the actual decision, the thing that Mr. Piper would have to do with regard to these two options?

In other words, was it--Did it relate to decisions he had to make, things he had to do in open court relating to the guilt phase or the sentencing phase?

A Well, the choice he had to make was, first of all, whether or not he wanted to plead guilty to the charges.

If he didn't want to plead guilty to the charges, then he had a right to a jury trial.

If he plead guilty to the charges, I explained to him that he would waive his right to a jury trial on both guilt and the sentencing.

Q Was that your--Was that advise given to him based on your understanding of the South Dakota capital punishment statute?

A Yes.

Q Just to make sure that I understand that, I want you to tell me, the options of A and B that you told Mr. Piper about, for both of those, the effect of his decision on the

guilt phase carries, under operation of law, the consequences of a death penalty, correct?

A Correct.

Q So the penalty phase effect of either A or B were mandatory by operation of law in your opinion?

A Yes.

Q And is that what you told Mr. Piper?

A Yes.

Q Did you ever--Now, I'm going to offer option C here and option C would be that a criminal defendant would have the right to plead guilty to criminal charges and still have the right to a jury sentencing on the penalty phase and I'm calling that option C.

Did you ever tell Mr. Piper prior to his entry of a plea that he had option C?

A No.

Q Did you tell him that he didn't have option C?

A No.

Q So based on what you told him, if that's all he knew, it was where this came from, your mouth to him, would he have any reason to know about option C prior to appearing in court?

MR. FITZGERALD: Objection, calls for speculation about what was in someone else's mind.

COURT: Overruled.

A No.
Q (BY MR. MILLER) No, meaning he would have no reason to know that?
A Correct.
Q Also, at some point during your representation, did Mr. Piper indicate to you that he had decided to enter a guilty plea to the charges?
A Yes.
Q And did you represent him in doing that?
A I did.
Q How long were those discussions about the possibility of pleading guilty to the charges between you and Mr. Piper?
A Well, from the onset of representation, I explained the process, explained the effects of someone pleading guilty to the charges and I would say, seriously, before the entry of a plea occurring on January 3, 2001, that those discussions would have taken place in November, December, 2000 up through the time of the plea.
Q By the way, your office is in Rapid City, correct?
A Yes.
Q Where was Mr. Piper being held at the time?
A In Deadwood.
Q Okay. So to speak with him you would have to drive to Deadwood or would you do it over the phone or--

penalty statute and that only option A and B were legally available, had that changed in any way from the time that you advised your client, Mr. Piper, that those were his options until the time the sentencing hearing began?

A No.

Q Had you ever advised Mr. Piper at any time between the time that you first told him about options A and B and the start of the sentencing hearing on January 17 that there was an additional option here?

A Not that I can recall.

Q Following the sentence of death and the entry of a judgment, a notice of appeal was filed with this case on Mr. Piper's behalf by either yourself or Mr. Duffy, is that correct?

A Correct.

Q And briefing ensued at that point, is that right?

A Correct, yes.

Q And I don't expect you to know the exact date, was the argument held, oral arguments held before the South Dakota Supreme Court on the first set of briefs in March, 2002 at the law school in Vermillion?

A I don't remember if that was the time, I'm assuming so, I don't know the time.

It was at the law school, though.

Q So it is true, then, so March 17th was at the law school?

had done my work in advance and given it to him and he responded to other issues, so I'm not sure that I did see that before it went out.

Q Okay.

A I may have, but I don't know.

I didn't sign it, but I know that I saw the portion that I wrote which dealt with the Toby Givens issue.

Q Okay. A signature appears over your signature line, which would be on the final page of exhibit 22.

A I see that and it's Pat Duffy's signature.

Q Did you authorize him to sign your name to that brief?

A Sure.

Q Okay. And so at least you would agree that that is considered your work as well?

A No objection to that, I agree.

Q Please take a look at, well, I'll give you a little bit of time here, exhibit 9--Pardon me, exhibit 8, 10 and 12.

A Okay.

Q Are those three separate requests on Briley Piper's behalf to extend the brief deadline for the reply brief?

A Yes.

Q Please take a look at exhibits 9, 11 and 13--Maybe they're mixed up.

A I've got 9, I've got 11 and I've got 13.

Q And are those three different Supreme Court orders which

A Correct.
Q Was that consistent with what you had told Mr. Piper throughout your representation?
A Yes.
Q Was that consistent with what you had explained to Judge Johnson at the beginning of the plea change hearing?
A Yes.
Q Did you officially ever take a position inconsistent with that one, that the only options were A and B?
A Not that I know of.
Q Did the Supreme Court opinion, issued in January of 2006 recognize that there was an option C?
A Yes.
Q Is that the first time option C had been recognized unless it was recognized by what Judge Johnson did in the transcript of the change of plea and of the sentencing?
A Yes.
Q So as I understand what our Supreme Court did, they held that option C can be read into our death penalty statute.
A Yes, they did.
Q And they held that that can be done without curative legislation?
A Yes.
Q They were doing it themselves or recognizing that in their view it was true before, one or the other?

talked to my client about, things of that nature.
Q Are you saying that it might lead the state to discover a potential strategy that you had in this case?
A It could be used to do that, yes.
Q Because by examination of what you spent your time on, then one might conclude what type of strategy you were going to take?
A Correct.
Q Do you have any objection, as his defense counsel, at this point in time, to having the matter unsealed so I could take a look at what the contents of that are?
MR. MILLER: Yes, I do have an objection to that.
In the first place, that would be a matter for Judge Johnson to decide; he's the one that sealed it.
And in the second place, there are good reasons for it remaining sealed in light of the limited nature of the attorney-client privilege waiver at this point.
The danger that lead to the sealing in the first place still exists today.
MR. FITZGERALD: Well, I strenuously disagree with that.
Mr. Piper plead guilty, has been sentenced, the case was appealed to the South Dakota Supreme Court and now we are into another proceeding, but it was sealed for trial strategy and that's no longer an issue, it basically does not apply today and that's my point.

plead guilty and I think that those discussions are properly before the court.

MR. MILLER: So my objection is overruled?

COURT: It is.

Go ahead, Mr. Fitzgerald.

Q (BY MR. FITZGERALD) Do you recall the question?

A I do; we started talking about the possibility of pleading guilty simply because the facts were very bad for Briley.

Q What do you mean by that?

A Well, the things that he said, the things other people indicated he said, remarks other people had heard, but even just getting down to the things Briley himself had said and looking at how terrible, terrible the whole fact pattern was, even Briley's words, and what the worry was is that we would have this case go before a jury, the question of guilt would be a really empty one for me and the things a jury would hear, listen to him and decide that he was lying about all of this and becoming angry and wanting to impose the death penalty.

And I think the worry was that if we had this case end up in front of a jury, a jury would be more likely to put him to death and so we started discussing it as to what his options were in something like that.

And what we kind of arrived at early on and not really,

you know, not really making a decision in November, but what we were thinking is that a judge would be more able to view the fact pattern in the context of Briley Piper's life, the context of his age, the context of his past and the context of other people who committed worse crimes in South Dakota and received less than the death penalty.

And so the thinking was, as it turned out, you know, as we're starting to talk about it, this is in December of 2000 and then we started discussing it with Briley.

The thinking was that the last thing we wanted was a jury to decide the death penalty issue because we didn't feel that they would be able to view things in a measured, calm way that we thought a judge would be able to do those things.

And there were certain issues here, certain things about this case that to a lay person sitting on a jury who's less qualified, mind you, that would really go against Briley, you know, the concept of homosexuality coming up; the concept of the torture with the acid; the concept of how long everything took; the concept of the way it was reported to people, how they were laughing; all kinds of--Well, they thought it was funny--

MR. MILLER: Object as to the narrative at this point--

Q (BY MR. FITZGERALD) I'll ask my next question.

Mr. Rensch, would you list for us those things that were

thought of as far as strategic reasons for having this sentencing carried out before a circuit judge rather than a jury that you were concerned about.

A Well, I think if it came down to the reasons, there were many reasons, there were many reasons to have a judge do it.

But if you look at the closing arguments that we made to Judge Johnson at the time of sentencing, by having a judge decide this, you first of all have a person whose seen many cases of this type and from that standpoint, would be able to compare this case with the others that he's seen and would be less likely to suffer a significant reaction as opposed to a lay person who has been qualified as a juror who has not had the benefit of the years of experience that Judge Johnson had, deciding how horrible these things are and just using that against Briley.

In addition to that, Judge Johnson was in a position where he had sentenced people to life.

He, himself, I know was a prosecutor on a case in Lawrence County that involved a possible serial killer, involved a number of victims and he, himself, had been on trials that were very graphic, very bloody, very horrific, dealing with people who were much older, dealing with people who had much worse records than Briley Piper had.

So I think one of the reasons was that we would stand in front of a judge and try to bring some measured calm, cool

reasoning rather than continuing this highly emotional fashion that we were worried would just take Briley Piper out.

In addition to that, in front of Judge Johnson we were able to point out other cases where people had killed more than one person, where they had tortured people and they received life, and other cases, too, where people had gotten life and so what happened was is the decision came down to hopefully Judge Johnson would be able to recognize that Briley Piper was a young man, no prior felony, pleading guilty, saying, "I'm sorry", expressing remorse so that would be of benefit to family and victims because it's better to hear, "I'm sorry for what I've done," than not to at least say that.

And we also thought that with Briley's family and past, you know, would show how--

MR. MILLER: At this point, your Honor, I'm going to object to the extent that we're getting into work product that the attorney did in preparing for the trial in this case.

The whole problem with the privileged thing is, your Honor, is that every time something like this is disclosed, it's additional ammunition for the state if there's a retrial, if the case results in a reversal.

Now, I don't mind conversation back and forth about what

should we do and what strategy we should use, but he's getting into all of the details as to why the attorneys might recommend that, that necessarily goes into the work product of something that's been discussed.

I should have objected when there was any mention of the family; because that stuff has no place in this hearing whatsoever.

How can you say, how can it be said, rather, that just because Briley Piper filed a habeas, he has to give the state ammunition, if he wins, how can that be said?

COURT: I'll overrule the objection.

I find that this examination is within the privilege that the court has previously waived.

Go ahead, Mr. Fitzgerald.

Q (BY MR. FITZGERALD) Would you continue, Mr. Rensch.

A We talked about, you know, things he'd done in the past, the interview, the record, sentencing phase, the affidavit, to explain the things that this young man had done in the past, so we were trying to redeem those qualities and the long and short of it is after we discussed all of this stuff with Briley and talked about a lot of different things and the decision was made that we didn't want to have a jury deciding whether or not he received the death penalty.

This was never about whether or not we can win the murder case; we didn't believe we could; he did not believe we

could and by having or being the first one to come forward and plead guilty, giving him the benefit of careful reasoning of making that decision that wasn't fueled by emotion and we felt that we'd be better off with the judge, as far as I can recall, you know, those are the reasons and the types of things that we discussed and in the end that's why he came in and plead guilty, which was his choice, it was his choice to plead guilty.

Q Okay. So let me ask you this, the South Dakota Supreme Court in their decision of State vs. Piper said that this case is an example of the most profound case of torture in the history of South Dakota--

MR. MILLER: I'll object to that characterization and I will object to the witness being allowed to answer it, the fact that it's set forth; you've got it right in front of you and we're not here to retry the murder charge.

COURT: I'm not sure where you're going with your question, Mr. Fitzgerald?

Q (BY MR. FITZGERALD) Maybe I'll just move ahead.

What was your concern, Mr. Rensch, about the aspects of torture in this case on a jury's ability to weigh in as to the appropriateness of the death penalty or not?

MR. MILLER: I'll object to that as having been previously asked and answered.

Mr. Fitzgerald is asking a question that allows a witness

to go on for five minutes or so.

He has answered the question.

COURT: I'll overrule the objection.

You may proceed.

A Well, the thing that worried me about the torture was the fact that he was given acid and told to drink it and the fact that they decided to kill him and it was discussed right in front of him and that he was then taken out to Higgens Gulch and they took a long time to kill him.

And at one point, as I recall, they were talking about letting him into the car and giving him a drink of water and then they decided not to do that and they laughed at him.

And down the line, you know, they talked about certain things in front of him, and the whole thing, from beginning to end, you know, it started out that he was pretty nice to these guys and he opened up his house to them and then he had to beg for his life and then they killed him.

My worry was that if that got in front of a jury, then, they would be able to sit back and try to decide whether or not he should get the death penalty.

The benefit of having Judge Johnson do it was that Judge Johnson had the experience and Judge Johnson might be a little less sensitive to the type of things that happened because really, when you're standing there asking for life, we're not talking about the type of thing that happened;

and he did.
Q And we can assume that he was very serious and if Mr. Piper had made some sort of objection that the judge would have dealt with it?
A I'm assuming so.
Q We don't know exactly what he would have done, but he did ask to make sure?
A Yes.
Q And there's nothing contrary to the record or in your memory?
A No.
Q That's what he wanted to do.
A Correct.
Q And he was well aware of the consequence of this plea of guilty and his choice to go with the judge could result in a death sentence or life?
A Yes.
Q In fact, there was no other option.
A Correct.
Q And then regardless of his decision to have a judge or a jury determine the consequences for his murder plea, Judge Johnson was going to have to impose sentence for all the other charges, is that correct?
A Correct.
Q So he was going to have the option to give him a life

10, line 6?
A Correct.
Q And 14 days later, before the sentencing commenced, Judge Johnson again indicated or had the defendant and yourself indicate that it was still the choice to waive a jury and proceed with his guilty plea and have sentencing before the court, respondent's exhibit 3 or respondent's exhibit 3, page 4.
A Yes, he asked Mr. Piper if he still wanted to proceed and Mr. Piper said, yes.
Q Okay. And you didn't believe that that was true at the time, that he had a right to waive?
A I didn't care; I wanted the judge to sentence him.
Q Did you express at all on the record that you were in disagreement with Judge Johnson's interpretation of the law, that not only did the defendant have to waive, but the State of South Dakota had to waive sentencing before a jury?
A No, we wanted the judge to sentence him and that's what we did.
Q And that was the choice?
A Yes.
Q Voluntarily made by a competent individual?
A I believe so.
Q Who has for his benefit two experienced attorneys.
A Correct.

sentenced by a judge and the other one was if you don't plead guilty, you get sentenced by a jury.

Q The Supreme Court held that you could waive that right because you did have a right to be sentenced by a jury.

A They held what they held, that Judge Johnson's procedure was authorized by statute.

Q Was it contemplated or thought about having a jury impaneled and pleading guilty in front of a jury and thereby having a jury?

MR. MILLER: I'll object to that; I don't know, contemplated by whom; I guess I just don't know what the question is.

COURT: Overruled; you may answer.

A You know, I think we thought about what course we'd take and the decision was made that we didn't want to have it in front of a jury.

I don't ever remember discussing with Briley pleading guilty in front of a jury and going to a sentencing in front of a jury because he wanted to be sentenced by a judge.

Q (BY MR. FITZGERALD) He wanted to be sentenced by a judge, correct?

A Well, we were explaining to him that a lot of the stuff here that could hurt him badly with 12 people, that could be somewhat, you know, it might not hurt him as bad in front of a judge.

Q Would you agree that the South Dakota death penalty statutes do not say that if you plead guilty in front of a judge only a judge can sentence--

A No, they say the opposite.

Q And the Supreme Court decided what?

A We lost.

Q Your Honor, I would ask that the noon recess be taken at this time and leave Mr. Rensch under subpoena because as I explained to the court before we started, I was under the impression when you make one of these claims that Mr. Piper had a right to talk to counsel and I was not able to talk to Mr. Rensch and so I would like to ask that the noon hour be taken now to kind of digest things to see if I left anything out.

COURT: It's just a few minutes before noon and I think the request is appropriate, and so let's take a recess.

Let's come back at 1:15.

Court will be in recess.

(Whereupon a noon recess was taken off the record)

COURT: Be seated, please.

The record may reflect that we are back in session; Mr. Piper is present along with the attorneys.

Mr. Fitzgerald, you may continue.

MR. FITZGERALD: Could I have this marked as an exhibit.

(Whereupon Respondent's Exhibit D was marked for

Q (BY MR. FITZGERALD) Well, Mr. Rensch, I summarized what I believed were two issues which you wanted to raise; do you want to clarify or amplify what it was that you wanted to raise in the rehearing?

A Yes, what I wanted to raise in the rehearing, the new argument and I don't know if it was really a new argument, but what I thought of that I didn't think about before was that when you look at 23A-27A-6 in the context of the other statutes, it seems more clear that there was no right to a jury sentencing upon a guilty plea and I was asking the Supreme Court to look at that statute in the context of the other statutes and in the context of the general police statutes which states when you plead guilty to something, you waive your right to jury trial.

That is it.

Q Hadn't that been basically dealt with?

A Well, it had been dealt with, but I thought it was a new slant on the argument because it didn't look like 23A-27A-6 had been evaluated in the context of the other statutes around it, but to make it appear more clear that there was no right to a jury sentencing in the event of a guilty plea.

Q Okay. Well, if that was considered by the South Dakota Supreme Court in State vs. Piper how was Mr. Piper prejudiced now by not considering what you wanted reversed?

A Well, I don't know that he is prejudiced; on rehearings

they're often granted and we made the argument; I thought it was a new argument and if there was something to it, it should be brought to the light of day.

Q Okay. When you consulted with Mr. Piper about his decision to choose judge versus jury, did you talk about the potential for say a hung verdict so to speak by a jury in a death penalty case?

A Yes.

Q What did you tell him about that?

A Well, I explained to him that a jury would have to listen to his case and in order for them to sentence him to death they would have to have a unanimous decision in that regard.

And that if we hung one of the twelve, the sentence would be life.

So in essence, they'd have to convince all twelve for death, but if we hang up one of the twelve for life, it will hang the jury, then life would be appropriate.

Q Did he have any questions or comments or want a reexplanation of that point?

A No, he did not.

Q Would Mr. Duffy, as best you can recall, would have he been present at that time for that conversation?

A I think so, yeah.

Q And I realize it's hard without access to the times in the billings, but do you remember how many times that came

up?

A Well, it came up about the last month and a half before the plea and we talked about it a number of times and it came up in the entire process even before November of 2000.

We had talked about what was necessary in order for him to receive the death penalty and so if we include that time, it probably would have been provided to him from nearly the first meeting throughout the process about how the process worked, that if he were convicted at a jury trial and then go on to the sentencing phase, it would have to be unanimous for the death penalty.

Q When you represent somebody in a criminal case, how do you, I guess, insure to yourself that the choices that the clients are making are his and his alone?

A Well, I explain to my clients that, "Briley, you have a right to a jury trial and if you want to have a jury trial, you will have it. If you want to plead guilty, that's your business. You have to make sure that that's the choice you want to make."

Because as I told him, you know, nobody can make any promises to you and if you plead to something, you have to be ready for the possibility of the maximum punishment, while we hope for something less and you want to be really sure of it because it's your choice here.

And so I make sure that they know it's their choice, tell

Q At that point in this hearing including this passage, had anyone waived the right to a sentencing by a jury?
A I think up to this point we had notified the court that we felt that it was the court's obligation to sentence him upon a guilty plea and cited 23A-27-6.

As far as us saying it out loud, nobody before that said we were waiving that right.
Q Okay. And so no waiver had happened yet in your opinion?
A No, we just indicated to the judge that we wanted the judge to sentence us.
Q So it was an expression of intention, but no waiver yet, is that correct?
A Correct.
Q Next--Well, the next thing that happened was the judge begins to advise Mr. Piper of the elements of the offense, offenses, from the middle of page 10 through the bottom of page 12; go ahead and look.
A Yes.
Q Is there any waiver of a right to jury sentencing in that part of the transcript?
A No.
Q Has a waiver of a right to jury sentencing actually happened?
A No.
Q Next the judge advises of maximum possible penalties,

A No.
Q Line 25, page 20, the court to Mr. Piper, "And if you make that decision I will hear the evidence and I will follow the law and I will make a decision."
At that point, had any waiver occurred yet?
A Well, he says he agrees that's what he wants the judge to do, but he doesn't say that.
Q Okay. So what are you saying there?
A He says, "I will follow the law and I will make a decision, is that what you want me to do?" Answer, "Yes."
Q Is it your position that that, by itself, is a waiver of jury, right there?
A My position is that Briley Piper wanted the judge to do the sentencing.
Q That Briley Piper is saying, "I do want the judge to do the sentencing," is that where you argued in your appeal brief that a waiver has occurred?
Would you argue, orally, to the Supreme Court that he did waive it twice, words from your mouth, is that what you're referring to, those very lines?
Is that your version of waiver, yes or no?
A No, that's not what he said.
Q So the waiver hadn't occurred yet, had it?
Well, if you make that decision, is this a waiver, had he just waived his right to jury trial in your opinion?

'06, would you agree with this statement, that what the Supreme Court recognized was the right to jury sentencing which survived a guilty plea?

A Yes.

Q And you had advised your client that he had no right to sentencing that survived a guilty plea?

A Correct.

Q You had advised him of options A and B, but not option C, correct?

A Correct.

Q And it is option C that the Supreme Court recognized in the Piper appellate decision?

A Correct.

Q In reading the entire transcript through the end which you have just done, section by section, did Judge Johnson ever advise Briley Piper of option C?

A Well, you know, I don't know how you want to characterize it.

He asked him if he wanted a jury sentencing and Briley said he wanted him to sentence him--

Q Well, is it true--

A He said what he said.

Q Is there any specific waiver language that occurred after the entry of a plea in that transcript?

A No.

Q If it's true that a waiver, that a right to jury sentencing survived the guilty plea, how can that be waived before the plea?

A I don't know the answer to that--

Q You know what, it was unfair for me to ask you that question.

