IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

Appeal No. 31001

THEODORE GUZMAN,
Petitioner/Appellant,

vs.

DANIEL SULLIVAN, Warden, South Dakota State Penitentiary,
Respondent/Appellee.

Appeal from the Circuit Court, Seventh Judicial Circuit
Pennington County, South Dakota

The Honorable Robert Gusinsky

APPELLANT'S BRIEF

Stanton A. Anker
Anker Law Group, P.C.
1301 West Omaha Street, Suite 207
Rapid City, South Dakota 57701
Telephone: (605) 718-7050
Email: stanton@ankerlawgroup.com
Attorneys for the Appellant

Marty J. Jackley
South Dakota Attorney General
1302 E. Hwy 14, Suite 1
Pierre, South Dakota 57501
Telephone: (605) 773-3215
Email: atgservice@state.sd.us
Attorneys for the Appellee

Sarah L. Thorne
South Dakota Assistance Attorney General
1302 E. Hwy 14, Suite 1
Pierre, South Dakota 57501
Telephone: (605) 773-3215
Email: sarah.thorne@state.sd.us
Attorneys for the Appellee

Matthew W. Templar
South Dakota Assistant Attorney General
1302 E. Hwy 14, Suite 1
Pierre, South Dakota 57501
Telephone: (605) 773-3215
Email: matthew.templar@state.sd.us
Attorneys for the Appellee

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Lara Roetzel
Pennington County State's Attorney
130 Kansas City Street, Suite 300
Rapid City, South Dakota 57701
Telephone: (605) 394-2191
Email: larar.roetzel@pennco.org
Attorneys for the Appellee

Megan A. Krueger
Pennington County Deputy State's Attorney
130 Kansas City Street, Suite 300
Rapid City, South Dakota 57701
Telephone: (605) 394-2191
Email: megan.krueger@pennco.org
Attorneys for the Appellee

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PRELIMINARY STATEMENT

Theodore Guzman was convicted by a jury on three counts of rape and sentenced to life imprisonment on each count, plus 15 years on a count of sexual contact. The conviction was affirmed by the Supreme Court on November 16, 2022. An Application for Writ of Habeas Corpus was dismissed by the circuit court on November 20, 2024. This appeal follows the issuance of a Certificate of Probable Cause.

In this brief, Appellant/Petitioner, Theodore Guzman, will be referred to as "Guzman"; certain minor children will be referred to by their initials, A.C., N.G., or L.G; the State of South Dakota will be referred to as "the State"; and witnesses will be referred to by name.

Because there were two trials in this matter, reference to the initial trial transcript is cited as "1st Tr. __"; reference to the second trial transcript is cited as "2nd Tr. __"; reference to the sentencing transcript is cited as "ST. __"; reference to the trial court's settled record is cited as "SR __"; reference to settled record in the habeas case is cited as "HSR. __"; and the appendix is cited as "App.".

JURISDICTIONAL STATEMENT

The circuit court filed a Memorandum Decision dismissing an Application for Writ of Habeas Corpus with the Pennington County, South Dakota, Clerk of Courts on November 20, 2024. Guzman timely filed a Motion for Issuance of Certificate of Probable Cause on December 2, 2024 and on January 16, 2025, the South Dakota Supreme Court entered a Certificate of Probable Cause and Order Directing Appointment of Counsel. Following appointment of counsel, Notice of Appeal was timely filed on February 14, 2025.

STATEMENT OF ISSUES AND AUTHORITIES

1. WHETHER GUZMAN'S CONSTITUTIONAL RIGHTS WERE VIOLATED DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL.

Trial counsel's representation of Guzman fell below the objective standard of reasonableness and such deficiencies prejudiced Guzman.

Most relevant cases and statutory provisions:

a. Rhines v. Weber, 2000 S.D. 19, 608 N.W.2d 303

b. Miller v. Young, 2018 S.D. 33, 911 N.W.2d 644

c. Coon v. Weber, 2002 S.D. 48, 644 N.W.2d 638

2. WHETHER GUZMAN'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE TRIAL COURT'S RULINGS PROHIBITING WITNESSES AND EVIDENCE TO BE PRODUCED AT TRIAL.

The trial court ruled against Guzman on several key issues which prejudiced and violated his Constitutional rights.

Most relevant cases and statutory provisions:

a. State v. Birdshead, 2015 S.D. 77, 871 N.W.2d 62

b. State v. Lamont, 2001 S.D. 92, 631 N.W.2d 603

c. U.S. Const. amend. V

3. WHETHER THE TRIAL COURT'S SENTENCE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT AND VIOLATES GUZMAN'S CONSTITUTIONAL RIGHTS.

The trial court's sentence was cruel and unusual, and violated Guzman's Constitutional rights.

Most relevant cases and statutory provisions:

a. State v. Deleon, 2022 S.D. 21, 973 N.W.2d 241

b. State v. Rice, 2016 S.D. 18, 877 N.W.2d 75

c. U.S. Const. amend. VIII

STATEMENT OF THE CASE

On March 7, 2018, Defendant Theodore Guzman was indicted by a Pennington County grand jury on one count of first degree rape of a minor child, A.C. SR. 1. On April 10, 2018 a Part 2 Information was filed alleging Guzman was a habitual offender with a prior felony DUI conviction and a prior conviction for unauthorized ingestion of a controlled substance. SR. 43.

On August 8, 2018, a Superseding Indictment was filed against Guzman alleging three counts of first degree rape of a minor, A.C., N.G., and L.G., and one count of sexual contact with a child under age 16, N.G. SR. 61. An Amended Part 2 Information was filed on September 11, 2018, alleging Guzman was a habitual offender for the same prior convictions as outlined in the April 10, 2018 Part 2 Information. SR. 65.

On January 9, 2020, trial commenced before the Honorable Robert A. Mandel. 1st Tr. 1. On January 16, 2020, the Court declared a mistrial because the jury was unable to reach a verdict. 1st Tr. 1040.

A second trial commenced on April 8, 2021 before the Honorable Robert A. Mandel. 2nd Tr. 1. On April 15, 2021, the Jury found Guzman guilty on all counts. SR. 2782. On July 21, 2021, Guzman was sentenced to life imprisonment on each of the three counts of first degree rape and fifteen years on the count of sexual contact, all to run consecutively. SR. 5355.

On July 27, 2021, Guzman filed a Notice of Appeal. SR. 3523. On November 16, 2022, the South Dakota Supreme Court filed its opinion affirming the conviction. SR. 5365.

On February 28, 2023, Guzman, acting *pro se,* filed an Application for Writ of Habeas Corpus. HSR. 2. The Honorable Robert Gusinsky, entered a Memorandum Decision dismissing the Writ of Habeas Corpus on November 20, 2024. HSR. 45.

Guzman filed a Motion for Issuance of Probable Cause on December 2, 2024. HSR. 63. On January 16, 2025, the South Dakota Supreme Court entered a Certificate of Probable Cause and Order Directing Appointment of Counsel. HSR. 91. Attorney Mark Marshall was appointed to represent Guzman on January 21, 2025. HSR. 98. Attorney Stanton A. Anker was appointed to represent Guzman on May 20, 2025.

STATEMENT OF FACTS

On December 5, 2017, 12 year old A.C., a friend of Guzman's daughter, reported to her mother that she had been raped by Guzman at a sleepover approximately 2 to 3 weeks prior. SR. 5368. This allegedly took place a sleepover A.C. had with Guzman's daughter, N.G. SR. 5367. Tiffani Petro of the Children's Advocacy Center in Rapid City, South Dakota interviewed A.C. on December 11, 2017. SR. 5368. As a result of the allegations made by A.C., Guzman's children were taken into foster care of December 13, 2017. Id.

Guzman's daughter, N.G. who was 10 at the time, was interviewed by Petro on December 15, 2017. She denied any sexual contact with her father during this interview. SR. 5369.

Later in December 2017, N.G. disclosed to her foster parent that she had been raped by her father. N.G. was interviewed again by Petro on January 5, 2018 and made the allegation of sexual contact with the father. Id.

On July 10, 2018, another of Guzman's daughters, L.G., then 8 years old, disclosed to her foster parent that she too was raped by her father. L.G. was interviewed by Petro on July 31, 2018, in which she made allegations of sexual contact with her father. SR. 5370.

Guzman's son, A.G., was interviewed by Petro on August 7, 2018. SR. 2889. He made allegations that an unknown male neighbor had raped him approximately one year earlier. However, he was unable to provide any details about the alleged event, the name of the individual (even though they were supposedly friends), or a description of the individual. SR. 2889-2894.

Guzman was initially indicted on March 7, 2018 on one count of first degree rape of a minor child, A.C. SR. 1. On August 8, 2018, a Superseding Indictment was filed against Guzman alleging three counts of first degree rape of a minor, A.C., N.G., and L.G., and one count of sexual contact with a child under age 16, N.G. SR. 61.

Guzman's first trial, which began on January 8, 2020, resulted in a hung jury. 1st Tr. 1040. Shortly thereafter, his trial attorney, Paul Winter, withdrew from the case and attorney Conor Duffy was appointed to represent him. SR. 954.

Guzman was tried for a second time on these charges beginning April 8, 2021. 2nd Tr. 1.

At the trial, the three children testified about incidents with Guzman, alleging he engaged in sexual penetration with them. The alleged victims' accounts, however, contained discrepancies. Discrepancies as to locations of the alleged assaults and who was present when the alleged assaults took place. 1st Tr. 87, 320, 506; 2nd Tr. 155, 338, 391, 627.