You gave a litany of reasons as to why you, the defense I should say, chose the option of pleading guilty and being sentenced by a judge in this case, you did that in cross examination when you were being cross examined by Mr. Fitzgerald.

Do you remember that testimony?

A I remember explaining the factors, some of the factors that were involved.

Q Was one of the factors that you mentioned that you had a very small chance of success at trial on the merits of the charges?

A Well, I mentioned that we had a small chance of success on the merits of the charges; I don't know that that was what made us want to go in front of a judge for sentencing as opposed to a jury.

We wanted the judge to sentence him; we thought he would be more receptive to the requests we were making.

Q Were you able to argue to the judge at the sentencing hearing that Mr. Piper's guilty plea, his decision to plead

guilty rather than going to trial, was a mitigating circumstance?

A Yes.

Q Was that argument available had there been a jury sentencing under the option A or B?

A Sure.

Q How would have it been available with a jury?

A Well, no, I mean, if they would have granted a jury sentencing, which the Supreme Court said that could have been done under option C, that would have been available, but it would not have been available under A and B.

Q Under how you had--Well, were you able to argue the acceptance of responsibility by way of the guilty plea to the Supreme Court in oral arguments, the proportionality issue?

A I think so.

Q After Mr. Piper received the death sentence and the judgment was entered and notice of appeal filed, what was the scope, in your mind, of that appeal?

A To get it reversed.

Q To get what?

A Get the sentence reversed.

Q There was no attempt made, was there, to reverse the plea of guilty, too?

A Not at all.

line 1?

A Well, yes, but it does not specifically say waiver there; although he's plead guilty, he's telling the judge he wants him to sentence him.

Q And again, starting on page 19, line 23 through page 20, line 17, there, there's talk again about him giving up that right, is that fair?

A Well, at that point the topic had come up if he understood what was going on, at the top of the page, line 3, explaining aggravating circumstances, what they are and if a jury finds aggravating circumstances, they could impose the death sentence and so I don't know that there's a waiver, it's more of an explanation of finding aggravating circumstances.

Q On a number of occasions before he ever went to court you had explained to Mr. Piper that he would be waiving a right and be sentenced by the court, is that true?

A I explained to him that if he plead guilty, the judge would sentence him and we discussed also what happens if he plead not guilty and were found guilty and then he would have a jury sentencing.

We all decided, Briley included, that we didn't want to have a jury sentencing, we wanted a judge sentencing and so we went in and plead guilty.

Q So again, from the backdrop of reading the transcript,

Mr. Piper had an understanding of what was going to take place even before he went into court.

A Yes, we wanted to have a judge sentencing.

Q What was the reason for not informing the state that at the hearing there was going to be a change of plea?

A I was hoping that he might just sentence him to life right then and there.

Q Strategy?

A Yes.

I also didn't want you to have an opportunity to pick and choose which strategy to use.

Q And I did ask for a continuance?

A I believe you did.

Q About a half hour.

A Correct.

Q And the judge seemed to have more of an understanding of what was about to transpire from reading the record, is that a fair statement?

A I think it is.

Q So did you talk to Judge Johnson briefly to advise him at least what was going to take place?

A I must have.

Q Do you remember what you told him?

A You know, I think I said we're going to be entering a plea; I think it was here in open court, people were

not, but that would have been a challenge and the result that they could have achieved would have been to vacate the death penalty sentence.

Q Were you sitting in here today and heard Mr. Rensch concerning the advise he would have given to Mr. Piper concerning jury unanimity?

Did you hear Mr. Rensch's testimony?

a He testified about--Are you asking me what it was he advised him?

Q Well, we'll start with that; what do you think he said?

Your opinion based upon what you're thinking.

A I understand.

He testified that he advised Mr. Piper correctly about unanimity, that under the law of South Dakota that a hung jury, you know, "sentencing jury" would result in a life sentence. That's what I understood that he told to him and that, as I understand it, that's the state of the law.

Q Okay. So just to make sure that I understand it, are you saying that your impression of Tim Rensch's testimony is that he correctly advised Mr. Piper in this area of the law?

A Yes.

Q And that the judge's formal advisement incorrectly advised Mr. Piper on this area of the law?

Is that what you're saying?

A I'm not sure if Tim said that the judge, no, no, no.

in that place it appears that the judge here differentiates between the two, between the right to have a jury hear your guilty plea and right to have a jury hear your sentencing. It appears that in his mind and maybe it's before that, but I think it's in another place that the transcript reads the same way, it looks like here, page 14, line 20 and below, there's a discussion about whether Mr. Piper, when they first began to discuss this, the possibility of pleading and then the judge says and that includes the possibility of having the court deal with sentencing, so it appears again there that he's differentiating the two.

And so at least early on in the transcript I see the judge having, what I believe to be the correct mindset or correct grasp of the situation; that there are two separate things here that need to be addressed.

Q So you believe that Mr. Rensch and Mr. Duffy apparently had never covered it?

A Never believed that it was a possibility, never believed that he cold have a jury sentencing if you plead guilty.

Q And that's what's called option C, as I recall?

A Yes.

Q And are you saying the judge could be sitting on the thought of option C possibility?

A Well, it would appear to me that he did think that.

Q Okay. So once we start the actual advisement of rights

A Yes.
Q And as I recall, they thought they would be better off going in front of just a judge rather than a jury, do you recall that?
A Yes, I believe that's what he said.
Q And that the defendant wanted that to occur.
A Yes, that's what he said.
Q Okay. So he waived the right to have a jury determine penalty?
A Well, he waived it on options A and B, option C had not been presented to him, the ability to plead guilty and take all of the mitigating evidence and factors that would be involved and be sentenced by a jury?
A According to Mr. Rensch, Mr. Rensch and Mr. Duffy did not tell Mr. Piper that was an option, they believed it was not.
Q Okay. You heard Mr. Rensch testify that he told Mr. Piper on numerous occasions that it was his legal opinion that if the jurors were unable to reach a unanimous decision on the question of death, it would be equal to or equate out to a life sentence, is that correct?
A I'll have to look at my notes here, I think you have it right, but I just want to be sure; yes, he did say that.
Q So Mr. Rensch in your opinion had properly advised the applicant of the ramifications of a non-unanimous verdict on the question of the death sentence, is that true?

testified that he did, but I don't know if he included the issues or just wanted to file the document to enlarge the time, I don't know.

Q Do you take issue with Mr. Rensch in that he did not raise during that period of time the issue of the judge advising him of the consequences of a non-unanimous verdict on the death penalty?

A They could have raised that early on, in the direct appeal; they didn't have to wait until the rehearing to do that, so if you want to say that was ineffective not to have done so on rehearing, yeah, ineffective all the way along.

So what I believe was ineffective was not to have raised it, waiver of jury sentencing, on the petition for rehearing because at that point and for the first time, at that point they had become aware that their reading of the statute was wrong, according to the Supreme Court.

The Supreme Court had told them, then, and they had not been told before, that their reading of the statute was wrong and so it was deficient for them not to have raised it on the petition for rehearing.

Q Even knowing their client didn't want a jury sentencing?

A Correct.

Q Would it also be true that it was available, and Mr. Rensch testified to this that if Mr. Piper had wanted to go and be sentenced by a jury, it was available?

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:
COUNTY OF LAWRENCE) FOURTH JUDICIAL CIRCUIT

****

BRILEY PIPER,

Petitioner,

vs.

DOUGLAS WEBER, Warden, South Dakota State Penitentiary,

Respondent.

CIV. 06-222
HABEAS CORPUS HEARING
(Vol. 2 of 2)

****

BEFORE: THE HONORABLE JOHN W. BASTIAN, Circuit Court Judge at the courthouse in Deadwood, Lawrence County, South Dakota, on the 18th day of April, 2007.

****

APPEARANCES: For Petitioner:

MR. STEVE MILLER and MR. STEVEN BINGER
Attorney at Law Attorney at Law
Sioux Falls, South Dakota Sioux Falls, South Dakota

For Respondent:

MR. JOHN FITZGERALD and MS. SHERRI SUNDEM WALD
State's Attorney Assistant Attorney General
Lawrence County Pierre, South Dakota
Deadwood, South Dakota

RON RYKEN
Official Court Reporter
Fourth Judicial Circuit
Belle Fourche, South Dakota

yes, I understand the issues in this case and yes, they are not prejudged.

MR. MILLER: Thank you.

MR. BINGER: Your Honor, just for the record, it's my interpretation of what your Honor ruled yesterday that the attorney-client privilege was waived as to any matters related to the appeal because that's the only issue of ineffective assistance of counsel that has been raised.

Other issues concerning the waiver or the alleged waiver are just based on the record alone and so we would ask that we have a standing objection and we do object to any ruling by the court that says that anything prior to the appeal is waived because we are not alleging ineffective assistance of counsel when it comes to the issue of pleading guilty.

The rest of it is simply a matter of what's on the record and how we have been interpreting that ever since, so it is our position that there is not a waiver until the notice of appeal was filed.

Anything prior to that is not waived.

That's our position.

COURT: I recall it a little differently yesterday and of course the record will say what it says, but I understood it that--I do agree that you're not claiming ineffective assistance of counsel for anything that occurred prior to the notice of appeal, correct?

MR. BINGER: That's correct.

COURT: And that it's clear that the attorney-client privilege is waived from that point forward.

I also think that it was--I guess I'm making my own record, but I think it was also clear that to get to that point there were certain conversations and certain things that occurred leading up to that; Mr. Rensch talked about them, and that's when he got into the discussion about the reasons and the strategies for entry of guilty pleas and making a decision to put the matter before the judge for sentencing rather than a jury.

I find all of that necessary and incorporate any waiver that Mr. Piper gives by virtue of the filing of this habeas. I can understand how there are a lot of things that the privilege doesn't include, but I don't think that yesterday we drew a line at the filing of the appeal and in fact discussed things that lead up to the decision, that appeal and the sentencing decision.

So that's my posture with Mr. Duffy's testimony as well, and again, having said that, I understand your record and the standing objection and I don't quarrel with that, but as we go along, if there's some specific areas that you wish to object to in addition, you certainly may.

MR. MILLER: May I just make one additional, final point?

COURT: Certainly.

Q Ultimately were there discussions about this defendant pleading guilty to the charges lodged against him?

A Yes.

Q Okay. Can you tell us when those discussions first took place, as best you can remember.

A I can't give you a time frame.

I can tell you that there was a signature of events that took place during the course of the investigation and preparation that lead Mr. Rensch and me to begin discussing whether or not this case should be tried before a judge or a jury.

Q Could you explain or elaborate about what you term a signature of events, please.

A I think there's probably three; the first was, I went to Alaska for nine days. During the course of my trip to Alaska, I can't tell you everybody that we met; former teachers; I examined a box of documents--

MR. BINGER: Objection, your Honor, if I may object, this is attorney work product, it is not relevant or material to the discussions.

I believe the court has ruled that the discussions leading to the plea may have some relevance to this case, although we've objected to that ruling, but the attorney work product or what he did during his own investigation is beyond the scope of this hearing; it is not--It is not

covered by the court's previous ruling, this is protected by attorney-client privilege and it's just not, you know, what the factual reasons were or what he did during his own investigation in this case has no pertinence to this case.

COURT: Mr. Duffy, these signature events that you are referring to and you are about to testify to, were these things that you considered internally or things that you discussed with your client during the time that you were discussing or contemplating a guilty plea rather than a jury trial?

A One, I discussed in some detail with my client; the other two I can't say for certain I discussed it with my client, but I did discuss them with Mr. Rensch.

MR. MILLER: May I be heard in regard to one other point?

COURT: Yes.

MR. MILLER: We all know that there was a guilty plea and the guilty plea is not even being challenged.

The fact that the attorney may have recommended to Mr. Piper that he plead guilty and the events actually following that advise, we're not challenging and we never have.

So at this point, if Mr. Duffy knows something that was damaging about Mr. Piper or that might hurt him or make it look bad, this is still covered by work product, it's still covered by attorney-client privilege and it is not material to assist the state in showing whether there was a waiver.

The only issue in the case is waiver, not the guilty plea and so if there's some sort of negative information about Mr. Piper, this should not be disclosed; I don't know if it was or not, but it has no relevance to this case.

It does not assist the state or the court in resolving the real issue which is waiver.

COURT: I think what's significant and I'll sure take comments, but I think what's significant to me is that the guilty plea and the alleged waiver of a sentencing jury happened really at the same time and I don't think that you can separate out one from the other; these events came along together, as I understand the evidence that I've heard so far

That these decisions were made jointly and so I don't know how you can separate out the guilty plea from the waiver issue.

MR. BINGER: But at the same time, your Honor, this witness does not need to tell us any specifics on what their own investigation of Mr. Piper disclosed.

If they told him, for example, and I think Mr. Rensch said this yesterday, all the facts looked bad, you're going to lose, you can't win the trial so you might as well plead guilty, we can leave it at that, you know.

At this point this witness is very likely, is very possibly going to divulge information that was previously

unknown to the state or anybody else and it should remain that way because it's enough for him to just say, we thought the facts looked bad and that our client plead guilty.

There is absolutely no need for him to get into specific details about what he found out when he went to Alaska or when he went and interviewed witnesses A, B, C and D, there is no reason for that.

If he just testifies that we told our client the facts looked bad, go ahead and plead guilty because this is of great concern to us because if this habeas corpus action is successful, then our client will eventually be coming back for a resentencing and now everything that his attorneys know or knew will be known to the state and what's the reason for that? There is no reason.

It is far more prejudicial than it is probative and it's enough for him to just say, just like Mr. Rensch did, the facts looked bad, the best thing for you to do is plead guilty.

Do we need to go any further than that?

Why does he need to disclose all his work product?

COURT: Mr. Fitzgerald.

MR. FITZGERALD: Just trying to establish on the record why things happened as they did in this case.

His co-counsel has been accused of ineffective assistance of counsel and I'm trying to dispute that by showing that

there was a careful, thorough analysis of the facts and the circumstances of this case and that their client made his decision with full knowledge of his choices and then the consequences that were going to take place.

COURT: I think what's relevant here is the discussion that Mr. Duffy may have had with Mr. Piper leading up to the decision to plead guilty and jointly waive the sentencing jury, so perhaps the best way to approach this is rather than discuss Mr. Duffy's signature events, to discuss those things that he discussed with his client and if we go into some of those areas, so be it, but what's important here is those discussions that lead up to that ultimate decision, so to that extent, the objection raised by petitioner is overruled.

I will continue to entertain any objections that you make.

MR. DUFFY: Judge, just so I'm clear, are you telling me that I do have to testify as to these matters; the questions put to me, do I have to testify to these matters?

COURT: Yes, subject to the objections that may be raised by petitioner's counsel that I will be ruling on.

MR. DUFFY: All right.

COURT: I understand Mr. Binger's argument and I appreciate the argument that there are things that I'm sure that you and Mr. Rensch discovered in your investigation

that, first of all, would probably be under the continuing attorney-client privilege and second of all, would not be relevant to the decision that was made by Mr. Piper to plead guilty and waive jury trial, so the focus of the court and the intention of the court to waive probably the attorney-client privilege pertains to the reasons that Mr. Piper plead guilty and allegedly waived, and I know I continue to use the term waiver because I think it's easy to use, but I'm aware that he did plead guilty and waived jury trial, jury sentencing.

So with that, maybe we ought to just handle it question by question.

And Mr. Duffy, if you're not clear, when you're being questioned by either Mr. Fitzgerald or Mr. Binger, if you're not clear whether the privilege attaches, raise it.

MR. DUFFY: I'd rather not testify against my own client--

COURT: But I've waived any privilege for the areas that we discussed.

MR. DUFFY: All right.

COURT: Mr. Fitzgerald, you may proceed.

Q (BY MR. FITZGERALD) Could you explain about the signature events.

MR. BINGER: Objection, your Honor, that question is too general; each question needs to be very specific because, if I may, if I--

COURT: I don't mean to cut you off, but this is my concern, Mr. Fitzgerald; I don't know whether these signature events had anything to do with Mr. Piper's decision to plead guilty and request a court sentencing. That's what I think we need to focus on.

Q (BY MR. FITZGERALD) There was a reason in your mind why you have characterized three signature events as having lead to the discussions that ultimately ended up with Mr. Piper pleading guilty and waiving a jury on the issue of punishment for murder in the first degree; is that an accurate assessment?

A Yes and no; I mean, I take issue with the characterization of pleading and waiving because it was my position then and I think a fair reading of the statute, and of course the Supreme Court overruled me, but I think it was a fair reading is that once you plead before a judge, you cannot get to a jury for sentencing, but yes.

Q We'll get to that later, Mr. Duffy; I understand that that's an issue that I think needs to be discussed, but let me see if I understand this; you went up to Alaska and gained certain information that lead you to believe that it would be prudent to have conversations with your client about ultimately, I guess, accepting responsibility for what he had been charged with--

MR. BINGER: Objection--

Q (BY MR. FITZGERALD) --is that accurate?

MR. BINGER: Objection, leading the witness.

MR. FITZGERALD: Well, your Honor, if I could be heard on that; I'm being forced to lead here because if I ask open-ended non leading questions, everything is being objected to as attorney-client and I would defer to the court on that.

COURT: I'll overrule the objection, I find that the question can be answered yes or no and I find based on our conversation, our discussion here that it's foundational.

I think Mr. Duffy can say whether or not he learned this from something that caused him to be concerned and so I'll overrule the objection.

Q (BY MR. FITZGERALD) Do you remember when that event to Alaska took place, approximate time frame?

A I can remember exactly where I was sitting, I can remember what I was doing, but I can't give you the exact date.

Q Okay. Would it be more than a month prior to the change of plea on January 3, 2001?

A I don't know.

Q Okay. Let's talk about the second signature event; when did it occur?

A I don't know; it occurred before the trip to Alaska.

Q Okay. Would there be a way without going into

potentially objectionable attorney-client privilege matters to give us a way so we could characterize what that event was, a way to give a short--

A Yes.

Q Yes, there's a way to do that?

A Yes.

Q Please give us that way.

A It was my discussion with Mr. Rensch about potential possibilities of psychiatric testimony in this case.

Q What was before Alaska, then?

A I'm pretty sure it was, John.

Q Okay. And the third one, the same way; could you give us a way of understanding without going into detail what type of event it was that, in your mind, that lead you to the conclusion?

A Yes, I had more or less dispatched Mr. Rensch up here to Deadwood; I was working on something else and it was a specific area that I wanted him to discuss with Mr. Piper. I have a vivid memory of it and I have a vivid memory of the conversation that I had with Mr. Piper after my discussions with Mr. Rensch concerning what Mr. Piper told him when he came up here to speak to him.

Q Is there any way you can elaborate on that?

MR. BINGER: Objection, your Honor, once again, I don't--

COURT: I don't want to get into the facts of the

discussion; I understand the objection over here and maybe I'll change my mind as we go along, and I'm trying to keep it relevant to the issues and I don't want to completely open it up--

MR. FITZGERALD: I'll withdraw the question and move on to another area.

COURT: Thank you.

Q (BY MR. FITZGERALD) So Mr. Duffy, when--In terms of months, how many months prior to January 3, 2001 did the first event occur, as best you can recall?

A I don't know.

Q Would it have been more than a month?

A I think so, yes.

Q After these three events were there discussions after each event about the potential of pleading guilty and having a judge determine competence or was it after all three events had occurred that ultimately there were discussions?

A Both.

Q Now, these discussions that I'm talking about, we'll say pleading guilty and having a judge determine sentence on the murder charge, were those conducted by yourself alone with Mr. Piper or were they with Mr. Rensch or both?

A Both.

Q Okay.

A In particular, I mean, in particular that the discussions

that I had with Mr. Piper and Mr. Rensch was present as well, was after the third event that I described to you; the conversation that Mr. Rensch had with Mr. Piper, Mr. Rensch spoke to me of what Mr. Piper's response was and then after a very short period of time, we then began meeting with Mr. Piper.

Q Okay.

A And I'm almost certain that both Mr. Rensch and I were present at that discussion and that is--

MR. BINGER: Well, objection, he's answered the question at this point.

The question was if he talked to him alone or did he talk with Mr. Rensch and the answer already was, both, and at this point he's answered and then there's more narrative.

COURT: You may ask your next question.

Q (BY MR. FITZGERALD) How many times did you talk to him about it alone, how many times did you talk to him with Mr. Rensch, as best you recall?

A I think every time I talked to Mr. Piper about pleading, the impact of pleading, the options that he had, how the system would work, I was with Mr. Rensch.

Q Okay. Now, prior to these discussions about a change of plea and a judge deciding sentencing, had you talked with him about the right to trial by jury?

A Yes, but I can't tell you when.

A Right.

Q Can you describe for us the conversations that took place between you and Mr. Rensch and Mr. Piper concerning his decision to plead guilty to murder and the other charges and have the judge impose sentence.

MR. BINGER: Again, your Honor, I'll object as to it does not cover specific facts.

He thought the evidence was overwhelming, that's enough and we don't need to get into the specifics.

COURT: I would ask you to generalize when you answer that question.

A Could I hear the question again?

Q (BY MR. FITZGERALD) Could I have Mr. Ryken read it back for him.

COURT: Sure.

(Whereupon court reporter read back last question)

A That's going to be very difficult; I don't know how to describe the conversation, generally. I just don't want to run afoul of any of the rulings; I don't know how to describe the conversations in general here.

Q (BY MR. FITZGERALD) Well, I'll ask you to describe specifically.

MR. BINGER: Your Honor--

COURT: You know, what's difficult and I'm not being critical, but I don't know, it's hard for me to, you know,

case of torture in the history of murder in South Dakota?

MR. BINGER: Objection, your Honor, we don't need the opinion; that's his conclusion; not relevant.

COURT: Sustained.