With respect to A.G., the defense attempted to introduce false accusations through his prior forensic interviews. SR. 2188. The trial court sustained the State's objection and excluded the evidence. SR. 3584.

At the second trial, the State called several expert witnesses.

Hollie Strand, a forensic examiner with the Pennington County Sheriff's Office, testified regarding trauma response, forensic interviewing, manipulation and grooming behaviors, and the dynamics of child sexual abuse disclosures. 2nd Tr. 29.

Tifanie Petro, a certified forensic interviewed, testified regarding her interviews with the alleged victims. 2nd Tr. 230.

Dr. Cara Hamilton, a pediatrician at Black Hills Pediatrics, testified as an expert in treatment of victims of sexual abuse. 2nd Tr. 312, 315.

The defense did not request independent psychological evaluations of the children. As a result, no defense mental health expert testimony was presented to challenge the State's experts.

An order to sequester witnesses had been entered by the trial court as it related to the first trial. SR. 104. Prior to the second trial, Guzman's counsel did not move to sequester witnesses and no order was entered. The State moved to prohibit Helen Guzman from testifying for violating a sequestration order. 2nd Tr. 714. Despite there being no order in place for the second trial, the trial court granted the State's motion and Helen Guzman was prohibited from testifying. 2nd Tr. 717.

In his first trial, Guzman testified. At the second trial, he did not. The State moved to have his testimony from the first trial read into the record. Defense objected, but the trial court permitted it to be read. 2nd Tr. 708.

At the conclusion of the second trial, Guzman was convicted on all counts. SR. 2782. On July 21, 2021, Guzman was sentenced to life imprisonment on each of the three counts of first degree rape and fifteen years on the count of sexual contact, all to run consecutively. SR. 5355.

On February 28, 2023, Guzman, acting *pro se*, filed an Application for Writ of Habeas Corpus. SR. 2. The Honorable Robert Gusinsky, entered a

Memorandum Decision dismissing the Writ of Habeas Corpus on November 20, 2024. HSR. 45.

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STANDARD OF REVIEW

The Court's review of a habeas corpus proceeding is limited because it is a collateral attack on a final judgment. Miller v. Young, 2018 S.D. 33, ¶ 12. Habeas corpus can be used to review (1) whether the trial court had jurisdiction of the crime and the defendant; (2) whether the sentence was authorized by law; and (3) whether the defendant was deprived of basic constitutional rights. Id.

This court reviews the circuit court's determination of a Sixth Amendment ineffective assistance of counsel claim as a mixed question, reviewing the court's decision on the constitutional issue de novo and its findings of fact for clear error. Evans v. Sullivan, 2024 S.D. 36, ⁋ 31, 9 N.W.3d 490, 500 (citing Reay v. Young, 2019 S.D. 63, ⁋ 13, 936 N.W.2d 1217, 120).

ARGUMENT

I. Guzman's Constitutional Rights were violated due to the ineffective assistance of counsel at his second trial.

"The Sixth Amendment 'right to counsel is the right to the effective assistance of counsel.'" Rhines v. Weber, 2000 S.D. 19, ¶ 12 (*quoting* Strickland v. Washington, 466, U.S. 668, 686, 104 S.Ct. 2052, 2063 (1984). "The benchmark for judging any claim of ineffective assistance 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. *See also* Coon v. Weber, 2002 S.D. 48, ¶ 11; Miller v. Young, 2018 S.D. 33, ¶ 25.

The Court applies a two-prong test to ineffective assistance of counsel claims. Rhines, 2000 S.D. at ¶ 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 representations fell below an objective standard of reasonableness, and (2) that such deficiency prejudiced the defendant." Id.

a. Guzman's Constitutional Rights were violated when trial counsel failed to request defense's own expert to interview and evaluate the alleged victims.

The State called several expert witnesses who had interviewed or treated the minor children prior to trial.

Hollie Strand testified as an expert in trauma response, forensic interviewing, manipulation and grooming behaviors, and the dynamics of child sexual abuse disclosures. 2nd Tr. 29.

Strand testified regarding the background on the development of forensic interviewing protocols, noting that Child Advocacy Centers use internationally recognized, peer-reviewed protocols aimed at being trauma-informed and developmentally sensitive. 2nd Tr. 35. She discussed the characteristics of victims of sexual assault and a child's ability to disclose abuse. 2nd Tr. 45. She testified that disclosures often occur in a piecemeal fashion, with children revealing information gradually. 2nd Tr. 44. She also testified about grooming behaviors. 2nd Tr. 66.

During redirect, Strand clarified that she was noticed as an expert in the case and that defense counsel did not consult with her prior to her testimony. 2nd Tr. 96.

Tifanie Petro, a certified forensic interviewed, testified regarding her interviews with the alleged victims. 2nd Tr. 230. Petro testified that children often disclose more information over time and interviews, explaining that delayed disclosures and partial denials are not uncommon in child sexual abuse cases. 2nd Tr. 290, 300, 496, 536. She testified she found no indication that the children were coached. 2nd Tr. 692. Petro admitted that explicit denials in forensic interviews are rare but stated that it is not uncommon for child victims to initially deny abuse out of fear or confusion. 2nd Tr. 705.

Dr. Cara Hamilton, a pediatrician at Black Hills Pediatrics, testified as an expert in treatment of victims of sexual abuse. 2nd Tr. 312, 315. Dr. Hamilton testified regarding her examination of A.C. She testified that A.C. had symptoms of abdominal pain and isolating behavior which are common in children who have suffered sexual abuse. 2nd Tr. 318, 325.

All of this testimony was introduced without any rebuttal. Guzman's attorney did not have any experts testify on his behalf to contradict anything said by the State's experts.

Counsel did not have the alleged victims interviewed or evaluated by his own experts. There was no attempt to show that the alleged victims were being coached by anyone other than those paid by the State to testify for the State. There was no attempt to show that any of the alleged physical symptoms could have been caused by any other medical condition.

Counsel did not interview the State's witnesses prior to trial.

In addition, the lack of any experts made it difficult for the defense to impeach the alleged victims based upon inconsistent statements. There were no experts to testify that the inconsistencies were not organic but caused by coaching or the techniques used by the interviewers.

It is interesting to note that in the first trial, the defense had Dr. Dewey Ertz, a psychologist, testify. 1st Tr. 676. He testified regarding the methodology of forensic interviews of children. 1st Tr. 682. He testified

regarding coaching and outside influences on children during interviews. 1st Tr. 686. Dr. Ertz testified regarding trauma. 1st Tr. 691.

In the second trial, Dr. Ertz was not called to testify.

If there would have been defense experts to testify about these matters, and rebut the testimony of the State's experts, the outcome of the trial could have been significantly different. As a result of the deficiency in obtaining his own experts, Guzman has been prejudiced and did not have the effective assistance of counsel constitutionally guaranteed to him. For this reason, the conviction should be overturned and a new trial ordered.

b. Guzman's Constitutional Rights were violated when trial counsel caused delays to the trial, against Guzman's wishes, and violated his right to a speedy trial.

Guzman's first trial ended in a hung jury on January 17, 2020. 1st Tr. 1041. On January 22, 2020, his new trial was scheduled to begin on July 14, 2020. SR. 3755. During the January 22, 2020 hearing, the trial court discussed the need to start the trial by that date because of the 180 day rule for speedy trial. SR. 3755. Guzman's counsel from his first trial withdrew on April 20, 2020. SR. 953. His new counsel was appointed on April 30, 2020. SR. 954.

On July 6, 2020, Guzman's attorney filed a motion to continue the trial that was to begin in a little over a week. SR. 2151. The trial was continued to January 4, 2021. SR. 2154. At a status hearing on December 11, 2020,

Guzman's attorney made an oral motion to continue the trial. SR. 3765. The second trial eventually began on April 8, 2021. 2nd Tr. 1.

Although defense counsel made two motions to continue the trial, he did so without the consent of Guzman. When counsel told Guzman he would be moving the trial, Guzman told him no. Guzman wanted to his trial to proceed as scheduled, arguing with his counsel that the prosecution has had enough time and he wants this done.

By continuing the trial without Guzman's consent, not once but twice, Guzman was prejudiced by his attorney's actions, resulting in an unnecessary delay to his speedy trial rights guaranteed under the Constitution.

c. Guzman's Constitutional Rights were violated due to trial counsel's perceived bias against him.

Several comments by trial counsel, prior to and during the second trial, showed that he was biased against his client.

During jury selection, Guzman was taking notes of answers from the jury pool. He passed those notes to his attorney's paralegal, who was sitting between him and his attorney. When the paralegal leaned in and asked the attorney about Guzman's notes, the attorney did not look at the notes, but instead pushed them aside and said they were "chicken scratch". He did not take any input from his client into consideration.

During trial, defense was allowed to use a conference room in the Courthouse during breaks. During a break, Guzman was in the room having his handcuffs removed. On the other side of the door, his attorney was

having a conversation with another attorney (trial counsel's wife), and overheard him say that he thought Guzman had committed the alleged crimes. The other attorney commented that "you should ask him". When his attorney entered the room, he never asked Guzman anything. When Guzman brought it up, the attorney exited the room.