Q (BY MR. FITZGERALD) Did you discuss with him the strength of the evidence?

A Yes.

Q What did you tell him about the strength of the evidence?

MR. BINGER: Objection, we don't need to get into the specifics; we already know what he was told, he plead guilty, the evidence was strong and that's not even disputed by Mr. Miller and myself.

We never took that position, your Honor.

COURT: I think Mr. Duffy can testify as to how he characterized, generally, whether the evidence was overwhelming, words of that nature.

A The evidence?

COURT: Correct.

A I thought the evidence was overwhelming.

In my conversations with him, I told him that I thought between the attitude that he had expressed to me and Mr. Rensch about this killing, combined with the evidence as such, that he needed the judge on this.

Q What had he said?

MR. BINGER: Objection, your Honor, we don't need to go

this far.

COURT: Sustained.

Q (BY MR. FITZGERALD) Mr. Duffy, did you discuss with him the fact that there was at least evidence gathered by law enforcement to suggest that he had found humor or found laughter in the suffering of Mr. Poage?

A Yes, I did, at some length.

Q Was that a concern to you?

A Yes, it was.

Q What was your concern?

MR. BINGER: Objection, not relevant, cumulative and it's going further than the evidence needs to go.

COURT: I'm not sure--Well, why don't you rephrase your question and be more specific.

Q (BY MR. FITZGERALD) Okay. Was the aspect of Mr. Piper's laughing or taking pleasure in the suffering of Mr. Poage a large concern to you as his lawyer?

MR. BINGER: Objection, he's already answered that question.

COURT: Overruled, you may answer.

A As to what?

Q (BY MR. FITZGERALD) Was there a concern about that evidence coming before a group of lay people selected from the community?

A Yes.

Q Okay. Mr. Duffy, do you think that in some respects it was strategic to let or put the burden on just one person, a judge, versus giving it to a jury where there was at least comfort in numbers versus just one imposing the death sentence?

A I don't know if I would characterize it that way, but was it a strategic component in my mind, yes; to have a judge make the decision to kill someone as opposed to 12 people, yes. I think it was a strategic decision.

Q You've been involved in other murder defenses, have you not?

A I have.

Q From your view was there more gruesome mental torture involved in this case than any other that you've been involved in?

A Yes.

Q You were present in court on January 3rd, 2001 when there was a change of plea made in this case?

A I was.

Q This is already an exhibit, although my copy is not marked, but I would ask you to just look at it and see if this looks like a genuine, authentic copy--

A I'll take your word for it.

COURT: And it was admitted as state's--Excuse me. respondent's exhibit B.

STATE OF SOUTH DAKOTA)
) IN CIRCUIT COURT
COUNTY OF LAWRENCE)
) FOURTH JUDICIAL CIRCUIT

BRILEY PIPER,

Petitioner,

vs.

DARRIN YOUNG,

Respondent.

Hearing on Writ of Habeas Corpus

CIV. 14-98

BEFORE: THE HONORABLE RANDALL L. MACY
Circuit Court Judge
Deadwood, South Dakota
July 21, 2016, at 9:00 a.m.

APPEARANCES:

For the Petitioner: MR. MATT J. KINNEY
Kinney Law, pc
121 West Hudson Street
Spearfish, SD 57783

For the Respondent: MR. JOHN FITZGERALD
Lawrence County State's Attorney
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1 of 2

I N D E X

WITNESSES:

	PAGE
ROBERT VAN NORMAN:	
DIRECT EXAMINATION BY MR. KINNEY	7
EXAMINATION BY MR. PIPER	37
FURTHER DIRECT EXAMINATION BY MR. KINNEY	44
CROSS-EXAMINATION BY MR. FITZGERALD	82
MICHAEL STONEFIELD:	
DIRECT EXAMINATION BY MR. KINNEY	114
EXAMINATION BY MR. PIPER	160
CROSS-EXAMINATION BY MR. FITZGERALD	167
REDIRECT EXAMINATION BY MR. KINNEY	187
RECROSS-EXAMINATION BY MR. FITZGERALD	190
STEVE MILLER:	
DIRECT EXAMINATION BY MR. KINNEY	192
CROSS-EXAMINATION BY MR. FITZGERALD	221

get?
A Both sides by statute get 20 strikes. The judge gave us each one additional. We had requested additional preemptory strikes because of the publicity and the nature of the case.
Q And, again, just how many jurors does it take in a verdict to spare the death penalty?
A One. If it's a nonunanimous verdict, then life is automatic.
Q So really what you're looking for is just one juror to not impose the death penalty to have the success of your appointment?
A It's kind of an adage in that business of the death penalty defense business that you select a juror, if you can.
Q So strikes really matter in this case?
A Yes, they do. They're the essence of the case. The case in many respects is over by the time you pick the jury.
Q So if you believe that there are constitutional violations here, or if one were to argue, what sections of the United States Constitution parallel --
A Well, obviously if -- if the judge were to determine that I erred then that would be a denial of the Sixth Amendment Right to Counsel, and of course the judge's

give this Court a little history as to who this witness was?

A Yes. He was in jail at the same time or part of the time that Briley, Elijah Page, and Darrell Hoadley were in the Lawrence County Jail. Mr. Curtis had, what I considered, a fairly involved relationship with one or another of these co-defendants. He was at the same time taking some money from Briley, eventually, when he was released and simultaneously providing information to the State, jailers about alleged plans to escape, as well as Curtis's recitation of what he claimed various people had said, the defendants, in particular Briley.

Q Was there questions -- was Mr. Curtis asked questions about the murders truths and facts?

A Yes.

Q And did he testify to those in detail?

A Yeah, some detail. He had testified at the sentencing hearing, as I recall, and then he reiterated various things. Some things were limine'd out, such as talk about bisexuality. But there was a recitation of facts. He claimed that Briley was a pretty noisy, big-mouth cellmate or cellie, jail inmate, and that Briley made a number of admissions in his presence.

Q Did he also testify as to the 2- or 3-part planning of how to escape?

a half; correct?
A Yes.
Q So the disclosure that you got may have been dated due to Mr. Curtis's new criminal activity?
A Yeah. I could have easily thought about a career criminal like him having a continuous, fluid criminal existence.
Q Had you ever requested from Mr. Fitzgerald an updated rap sheet of Tom Curtis right before?
A I don't recall that I did.
Q When did you find out that there was -- did you find out that there was more criminal history that Mr. Curtis had amassed that wasn't disclosed to you?
A Okay. I already mentioned what he said, I believe, were 8 cocaine-related false convictions that a jury had just imposed on him recently, just before his testimony sometime. After the case was done, I had my legal assistant check his record, and I found out that I think it was concurrent with the 8 cocaine distribution case -- charges that he was convicted on, there were several rape charges he was also convicted of. Curtis only admitted the cocaine convictions in front of the jury when I questioned him.
Q He also admitted his misdemeanors in --
A Yes.

Q -- Lawrence County; correct?
A Well, at least the -- simple assault I recall because that was the charge -- there was an aggravated assault charge pending, as I recall, at the time that he claimed to have heard Briley say things in the Lawrence County Jail.
Q Was there a request for any sort of plea deal or arrangement or any sort of consideration Mr. Curtis would receive in exchange for testifying against Mr. Piper?
A I asked Mr. Curtis on the stand. I did not -- I can say now I failed to ask Mr. Fitzgerald for an updated rap sheet given the guy comes into the courtroom, to my surprise, in a jail outfit, and I think he was manacle. He was pending sentencing we learned. I failed to ask for an updated rap sheet or whether or not there was any consideration even being discussed by Mr. Fitzgerald and the Utah attorney or the Utah prosecutor.
Q Despite Mr. Curtis's felony history and his testimony, do you have any information or reason to believe that there was some consideration given to him for testifying at trial, or do you think he was --
A I think that's inferential from the circumstances, but I don't know that there was any consideration. It could have been a consideration from the Utah prosecutor. Go

to another state and testify and we'll give you a break if we get a good report not withstanding anything Mr. Fitzgerald did or didn't say, but I don't know whether there was an agreement.

Q Was there -- did you ever ask Mr. Fitzgerald during the trial or at any time: Did anything change, there's a new agreement in place, anything like that?

A I didn't do that.

Q Okay. Did it occur to you that, okay, now we see this guy in chains, that there's probably even more of a reason for him to receive consideration for testifying?

A Certainly. And his history indicated that that's how he operated.

Q Did you find it -- understand these are facts that don't leave someone's head no matter what role you play in this, but did you feel that Mr. Curtis needed to be impeached on the amount of detail that he gave about Mr. Piper's apparent confessions and storytelling in the jail?

A Mr. Curtis was a fairly compelling witness despite his history. Anything that was legitimately available, which of course convictions are, is useful and, in fact, my duty to find. I learned of the rape convictions several weeks after the trial. I think that the rape convictions, had they been disclosed and used for

We were fairly close to trial. I'd say March, maybe, and we went to trial in July. And we had a number of witnesses who were listed from the penitentiary. We didn't have addresses. We had to get addresses or contact information. The information that we eventually got, I believe through Mr. Fitzgerald's office, was penitentiary. And then we ran into additional obstacles as far as talking with or contacting those people.

So the Court knows, many of these witnesses testified as to their opinions and observations, at least to a limited degree, of Briley as an incarcerated person. Whether he was manipulative and that type of thing a lot of times. We tried to reach them. There's a -- this is a bureaucracy you're dealing with, but it is the State and the State, of course, is prosecuting the case, and we couldn't get through to many of the witnesses initially.

Then we had to go through corrections department attorney named Loen I think his name was. The last name started with an L, and he wasn't particularly helpful. He gave us e-mail addresses eventually to try and contact these people. We went -- we e-mailed of course, and we called and left messages. A few of them responded. Some of them didn't. I don't remember what

the response rate was. I know Mr. Stonefield talked to some of them, my legal assistant talked to several of them, I talked to several of them.

When we got to trial, after several of them had been -- and I can't even tell you who they are right now -- several had been quite laudatory of Briley on the telephone. They changed the pitch anyway, the tone of presentation of information at trial.

Q In consulting the transcript during your pretrial argument -- you don't have this in front of you -- you argued that it was hard to get ahold of these people and that you were, quote, "chasing people down a rabbit hole."

A Yes, we were, because we went from, okay. We've got a list of names and where they're employed to try and contact them through the switchboard of the penitentiary. Then being told we had to go through Mr. Loen, or whatever the attorney's name was, then to be limited to -- being limited to e-mail addresses.

I argued to the judge a case that I had won on and it ended up being appealed. It's a Grooms case out of the State Supreme Court. We had a right to know these folks' home addresses so that we could investigate them in their communities of residence, and I believe that continues to be part of the laws as far as investigating

witnesses.

It was frustrating. I didn't go to Sioux Falls and try to run them down. I didn't have an investigator do that or anybody else on my team. This was a fairly massive undertaking at that point in this case, and we were trying to do a number of things simultaneously. Should I have done that? Probably. I didn't have any other choice. Would they have talked to me? That's a different question. And that's with regard to the penitentiary witnesses. I could talk about Dr. Pesce, if you wish. Dr. Pesce was somebody who was added fairly late.

Q Psychiatrist; correct?

A Yes. And I know -- I, several times, objected based on notice, and simply, you know, ability to actually confront Dr. Pesce. I think we were into jury selection before we may have even got his CV. I didn't know a thing about him and really didn't have an idea of what he was gonna say. I didn't, but I suppose I could have asked for a deposition mid-trial.

Q Okay. And obviously a lot of your testimony today talks about looking back and wishing, you know, we could do things better, which is what we do as lawyers when we don't win a case, but I want to point something out about this subject. You made an argument to Judge

Eckrich about this issue, and after you made the comment about chasing people down a rabbit hole, I think you state -- you've been doing that for the last two weeks, and I'm going to read the quote. "You cannot say I'm effectively representing this man under these circumstances with regard to these witnesses."

A Yes.

Q So you recall stating that?

A Yes, I do.

Q And that -- is it true that -- your state of mind is that this is important and we're not getting a chance to be prepared for these people, and it troubled you?

A Yes, it did. We weren't adequately prepared to confront those people.

Q And then no action then effectively precludes the State's testimony at trial because the trial was just the next day or the -- you know, right around the corner; correct?

A I understand, yes.

Q But, yet, you did brief it. It's not that you didn't do anything. It's just that you were troubled, and is it clear -- am I right in understanding that your testimony is that perhaps we should have went to Sioux Falls, hunted these people down, did something of that nature?

A I can tell you from my experience -- well, first of all,

himself.
Q Another judge was assigned to the case?
A Yes.
Q And then you had the better part of the two years to prepare for the trial?
A Yeah, probably a year and eight months.
Q Okay. About a year and eight months?
A Eight or ten.
Q When did you start getting the discovery matters in this case?
A Oh, we had a lot of information from the start. I didn't feel like you were hiding discovery at all.
Q Well, that wasn't the question, but when did you start getting it?
A I don't remember. Fairly early because you did inventory so, again, that's -- you filed the inventories with the discovery notices, as I recall. So what was discovered -- I think we started getting them, John, within two to three months, maybe even earlier, of appointment, and you and I had met and we discussed a lot of those things.
Q And if I -- would it be true that you got the discovery from all three of the co-defendants' cases?
A I believe so. I don't know what the extent of it was. We didn't compare it that way, but we had a lot of

overlapping information from different cases.
Q Okay. And you're saying you didn't get Thomas Curtis's criminal history?
A No, no. I'm saying I got his criminal history.
Q When did you get it?
A Well, I don't remember. You had --
Q Could you have gotten it --
THE COURT: Well, hold it, Mr. Fitzgerald. Just slow down a little bit. Let him finish.
A I know we had his rap sheet; usually what we call a Triple I. I didn't have knowledge of the immediate Utah issue. That's the only thing I was talking about that we didn't have.
Q (BY MR. FITZGERALD, continuing) When was the rap sheet run and given to you?
A I don't remember.
Q Wouldn't it be dated?
A Oh, sure. Yeah.
Q And it would be in your file?
A Yes.
Q So you would know exactly when you got it?
A If I had the file and the document in front of me. I'm not saying you didn't provide his rap sheet. Not at all.
Q And you're aware that when he testified, he testified

specifically about every transcript that he had had access to and had knowledge of?

A Yeah. Whatever he stated was what he stated.

Q Do you have any evidence that there were any other statements besides the one that he said he had reviewed before he testified?

A No, I don't.

Q Was -- so anything that he had said -- jeez, this would have been 10 years before -- was documented in those interviews?

A Right.

Q Okay. And did you have -- you're not saying it's because of your heart. You weren't able to point out any inconsistencies in what he said before versus what he said in 2011, are you?

A No. No, I'm not saying that at all.

Q Okay. Now, talk a little bit about the motion to withdraw the guilty plea. What formed the basis of the reason behind that motion when the case was sent back or remanded for resentencing?

A Mr. Stonefield and I felt -- or thought that that had hadn't been adequately addressed at any point along the way, and it obviously hadn't been appealed. And we analyzed the case and decided that that was a topic that was colorable and that we wanted to litigate. And my

A No. It's because I was tired, John.
Q All right. So you said that then after the trial you learned that Thomas Curtis was convicted in addition to what he disclosed about distribution of cocaine --
A That's what he disclosed.
Q -- of rape?
A He disclosed the cocaine convictions during his testimony, as I recall. And I understand since then -- since the trial, we learned that he'd been convicted of several counts of rape at the same trial.
Q And you're saying that because you were tired, that was something that you didn't explore?
A No. I'm saying -- I'm saying I should have asked you at that point, "What else is there?" I did not do that, and you didn't tell me whether there was --
Q Wouldn't the rap sheet have shown what the State had?
A The rap sheet did not show the Utah convictions, all right? He came into that courtroom, he had a jail uniform as I recall, and I believe he was shackled at least around his feet. And we asked at that point, as I recall again, on cross or maybe you asked on direct, "Why are you in jail clothes?" And he said what he said about his cocaine convictions. He didn't say anything about the rape convictions.
Q Okay. And you're saying that there was some sort of

undisclosed deal made with Mr. Curtis?
A I don't know.
Q What evidence do you have that there is, or is that just speculation?
A He said that he thought he'd probably get something out of it eventually.
Q From whom?
A I don't know.
Q Okay. There was a plea agreement made in his case in South Dakota.
A Yeah. There was here, yeah. And we went through that.
Q And that had been 10 years before?
A Yes, and you disclosed that fully.
Q And so now you think that there was some other deal -- well, did you follow it up after?
A What I followed up was the convictions, and I talked to Mr. Miller about the possibility of a remand to get this straight.
Q Yeah. And what did you find out then about what considerations he got in Utah?
A I didn't. I only found out about the additional convictions. I handed it off to Mr. Miller at that point with specific disclosures.
Q Did you have a jury consultant in this case?
A You know, it seems like we had, like I said, Jody

psychiatry?
A Yes.
Q And you then encouraged your client to meet with the neuropsychiatrist?
A Yes.
Q Was it Dr. Wortzel? Is that how it was pronounced?
A I misspelled it. Wortzel.
Q He was from Colorado?
A Denver, I believe.
Q He had some credentials from --
A He had wonderful credentials. And by the way, I think you did a great job of cross-examining him.
Q Well, thank you. Mr. Van Norman, you then allowed your client to talk with the psychiatrist --
A We did.
Q -- did you not?
A Yes.
Q And your client told the psychiatrist, who then repeated in court, that your client had admitted to stabbing the deceased; is that right?
A As I recall, yes.
Q And then the psychiatrist also said that your client had admitted his involvement in all of the crimes; is that right?
A Yes.

Q And then the psychiatrist was allowed to testify about the fact that your client was laughing when the deceased was being struck in the head with a knife; is that true?
A That part I don't remember specifically. I remember talk about laughter during this whole scenario. I don't remember specifically.
Q Okay. Would you agree, in a general sense, sir, that your own witness gave testimony that was indicative of the existence of aggravating circumstances?
MR. KINNEY: I'll make my objection again. Beyond the scope of direct.
THE COURT: Overruled.
A You're talking about this Wortzel?
Q (BY MR. FITZGERALD, continuing) Yeah, Wortzel, yeah. He said that this man, Chester Allan Poage, was killed for money, according to your own client.
A Yes.
Q Your client said that he had killed him for money and that they tortured him.
A Right.
Q And that they had killed him, obviously, I think he said, to eliminate a witness.
A Yes.
Q So you had a psychiatrist testify about conversations that you allowed to take place with your client where

all of the aggravating circumstances were basically admitted by your own witness; is that true?
A Yes. And you may be pointing out a failure by me.
THE COURT: I'm sorry. What?
THE WITNESS: He may be pointing out a failure by me if that's how that could have been twisted, because I didn't think about that.
Q (BY MR. FITZGERALD, continuing) Am I twisting it, Mr. Van Norman?
A No, how that could be presented, John. I'm not saying you're twisting it. I can use words without impugning you. That isn't what I was doing. You're pointing out something that hadn't occurred to me that could well have been a failure by Mr. Stonefield and me. I had never thought of that.
Q Who presented that witness? Was it you --
A I believe I did.
Q -- or Mr. Stonefield?
A I believe I did. Or Mr. Stonefield might have. I don't remember.
Q So explain the purpose in presenting a witness that told the jury that your client admitted to the aggravating circumstances. Was that strategy?
A Of course.
Q Okay. What was the strategy?

A Strategy is we present someone who talks about -- knowledgeably, hopefully, about the case, who also has advanced learning. And one of the bigger issues was the prefrontal development and the discussion of young men in particular and their impulse control problems and that sort of thing. That was the main issue as we were concerned.

The facts of this case weren't particularly contested as to what happened. He already pled guilty, and the factual statements at the time of the guilty plea persisted, and you presented them. And, yes, you're absolutely correct. We presented a witness who provided, from my client, the aggravating circumstances evidence.

Q Okay. When you talked to Mr. Hoadley, did he describe an event in Eugene, Oregon, in which he and Briley Piper had taken a frying pan to try to beat a man to death?

A Yes.

Q Do you know the man's name?

A Someone that befriended them. I can't remember his name.

Q And that was consistent with what Hoadley told Dr. Gummow that your client had, for a period of time, discussed wanting to kill somebody for the thrill.

A I think that's right. I'm not thinking you're

STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
)	
COUNTY OF LAWRENCE)	FOURTH JUDICIAL CIRCUIT
BRILEY PIPER, Petitioner, vs. DARRIN YOUNG, Respondent.	Hearing on Writ of Habeas Corpus CIV. 14-98

BEFORE: THE HONORABLE RANDALL L. MACY
Circuit Court Judge
Deadwood, South Dakota
July 21, 2016, at 9:00 a.m.

APPEARANCES:

For the Petitioner: MR. MATT J. KINNEY
Kinney Law, pc
121 West Hudson Street
Spearfish, SD 57783

For the Respondent: MR. JOHN FITZGERALD
Lawrence County State's Attorney
90 Sherman Street
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2 of 2

I N D E X

WITNESSES:	PAGE
ROBERT VAN NORMAN:	
DIRECT EXAMINATION BY MR. KINNEY	7
EXAMINATION BY MR. PIPER	37
FURTHER DIRECT EXAMINATION BY MR. KINNEY	44
CROSS-EXAMINATION BY MR. FITZGERALD	82
MICHAEL STONEFIELD:	
DIRECT EXAMINATION BY MR. KINNEY	114
EXAMINATION BY MR. PIPER	160
CROSS-EXAMINATION BY MR. FITZGERALD	167
REDIRECT EXAMINATION BY MR. KINNEY	187
RECROSS-EXAMINATION BY MR. FITZGERALD	190
STEVE MILLER:	
DIRECT EXAMINATION BY MR. KINNEY	192
CROSS-EXAMINATION BY MR. FITZGERALD	221

effect the outcome of a trial? Not this particular one. In general.