During his closing statement, Guzman's attorney admitted that the cross-examination of A.C. was too much for him, so he begged his wife to cross-examine the other children and to "get me out of it." 2nd Tr. 858. He stated that he just wanted to get up out of his chair and "hug" them. Id. This statement could have telegraphed to the jury that his own attorney did not believe in him.

These statements, both to Guzman and the jury, show that his attorney had a preconceived notion of his guilt. This preconceived notion furthers the ineffective assistance of counsel he received and explains the decisions, or lack thereof, that were made on Guzman's behalf. Because of this, Guzman was prejudiced by the ineffective assistance of counsel guaranteed him by the Constitution.

II. Guzman's Constitutional Rights were violated by the trial court's ruling regarding witnesses and evidence he was prohibited from introducing.

The rights of those accused are enshrined in our laws.

"No person ...shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;...". U.S. Const. amend. V.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, ...to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

"No State shall...deprive any person of life, liberty, or property, without due process of law;...". U.S. Const. amend XIV § 1.

"No person shall be deprived of life, liberty or property without due process of law." S.D. Const. art. 6 § 2.

"In all criminal prosecutions the accused shall have the right to defend in person and by counsel; to demand the nature and cause of the accusation against him; to have a copy thereof; to meet the witnesses against him face to face; to have compulsory process served for obtaining witnesses in his behalf, and to a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed." S.D. Const. art. 6 § 7.

"'[A]n accused must be afforded a meaningful opportunity to present a complete defense. When a defendant's theory is supported by the law and . . . has some foundation in the evidence, however tenuous, the defendant has a right to present it.' Roach, 2012 S.D. 91, ¶ 13, 825 N.W.2d at 263." State v. Birdshead, 2015 S.D. 77, ¶ 27. "When a defendant is denied the ability to

respond to the State's case against him, he is deprived of 'his fundamental constitutional right to a fair opportunity to present a defense.' Crane v. Kentucky, 476 U.S. 683, 687, 106 S.Ct. 2142, 2145 (1986)." State v. Lamont, 2001 S.D. 92, 631 N.W.2d 603, ¶ 16. "It is only fair that a defendant in a criminal trial be allowed to present his theory of the case." Id.

a. Guzman's Constitutional Rights were violated when the trial court prohibited Helen Guzman from testifying at trial.

As this Court wrote in its opinion dated November 16, 2022, "the total exclusion of Helen Guzman as a witness was too harsh a remedy for the violation of the sequestration order under the circumstances presented." State v. Guzman, 2022 S.D. 70, ¶ 33. "[T]he right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense." Id. at ¶ 27 (internal citations omitted). "[E]xclusion of a witness's testimony is 'an extreme remedy' that 'impinges upon the right to present a defense,' and thus should be employed sparingly." Id. at ¶ 29.

The trial court's exclusion of the testimony of Helen Guzman was extreme. At the first trial, Helen Guzman was permitted to testify. At the second trial, she was not. The first trial ended in a hung jury. The second trial ended in a conviction. Now, it is impossible to know if Helen Guzman's testimony was the reason for the hung jury. However, her exclusion from the second trial does leave that question open.

There is also the issue of perceived bias against Guzman by the trial judge. One morning during trial, Guzman had been escorted into the courtroom prior to anyone else. When the judge entered the courtroom, without noticing Guzman sitting there, commented that "I'll be glad to put this one to bed".

Additionally, there appears to have been a possible personal connection between Guzman and the judge's family that should have warranted him recusing himself, because it could easily lead to bias.

Guzman has a prior drug-related conviction. When he did drugs, he would hang out and use with the daughter of the judge that presided over his case. This knowledge could have led the trial judge to be biased against Guzman.

The decision to exclude Helen Guzman's testimony could have been motivated by the judge's knowledge of his daughter's connection with Guzman and illegal activities.

The exclusion of Helen Guzman's testimony violated Guzman's fundamental and Constitutional rights. The exclusion was prejudicial to Guzman. Because of the Constitutional implications, this is ripe for habeas review. A Constitutional error should not be considered harmless.

b. Guzman's Constitutional Rights were violated when the trial court prohibited the introduction of evidence concerning false and unfounded allegations.

Guzman provided notice of his intent to offer a witness interview of his son, A.G., at his second trial. A.G. had been interviewed by Petro, the same person who interviewed A.C., N.G., and L.G., about allegations of rape. SR. 2889. During this interview, he accused an unknown, unnamed neighbor, of raping him. SR. 2889-2894. This alleged rape had occurred approximately one year earlier, which would have been approximately two months prior to when the allegations by A.C. had occurred. Id.

A.G. had also been interviewed by Petro on October 4, 2017, approximately 10 months earlier. SR. 2878. During this interview, A.G. made allegations against two females and his step-father. SR. 2878-2888.

A.G. had made false accusations of sexual assault against a likely fictitious neighbor in response to the same line of questioning, by the same forensic interviewer, in the same time period as other accusations had been made against Guzman. Whether children can fabricate stories of sexual abuse was relevant to the trial. It goes to show mindset and the susceptibility of children to follow the lead of others. It would show how the questions of the interviewer could lead a child to make a specific conclusion, even without there being anything truth to the conclusions or statements.

By not allowing this interview, the trial court prevented Guzman from presenting a meaningful defense. His theory had some foundation in the

evidence: one of his children had made false accusations already against someone. Even if the defenses theory was tenuous, Guzman had the right to present it to the jury. Birdshead, 2015 S.D. at ¶ 27. By denying him the ability to respond to the State's case against him, Guzman was deprived of his fundamental constitutional right to a fair opportunity to present a defense. Lamont, 2001 S.D. at ¶ 16.

The decision to exclude this evidence could have been motivated by the judge's knowledge of his daughter's connection with Guzman and illegal activites.

The trial court's exclusion of evidence violated Guzman's fundamental and Constitutional rights. The exclusion was prejudicial to Guzman. Because of the Constitutional implications, this is ripe for habeas review.

III. Guzman's sentence is unconstitutionally cruel and unusual.

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

"A sentencing court abuses its discretion when the sentence imposed is 'a choice outside the range of permissible choices.'" State v. Deleon, 2022 S.D. 21, ¶ 17 (*internal citations omitted*). "Courts should consider the traditional sentencing factors of retribution, deterrence—both individual and general—rehabilitation, and incapacitation, without regarding any single factors as preeminent over the others." Id. "These factors are 'weighed on a case-by-

case basis depending on the circumstances of the particular case.'" Id. "Further, a sentencing court should consider both the defendant appearing before it as well as 'the nature and impact of the offense.'" Id. at ¶ 18.

"Whether a circuit court's sentence violates the Eighth Amendment is a question of constitutional law reviewed de novo." Deleon, 2022 S.D. at ¶ 26. "The Eighth Amendment prohibits the imposition of 'cruel and unusual punishments.'" Id. "When reviewing a punishment for an Eighth Amendment violation, we first determine if the sentence is grossly disproportionate to the crime 'by comparing the gravity of the offense against the harshness of the penalty.'" Id. *See also* State v. Rice, 2016 S.D. 18.

It should be noted that, shortly after the second trial concluded, the judge had retired from the bench. The sentencing was originally scheduled to take place before a different judge. At some point prior to sentencing, the judge who presided over the trial decided to come back and handle the sentencing.

The sentence Guzman received was grossly disproportionate to the offense he was alleged to commit, and the circumstances of those alleged crimes. Guzman was convicted of three counts of first degree rape of a minor and one count of sexual contact with a child under age 16. For this he received three life sentences, to run consecutive, and fifteen years, to run consecutive.

The sentence of Guzman is cruel and unusual because it is disproportionate. To come to this sentence, it appears the trial court did not properly weigh Guzman's background, criminal history, age, or prospects of rehabilitation in determining the sentence. This can be seen in the trial court's own statements at the time of sentencing. The trial court discussed people committing these types of crime as being evil. ST. 18. The trial court discussed danger to society and there being no solution to that. Id.

There was no discussion by the trial court of the prospect of rehabilitation, or his criminal history. The trial court's statements make it clear that it was predisposed to sentence Guzman as harsh as possible without regard to the sentencing factors. Additionally, the trial court did not enter findings of fact to support three consecutive life sentences.

In State v. Rice, this Court stated that the sentence reflected that the sentencing court had the sentencing factors in mind. Rice, 2016 S.D. at ¶ 28. This Court went on to state that the sentence in Rice was substantially less time than that authorized by the Legislature. Id. "By imposing a term of years, the court preserved the possibility of future parole for Rice, see SDCL 24-15-4, and struck a balance between retribution, rehabilitation, and deterrence." Id.

In this case, that did not happen for Guzman. The trial court did not strike a balance between retribution, rehabilitation, and deterrence, but went straight to retribution. Almost as if this was personal to the judge. By doing

so, Guzman's sentence is cruel and unusual and violates his Eighth Amendment rights.

CONCLUSION

In this case, Guzman was prejudiced by errors made by his attorney, which errors amount to ineffective assistance of counsel. Guzman was also prejudiced by errors made by the trial court. The cumulative effect of this prejudice is overwhelming, and go the heart of his Constitutional Rights. For these reasons, the conviction of Guzman should be vacated and a new trial ordered.

REQUEST FOR ORAL ARGUMENT

Undersigned counsel for the Appellant, Theodore Guzman, respectfully requests 30 minutes for oral arguments.

Respectfully submitted this 5th day of September, 2025.