A Well, there -- Mr. Fitzgerald's argument here -- the theme of this case was -- a main theme was that Briley Piper was a leader and a manipulator from the time of the crime all the way up to 2011 when this occurred. And, you know, I also read the closing arguments, and he referenced this incident with Sister Crowley in his closing arguments, further evidence that he continues to manipulate people.

And so, you know, this was -- I can remember the feeling at the time that this was a blow. This was damaging. We have this witness here that we thought was going to present Briley in a positive way, and it ended up -- maybe the final image or thought left with people was negative. So was it damaging in my opinion? Yes.

Q Would the use of an objection to the admission of the exhibit or the representation that there was a policy in place may have mitigated all that impeachment?

A Yes. I -- you know, when I reread this and looking at it again now, I handled this really badly. I didn't know what policy he was asking her about, but she appeared to -- through her answer, I don't know if she really did or not, but I -- you know, as with different things when you review work, you see things that could

been denied. There was more -- there was more record made on that, but ultimately, it was denied.

Q What was the basis of the Trial Court's denial of your motion?

A Well, again, you know, the records, if there was a written opinion, would speak for itself. What the judge said at the time of the trial would speak for itself. As I remember, generally it was the -- these were arguments of an attorney and that you could not hold him to the kind of clarity, if you will, that we were trying to hold him to.

Q Are you aware of any civil case law that prevents lawyers from taking different positions after representations --

A Well, I think, Matt, that most -- I think that a good part of the authority here on this issue was civil. Although I think that -- if I remember right, I think I did most of the research on this. I think that there was some criminal authority, but I think a lot of it was civil. And I know -- I can think of a case or two from our Supreme Court where civil plaintiffs said the same attorney argued conflicting sets of facts to different jurors -- to different juries. And, you know, there's definitely a body of case law on this issue of the issuance of party opponents.

issue, you know, and so you might have one or three or 23 particular issues in a case that you would say, "The representation on this point is what was so poor that it rises to this high constitutional standard."

I've never looked at it as an accumulative kind of thing. Were there issues here that rise to that standard? I'm not the one to say that. But, you know, I can point to a couple of the things that you talked about here today as -- and say, "You know, if I had this to do over, I'd do it differently." I know that.

Q What would you do differently without asking you the ultimate question of --

A The Sister Crowley issue. I would have -- I would have approached it differently. The issues with the different prison workers and how they came in and how we hadn't talked to all of them, or we -- some of them I don't know -- there may have been some we haven't talked to at all. I would say that there were a number that we hadn't talked to in a way that I would have wished we had. Those are -- those are a couple of points right there.

Q Mr. Stonefield, we've received permission from the Court to allow Mr. Piper to ask a few questions --

A Sure.

Q -- with Mr. Van Norman.

saying, "I was in a program as a volunteer at the penitentiary," and the response was, "Okay." And the reply from her was, "Yes, and there were restrictions." And the question then was, "There were restrictions on South Dakota State Penitentiary inmates writing to other penitentiary inmates; is that correct?" And she said, "That's right." "All right. And were you aware of that?" And she responds that she was aware of that.

But nowhere does Mr. Fitzgerald ask Sister Gabriella Crowley in her role as a volunteer, you know, at the penitentiary, "Was there a difference in being a volunteer in the penitentiary versus being somebody's visitor later after her volunteer service had been discontinued?" So by not going into that, is it fair to say that he might have misrepresented the relationship between herself and myself?

A Yeah. It might have been misrepresented.

Q Because clearly inmates writing to one another is a violation and is not allowed, so I just want to make that clear. But asking somebody to write to somebody to express a willingness to -- you know, in regard -- in a third-person context is not a violation because it is not prisoner to prisoner communication, which is covered in the volunteer rules --

THE COURT: Well, just a minute. Do you have a

A I think that's right.
Q Okay. And so we were given additional strikes then for the extra positions?
A You know, I think I read that recently. I think he gave us each one extra. I think we both had 21.
Q 21 strikes and 15 jurors to start with?
A Yeah. The method he did -- yeah, that would have been right because I remember reading the method he did. We had to pass 57 people to get -- to finish the questioning.
Q And the judge is the person who is in charge of making sure that a jury gets selected and seated; isn't that true?
A Sure.
Q So sometimes judges do get involved in asking questions of jurors, potentially, so that the process can move forward because ultimately, if it's a challenge, it's the judge that makes the call?
A Sometimes they do, yeah.
Q And that's permissible to do that, is it not?
A Yes.
Q Okay. Are you finding some areas of critique for the trial judge in this case that he got involved too often in the --
A Well, the one particular juror that I was looking at,

Q Okay. But it would be true that there were two attorneys for the defendant, and so if one were to get, say, tired, it could be assigned, the chore of the next juror, to the other attorney. And isn't that what happened in this case?
A We traded off, I wouldn't say every time, but we -- I would say we did probably close to an equal number.
Q Was there a plan in place where you would do one and then Mr. Van Norman would do the next, or did you assign it by doing one morning and then another lawyer for the afternoon?
A We kind of -- as I recall, we kind of just alternated and, you know, sometimes you would have a person whose time was very short. They might only be there for 90 seconds, and then the same attorney might have handled the next one. Or once in a while there would be someone that one or the other one of us would know, and we might want to talk to that person particularly, but for the most part it was just shared.
Q Okay. And Judge Eckrich took this chore of getting a jury very serious, did he not?
A I believe that he did, yes.
Q And, in fact, he kept a pretty close eye on the jury during the trial, did he not?
A I believe he did, yes.

A Yep.
Q And then the Supreme Court reversed that portion of the case dealing with sentencing and sent it back; is that true?
A Yes, that's right.
Q And, in fact, you and he have been intertwined in this case for some time; is that correct?
A Yes.
Q Because you were an expert witness called by Mr. Miller and Mr. Binger in the original habeas proceedings.
A In the habeas evidentiary trial, yes, I was.
Q That was the one conducted in front of Judge Bastian?
A Yes.
Q So it would seem that you were familiar with his skills as an appellant lawyer, Mr. Miller?
A Yes. His skills as an appellant lawyer many times over the years have been very, very good. Very high.
Q Because didn't he at one point -- this is going back to the '80s. He wrote the South Dakota State's Attorney's Manual of Procedures, did he not?
A He wrote a long procedural manual book that when I began practicing in the '80s was still updated and still being used by many people.
Q Okay. So he has a known skill in this area?
A Definitely.

exceptions, say, to the hearsay rule?
A Yeah, what you said is fair.
Q I mean, you can't introduce -- well, in the sentencing hearing in this case, Elijah Page's statements were not allowed in to the triers of fact out of Pennington County; correct?
A That's right.
Q So, I mean, just by the variation of the rules of evidence and who the defendants are, some of the evidence is going to have to be a little bit different?
A Sure.
Q And you're saying that that was another grounds that Mr. Miller should have appealed, would be the arguments that you presented about the State's inconsistent arguments that should have been allowed?
A I'm saying that, in my opinion, it was -- it was an issue that had been preserved and it was a colorable issue, and I -- and again, you know, I can just give you my opinion. If I had been doing the appeal, I would have raised it. I thought it was strong enough to raise it in the way that I did to the Trial Court, and so had I been the appellant attorney, I would have raised it, yes.
Q Okay. And you talked to Darrell Hoadley in the penitentiary?

the Supreme Court.
Q Did the -- okay. So we're talking Piper II here; correct?
A Yes.
Q Okay. In Piper II, was there ever a motion or was there ever a legal argument raised as to the validity of his guilty plea?
A No.
Q Okay. And --
A May I correct that?
Q Sure.
A The argument that was raised would go as well to the discipline as well as to the waiver of the jury sentencing. But in the habeas proceedings in front of Judge Bastian, we were careful not to challenge the plea. We only challenged the waiver of the jury sentence.
Q And what was the reason behind that?
A It was based upon -- it was based upon a discussion that I had with Briley, and it was a decision that we made.
Q Can you give us some details as to that discussion?
A I cannot do so unless I get a judicial order that the attorney-client privilege has been waived.
Q Okay.
MR. KINNEY: Judge Macy?

that he would have a different judge, and I told him that at that time his new attorneys could accurately advise him as to the pros and cons of leaving his plea in place or withdrawing it. The very things I didn't feel qualified to advise him of.

And basically -- and I also told him that he did not have to release the plea challenge in the habeas proceeding in order to preserve it for later because I knew that there was case law that said that unless required to raise an issue the first time that it's available, you don't have to do so. And that he was not required to because the state law gave him the opportunity to in the criminal case. And the second reason -- I forget where I was going with this. You'll have to remind me.

Q When approximately in the case procedure was this conversation? Was it at the beginning? Was it after Piper II's decision, or was it before?

A It was much before. It was at the time that we were filing the habeas application of Piper II, and so my best guess is it would have been August of 2006.

Q Had you uncovered the ruling of the advisement given by Judge Johnson prior to filing the habeas application, or is that something you discovered after you were appointed counsel?

A It was after I was appointed counsel, but I was appointed in the springtime at about the same time I believe that its --

THE COURT REPORTER: I didn't get that.

Q (BY MR. KINNEY, continuing) Could you -- the court reporter advised me she did not -- there was a little glitch in the Internet here. Could you repeat some of that last response?

A Sure. I think I was appointed around March of 2006, and it was -- I think it was about the time that the warrant of execution was being issued. I would have discovered Judge Johnson's faulty advice before I filed the first habeas application and before I had this conversation with Briley. And I believe that that habeas -- the first habeas application was filed in August of 2006. It was sometime towards the end of summer.

Q Do you believe Briley relied on your advice as to how you just described it previously?

A He told me he did, and he agreed with me.

Q So we were gonna do the habeas, and then upon reversal, he will probably have new attorneys where he could proceed with his motion to withdraw a guilty plea?

A He would have new attorneys and he would be placed back in a position where the motion was possible, and he could decide at that time, based upon competent legal

advice, whether he wished to do it or not. Basically what I told him is: You don't have to make that decision now. It is premature.

Q So you believe that the motion to withdraw guilty plea was not right at the Piper II stage; correct?

A What I believe is that the withdrawal of the guilty plea could have been raised as a habeas decision. I have never disputed that in all the briefs I've written, but I believe that it was -- for practical reasons, it was premature to make that decision at that time. And for legal reasons, he did not have to make it at that time.

Q My knowledge of your habeas case may be a little more limited than the time I've spent with the sentencing trial and the appeal. Let me ask you this: During the habeas proceeding, was it alleged that Attorneys Rensch and Duffy erroneously advised Mr. Piper of the concept of the judge takes the plea, the judge takes -- decides the sentence? Advice that you had described earlier, was that raised as an ineffective assistance of counsel claim?

A No.

Q Was it not discovered that they advised him that way at that time or what --

A Yes, it was discovered, and they raised that -- it was important to Piper I, and it was in the decision on

Piper I that the Supreme Court decided that the two forums did not have to be identical. So at the time they advised him, I believed that their advice could have been considered reasonable and based on the way the statutes are worded.

In fact, to tell you the truth, I tend to agree with their advice. I think the Supreme Court had twisted the statutes to reach a different result. I'm not complaining to the Court for that. I'm just saying that I had always thought that if you plead guilty, you do not get to do the sentence over, and so I did not raise that as an ineffective assistance of counsel issue.

Q In hindsight, do you believe that should have been raised or do you think the merits of -- or do you believe Mr. Piper's rights were not effected by that decision?

A Well, I think I'm gonna give you a third answer, and that is: I don't think it should have been raised because he certainly would have lost, and he would have lost because the advice -- that advice, when it was given to Briley, was not so unreasonable that he would have won. I don't like to pursue issues that I know I'm going to lose, and I would not have raised that for that reason.

the trial attorneys?
A We talked about it, yes. That was more Mr. Van Norman than Mr. Stonefield.
Q And what did Mr. Van Norman believe was appealable from that record?
A What I remember about it is the claim was that the witness had reached some sort of a deal with the State, I think, in return to receive lenient treatment, I believe, in Utah. I may be wrong about that. And that arrangements were not disclosed to the defense before the witness testified, or in fact, any time the witness testified. That was the gist of the complaint that I received from Mr. Van Norman.

There may -- you know, there may have been other things with regards to Mr. Curtis. He might be the witness that the complaint was made that Mr. Fitzgerald talked to him right before his testimony over at the jail, and I just kind of shrugged at that because why can't the prosecutor talk to a witness the night before he testifies?

At any rate, that's the gist of what I remember the complaint to be. But once again, the record does not reflect that there was any undisclosed deal or promises of leniency. And again, the record could be developed by way of a habeas proceeding, and so it was a bad

appeal issue because the record wasn't sufficient. It was a potential habeas issue, and so I left it alone.

Q How about denials of juror challenges? Was that discussed, or did you find in reviewing the record that a viable appealable issue was present?

A I read the entire record, and I don't specifically recall that, but what I concluded was that I had no issue that was even arguably close to the strength of the issue that I raised, and that's why I chose to raise only the issue that I did.

And I'm not talking about the second issue, the automatic appeal one. That I threw in because I figured I had to. But where I thought I had choices, I found nothing that had even close to the arguable merit of the one that I did raise, and that's why I decided to go with that.

Q And I'll just go through a couple more of these issues and just please advise if you either recall these issues or if you made a decision about these issues, if you do recall them. Availability of certain witnesses. There was a State witness that was unavailable, and it was allowed that his testimony be read -- or prior testimony be read into the record. His name was Kenneth Tingley. Again, it was kind of one of these jailhouse-snitch-type deals. Do you know of that issue being discussed as an

appealable issue?
A I don't think it was ever discussed between myself or Mike or Van Norman. And I don't have any recollection of that issue at all.
Q How about an issue of whether the prior statements of Briley being interviewed in Alaska by law enforcement? Those were litigated in Piper I, and they -- well, not during the appeal, but during that phase of the case -- and then there was a motion in limine issued or submitted here and denied, and thus the statements came in to the jury. Was that an issue that was discussed for an appeal?
A You know, that one might have been discussed at some point. But I didn't -- I don't specifically remember my thought process except for the general thought process that I gave you.
Q Okay. Was there any discussion of appealing the Court's refusal to deny extra time at the pretrial stage for the defense attorneys to interview State witnesses from the penitentiary that they couldn't contact within sufficient time of their disclosure?
A I don't remember that being discussed, but if it was, I chose to appeal only what I appealed for the reasons I told you earlier.
Q I appreciate that. I'm just gonna go through a couple

more of these here.
A Sure.
Q How about, there was a mistrial motion made by Mr. Van Norman when Mr. Fitzgerald had apparently asked the penitentiary unit manager that -- of what Mr. Piper's privileges were, specifically television privileges, and that was answered and the mistrial motion was denied. Do you believe that is a viable issue and should that have been litigated on appeal?
A I don't have any recollection of that at all.
Q Okay. With regard to jury selection, you know what death-qualified jurors are in South Dakota; correct?
A Yes.
Q Okay. Was it ever discussed that an appeal should be raised in an attempt to overturn that law?
A I don't recall that being discussed. I just don't have any recollection of that. I would have chosen not to raise it if that would have been discussed because that is clearly citing the law.
Q With regard to an issue that Mr. Van Norman and Mr. Stonefield both testified about, and that was inconsistent prosecutor arguments that were made with the co-defendants' sentencing trial -- or sentencing hearings and wanting to advance those in the Piper sentencing trial. In other words, when Mr. Fitzgerald

said?
A That's what the lawyer said.
Q Okay. They both said that, didn't they?
A That's what both lawyers told him. He testified to that at the habeas.
Q Okay. Could you say that one more time? You cut out, Mr. Miller.
A Certainly. Both lawyers did testify to that at the hearing before Judge Bastian.
Q Okay. And, sir, isn't it true that both of the lawyers said that this was their strategy was to plead in front of the judge and specifically ask that the Court impose or conduct this sentencing hearing rather than a jury because they thought something about the graphic nature of the testimony and the photos was gonna be very difficult for a jury to deal with?
A I believe that that is what they testified to.
Q Okay.
A The transcript would tell the truth, but I believe you're correct.
Q All right. What statute is it, sir, that says if you plead guilty in front of a judge to a capital murder charge, you have to have the judge impose the sentencing versus the option for a jury after you plead guilty?
A You know, I don't know that I could -- I don't have the

STATE OF SOUTH DAKOTA	)	**IN CIRCUIT COURT**
	) ss	
COUNTY OF LAWRENCE	)	**FOURTH JUDICIAL CIRCUIT**
STATE OF SOUTH DAKOTA, Plaintiff,	)	**CRI 00-431**
vs.	)	**DEFENDANT'S AMENDED MOTION TO WITHDRAW GUILTY PLEA**
BRILEY W. PIPER, Defendant.	)	

COMES NOW, the above-named Defendant, through his attorneys, Matthew J. Kinney and Kimberly R. de Hueck, and moves this Honorable Court for an Order permitting the Defendant to withdraw the five pleas of guilty that he entered in this case on January 3, 2001, for all of the reasons stated below.

Facts surrounding guilty pleas: Procedural history

Defendant was charged with five separate crimes, including several alternative counts, from his actions in the death of Chester Poage in March, 2000. The crimes included first degree murder, kidnapping, first degree robbery, first degree burglary, and grand theft. Settled Record of the court file, 140-142 (hereafter SR). Just days before his capital murder trial was scheduled to begin in January, 2001, Defendant appeared before Judge Warren G. Johnson, the trial judge in the case, with his attorneys, Timothy Rensch and Patrick Duffy, and entered guilty pleas to every one of the non-alternative crimes in the indictment. January 3, 2001, Change of plea hearing transcript, 26 (hereafter COP). That Defendant intended to enter guilty pleas clearly came as a surprise to the trial court and to the State's Attorney. COP 2-4. The State persisted with its request that Defendant receive a death sentence for his murder conviction. The parties all agreed that the trial judge would then conduct Defendant's sentencing trial and be the sentencer, rather than have a jury make the decision to impose a life imprisonment sentence or a death sentence. COP 9-10, 22-23.

The sentencing hearing was held, later in January, 2001. At the close of the hearing, the trial judge sentenced Defendant to death on the murder conviction. He further sentenced

Defendant to life imprisonment on the kidnapping conviction, and to consecutive, maximum, sentences on the other three convictions. SR 748-751; Sentencing hearing transcript, 482-484 (hereafter SEN). So, Defendant's sentences were death, a separate life imprisonment sentence, and then 60 more years of imprisonment, all consecutive to the life sentence.

In July 2009, the South Dakota Supreme Court overturned Defendant's death sentence, on an appeal from the denial of a writ of habeas corpus in the habeas trial court. *Piper v. Weber*, 2009 SD 66, 771 N.W.2d 352 [hereinafter *Piper II*]. The case was remanded to the criminal trial court to conduct a new sentencing hearing. *Id.*, at 21, 771 N.W.2d at 360. The Supreme Court's opinion did not address the validity of, or any issues surrounding, any of Defendant's underlying convictions.

On December 18, 2009, a hearing was held on Defendant's Amended Motion to Withdraw Guilty Pleas before the Honorable Jerome A. Eckrich. The motion alleged four separate grounds justifying a withdrawal of Piper's guilty pleas: (1) misadvisement of the options open to Piper, thus rendering his pleas invalid, (2) failure to advise of consecutive sentences; (3) a defective factual basis, and (4) a failure to obtain a specific waiver of Piper's *Boykin* rights. Piper filed his final submission regarding the Motion in February 2010. On November 8, 2010, the Motion was denied by Judge Eckrich as set forth by Memorandum Decision and the Court's Findings of Fact and Conclusions of Law dated November 19, 2010.

In its Memorandum Decision, this Court stated that it "will import no more than what

the Supreme Court said [in *Piper II*]." Mem. Dec. at 4. By citing three cases, this Court determined that its purpose of remand was for a sentencing by jury trial and not relief for determining whether a guilty plea was invalid. However, the trial court also found authority and concluded it had jurisdiction to decide whether Piper's guilty plea could be considered as constitutionally invalid. (Conclusion of Law #1; Mem. Dec. at 5).

An intermediate appeal was sought by Piper, permission of which was denied by the South Dakota Supreme Court on December 23, 2010, with its Order "express[ing] no opinion as to the merits of the appeal."

A sentencing jury trial was subsequently held during July 2011 and the jury returned its verdict on July 29, 2011, finding the existence of three (3) aggravating factors and sentencing Piper to death. Formal judgment and sentence was filed on August 9, 2011. Piper filed his Notice of Appeal on September 1, 2011. Piper alleged the Motion was improperly denied and that the death sentence was disproportionate to the life sentence imposed on co-defendant Darrell Hoadley. By its Opinion of January 8, 2014, the Supreme Court affirmed the sentence, holding that, among other things, the trial court's consideration of Piper's Motion was authorized on remand. *State v. Piper*, 2014 S.D. 2, ¶¶ 9-13, 842 N.W.2d 338 ("hereinafter *Piper III*). The *Piper III* Court held that the trial court's consideration of Piper's Motion was "in excess of what was permitted by [the Supreme Court's] limited remand" authorized by the Court in *Piper II*. Despite ruling that the trial court did not have dispositional power *following remand* with regard to Piper's Motion, the

possibility of remanding the case to the circuit court for the explicit purpose of permitting Piper to withdraw his guilty pleas." *Piper III*, 2014 S.D. at ¶12 (citing *State v. Apple*, 2008 S.D. 120, ¶¶ 22-23, 759 N.W.2d 282, 291).

Therefore, Piper argues that his Motion to Withdraw Guilty Pleas has yet to be decided on the merits and therefore submits his Motion accordingly for the trial court's consideration now that the matter is no longer on remand from the Supreme Court.

The law regarding the withdrawal of guilty pleas

1. A defendant's guilty plea must be both knowing and voluntary to constitute a valid conviction. *Parke v. Raley*, 506 U.S. 20, 28 (1992). A valid plea must of course include a full explanation by the court of the *Boykin* rights, and the court must establish a defendant's knowledge and understanding that a guilty plea is a waiver of those rights. A valid plea also must include more than mere compliance with *Boykin*. "...[A] plea of guilty is more than an admission of conduct; it is a conviction." *Boykin v. Alabama*, 395 U.S. 238, 242 (1969). "What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence." *Id.* at 243-244 (emphasis added).

Factors regarding whether a plea is knowing, voluntary, and intelligent include whether the defendant received incorrect advice from the court, whether the defendant had a misunderstanding of the effects of the plea, and whether the defendant possessed reasonable

expectations arising from the government, or from statements of the court. *State v. Lohnes*, 344 N.W.2d 686, 688 (S.D. 1984); *State v. Grosh*, 387 N.W.2d 503, 506 (S.D. 1986). In deciding whether a plea was knowing, voluntary, and intelligent, the totality of the circumstances regarding the plea should be examined. *State v. Goodwin*, 2004 S.D. 75 ¶ 11, 681 N.W.2d 847, 852. "The fundamental test is whether the plea of guilty was an intelligent act done with sufficient awareness of the relevant circumstances and likely consequences." *State v. Thin Elk*, 2005 S.D. 106, ¶ 15, 705 N.W.2d 613, 618 (emphasis added).

2. SDCL § 23A-27-11 provides a method for a defendant with withdraw pleas of guilty or nolo contendere. It provides:

> A motion to withdraw a plea of guilty or nolo contendere may be made only before sentence is imposed ... but to correct manifest injustice a court after sentence may set aside a judgment of conviction and permit the defendant to withdraw his plea.

3. Many South Dakota cases have held that the trial court's discretion in considering a pre-sentencing plea-withdrawal motion should be "exercised liberally in favor of withdrawal," unless the prosecution of the defendant would be prejudiced. See e.g. *State v. Engelmann*, 541 N.W.2d 96 (1995). Absent prejudice, a defendant "need only state a tenable reason why withdrawal should be permitted, a reason based on more than a mere wish to have a trial." *Id.*, at 100. (emphasis added). "When deciding whether to allow a criminal defendant to withdraw his plea, the trial court must look at the reasons why the plea is sought to be withdrawn and if the request to withdraw is obviously frivolous, the trial

court need not grant it." *State v. Wahle*, 521 N.W.2d 134, 137 (S.D. 1994). If a defendant enters a plea without full knowledge of the consequences, a court's discretion should favor allowing withdrawal. *Id.*

4. Reasons to allow Defendant to withdraw his guilty pleas.

It is clear from the habeas corpus proceedings concerning Defendant's sentence of death that there were two reasons why he pled guilty to murder plus all of the other charges:

A. based on his attorneys' advice, by entering a guilty plea to capital murder, he would thereby assure himself that he would be sentenced by the trial judge, rather than by a jury,

and

B. based on his attorneys' advice, by pleading guilty to all charges, he would demonstrate his remorse for his involvement in Chester Poage's death. Habeas Corpus hearing transcript, 63-66. (hereafter HCH).

The following compelling reasons permit Defendant to withdraw his pleas in this case:

i. Nothing in the many records of this case establishes that Defendant was ever informed, by the trial court or by his attorneys, that he could have a jury trial on the indictment against him and have a jury determine his guilt or innocence, and then have the judge determine his capital murder sentence, if in fact he was found guilty of a count of capital murder. He was not informed of this right by the court at the plea hearing. Further,

his attorneys informed him of only two procedural options: 1) guilty-phase jury trial and sentencing by the trial jury; and 2) guilty plea to murder and sentencing by the court. HCH 28-30.

Defendant's pleas thus were not knowing, voluntary, and intelligent. They followed an incomplete and incorrect rights advisement by the trial court, which in turn had followed upon incorrect legal advice on the record from Defendant's attorneys. His purported waiver of his right to jury trial on the murder charge, and on all of the charges he faced, was not a knowing, voluntary, and intelligent waiver of that right, as must occur for a guilty plea to be constitutionally valid. How can a defendant knowingly waive a right if he does not know he has it? Of course, he or she cannot do so. A defendant must have a thorough, correct understanding of a particular *Boykin* right before he can validly waive that right, as the Supreme Court's recent decision in Defendant's habeas corpus case makes clear. *Piper v. Weber, supra.*

ii. At the sentencing, the trial court imposed not only a death sentence for felony murder, but also a life sentencing for kidnapping, and maximum, consecutive sentences of 25 years, 25 years, and 10 years for the robbery, burglary, and grand theft convictions. SEN 482-84. The judgment filed in the case wrongly states that only the terms-of-years sentences are consecutive to each other. SR 748-751. A review of the change of plea hearing transcript shows that at no time during that hearing did the court inform Defendant about the possibility of the court imposing consecutive sentences on any of the crimes to which

Defendant was pleading guilty.

In *Wahle*, supra, the State Supreme Court said that, if a record contains objective proof that a defendant could have misunderstood the maximum sentence he faced, his plea was entered involuntarily without full knowledge of its consequences. 521 N.W.2d at 137. A maximum penalty advisement is also required by statute. SDCL § 23A-7-4(1).

Defendant's guilty pleas thus were not knowing, voluntary, and intelligent. Further, his purported waiver of his right to jury trial on all of the charges he faced was thus not a knowing, voluntary, and intelligent waiver of that right, as must occur for a guilty plea to be constitutionally valid. *Boykin*, 395 U.S. at 243-244.

iii. In *State v. Sutton*, the State Supreme Court said, "the trial court must be able to determine from its own record that the accused has made a free and intelligent waiver of his constitutional rights before a guilty plea is accepted." 317 N.W.2d 414, 416 (S.D. 1982). In Goodwin, *supra*, a post-sentence motion to withdraw a plea was granted. One of the State Supreme Court's holdings was that the trial court had not made a finding that the defendant had intelligently and knowingly waived his rights at the plea. 2004 SD 75 at 9, 681 N.W.2d at 851-852.

A review of the change of plea hearing transcript in the instant case shows that the trial court also made no such finding before he accepted Defendant's pleas, at page 34. The acceptance of the pleas occurred immediately after the request to use the suppressed June 9 statement as part of the factual basis.

Further, the record reveals no inquiry of Defendant about whether Defendant agreed to waive his constitutional rights. In *Monette v. Weber*, 2009 S.D. 77, ¶¶ 13-15, 71 N.W.2d 695, this failure by the court contributed to the ruling that the defendant's plea was involuntary. The trial court's lack of a finding of voluntary, knowing, and intelligent rights waivers, and its further failure to make a specific waiver inquiry of Defendant are additional grounds for finding that the guilty pleas were not knowing, intelligent, and voluntary.

iv. Whether valid factual bases were established by the trial court before its acceptance of the please also is problematic. "Establishing a factual basis for each element of an offense is essential to a knowing and voluntary plea." *Apple*, 2008 S.D. at ¶ 18, 759 N.W.2d at 289. "...[T]he trial court should question the defendant in a manner that requires the accused to provide narrative responses." *Id.* at 18, at p. 290.

The trial court began an inquiry into a factual basis. COP 26. After just four questions, however, Attorney Rensch took over, and said he would provide the basis. He then went on for almost three pages of the transcript. COP 27-30. Mr. Rensch's comments did not satisfy the court, however, so several more pages are devoted to Defendant and the court disputing whether Defendant had in fact stabbed Poage. Not until the court's request to include the unlawfully-obtained June 9 statement did the court find a factual basis. COP 30-34. [1]

[1] Defendant requests that the Court take judicial notice of the transcript of co-defendant Elijah G. Page's change of plea on January 9, 2001, in criminal file number 00-431. The contrasts between the factual bases established for the guilty pleas in that case, on the same charges as in Defendant's case, are startling, in part, because the details by

The factual bases for the robbery, burglary, and grand theft convictions were not established on the record. The robbery was charged as the taking of unnamed personal property, by the three defendants, from Poage's person, against his will. Mr. Rensch said that Defendant committed first degree robbery "...because they took the billfold..." COP 30 (emphasis added). Exactly who of the three, did what actions as to the robbery count, was not established. Nothing in the record even indicates that this act is what the State had in mind when it charged the crime of robbery. No bases for Defendant having done all of the charged elements of a robbery were provided in Mr. Rensch's narrative.

The burglary was charged as the entering in or remaining in Dottie Poage's house, by the three defendants, in the nighttime, with the intent to commit theft. Here, Mr. Rensch's factual basis is "they went back ... stole everything in the residence." COP 30 (emphasis added). Obviously, "everything in the residence" was not stolen. Exactly who of the three, did what actions, as to the burglary count, was not established. Further, the element of "in the nighttime" was not established.

Similarly, the grand theft charge lacked a sufficient factual basis. It was charged as the taking of unidentified property of the "Poage family," by the three defendants (Piper, Page and Hoadley), with intent to deprive, of the value of over $500. Here, Mr. Rensch's factual basis was "they ... possessed what was in the residence." COP 30 (emphasis added). Again, exactly who of the three, did what, was not established. The value element also was

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element per charge are reviewed and found. (If the court wishes to have counsel provide it with a copy of the

not established.

5. The entry of all of these guilty pleas in January, 2001, was tainted by several constitutional violations. As Defendant is currently awaiting a jury sentencing on a murder conviction, he does not have a heightened burden to show that he should be able to withdraw his guilty plea to the murder charge. He has shown much more than "a tenable reason" why permission to withdraw that plea should be granted. *Engelman*, supra, 541 N.W.2d at 100. Moreover, these five guilty pleas were all part of one package. They were and are inseparable from each other. They were all done, at one time, for the most two reasons. If only the murder plea were allowed to be withdrawn, Defendant would be put into an untenable position. His still-existing kidnapping and robbery pleas would provide the State with already existing, on-the-record proof of an element of two of the three alternative counts of murder.

In *Piper v. Weber*, the State Supreme Court acknowledged that "...we accord higher scrutiny to capital sentencing determinations..." For this reason, in a death penalty plea, more so that in other pleas, the trial court has the duty to ensure 'that the defendant truly understands the charges, the penalties, and the consequences of a guilty plea.'" *Piper II*, 2009 S.D. at ¶ 19, 771 N.W.2d at 360.

In summary, Defendant moves this Court, based on the argument and analysis incorporated above, to grant Defendant's Amended Motion to Withdraw Guilty Plea.

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transcript, or any other transcripts from these voluminous files, it will do so).

DATED this 25th day of September, 2015.

KINNEY LAW, P.C.

By: /s/ Matthew J. Kinney
Matthew J. Kinney
Kimberly R. de Hueck
Attorneys for Defendant
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below, by depositing the same in the U.S. Mail at Spearfish, South Dakota, by electronic service through Odyssey File and Serve.

Mr. John Fitzgerald
Lawrence County State's Attorney
90 Sherman Street
Deadwood, SD
57732

Dated this 25th day of September, 2015.

/s/ Matthew J. Kinney
Matthew J. Kinney

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

* * * *

STATE OF SOUTH DAKOTA, Plaintiff and Appellee, vs. BRILEY PIPER, Defendant and Appellant.	ORDER DISMISSING APPEAL #27797

It appearing to the Court that the order denying motion to withdraw guilty pleas from which appeal is sought, in the above-entitled matter, is an order that this Court does not have appellate jurisdiction to consider pursuant to *State v. Kaufman, 2016 S.D. 24,* ___ *N.W. 2d* ___, now, therefore, it is

ORDERED that the appeal be and it is hereby dismissed.

DATED at Pierre, South Dakota, this 24th day of March, 2016.

BY THE COURT:

David Gilbertson, Chief Justice

ATTEST:

Shirley A. Jameson-Fergel
Clerk of the Supreme Court

By: _____
Chief Deputy Clerk
(SEAL)

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
COUNTY OF LAWRENCE) FOURTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,
Plaintiff,
vs.
ELIJAH PAGE,
Defendant.

COPY

SENTENCING

Crim. 00-430

Vol. V of V

(Pgs. 821 - 992)

BEFORE: THE HONORABLE WARREN G. JOHNSON
Circuit Court Judge
Deadwood, South Dakota
February 16, 2001, at 9:00 a.m.

APPEARANCES:

FOR THE STATE: MR. JOHN FITZGERALD
- and -
MR. BRUCE OUTKA
State's Attorney's Office
90 Sherman Street
Deadwood, SD 57732

FOR THE DEFENDANT: MR. RANDAL CONNELLY
Attorney at Law
703 4th Street
Rapid City, SD 57701
- and -
MR. JOHN MURPHY
Attorney at Law
P.O. Box 5634
Rapid City, SD 57709

Court knows in State versus Moeller, the 2000 case, that the Supreme Court defined depravity as corrupt or perverted or immoral state of mind, indifference to life or suffering, committing an aggravated battery or torture on a living human being, or subjecting the body of a deceased to mutilation or serious disfigurement or relishing or gaining a sense of pleasure for the murder.

Torture is defined as when a victim is still alive and conscious, the defendant intentionally inflicts severe, unnecessary physical or mental pain or anguish on the victim. It could include a victim's serious mental anguish in anticipation of serious physical harm.

Aggravated battery is serious physical abuse of a victim that renders a member of his body useless or seriously disfigures his body and, at the time, the defendant had the specific intent to inflict unnecessary pain to the victim.

In this case, the facts support all three, depravity, torture, and aggravated battery upon Chester Allan Poage at the hands of the Defendant beyond a reasonable doubt; and they're all intertwined, so I'll discuss them at once.

It starts when the Defendant pulled a gun and

pointed it at the head of his victim, which rendered him helpless to Piper, who then kicked him in the head unconscious. It continued when he was tied up and he was made to drink some sort of a concoction. The depravity and the torture continued when he was hit and slapped, when he was tied up and helpless.

It continued again when they discussed methods of murdering Chester Allan Poage in front of him while he was tied up and outnumbered three to one. They discussed drowning him, they discussed hitting him in the head with a fire extinguisher, and they discussed slitting his throat in his presence when he was helpless to defend himself and he was outnumbered. That was depraved and that was torture for the victim to suffer through.

And it was only decided not to slit his throat -- it was not out of compassion for him, but it was because Elijah Page, this Defendant, didn't want to make a mess in his house with the blood of his defenseless victim. Didn't want to get Preston Willuweit, his roommate, involved. And that was an act of depravity on behalf of Elijah Page and it was torture for the victim, Chester Allan Poage, to suffer.

The torture and depravity continued when they

forced him into his own vehicle. Tied, he was taken to a remote area of Lawrence County to be murdered, and he knew he was going to be taken up there and murdered because they discussed that. That was depraved and that was torture for the victim.

They got him out and they stripped him naked. It was deep snow around. They went through his pockets, and the Defendant stole right out of his pockets. All the time Chester Allan Poage knew that they were going to murder him. And they forced him to go and lie down in deep snow naked, and as they did, they all covered him up in snow, and at that time he was begging for mercy, and that was depraved and that was torture for Chester Allan Poage to go through.

And when the victim escaped, the Defendant chased him; and when he did, he got his boots wet and he got his pants wet; and when he recaptured him, he punished him for trying to escape. He punished this victim for trying to do just a real human act, which was Chester Allan Poage ran for his life. He wanted to live. And this is what the Defendant did: He brought him back and he punished him for running off, and the punishment was he forced a naked man to lie down in the freezing stream in a remote area of this county in the wintertime, and that was depraved on behalf of

Elijah Page, and that was torture for Chester Allan Poage to suffer through.

The Defendant admits that he kicked the defenseless victim with his boots on until his own feet were sore from kicking that victim in the head. It's no wonder that the victim, when he was found on April 22nd, didn't have any ears on either his right or his left side of his head. That was an act of depravity and that was torture for Chester Allan Poage to go through.

And he described to the police that he gave Chester Allan Poage full football kicks to his head. As that victim screamed, he would kick him. And all the time the victim begged and he pleaded for mercy; the Defendant showed him absolutely none.

And then after he kicked him in the head for a while, they argued in front of this defenseless man who was outnumbered about who was going to stab him. And that was an act of depravity to do that in front of your victim, and it was an act of mental torture for Chester Allan Poage to endure.

And then it took an action of depravity. He went down to the river, the creek, where Chester Allan Poage was and he put his arm around Chester Allan Poage, and Chester Allan Poage said to him, "What are

2000. When he committed this crime, he was fully accountable at law for his actions, and he shouldn't be allowed to minimize his responsibility by blaming others.

The fact is, the Defendant was a man of action in this murder. He's the one that stole the gun that was used in the first acts of aggression. That's when it all started is when he pointed the gun at Chester Allan Poage to facilitate his kidnapping. Nothing would have happened had he not pointed the gun at Chester Allan Poage's head.

He was the one that forced him to the floor. And he told Dr. Perrenoud that it was his idea to tie Chester Allan Poage up. This crime all started at the Defendant's house. And when the victim made a valiant effort to try to escape from an overwhelming force, while others debated what to do, the Defendant went into action. He chased Chester Allan Poage down. He recaptured Chester Allan Poage so that they could murder him. And I'll quote from 187, it says that "When Chester Allan Poage escaped, we were just standing there going, 'Okay. He's getting away. One of us better go after him.' And we just sat there and watched him as he almost got to the top of the other side of the hill. Finally, I was like, 'Well, fuck

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
)ss
COUNTY OF LAWRENCE) FOURTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,
Plaintiff,

vs.

BRILEY W. PIPER,
Defendant.

VOIR DIRE
CRIMINAL SENTENCING TRIAL
Crim. #00-431
VOLUME 11 of 14
July 12, 2011 **(continued)**

BEFORE: THE HONORABLE JEROME A. ECKRICH, III, Circuit Court Judge, and a Jury of 12, at Rapid City, South Dakota, on July 5, 6, 7, 8, 11, 12, 13, 14, 18, 19, 20, 21, 22, 25, 26, 27, 28 & 29, 2011.

APPEARANCES:
For the State: MR. JOHN H. FITZGERALD
State's Attorney, &
MR. BRUCE L. OUTKA
Deputy State's Attorney
Lawrence County
Deadwood, South Dakota

For the Defendant: MR. ROBERT W. VAN NORMAN &
MR. MICHAEL STONEFIELD
Attorneys at Law
Rapid City, South Dakota

Jack Ken Howell, RPR
Court Reporter

MR. MCOWEN: Thanks.

(Whereupon, Mr. McOwen left the courtroom, and Mr. Steven Monteforte entered)

THE BAILIFF: Juror number 157, Steven Monteforte.

THE COURT: Please be seated.

(Whereupon, Mr. Monteforte was seated in the witness chair)

THE COURT: Good afternoon and thank you for your patience, Mr. Monteforte.

MR. MONTEFORTE: Yes, sir.

THE COURT: It's been some time since you were sworn as a potential juror, the -- I want to remind you that you're still under oath, sir. The attorneys are going to be asking you some information -- are going to be asking you some questions, rather, please be candid with them. All right?

MR. MONTEFORTE: Yes, sir.

THE COURT: Thank you.

MR. VAN NORMAN: Thank you, Your Honor.

EXAMINATION

Q (By MR. VAN NORMAN) How are you?

A I'm well, how are you?

Q Good. I have known you for how many years now?

A About five, six.

Q Okay. And I know you were asked in the questionnaire not whether you know somebody now or have a professional

relationship but so Mr. Fitzgerald will know, you and I have shared dinner together on a number of occasions and I have been around your babies after they were born.

A (Nodding head positively)

Q Mr. Monteforte was married to my daughter-in-law's sister. And you have two children together, right? Roman and Sura? Soren?

A Soren and Roman.

Q Yeah.

THE COURT REPORTER: I'm sorry?

MR. MONTEFORTE: Soren and Roman.

Q (By Mr. Van Norman, continuing) S-o-r-e-n, and Roman.

The -- and I have seen you since then and obviously we have done business together, you have sold me two cars, as I recall.

A Correct.

Q Okay. I mention that because sometimes when people come into a courtroom if they have feelings one way or another about the attorneys or about somebody else or a witness they may know is going to testify then it's only fair that those things be disclosed, wouldn't you agree?

A Yes, sir.

Q All right. Would the fact that you and I know one another in the manner that I have indicated make it difficult for you to listen to both sides of this case fairly? Or, you

tell us how it would affect you, if at all.

A I don't think it would at all. I mean, it's still -- I don't know, I'm very nervous --

Q That's okay.

A -- and I don't -- I actually have -- I don't think it would affect anything, I mean, it would just still be the same. You know, you're still doing your job, you're still a professional and I have to maintain that, so --

Q You're saying that that -- that factor alone wouldn't affect you as a --

A No, of course not.

Q -- your fairness as a juror.

A No.

Q Okay. And you know we're here about a very important and serious business, right?

A Yes.

Q Okay. You went to Catholic Boys High School in New Jersey?

A Correct, Paramus Catholic Boys High School.

Q And you were raised as a Catholic, is that right?

A Correct.

Q Are you still following that faith?

A I'm not exactly the most avid but I am still Catholic.

Q Right. And I know it sounds like we're prying but that isn't what I --

A No, that's okay.