ANKER LAW GROUP, P.C.

Stanton A. Anker, Esq.
1301 West Omaha Street, Suite 207
Rapid City, South Dakota 57701
Telephone: (605) 718-7050
Email: stanton@ankerlawgroup.com
Attorneys for the Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to S.D.C.L. § 15-26A-66, the foregoing brief is typed in proportionally spaced typeface in Century Schoolbook style font 12 point, does not exceed thirty-two pages, and does not exceed the word limit. The word processor used to prepare this brief indicated that there are no more than 4,981 words, excluding the Table of Contents, Table of Authorities, any addendum materials, and any certificates of counsel.

Stanton A. Anker, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of September, 2025, a true and correct copy of Appellant's Brief with Appendix was served electronically through Odyssey File and Serve upon:

upon:

Marty Jackley
South Dakota Attorney General
atgservice@state.sd.us

Sarah Thorne
South Dakota Assistant Attorney General
sarah.thorne@state.sd.us

Matthew W. Templar
South Dakota Assistant Attorney General
matthew.templar@state.sd.us

Lara Roetzel
Pennington County State's Attorney
larar@pennco.org

Megan Krueger
Pennington County Deputy State's Attorney
megan.kruger@pennco.org

Stanton A. Anker, Esq.

APPENDIX

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STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS	
COUNTY OF PENNINGTON	)	SEVENTH JUDICIAL CIRCUIT

THEODORE GUZMAN, PETITIONER, vs. DANIEL SULLIVAN, Warden, South Dakota State Penitentiary, RESPONDENT.	CASE NO. 51CIV23-000239 **MEMORANDUM DECISION**

On March 7, 2017, an Indictment was filed charging Theodore Guzman (Guzman/Petitioner) with First Degree Rape (case no. 51CRI18-001107). On August 8, 2018, a Superseding Indictment was filed charging Guzman with two additional counts of First Degree Rape of two other children and one count of Sexual Contact with Child Under Sixteen Years of Age. Attorney Paul R. Winter represented Guzman. A jury trial was held in January 2020. This trial ended in a mistrial when the jurors were unable to return a verdict on any of the charges. Following the first trial, Mr. Winter withdrew as counsel, and Attorney Conor Duffy was appointed. A second jury trial was held in April 2021. On April 15, 2021, Guzman was convicted of all counts: First Degree Rape (three counts) and Sexual Contact with Child Under Sixteen Years of Age.[1] Guzman was sentenced on July 22, 2021. Thereafter, the case was appealed. The South Dakota Supreme Court affirmed the judgment of the circuit court on November 16, 2021 (appeal no. 29722). On February 28, 2023, Guzman filed an Application for Writ of Habeas Corpus (Application) asserting that (I) various acts of the trial court violated his rights, (II) he received ineffective assistance of counsel from Mr. Duffy, and (III) his rights were violated because he is actually innocent. Respondent filed a Motion to Dismiss, arguing that Petitioner failed to state a claim upon which relief can be granted.

SDCL 15-6-12(b) states, in pertinent part:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive

[1] Verdict (filed 04-15-21).

pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

(1) Lack of jurisdiction over the subject matter;
(2) Lack of jurisdiction over the person;
(3) Insufficiency of process;
(4) Insufficiency of service of process;
(5) Failure to state a claim upon which relief can be granted;
(6) Failure to join a party under § 15-6-19.

Accordingly, under subsection (5), a party may assert the defense that there has been a failure to state a claim upon which relief can be granted. *See also Jenner v. Dooley*, 1999 S.D. 20, ¶ 13, 590 N.W.2d 463, 469 (SDCL 15-6-12(b)(5) is applicable in habeas proceedings since such cases are civil in nature). The South Dakota Supreme Court has explained that a motion to dismiss may be granted under SDCL 15-6-12(b)(5) when the allegations in a complaint are insufficient to provide a basis for relief:

> We no longer apply the rule that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *See Sisney v. Best Inc.*, 2008 S.D. 70, ¶ 7, 754 N.W.2d 804, 808, *abrogating Schlosser v. Norwest Bank* S.D., 506 N.W.2d 416, 418 (S.D.1993). Instead, to survive a motion to dismiss under SDCL 15–6–12(b)(5), "[f]actual allegations must be enough to raise a right to relief above the speculative level. The pleading must contain something more than a statement of facts that merely creates a suspicion of a legally cognizable right of action on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Best*, 2008 S.D. 70, ¶ 7, 754 N.W.2d at 808 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 553, 127 S.Ct. 1955, 1964–65, 167 L.Ed.2d 929 (2007); *Sisney v. State*, 2008 S.D. 71, ¶ 8, 754 N.W.2d 639, 643). As we stated in *Sisney*:
>
> > "While a complaint attacked by a Rule 12(b)(5)[2] motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause [of] action will not do." The rules "contemplate a statement of circumstances, occurrences, and events in support of the claim presented." Ultimately, the claim must allege facts, which, when taken as true, raise more than a speculative right to relief. Furthermore, "where the allegations show on the face of the complaint there is some insuperable bar to relief, dismissal under Rule 12(b)([5]) is appropriate."