Q You understand that if you're on a jury that outside influences, while they make us up and may inform some of our decision-making even on a jury, can't be the guideline for us. In other words, the Judge would give you the instructions of law, and could you agree to follow those?
A Of course.
Q And the jury then is the judge of all the facts that are presented in the courtroom, right?
A Correct.
Q And you hadn't sat on a jury before?
A Once when I was back home in New Jersey, but it's a lot different than this.
Q Okay. What kind of case was that?
A I -- I didn't even go in. Like you go for the day and then you -- if your name is called then you go in, and if not you leave, you're done for the day.
Q All right. This is a very different procedure.
A Yeah.
Q All right. We kind of put you on the spot, don't we.
A Yeah.
Q What do you think about the death penalty?
A I guess I am conflicted, I mean, you know, on one side, you know, is an eye for an eye the right thing to do? Probably not because, you know, it's not going to bring whatever happened to -- you know, it's not going to take pain away

or emotional turmoil for that matter, but, you know, the same situation, I'm not in the victim's shoes, the family's shoes, so I don't know, you know, I -- do I believe in it? I -- I don't, but then again God forbid if something ever happened to my family I guess I really can't put myself in that position, it's kind of hard to be like, "Yeah, I think --" you know, I don't know.

Q Right. Have you had instances over the years when you have read about -- or, have there been instances that you have read about where you thought the death penalty was probably deserved by somebody who got it?

A I have not in recent time, no, I think -- I think the only person that I saw get the death penalty was the Oklahoma City bombing guy, I forgot his name.

Q McVeigh?

A Yeah, that's him. He -- I don't know, in that situation I -- that was an awful thing that he did, you know. Well, you know, Saddam Hussein was another one that got the death penalty. Do I feel he deserved it? I don't know.

Q It didn't bother you, did it?

A Nope. It didn't affect anything on my life, you know, so it's kind of -- I know that sounds self-centered but, I mean, I just look at it like, well --

Q He got it?

A Yeah.

Q Did you watch any of the execution films?
A Oh, yeah, on Youtube, I think that's all -- I think it's a bit of a fabrication, I don't know if it's real film or not, but -- you know.
Q Where he actually drops from the scaffolding?
A Yeah, you know, I don't know if that's --
Q True or not?
A I don't know, you -- you can do a lot of things with computers and stuff like that, so I don't know.
Q But I take it you don't shy from that kind of information, you -- you don't have a problem knowing about it or even watching it.
A No, no.
Q As far as the death penalty is concerned, I take it from what you're saying is that you can consider it as an appropriate punishment in the right circumstances.
A It would have to depend on the circumstances, but --
Q All right.
A -- yeah.
Q The answer is yes then?
A I would probably say yeah.
Q Okay. There are a lot of people that oppose the death penalty, and we have talked to a number of people. Simple opposition to the death penalty doesn't make you incapable as a potential juror here. Do you understand that?

A Yes.
Q The bigger question is, can you temporarily set aside your hesitation or belief regarding the death penalty and perform according to the law, and that isn't that you're required to impose the death penalty, but you are required to follow the Judge's instructions. Can you do that?
A Sure.
Q And you also are required to be able to say honestly that you could fairly consider both options if you were on the jury and were required to impose the penalty, either life without the possibility of parole or the death sentence. Could you do that?
A Yeah, absolutely.
Q Okay. What you're really saying, I take it, and you correct me if I'm wrong, is that it's a serious decision that you wouldn't take lightly.
A Yeah, no, I would have to -- I mean, you would have to really hear all the -- the facts first before any kind of decision-making. You know, I mean, it makes me uncomfortable because of the fact that, I mean, that's a serious thing that I'm -- I mean, it's left in my hands, or in my fellow jurors, so that makes it a little bit uncomfortable, because I don't feel that I have that kind of capability like to hold someone's fate in my hands, I guess, that's kind of -- it's new to me, I have never done

this before, so it's kind of like, wow, I don't know how to handle it, I guess, but --

Q Sure.

A But, I mean, yeah, depending on facts, I mean.

Q I think it would be fair to be able to assure you that nobody else sitting on the jury would have been in this situation before either. Can you imagine that?

A Yeah, I can.

Q Okay. So do you believe you could share the experience with your jurors and listen to their opinions on what they think the evidence shows?

A Of course.

Q Okay. Now, you understand this isn't a mystery to be solved here. We know who killed Chester Allan Poage, the victim. And as Briley sits beside me he is a guilty murderer, first degree murderer. So can you accept that?

A I will try.

Q Okay. Do you have some issue about that?

A No, I just -- I -- I've never had anybody ask me that before so it's -- I'm kind of -- yeah, I mean, if --

Q It feels odd for me to --

A It's really uncomfortable, I mean, it's really -- I don't know.

Q Well, and I know you, of course, and I have the advantage of that. You are a person who is hesitant about many

things, right?

A Correct.

Q And that's how you approach life, you really want to understand it and evaluate it. Correct?

A Yes.

Q Okay. You indicated in answer to question 52, and this is the question: "Do you feel that the death penalty is used too often or too seldom?" and you mentioned "Too seldom." Okay, and what were you thinking about then?

A Because I don't hear about it very often. I mean, I'm sure that when people read about it and -- and all that kind of stuff, I don't go looking for that kind of information. What states do the most death penalty and stuff like that, I don't -- I don't know, I don't hear about it very often. You know, when I was back home in, you know, New Jersey you hear about people just going to life in prison all the time when they commit a crime, never a death penalty, so -- you hear about it more in Texas and stuff like that, so I -- I never hear about it here --

Q Okay.

A -- so that's -- that's why I said too seldom, I just don't hear about it.

Q You understand that it is a law that the Legislature has authorized a jury to consider a person's eligibility and whether the death penalty should be imposed upon him.

A Uh-huh.
Q Okay. Do you accept that as the law?
A I do, yeah.
Q All right. Let me give you a little more outline of what this proceeding is about. If you're on the jury the jury will consider all the facts, and the first decision a juror -- jury would have to make is whether or not one of those special aggravating circumstances exists in this case. And you heard the word "torture," horrific type of crime generally could be a special circumstance, right?
A Correct.
Q The jury would have to decide that that exists beyond a reasonable doubt, unanimously they would have to decide it; if they said, "No, there are no special circumstances," the case would be done, it would be life without parole. But let's assume something else. That you're on the jury and you're one of the jurors, they all agree that one of those special circumstances exists beyond a reasonable doubt, then the jury has to consider all the evidence that's been presented in addition to the evidence on the special circumstance and make a decision as to the appropriate punishment. All right?
A (Nodding head positively).
Q Can you speak out? You have to say yes or no.
A Yes, sorry.

Q Okay. Sometimes the Reporter has a hard time getting a nod.

All right, so we're at that point. We will have presented to you all kinds of evidence in addition to evidence about the actual crime. And would you like to hear as much evidence as possible about Briley before you would make a weighty decision like this?

A Well, of course, I mean, you want to hear all the facts, so --

Q Okay. Could you fairly consider whether or not his childhood had been troubled, if we presented that evidence to you?

A That's a tough -- I mean, I would say yes, I mean -- I mean, that sounds more of a psychological question than -- I mean, for -- you know, because I'm not in that field, I don't know, I mean, if I can determine whether or not someone has had a troubled childhood, I have no idea.

Q Well, if we presented evidence concerning that, say through experts or other witnesses, lay witnesses who can tell you about that.

A Well, sure, I mean, I think if anything is explained thoroughly, I mean, anyone can make a decision of anything.

Q Now, remember though, we're not talking about that evidence being a justification or excuse for the murder.

A Correct.

Q We're just talking about something that in fairness you would want to know about before you made a decision on punishment.

A Yes.

Q Okay. We would talk about additional evidence and that would be about the facts of the crime, surrounding all of the crime, you know, everything that we could think to tell you that was -- the Judge thought was relevant to the crime.

And then we would also want you to know about what Briley has been doing the past 11 years since the crime. You see, he's been in prison for over 10 years of that time, and do you think you could consider evidence about how he's behaved in the penitentiary as something before you pass judgment on him?

A I could.

Q Okay. You don't automatically feel that's irrelevant or something you really wouldn't give a darn about?

A I don't know, again, I don't know.

Q Okay. I'm not asking you to commit to it.

A No, no, I know, I know, but I -- I don't know. I would probably say -- I would probably say yes if -- if there was -- you know, if something has changed while he's been doing his time, I guess. I guess I would say, yes, that would lead to certain decisions.

Q Okay. Again, if it's presented to you here in court, and the Judge has permitted the evidence to be presented, that would be a part of the full case that you'll hear, and are you saying then you could consider --

A Yes.

Q -- could consider it?

A Yes.

Q All right. Anything that I haven't asked you that you want to bring up that you think bear on your being fair and impartial given everything we have talked about?

A No.

MR. VAN NORMAN: Okay. All right, I would pass for cause, Your Honor.

THE COURT: Mr. Fitzgerald.

MR. FITZGERALD: Sure.

EXAMINATION

Q (By MR. FITZGERALD) It's Mr. Monteforte?

A Monteforte.

Q Monteforte.

A Yes, sir.

Q My name is John Fitzgerald, so good afternoon, I guess we have never met.

A No, sir.

Q You have lived in Rapid City for how long?

A 10 years now, since 2000.

Q What is your occupation?
A I'm a business manager at Rapid Chevrolet-Cadillac.
Q Okay. And how long have you worked there?
A Since January. I have been in the business for about six years now.
Q Enjoy it?
A It's got -- pays the bills.
Q All right. A couple of things that I have heard you say was that you don't believe in "it," meaning the death penalty?
A Correct.
Q Okay. So explore with me your reasons for not believing in it.
A I guess it's more along the lines of -- of faith reasoning, you know, I mean, it's not -- an eye for an eye is not -- that's just what we grew up in, so I don't know, I mean -- but, again, I'm not in that situation so, I mean, if something like that happened to my family I guess I would feel a little bit different, but I -- I don't know. But, an eye for an eye is something that I don't really think is -- it doesn't take anything away, it doesn't take -- it doesn't bring the person back, it doesn't take the pain away, nothing goes away, it's just another thing you got to live with, but I don't know.
Q You were asked the reasons for the death penalty, and then

you said "Justice?" and then a question mark.

A If that's -- only in the sense like if -- if that's what certain people feel that's going to bring to justice, I mean, if that's their -- their reasoning, I mean, that's their reasoning, but, I don't know, that's -- I think that's why they get the death penalty, because they feel that justice has been served. I don't see how that is, but --

Q You don't see how justice is served by the death penalty?

A Right, I mean, because, again, the eye for the -- an eye for an eye is something that's just -- I don't know.

Q Well, okay. And then you said "Revenge?" question mark.

A Some people would want that to feel -- more of an emotional standpoint, if somebody was to try to move for the death penalty the family's thinking that they got vengeance and revenge on -- you know, for the victim, so I --

Q Okay. And do you think it serves that purpose, retribution?

A I don't think it serves -- no, I don't. I mean --

Q Can you think of any purpose that the death penalty serves?

A I don't know, I -- I don't think it serves any, but then again I can't -- it's so hard for me to say yes or no because I'm not in the situation, but, I mean, I don't think it does, no.

Q Okay. I'll just write it down. Well, that's your opinion

and you're entitled to it, and if you were I guess enmeshed in one of these situations on a personal level then that wouldn't allow you to be a judge of the facts of the case either because then you would have such feelings one way or the other that it would be asking too much, or it would be unfair, would you agree with that?

A Yes.

Q Okay. And then you have said that you felt like you would be holding his fate in your hands?

A Well, right, that's what I was saying before with Mr. Van Norman, is that, you know, I guess when you're called to a jury and you have something like this, whether or not they get life in prison or the death penalty, that's a pretty heavy responsibility, you know, that's huge.

Q So do you look at it -- well, let me just ask you this then: how can you participate in this in fairness to the State of South Dakota when you tell me that you don't think it serves any purpose at all and that it's not justice?

A I guess when I was talking about before about getting all the facts, I mean, I --

Q Yeah.

A -- I don't know, I mean, that's probably when I can make a more well-informed decision, I guess, but --

Q Okay.

A I -- I don't know.

Q But it sounds like you have already made a decision or you have come to the opinion in your own mind that it serves no purpose, so why would you want to -- how could you judge impartially the appropriateness of the death sentence when you have already avowed that it serves no purpose?

A I agree. I agree with what you're saying.

MR. FITZGERALD: Yeah. Okay. I would ask that -- I would challenge for cause.

THE COURT: Well, can you answer the question? The question was, how could you if you have determined that it serves no purpose?

MR. MONTEFORTE: I guess I could -- I could if I had all the -- all the -- you know, I guess hearing everything out and everything like that I can make some sort of opinion, or -- or, I guess decision, or whatever -- however they do that, vote or whatever, but --

Q (By Mr. Fitzgerald, continuing) Okay. What -- what purpose does life in prison serve for people who commit murder?

MR. VAN NORMAN: Excuse me, Your Honor, I am a little confused on the process. The Court was inquiring and he had challenged.

THE COURT: Well, I was finished with my question.

MR. FITZGERALD: Oh, sorry.

THE COURT: That's all right, no, go right ahead.

MR. VAN NORMAN: Okay, thank you.

THE COURT: It's been a little long in the day, I -- I could have made that clearer. Mr. --

MR. FITZGERALD: I apologize.

THE COURT: -- Fitzgerald, you may continue.

Q (By Mr. Fitzgerald, continuing) What purpose does life in prison serve?

A It's -- I mean, life in prison serves -- you didn't -- you didn't get the eye for the eye, I mean, but you -- to me it's just as bad, I mean, if you're going -- if you're going to prison for life that's -- for me that's a little bit more of a -- a little bit better sentence because, you know, they're never getting out, they're with people that are -- that are a bunch -- they're criminals and kill and whatever they are in there, I mean, but, you know, they have -- he has to live with that, you know, every single day when he wakes up and people are telling him what to do and stuff like that, that's something -- I think that's more -- if he goes through that every single day that's a little bit more -- more of a punishment than it is death. You know, if -- I don't know.

Q Okay. So you think that it's more purposeful to give somebody a life sentence.

A I think so, yeah.

Q And it serves the purposes of justice.

A Yes.

Q Okay. But if I have got it right, the death sentence doesn't serve any purpose that you can think of.
A I feel it does not, no.
Q Okay. And how long have you held that opinion?
A Probably since I first heard about this, because, I mean, like when you see it on television and stuff like you just shrug your shoulders and go, "Huh, that's nice," you know, but when you're put in that situation I -- I started thinking about it, and when I started filling out the questionnaire that was really the first time I ever invested thought into it, so --
Q Okay. Does your belief seriously impair your ability to consider the option in this case of the death sentence as the appropriate punishment for this murder?
A I think it would. I think it would.
MR. FITZGERALD: Okay. I would challenge for cause, Your Honor.
THE COURT: And that last answer that you gave, Mr. Monteforte, is that how you believe deep down inside?
MR. MONTEFORTE: Yeah, I mean, I do, I mean, I just don't think an eye for an eye is the way to go for this.
THE COURT: That wasn't quite the question, that wasn't quite the question.
Thank you, Mr. Monteforte, under all the circumstances the Court will excuse you.

MR. MONTEFORTE: Okay.

THE COURT: Thank you.

(Whereupon, Mr. Monteforte left the courtroom, and Ms. Tiffany Tuttle entered and was seated in the witness chair)

THE BAILIFF: Juror number 158, Tiffany Tuttle.

THE COURT: Good afternoon, Ms. Tuttle.

MS. TUTTLE: Good afternoon.

THE COURT: Thank you for your patience. How are you doing?

MS. TUTTLE: I'm pretty good.

THE COURT: Okay, good. It's been some time since you were sworn as a potential juror, ma'am, you're still under oath. The attorneys are going to ask you some questions now, please be candid with them.

MS. TUTTLE: All right.

EXAMINATION

Q (By MR. STONEFIELD) Hello, Ms. Tuttle.

A Hi.

Q How are you?

A Good, how are you?

Q I'm pretty good, thank you. I'm Mike Stonefield, I'm one of the attorneys who represents Briley Piper in this case, Briley is the man seated in the middle of the table there.

We have had access to your juror questionnaire here and so I have read over that and I'm going to ask you some

questions about your knowledge of this case and your opinions about it, okay?

A All right.

Q You were asked first of all whether you had any knowledge about the case, and you said that you're not familiar with the names but you do know that a man was killed by a few other men?

A (Nodding head positively).

Q Is your knowledge any deeper or broader than that?

A No.

Q Is Briley's name familiar to you in any way?

A Ever since I have been chosen for jury duty.

Q Okay, but before that?

A (Shaking head negatively).

Q Since you became aware that you were going be on this case have you sought out any other kind of information about it, looked in the papers or the internet or anything?

A No.

Q Okay. Do you believe that you have an opinion about the case as you sit here right now?

A I don't really know much about the case so I don't have an opinion on it.

Q Okay. You were also asked your opinions about the death penalty, and you did express some opinions there, okay?

A (Nodding head positively).

Q And you were asked the question about, "Please describe in detail thoughts or views on the death penalty," and you said that, ". . . if the case is severe enough and a murderer shows complete lack of respect for life then they deserve the death penalty." Is that how you feel?
A (Nodding head positively).
Q Okay.
THE COURT REPORTER: Could you say yes or no.
MS. TUTTLE: Yes, I'm sorry.
Q (By Mr. Stonefield, continuing) You were also asked if you believe in an eye for an eye, and you said, "Yes." Is that how you feel?
A Yes.
Q Okay. You were also asked if you believe that the State should impose a death penalty on everyone who intentionally kills another person, and you said, "Yes?"
A Yes.
Q And that's how you feel?
A Yes.
Q Have you felt -- have you had those feeling for some time?
A Ah --
Q Have you thought that way for a period of time?
A Yeah, I have.
Q Okay. And it sounds like your opinions are kind of -- are kind of strong opinions, I mean, you're kind of set in

them?
A Huh-uh, yeah.
Q You understand that Briley as he sits here is not innocent of murder and that this trial is not going to be about whether he's innocent or guilty of murder. Do you understand that?
A Yes, I do.
Q The trial is going to be about what sentence he should receive, whether he receives the death penalty or whether he receives life in prison. You know that?
A Yeah.
Q I take it from your answers that you have given on the questionnaire and what you have said to us before that knowing that Briley is a guilty killer, knowing that he was involved in a murder, and by definition showed a complete lack of respect for the life of the person that he was involved in killing, I take it from what you have said that you believe that he should get the death penalty.
A Yes.
Q Okay, you had no hesitation in your answer there?
A No.
Q Okay. In your opinion, Briley should be sentenced to death?
A Yes.
MR. STONEFIELD: Okay. Based on those answers, Your Honor,

I would challenge.

MR. FITZGERALD: No objection.

THE COURT: Ma'am, thank you for coming in today, the Court will excuse you.

MS. TUTTLE: Okay, thank you.

(Whereupon, Ms. Tuttle left the courtroom, and Ms. Kayla Carver entered and was seated in the witness chair)

THE BAILIFF: Juror number 161, Kayla Carver.

THE COURT: Good afternoon, ma'am, thank you so much for your patience this afternoon. It's been some time since you were sworn as a potential juror, I would remind you, ma'am, you're still under oath. The attorneys will be asking you some questions now, please be candid with them.

MS. CARVER: Okay.

EXAMINATION

Q (By MR. STONEFIELD) Ms. Carver, hello.

A Hi.

Q I'm Mike Stonefield, I'm one of the attorneys who represents Briley Piper, he's the man seated at the middle of the table here.

How are you?

A Good.

Q Let me tell you first off, it's been a long day, a long day for us, I'm sure it's been a long at least half a day for you sitting back there, and in my last questioning of the

APPELLANT'S REPLY BRIEF

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

No. 28153

BRILEY W. PIPER,

Petitioner and Appellant,

v.

DARRIN YOUNG, Warden South Dakota State Penitentiary,

Respondent and Appellee.

APPEAL FROM THE CIRCUIT COURT
OF THE
FOURTH JUDICIAL CIRCUIT
LAWRENCE COUNTY, SOUTH DAKOTA

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TABLE OF CONTENTS

		PAGE
TABLE OF AUTHORITIES		i
PRELIMINARY STATEMENT		1
STATEMENT OF LEGAL ISSUES		2
ARGUMENT		3
1.	**Piper's guilty pleas are invalid because they were not knowingly and intelligently made in violation of his Constitutional right to a jury trial.**	3
2.	**The prosecution's arguments made in State v. Page were inconsistent with the timelines argued in State v. Piper and should have been admitted into evidence as an admission by party opponent during the Piper re-sentencing.**	14
3.	**The deficiencies in jury selection regarding jurors Sagdalen and Carlin warrant a new trial under the South Dakota Constitutional rights to a fair trial.**	16
4.	**Pursuant to State v. Rhines, juror Monteforte should not have been excused for cause by only expressing general purpose objections to the death penalty.**	18
5.	**The cumulative effect of trial counsel's ineffective assistance requires a new trial.**	20
6.	**Appellate counsel was ineffective by not appealing and preserving all issues for appeal.**	23
CONCLUSION		25
REQUEST FOR ORAL ARGUMENT		26
CERTIFICATE OF COMPLIANCE		27
CERTIFICATE OF SERVICE		28

TABLE OF AUTHORITIES

	PAGES(S)
Cases:	
Anderson v. State, 373 N.W.2d (S.D. 1985)	23
Apprendi v. New Jersey, 530 U.S. 466 (2000)	8
Boykin v. Alabama, 395 U.S. 238 (1969)	6, 8, 13
Cochrun v. Solem, 397 N.W.2d 94 (1986)	24
Cuyler v. Sullivan, 446 U.S. 335 (1980)	12
Gray v. Mississippi, 481 U.S. 648 (1987)	19
Haase v. Weber, 693 N.W.2d 668 (S.D. 2005)	25
Hoover v. State, 552 So.2d 834 (Miss. 1989)	16
Illinois v. Rodriguez, 497 U.S. 177 (1990)	6
Jones v. Class, 1998 S.D. 55	23
Jones v. State, 353 N.W.2d 781 (S.D. 1984)	11
Lippold v. Meade Cty. Bd. Of Comm'rs, 2018 S.D. 7	4
Loop v. Solem, 398 N.W.2d 140 (S.D. 1986)	23
Lykken v. Class, 1997 S.D. 29	23
McCoy v. Louisiana, 138 S.Ct. 53 (2017)	21
McDowell v. Solem, 447 N.W.2d 646 (S.D. 1989)	22
Patton v. United States, 281 U.S. 276 (1930)	13
Piper v. Weber, 2009 S.D. 66 (Piper II)	3, 4, 7, 8, 9, 12, 13
Rhines v. Weber, 2000 S.D. 19	23
Ross v. Oklahoma, 487 U.S. 81 (1988)	16

PAGES(S)

Cases:

Smith v. Groose, 205 F.3d 1045 (8th Cir. 2000) 16

State v. Bailey, 1996 S.D. 45 5

State v. Bilben, 2014 S.D. 24 6, 12

State v. Daniel, 200 S.D. 18 18

State v. Darby, 1996 S.D. 127 18

State v. Etzkorn, 1996 S.D. 99 16, 17, 18

State v. Garza, 1997 S.D. 54 18

State v. Goodwin, 2004 S.D. 75 5, 8, 10

State v. Hansen, 407 N.W.2d 217 (S.D. 1987) 17

State v. Kaufman, 2016 S.D. 24 4, 5

State v. Kvasnicka, 873 N.W.2d 705 (S.D. 2016) 5

State v. Losieau, 266 N.W.2d 259 (S.D. 1978) 5

State v. McCormick, 385 N.W.2d 121 (S.D. 1986) 11

State v. Muetze, 368 N.W.2d 575 (S.D. 1985) 17

State v. Perovich, 2001 S.D. 96 22

State v. Piper, 2014 S.D. 2 (Piper III) 3

State v. Rhines, 1996 S.D. 55 18, 19, 20

State v. Schmidt, 2012 S.D. 77 5

State v. Sewell, 69 S.D. 494 13

State v. Verhoef, 2001 S.D. 58 17, 18

State v. Wahle, 521 N.W.2d 134 (S.D. 1994) 5

PAGES(S)

Cases:

State ex rel. Warner v. Jameson, 77 S.D. 340 (1958) 11

Tafero v. Wainwright, 796 F.2d 1314 (11th Cir 1986) 15

Uttecht v. Brown, 551 U.S. 1 (2007) 19

United States v. Dominguez Benitez, 542 U.S. 74 (2004) 12

United States v. Higgs, 353 F.3d 281 (4th Cir. 2003) 16

United States v. Kattar, 840 F.2d 118 (1st Cir. 1988) 16

United States v. Martin, 704 F2d 267 (6th Cir. 1983) 11

United States v. Salerno, 937 F.2d 797 (2nd Cir. 1991) 16

United States v .Wilken, 498 F.3d 1160 (10th Cir. 2007) 10

Wainwright v. Witt, 469 U.S. 412 (1985) 19

Witherspoon v. Illinois, 391 U.S. 510 (1968) 19

State Statutes:

SDCL 23A-20-6 18

SDCL 23A-20-9 18

Federal Statutes:

28 U.S.C. §§2254-2266 24

Constitutions:

South Dakota Constitution, Article VI, Section 2 26

South Dakota Constitution, Article VI, Section 7 26

United States Constitution, Fifth Amendment 26

PAGES(S)

Cases:

United States Constitution, Sixth Amendment 8, 26

United States Constitution, Fourteenth Amendment 26

Other Sources:

Antiterrorism & Effective Death Penalty Act of 1996 24

APPELLANT'S REPLY BRIEF

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

BRILEY W. PIPER,

Applicant and Appellant,

v. No. 28153

DOUGLAS WEBER (DARIN YOUNG),
Warden, South Dakota State Penitentiary,

Respondent and Appellee.

PRELIMINARY STATEMENT

This Reply Brief will be confined to addressing and responding to arguments in the State's Appellee's Brief (referred to as "AB"). Any argument presented in Appellant's Brief and not addressed in this Reply Brief is not intended to be waived.

"R" denotes the lower court's Record, as numbered in the Clerk's Index. Transcript references are as follows: "ST" is the sentencing jury trial; "HT" is the habeas corpus hearing before the habeas trial court. Other transcript references will be by name of the hearing ("Plea TR", for example) or date of the hearing. All references will include the page number after the hearing designation.

STATEMENT OF LEGAL ISSUES

The Appellee's brief begins with an exhaustive statement of the facts. The Appellee's brief ends with a threat to this Court that society cannot be protected from Piper. The evidence after the murder supports otherwise, and the brief's legal arguments do not change the arguments made by the Appellant in its original brief. The harsh view of penology asserted by the Appellee in its conclusion is not supported by the evidence presented at the sentencing hearing.

As nearly twenty years have passed since this murder, it is appropriate to consider how Briley Piper has chosen to live his life since his initial death sentence was imposed in 2001. Bard Woodward, Unit Manager at the South Dakota State Penitentiary (SDSP), testified about his relationship with Piper. Contrary to the picture painted by the Appellee, Piper committed no violent rule infractions in his nine years in the SDSP. ST: 569. Woodward was also not aware of any violence between Piper and other inmates. As a result, any argument that Piper will "kill again" is not supported by the evidence.

Justin Falon, a counselor with Dakota Psychological Services in Sioux Falls, testified as to his interactions in 2006 with Piper while also in the SDSP. Mr. Falon worked in the prison in a number of different roles and had a lot of experience with different inmates. Based on his experience as a counselor, Mr. Falon considers Piper "respectful, somewhat insightful, and seemed to have this drive about life that I hadn't seen before." ST: 1446, Lns. 11-15. While most inmates would act out and create problems for the prison, his interactions with Piper were positive. ST: 1447. Piper is a "learned man," taking advantage of every opportunity to learn new information. ST: 1448. To summarize Piper in one word, it would be "teleological" – goal seeking. ST:

1463, 11-15.

Woodward believes Piper has above-average intelligence and communicates well. ST: 548. While in prison, Piper received roughly twenty-two major violations in approximately nine years, with fifteen of those violations being in his first two years in prison. ST: 564, 568. Additional SDSP employees had similar opinions. Ms. Veld testified that Piper was respectful and his rule infractions diminished over time. ST: 950. Mr. Fredrickson testified that Piper was never rude, combative, disrespectful or threatening in his encounters with Piper. ST: 944.

ARGUMENT

1. Piper's guilty pleas are invalid because they were not knowingly and intelligently made in violation of his Constitutional right to a jury trial.

Before discussing the substance of Piper's argument, the State claims that Piper's renewed motion to the criminal trial court to withdraw his plea is fatal to this habeas claim. The facts are these: In State v. Piper, 2014 S.D. 2 (Piper III), this Court ruled that the criminal trial court had no jurisdiction to entertain and decide Piper's first plea-withdrawal motion, made prior to the jury sentencing proceeding. This Court ruled that its remand language in Piper v. Weber, 2009 S.D. 66 (Piper II) restricted the circuit court's jurisdiction on remand. The Piper III decision explicitly noted that this Court was not deciding the merits of Piper's plea-withdrawal claim which, at the time of the Piper III decision, had not been decided by any court. This habeas issue is squarely governed by this Court's decision in Piper II. Since the waiver of jury sentencing was constitutionally invalid, so is the guilty plea waiver.

At this point, Piper had a substantive issue in search of the appropriate remedy.

Piper then advanced his claim in both this habeas proceeding (the subject of this appeal) and by way of a new motion, made to the criminal court, to withdraw the plea. The criminal court denied Piper's new motion on the same procedural grounds, again ruling that the Piper II remand language continued to restrict its jurisdiction. Once again, there was no ruling on the merits of Piper's claim. Piper attempted to appeal this denial, and this Court dismissed the appeal for lack of appellate jurisdiction (docket #27797). This Court based its dismissal on State v. Kaufman, 2016 S.D. 24, 877 N.W.2d 590. Once again, there was no ruling on the merits of Piper's claim.

The State now argues that, in light of the above; Piper's current habeas issue is barred by the res judicata doctrine. The State claims that the plea-withdrawal litigation means that Piper's habeas claim cannot be considered again. However, there was no ruling on the merits ever made by the criminal circuit court or by this Court to preclude the habeas attempt to litigate this issue. Both the criminal circuit court and this Court rested their rulings on "lack of jurisdiction" grounds. The res judicata doctrine (as it is argued here by the State) does not apply, absent a final ruling on the merits in the previous litigation. See Lippold v. Meade Cty. Bd. of Comm'rs., 2018 S.D. 7 ¶¶ 28-29, 906 N.W.2d 917. [1]

The Appellee asserts Piper's claim circumvents State v. Kaufman, 2016 S.D. 24, 877 N.W.2d 590. AB: 40. This reliance is misplaced and the argument advances

[1] As discussed in Piper's initial brief, the res judicata doctrine has two prongs. The prong discussed above, in the text, concerns relitigation of an issue which has been previously litigated and decided on the merits. The second prong is that, under certain circumstances, an issue which could have been raised earlier, but was not, may also be precluded. That prong was extensively discussed in Piper's initial brief. The State does not attempt to refute that extensive discussion, except to summarily disagree in a single conclusory paragraph at AB, 21-22. The State's appellate burden, to provide reasoned analysis, has not been met here.

inconsistent positions. The Appellee first asserts that "the denial of a motion to withdraw a guilty plea after judgment is not appealable." However, the Appellee then goes on to cite State v. Goodwin, 2004 S.D. 75, ¶4, 681 N.W.2d 847, 849 and State v. Bailey, 1996 S.D. 45, ¶11, 546 N.W.2d 387, 390-91, which are both appellate decisions based on appeals from motions to withdraw guilty pleas. Other examples exist. State v. Kvasnicka, 873 N.W.2d 705 (S.D. 2016); State v. Schmidt, 2012 S.D. 77, 825 N.W.2d 77; State v. Wahle, 521 N.W.2d 134 (S.D. 1994); State v. Losieau, 266 N.W.2d 259 (S.D. 1978). In each case, this Court determined whether the trial court abused its discretion in denying a motion to withdraw a guilty plea.

The State also argues that "no inferior court can exercise review jurisdiction over a motion to withdraw a guilty plea if this court cannot." AB: 22. The State suffers from the misconception that Piper's habeas claim is an attempt to obtain judicial review of the criminal-court motion. Such is not the case. Piper's habeas issue is a freestanding, substantive, constitutional due process claim which is not dependent in any way upon the criminal-court motion. In addition, the State's argument compares apples to oranges. This Court's appellate jurisdiction, as discussed in Kaufman, is dependent upon a legislative grant of power, which is lacking for plea-withdrawal motions. In contrast, a circuit court's jurisdiction over habeas corpus proceedings flows, without restriction, from its powers as a court of original jurisdiction. The State's argument makes no sense and must be rejected.

Finally, an erroneous factual assertion in the State's brief must be corrected. At AB: 20, the State claims that Piper's first habeas attorney did not challenge the guilty plea in that proceeding "because he 'certainly would have lost'". While the State does

not provide a transcript page reference for that quote, it's at HT, 204, and is taken completely out of context. The discussion there had to do with whether an ineffective counsel challenge to the advice of Mr. Rensch and Mr. Duffy had been considered (regarding the construction of South Dakota's death penalty statutes). The quote, in other words, had nothing at all to do with whether or why the guilty plea was not an issue in the first habeas proceeding. Mr. Miller thoroughly testified to his reasoning about this, and his conversations with Mr. Piper, prior to the passage quoted by the State. The State's brief leaves the reader with a false impression, which is now corrected.

The balance of the State's argument on this issue addresses claims that have not been made, rather than the due process claim that is raised here. The State erroneously treats this as governed by plea-withdrawal standards (AB: 22-24), rather than by the constitutional standards which govern whether a plea-based waiver is voluntary and intelligent. The State then claims that any error here was attorney error (the pre-plea advisement by Mr. Rensch and Mr. Duffy), and then treats this issue as if it were an ineffective counsel claim. All of this is beside the point, as demonstrated below.

If Piper's purported waiver of his jury trial right was not made knowingly and intelligently, it is "void" as a violation of due process. Boykin v. Alabama, 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). Any such purported waiver "cannot be given effect." Illinois v. Rodriguez, 497 U.S. 177, 183, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990). It follows that no matter what kind of discretion a plea-withdrawal judge might have, in the typical course of events, a court has no discretion whatsoever to enforce a void, unconstitutional waiver. See State v. Bilben, 2014 S.D. 24 ¶17, 846 N.W.2d 336. Piper's habeas claim is a freestanding, substantive, constitutional due process claim,

rather than a State-law "plea withdrawal motion" claim. The State's argument to the contrary is meritless.

The State's next premise is that any error – linking a jury trial on guilt with the flawed jury trial on punishment – had nothing to do with the plea-taking court. AB: 25. The State, however, completely ignores what the court did on this question at the time of the plea. See Piper's initial brief at 6, fn. 1, which is a complete and accurate rendition of the plea entry hearing on this question.

This Court recognized as much in Piper II, 2009 S.D. 66 at ¶17:

> "Piper's attorneys advised him that the statute did not allow for a jury trial on the penalty phase after a guilty plea to first degree murder. . . . The judge's explanation did not clearly dispel that misunderstanding."

This Court was correct. Piper's attorneys told him explicitly that if he had a jury trial on guilt, he had to have a jury trial on sentencing. They also told him that if he waived his guilt jury and pleaded guilty instead, he had to be sentenced by the judge. We also know, from the plea-taking transcript, that the judge (at the beginning of the hearing, in Piper's presence) was told the same thing by defense counsel. The judge, in Piper's presence, took a break to look into it. When he returned to court, he ratified this advice by his silence -- he said nothing at all to tell Piper that this wasn't correct advice. We also know that what the judge ended up telling Piper explicitly confirmed this advice -- that jury-sentencing waiver was a "consequence" of the plea, and that once the plea was entered, judge sentencing would happen next. That's just what happened. A plea (to the charges) was entered, and no further waiver of any kind took place.

Therefore, this is not a situation, as argued by the State, where courts cannot divine when a defendant may have been misadvised and cannot be expected to address it

or correct it in the plea colloquy. The court knew, or should have realized, exactly what Piper had been told, since Piper was sitting there when the judge was told the same thing. After taking a break specifically to consider this, nothing was said to disabuse Piper of this notion. Instead, the judge's own statements told Piper the same thing: that a guilty plea to the charges would lead directly to judge sentencing, and that waiver of jury sentencing was a "consequence" of the guilty plea. The judge first (by his silence) ratified that misadvice, then expressly affirmed it, and then acted in accordance with it.

"The duty to explain these rights on the record belongs to the trial court and not to the defendant's attorney." State v. Goodwin, 2004 S.D. 75 ¶14, 681 N.W.2d 847 (citation omitted). The court's duty, in a case of this magnitude, is to be exercised with "utmost solicitude" and must include "a painstaking explanation of the rights afforded the accused." (Piper's initial brief at 13-14, citations omitted).

The advisement error here is not, as the State claims, on a "matter[ ] collateral to the requisite Boykin advisements" (AB: 27). Rather, the defect goes directly to the kind of jury trial which Piper was told he had. The right to a jury trial is not some collateral matter, but is instead a "constitutional protection[ ] of surpassing importance." Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2358, 147 L.Ed.2d 435 (2000). The very same defect which this Court (in Piper II) held to be constitutionally fatal to Piper's waiver, also indelibly burdened the guilt-phase jury trial which was advised to Piper. He was told of a version of his Boykin right (the Sixth Amendment right to a jury trial) which was unconstitutionally burdened. Therefore, Piper's habeas claim is properly considered exactly as he presented it: as a due process issue.

The State makes arguments which could be considered applicable to the issue

which Piper does actually raise. The State claims that Piper's choice to plead guilty was a part of his strategy, and not the product of the court's misadvice regarding penalty jury unanimity. The State also argues that Piper would have pleaded guilty even if he'd received accurate and complete advice, and thus there is no prejudice. Neither argument is valid.

Regarding the strategy claim, the State makes a factual argument that Piper was not actually misled by the plea-taking court's misstatements about unanimity, because his attorneys had advised him correctly. AB: 32 n. 3. This same argument was presented to this Court in Piper II, to no avail. Instead, this Court correctly focused on what the plea-taking court advised, at the time of the plea.

Judge Johnson advised of the jury function at a sentencing hearing three different times. The first time (Plea TR at 18), the judge explained that the jury would "determine whether or not the State has proved one or more aggravating circumstances and then for that jury to decide whether the penalty should be life or death. The verdict of the jury would have to be unanimous." It would be reasonable from this advisement to conclude that the jury's decision on punishment ("life or death", in the court's words) "would have to be unanimous" either way. Both the prosecutor and Piper's attorney promptly affirmed this advice, and Piper promptly said (for the only time in the entire hearing) that he did not understand. What the court then told Piper transforms this reasonable interpretation into *the only one which was possible*. (Emphasis added).

> Court: What you need to understand is that if you have a jury instead of a judge, all 12 jurors must agree on the penalty.

Piper then said he understood. TR: 19. The Court then, for the third time, misadvised Piper.

Court: What is significant about what you're doing here today is that if you waive your right to have the jury do the sentencing, you are trading 12 lay people for one judge to make that call. Do you understand that?

Piper: Yes.

TR: 20.

What Piper's lawyers may have told him before the plea hearing cannot carry the weight given to it by the State. There is no authority that would allow such earlier advice to trump affirmative judicial misadvice during the plea advisement. Even though "[i]t is assumed that legal counsel has explained the consequences of a guilty plea to a defendant," that assumption cannot save a deficient advisement on the record, because "this Court recently said that '[t]he duty to explain these rights on the record belongs to the trial court and not to the defendant's attorney.'" State v. Goodwin, 2004 S.D. 75 ¶14, 681 N.W.2d 847 (citation omitted).

In any event, Piper's lawyer affirmed this erroneous advice during the hearing, and the erroneous advice was given twice more (and never corrected) thereafter. When Piper's lawyer, in open court, is contradicting his own previous advice, Piper cannot be expected to believe the earlier, unofficial version from his attorneys. This earlier advice cannot legally trump what happened in court. See United States v. Wilken, 498 F.3d 1160, 1168 (10th Cir. 2007), where the plea-taking court's advisement contradicted the contents of a plea agreement's appeal-waiver provision:

> "[L]ogic indicates that if we may rely on the sentencing court's statements to eliminate ambiguity prior to accepting a waiver of appellate rights, we must also be prepared to recognize the power of such statements to achieve the opposite effect. If it is reasonable to rely upon the court's words for clarification, then we cannot expect a defendant to distinguish and disregard those statements of the court that deviate from [the defendant's previous understanding] – especially where, as here, neither the government nor defense counsel apparently noticed the error at the

time."

Besides the factual problems with the State's argument, it is also legally mistaken. Calling Piper's plea a strategic choice is not a substitute for a valid waiver because Piper was not informed. "A defendant can hardly be said to make a strategic decision to waive his jury trial right if he is not aware of the nature of the right or the consequences of the waiver." United States v. Martin, 704 F.2d 267, 273 n. 5 (6th Cir. 1983). This Court, too, has repeatedly held that a defendant's decision and course of action cannot be considered a valid waiver of fundamental constitutional rights, unless the defendant is fully aware of the right being waived. State ex rel. Warner v. Jameson, 77 S.D. 340, 91 N.W.2d 743, 745 (1958) (defendant's choice to proceed without counsel was invalid when he was not advised, and did not know, that he had a right to appointed counsel if indigent); State v. McCormick, 385 N.W.2d 121, 124 (S.D. 1986) (probation revocation defendant objected to due process violation, lack of advance written notice; continuance was offered and refused; Court held that this decision to decline a continuance was not a valid waiver of the right to advance notice, because defendant was unaware that his decision would constitute a waiver).

Jones v. State, 353 N.W.2d 781 (S.D. 1984) is particularly instructive. There, despite the misgivings expressed by the trial court to defense counsel about his performance, Ms. Jones continued with her lawyer. The State claimed that her continued reliance on trial counsel constituted a waiver of her right to counsel's effective assistance. This Court held that her decision was not a valid waiver, because she lacked the knowledge necessary to make it so. Id. at 784. Her decision could not be a sufficient *substitute for* a valid waiver. Instead, before her "decision ... could reduce or forfeit [her]

entitlement to constitutional protection" (Id., quoting Cuyler v. Sullivan, 446 U.S. 335, 344, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)), it had to be the *product of* a knowing and intelligent waiver. (Emphasis added).

In other words, the question of a voluntary, knowing and intelligent waiver of a fundamental constitutional right comes first. It cannot be dispensed with merely by claiming that the waiver (here, the plea) is the product of a defendant's choice. That choice must first be fully informed and voluntary before it may be enforced.

In a related vein, the State also claims that Piper was not prejudiced by any error because he'd have entered his plea anyway. The State exclusively discusses this by way of the "prejudice" prong of the ineffective counsel test, which is completely inapplicable here. The State presented the same argument to this Court in Piper II. This Court was not persuaded then, and shouldn't be today. The State's position is legally erroneous.

In United States v. Dominguez Benitez, 542 U.S. 74, 124 S.Ct. 2333, 159 L.Ed.2d 157 (2004), the Court held that prejudice must be shown to obtain relief from a non-Constitutional Rule 11 plea-advisement violation. But the Court contrasted its holding with the different rule that is applied to the situation here (542 U.S. at 84 n. 10, citation omitted):

> "This is another point of contrast with the constitutional question whether a defendant's guilty plea was knowing and voluntary. We have held, for example, that when the record of a criminal conviction obtained by guilty plea contains no evidence that a defendant knew of the rights he was putatively waiving, the conviction must be reversed . . . We do not suggest that such a conviction could be saved even by overwhelming evidence that the defendant would have pleaded guilty regardless."

This Court agrees. See Bilben, supra, 2014 S.D. 24 ¶¶ 16-17 (rejecting State's identical prejudice argument in context of constitutional plea defect).

Piper II stands for the same proposition. The State made this identical "no prejudice, he'd have pled guilty anyway" argument, and this Court reversed anyway. In fact, of the scores of cases decided by this Court since Boykin which challenge the constitutional validity of a plea, this Court has never once even hinted that this type of showing of prejudice is required.

In the final analysis, this habeas issue is squarely governed by this Court's decision in Piper II. This Court ruled that Piper's waiver of jury sentencing was constitutionally invalid. But there was no separate waiver of jury sentencing. The only decision Piper made at the plea hearing was to enter a guilty plea. He was told that the jury sentencing waiver was a consequence of his plea. He was also misadvised as to unanimity, in a way which unconstitutionally burdened the right to a jury trial as to guilt or innocence. The very same factors which resulted in the Piper II decision also apply here.

The United States Supreme Court has noted that a plea-taking court's duty is to be exercised "with a caution increasing in degree as the offenses dealt with increase in gravity." Patton v. United States, 281 U.S. 276, 313, 50 S.Ct. 253, 74 L.Ed.2d 854 (1930). This Court has long agreed: "When [a guilty] plea is tendered, it is received with the utmost caution. . . . The caution to be exercised on such occasions bears a direct proportion to the gravity of the charge." State v. Sewell, 69 S.D. 494, 12 NW2d 198, 199 (1943). "In a death penalty plea, more so than in other pleas, the trial court has the duty to ensure 'that the defendant truly understands the charges, the penalties, and the consequences of a guilty plea.'" Piper II, 2009 S.D. 66 ¶19 (citation omitted).

In conclusion the waiver was not informed, and the due process claim as to

whether Piper entered a constitutionally sound plea is properly before this Court. The res judicata doctrine does not bar the claim because no court has ruled on the substantive issues. The Constitutional claim is governed by Constitutional standards which govern whether a plea-based waiver is voluntary and intelligent. Nothing bars the Constitutional claim to be made in this habeas proceeding.

The decision cannot be considered strategic as Piper did not make the waiver knowing and intelligent in the first place, with a full understanding of the legal consequences of the decision. The trial court clarified Piper's understanding, only the clarification was in error. A new trial is the only appropriate remedy.

2. The prosecution's arguments made in State v. Page were inconsistent with the timelines argued in State v. Piper and should have been admitted into evidence as an admission by party opponent during the Piper re-sentencing.

The Appellee mischaracterized Piper's argument in its brief as Piper has never argued that only the initial aggressor deserved the death penalty. AB: 43. Instead, Fitzgerald argued, and this Court, gave credence to who committed the first act. Piper only argues that the story remain the same as to who that person was. AB: 22-23.

An attorney's arguments are not considered evidence in the normal jury trial. An attorney can summarize the evidence to aid the jury, and in this manner the statements are not evidence. But when statements by an attorney in one trial contradict statements made by the same attorney in a second trial, due process requires the jury in the subsequent trial learn about the previous inconsistent statements. The statements are no longer simply summarizing statements; they have impeachment value and exculpatory value, with due process requirements necessitating their admission into the second trial. The rules of

evidence allow this statement to be introduced as an admission(s) by party opponent.

It is incompatible for the State to argue in Page sentencing that Page and Piper committed the first acts (plural) of aggression, but then argue in Piper sentencing that Piper committed the first act (singular) of aggression. AB: 46. The Appellee asserts that even if contradictory, the exclusion of the mitigating evidence was harmless and cites Tafero v. Wainwright, 796 F.2d 1314, 1321 (11th Cir. 1986) for support. Tafero, however, has limited precedential authority in this context because Tafero did not present any mitigation evidence during sentencing. Id. at 1320.

The Appellee asserts that the evidence in the Page case and in this case show that both Page and Piper "simultaneously" initiated different forms of aggression against Poage. AB: 44. This is not what was argued, however, to the juries.

The Appellee spent nearly twenty pages of its brief trying to inflame the passions of this Court with extreme gruesome facts. Even this rendition of the facts, however, reveals that the county prosecutor made inconsistent statements to the jury. The Appellee's facts outline how the first act of aggression was when "Page then pulled a .22 pistol he had stolen from Poage's house and ordered Poage to "get the fuck on the floor, bitch." AB: 6. This is consistent when the Lawrence County prosecutor, John Fitzgerald, also made this fact important by arguing the same event during the closing argument of Elijah Page that [Page] is the one that started the assault with pulling the gun. App F: Page ST, 947-948.

In this trial, the county prosecutor inconsistently repeated twice during cross-examination that Piper was *the first person to cause any physical violence* in this case. ST, 1565: 8-15, ST, 1637: 9-17. (Emphasis added). In this case, the prosecutor argued

that Piper "was the one that did the first act of actual aggression to knock the victim unconscious." ST: 1807. These statements contradict the statements made in Page's sentencing trial and the factual rendition in Appellee's brief.

The content of the statements are important. These inconsistent statements were about the timeline of the event. AB: 43. The Government will always be able to produce and introduce a timeline about what happened. Some evidence will change, such as admissions by the defendant or the mitigation evidence and relevancy objections would be heard. A timeline does not change based on which defendant is on trial. The person who started this murder scheme did not change from 2001 to 2011, but the prosecutor's characterization of what occurred did, and the two characterizations are incompatible. That characterization should have been admitted to the jury. See Smith v. Groose, 205 F.3d 1045, 1047 (8th Cir. 2000); United States v. Higgs, 353 F.3d 281, 326 (4th Cir. 2003); United States v. Salerno, 937 F.2d 797, 811-812 (2d Cri. 1991); U.S. v. Kattar, 840 F.2d 118, 130 (1st Cir. 1988); Hoover v. State, 552 So.2d 834, 838 (Miss. 1989).

3. The deficiencies in jury selection regarding jurors Sagdalen and Carlin warrant a new trial under the South Dakota Constitutional rights to a fair trial.

The Appellee asserts that challenges to the jury selection process are barred by res judicita and Ross v. Oklahoma, 487 U.S. 81, 86 (1988). AB: 55. The reliance on Ross v. Oklahoma is misplaced as the South Dakota Supreme Court has never fully adopted the rationale in Ross, and instead ruled to the contrary.

The only South Dakota decision to directly cite Ross did so in the dissenting opinion. State v. Etzkorn, 1996 SD 99, ¶22, 552 N.W.2d 824, 829-30. Etzkorn was a

driving under the influence case where during jury selection, two jurors who had been married to alcoholics, indicated they could not be fair and impartial. 1996 at ¶¶3-4. The court refused to excuse the jurors for cause, so defense counsel exhausted his peremptory challenges to remove those two jurors and a third potential juror from the panel. Id. at ¶5. Chief Justice Miller, writing for the majority, considered the voir dire as a whole:

> The foregoing voir dire, as a whole, shows that both Kenney and Hofmeister were unable to set aside their preconceptions and presume Etzkorn innocent. While expression of a predetermined opinion of guilt, by itself, does not disqualify a juror per se, the inability to set aside such preconceptions and render an impartial verdict is disqualifying. Hansen, 407 N.W.2d at 220; Muetze, 368 N.W.2d at 585. Here, the entire voir dire of both Kenney and Hofmeister clearly evinces such an inability.

Id. at ¶13.

The Court concluded:

> A defendant should not be compelled to use his peremptory challenges upon prospective jurors who should have been excused for cause. Prejudice will be presumed if a disqualified juror is left upon the jury in the face of a proper challenge for cause, so that defendant must either use one of his peremptory challenges or permit the juror to sit. Prejudice results when defendant is required to, and does, exhaust all of his allowable peremptory challenges. Given this settled statement of the law, the result of the denial of Etzhorn's challenges for cause was clearly prejudicial error depriving Etzhorn of the impartial jury he is constitutionally and statutorily guaranteed.

Id, at ¶16-18.

The South Dakota constitutional and statutory rights to a fair trial were the basis for the holding in Etzkorn. State v. Verhoef, 2001 S.D. 58, 627 N.W.2d 437. As a result, the case was reversed and remanded.

Here, juror Sagdalen testified that the death sentence imposed by Judge Johnson should stand. She stated "Mr. Piper needs to accept the Judge's decision (of death) and that was his choice." ST: 76. Next, Juror Carlin wrote on his juror questionnaire "if you

take a life you should be willing to give up *yours*!!!" (Emphasis in questionnaire). ST: 1232. These two potential jurors testified more forcefully and partially than statements concerning the presumption of innocence as in Etzkorn. Instead of only initial impressions regarding the presumption of innocence, these statements left little doubt as to the conclusion these jurors would reach if they were selected to remain on the jury. They needed to be subject to challenges or the defense would have essentially left potential jurors who were both initially against the presumption of innocence and also against making the State prove the case beyond a reasonable doubt. The two potential jurors could not follow the laws in many respects. The defense had no choice but to use preemptory challenges in this case, which deprived Piper of the impartial jury as required by Etzkorn.

Subsequent cases have distinguished Etzkorn, but never overruled the decision. In State v. Garza, 1997 SD 54, 563 N.W.2d 406, 409, the jury was found to be impartial as no jurors held the firmly held belief like what occurred in Etzkorn. Id. at ¶16; See also State v. Darby, 1996 S.D. 127. 556 N.W.2d 311; State v. Verhoef, 2001 S.D. 58, 627 N.W.2d 437; State v. Daniel, 200 S.D. 18, 606 N.W.2d 532. As a result, while the federal constitutional and statutory rights have faded in this area, the constitutional and statutory right to an impartial jury remains strong in South Dakota. Since all preemptory challenges were used, and since these two jurors were not excused for cause by the trial court, contrary to the rights provided by the South Dakota Constitution and statutes, a new trial is warranted in this case. See SDCL 23A-20-6; SDCL 23A-20-9.

4. **Pursuant to State v. Rhines, juror Monteforte should have not been excused for cause by only expressing general purpose objections to the penalty.**

The State gives mere lip service to State v. Rhines, 1996 S.D. 55, ¶41, 548 N.W.2d 415, 430, which clearly indicates that prosecutors cannot strike jurors who oppose capital punishment in principle simply for expressing conscientious or religious scruples against capital punishment. A "life qualified" juror can only be excused if his/her views on capital punishment would "prevent or substantially impair the performance of his duties as a juror" in accordance with instructions and oath. Id. at ¶41, 548 N.W.2d at 430, quoting Wainwright v. Witt, 469 U.S. 412, 424 (1985). A "life qualified" juror with a conscientious objection to the penalty can be excused only if "the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." Rhines, 1996 SD 55 at ¶51, 548 N.W.2d at 432 quoting Wainwright, 469 U.S. at 426.

In Gray v. Mississippi, 481 U.S. 648, 667-668, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987), the Court held that improper exclusion of a juror qualified to serve under Witherspoon v. Illinois, 391 U.S. 510, 522, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) could not be deemed harmless error. Witherspoon held that a capital defendant's right to an impartial jury prohibited the exclusion of prospective jurors "simply because they voice general objections to the death penalty or expressed conscientious or religious scruples against its infliction."

The State relies heavily on Uttecht v. Brown, 551 U.S. 1, 7 (2007) where the trial court struck a juror who gave "ambiguous" and "equivocal" responses to questions about his ability to impose a death sentence over personal objections to capital punishment. The State moved to strike the potential juror asserting "confusion" as the rationale. Id. at 2227. The defense did not object to the removal of the potential juror. Id. The Court

gave great deference to the trial court's assessment of the prospective juror's demeanor, and also held that there was no requirement for the defense attorney to object. Id. at 2229.

Juror Manaforte is a Catholic who fits this description. He did have reservations about the purpose of the death penalty but that is not the question. The question is whether, as a juror, he could impose the death penalty. Monteforte did assure the court that he could consider the death penalty under the right circumstances. ST: 2097, Lns. 12-20. Monteforte could follow the judge's instructions and would be capable of returning a sentence of either life or death. ST: 2098, Lns. 2-14. As a result, the removal of juror Manaforte violated Rhines as Monteforte could still perform the duties as a juror by following the jury instructions. A new trial is warranted under both the Federal and State Constitution for these reasons.

5. The cumulative effect of trial counsel's ineffective assistance requires a new trial.

The Appellee dismisses claims that trial counsel was ineffective. Appellee asserts the trial counsel's decision to call experts that eliminated the need for the State to prove aggravating factors was "trial strategy." That could be true, but it does not eliminate the need to examine this strategy to determine whether it was objectively reasonable. Further, the record does not indicate whether Piper agreed to this strategy.

Trial counsel Van Norman seems surprised at the proposition that it was not a good idea to call an expert witness who relayed his client's admissions to the aggravating factors. As noted in the habeas hearing:

Question: So you had a psychiatrist testify about conversations that you

allowed to take place with your client where all of the aggravating circumstances were basically admitted by your own witness; is that true?

Van Norman: Yes. *And you may be pointing out a failure by me.*

The Court: I'm sorry. What?

Van Norman: He may be pointing out a failure by me if that's how that could have been twisted, *because I didn't think about that.*

Question: Am I twisting it, Mr. Van Norman?

Van Norman: No, how that could be presented, John. I'm not saying you are twisting it. I can use words without impugning you. That isn't what I was doing. You're pointing out something that hadn't occurred to me that could well have been a failure by Mr. Stonefield and me. *I had never thought of that.*

HT, 109. (Emphasis added).

The fact that the pros and cons of this "strategy" was never weighed by Mr. Van Norman lead to the conclusion that the decision was not objectively reasonable.

The United States Supreme Court has recently held that it is structural error for an attorney to admit his clients guilt without his client's authority to do so. McCoy v. Louisiana, 138 S.Ct. 53, ___ U.S. ___ (2017). A client's autonomy supersedes an attorney's strategy with the Court noting that:

> "With individual liberty – and, in capital cases, life – at stake, it is the defendant's prerogative, not counsel's, to decide on the objective of the defense: to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt."

McCoy v. Louisiana, 138 S.Ct. 53, ___ U.S. ___ (2017).

There is no evidence that Piper agreed to this. While Piper did plead guilty, he had moved to withdraw his guilty plea in 2010 prior to the re-

sentencing in 2011. This was a sign to counsel that Piper would not have wanted to admit to aggravating factors during the sentencing hearing as well. When the client moved to withdraw that plea, autonomy indicated a desire to not admit to the offenses as alleged at the time of the sentencing trial.

The Appellee's brief bypasses South Dakota law and cites Eighth Circuit cases regarding whether a cumulative effect can show prejudice. AB: 66. Under South Dakota law, the cumulative effect of errors by the trial court may support a finding by the reviewing court of a denial of the constitutional right to a fair trial. State v. Davi, 504 N.W.2d 844, 857 (S.D. 1993); See McDowell v. Solem, 447 N.W.2d 646, 651 (S.D. 1989) (denying prosecutorial misconduct and ineffective assistance arguments when considered cumulatively); State v. Perovich, 2001 S.D. 96, 632 N.W.2d.

How trial counsel admitted aggravating factors, conducted examinations of Dr. Pesce and Dr. Franks, Tom Curtis, Sister Crowley and the issue about television privileges can be considered together to determine whether counsel was ineffective. We have two experts who cross-examinations were extremely harmful because defense counsel did not have the time or spend the resources to prepare. We have a jail informant with no investigation into whether he received additional leniency or cooperation agreements for testifying again. And we have a devastating cross-examination of defense witness Sister Crowley, which the defense could not counter with true facts because they did not spend the time to determine whether a policy applied to Sister Crowley or not. Cumulatively, all these errors paint a clear picture of ineffective counsel attempting to get through a death penalty trial without adequate preparation.

6. Appellate counsel was ineffective by not appealing and preserving all issues for appeal.

Petitioner submits that if this Court denies the Petitioner the ability to withdraw his guilty plea, then it must be found that counsel provided ineffective assistance of counsel by not filing the motion when it could be filed, which would have been the only chance for this Court to hear the motion.

The Appellee argues that Appellate counsel acted correctly when he did not appeal certain issues. The attorney's discretion was applauded by the Appellee. AB: 40. But this same discretion according to the Appellee forever bars Piper from being able to raise all potential claims for a new trial. This is irreconcilable. But if this Court finds the argument persuasive, the result is the attorney was constitutionally ineffective.

This Court has long held appellate counsel to the same standard of effectiveness as trial counsel:

> Constitutionally guaranteed representation must be "adequate and effective" at every critical stage of a criminal proceeding, including appeal and not merely "perfunctory and casual." Loop v. Solem, 398 N.W.2d 140, 141 (S.D. 1986) (citing Anderson v. State, 373 N.W.2d 438 (S.D. 1985) (overruled on other grounds)). In reviewing the adequacy and effectiveness of representation, we must determine whether counsel exercised the "customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances." Id. The same standards that are applied in measuring trial counsel's competence to determine alleged ineffectiveness apply in measuring appellate counsel's performance. Lykken v. Class, 1997 S.D. 29, ¶27, 561 N.W.2d 302, 309 (citations omitted).

Jones v. Class, 1998 S.D. 55, ¶25, 578 N.W.2d 154, 162.

To prevail, the petitioner must prove that "counsel's representation fell below an objective standard of reasonableness" and "that such deficiency prejudiced the defendant." Rhines v. Weber, 2000 S.D. 19, ¶13, 608 N.W.2d 303, 307.

In this case, if the State's argument is correct that Piper's motion to withdraw his guilty plea is barred by res judicata, Appellate counsel was ineffective by failing to recognize the significant barrier which could exist by failing to appeal issues. Piper's appellate counsel was appellate counsel in Cochrun v. Solem, 397 NW.2d 94 (1986), which held that claims that could have been presented to the Court are barred by the doctrine of res judicata. As appellate counsel in Cochrun, he was fully aware of the potentially devastating consequences of failure to brief and argue arguments at the earliest opportunity, particularly in a death penalty case, to prevent a potential res judicata bar. Further, the Antiterrorism & Effective Death Penalty Act of 1996 requires the issues to be preserved for future federal habeas corpus bar. 28 U.S.C. §§2254-2266. In order for these issues to be preserved for federal habeas review, every appealable issue must be exhausted.

As a result, any "strategy" to only appeal the "best" issue was not only ineffective in the short-term but has the potential to impact the "long-game" strategy in death penalty appeals. This drastic consequence of failing to raise a claim, specifically in death penalty cases, requires counsel to present all possibly meritorious claims and not compare the strength of those claims. Potentially barring claims that your client can make is not the objective reasonable role of an advocate or appellate counsel. The advocate in these situations should not make the judgments and decisions about which claims should be raised and which claims could be forever barred. That is the role of the Court, not the advocate. What may have been a sound appellate advocacy strategy for non-capital appeals in the early 1980s was clearly risky post-Cochrun.

The logical conclusion of the Appellee's argument is that Petitioner's claims are

forever impacted by their attorney's advice. A decision by an attorney, with such a drastic remedy, cannot be considered objectively reasonable.

Prejudice is apparent, as not being able to argue potential meritorious claims is a direct hinderance on the Petitioner's exercise of constitutional rights. Nothing is more important than a viable claim to a death row inmate.

This injustice requires Haase v. Weber, 693 N.W.2d 668, 2005 S.D. 23 (S.D. 2005) be applied to the facts of this case. In Haase, the attorney determined that no issues, factual or legal, were meritorious to be raised in a habeas petition. Id. at ¶2. Haase filed subsequent petitions which were denied before filing a third habeas application alleging ineffective assistance of second habeas counsel. This Court recognized "the unique and troubling situation." Id. at ¶5. The Court determined that no judge had made an independent review of the claims, and that denying the application would result in a fundamental injustice through no fault of his own, but, rather through the mistakes of prior counsel and courts. Id. As a result, this Court determined it was in the best interest of justice and judicial efficiency to remand the case back to the trial court for a hearing on the merits. Id. This is a similar unique and troubling situation this case should be remanded as well.

CONCLUSION

Appellee's argument does not change the fundamental assertions in this case: The trial court erred in denying Piper's motion to withdraw his plea. Piper's due process constitutional rights were violated at the plea hearing when the plea was not informed, and the only remedy is a new trial. This issue has never been resolved on the merits. Additional due process violations are present when the State advanced inconsistent

arguments in the separate sentencing hearings of the multiple individuals charged with the same murder. Next, trial counsel was ineffective by calling witnesses who were catastrophic to the Petitioner's case, errors in jury selection and for the failure to investigate multiple witnesses. If the State is correct and Piper is barred to make his motion for a new trial, appellate counsel was ineffective for not raising the issue at the proper time.

Piper was deprived of due process of law, the right to a fair trial, and the right to a jury trial, in violation of his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article VI, Sections 2 and 7 of the South Dakota Constitution. The Writ of Habeas Corpus should be issued, Piper's death sentence should be vacated, and the matter remanded to the Circuit Court of Lawrence County for a jury trial on the merits of the case.

REQUEST FOR ORAL ARGUMENT

Counsel for Briley Piper respectfully requests twenty minutes for oral argument.

Respectfully submitted this 10th day of July, 2018.

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Reply Brief is within the limitation provided in SDCL 15-26A-66(b) using Times New Roman typeface in 12 point type. Appellant's Reply Brief contains 7,153 words.

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

Dated this 10th day of July, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of July, 2018, I electronically filed the foregoing brief and appendix with the South Dakota State Supreme Court Clerk and the original and two true and correct copies of the foregoing brief and appendix were served by United States mail, first class postage prepaid to Clerk of the Supreme Court, 500 East Capitol, Pierre, South Dakota, 57501.

A true and correct copy of the foregoing brief and appendix was served electronically to the Office of Attorney General, Marty Jackley at atgservice@state.sd.us and to John Fitzgerald, Lawrence County State's Attorney, jfitzger@lawrence.sd.us.

Dated this 10th day of July, 2018.

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