[2] "Rule 12(b)(5)" is a reference to SDCL 15-6-12(b)(5). *Upell v. Dewey Cty. Comm'n*, 2016 S.D. 42, ¶7 n.1, 880 N.W.2d 69, 71 n.1.

2008 S.D. 71, ¶ 8, 754 N.W.2d at 643 (internal citations omitted).

Hernandez v. Avera Queen of Peace Hosp., 2016 S.D. 68, ¶ 15, 886 N.W.2d 338, 344-45. And, similarly, as noted in *Jenner*,

> [i]f an applicant's allegations are unspecific, conclusory, or speculative, the court may rightfully entertain a motion to dismiss. *See* SDCL 21–27–5 (writ may be denied if it appears from the application itself that no relief can be granted). Also, if pleadings fail to allege a requisite element necessary to obtain relief, dismissal is in order.

Jenner, 1999 S.D. 20, ¶ 13, 590 N.W.2d 463, 469. For the reasons that follow, dismissal under SDCL 15-6-12(b)(5) is appropriate in this case.

The South Dakota Supreme Court has pointed out the circumstances under which a habeas corpus procedure may be used:

> "Our review of [a] habeas corpus proceeding[ ] is limited because it 'is a collateral attack on a final judgment.' " *Miller v. Young*, 2018 S.D. 33, ¶ 12, 911 N.W.2d 644, 648 (quoting *Vanden Hoek v. Weber*, 2006 S.D. 102, ¶ 8, 724 N.W.2d 858, 861). It is not, as we have time and again held, a substitute for appeal.[3] *See, e.g., Wright v. Young*, 2019 S.D. 22, ¶ 10, 927 N.W.2d 116, 119 (explaining that review of a habeas action is more limited than for a direct appeal because it is a "collateral attack upon a final judgment"). Courts may use the habeas corpus procedure in the narrow realm of post-conviction litigation to determine: "(1)

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[3] The court went on to explain why a habeas action is "not. . . a substitute for appeal":

> While this often-repeated statement seems unremarkable in contemporary times, it marks an important distinction between direct appeals and habeas review that did not always exist. The right to appeal is often not conferred by constitution, and historically, people convicted of criminal offenses did not have the right to seek direct review until the enactment of statutes that authorized direct appeals. As a result, the United States Supreme Court has reflected on its own early practice of using the ancient writ of habeas corpus to find "jurisdiction" and correct trial errors. *See United States v. Cotton*, 535 U.S. 625, 630, 122 S. Ct. 1781, 1784-85, 152 L. Ed. 2d 860 (2002) (explaining that the "expansive notion of jurisdiction" can be traced to the time when defendants could not directly appeal their convictions). The advent of statutes providing for a right of appeal has eliminated the need to use habeas corpus proceedings to correct trial errors that could have been raised on direct appeal.

Piper v. Young, 2019 S.D. 65, ¶21 n.12, 936 N.W.2d at 803 n.12, *cert. denied*, 141 S. Ct. 247 (2020).

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." *Piper II*, 2009 S.D. 66, ¶ 7, 771 N.W.2d at 355.

However, even for claims alleging the deprivation of constitutional rights, we have traditionally applied the doctrine of res judicata to determine whether a post-conviction claim is cognizable in a habeas corpus action or whether it has been defaulted because it was not made in an earlier proceeding. *See, e.g., Ramos v. Weber*, 2000 S.D. 111, ¶ 8, 616 N.W.2d 88, 91. Res judicata involves two distinct concepts—issue preclusion and claim preclusion:

> Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided .... Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit[.]

Am. Family Ins. Grp. v. Robnik, 2010 S.D. 69, ¶ 15, 787 N.W.2d 768, 774 (quoting *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1, 104 S. Ct. 892, 894 n.1, 79 L. Ed. 2d 56 (1984)).

Piper v. Young, 2019 S.D. 65, ¶¶ 21-22, 936 N.W.2d 793, 803–04, *cert. denied*, 141 S. Ct. 247 (2020) (footnote omitted).

I. Acts of the Trial Court

Petitioner argues that acts of the trial court violated several of his constitutional rights. In particular, Petitioner argues that (A) his Sixth Amendment right to "obtain witness [sic] on his behalf and present a meaningful defense" was violated when his mother, Helen Guzman, was prohibited from testifying at the trial, (B) his Fifth Amendment right against self-incrimination was violated when the prosecution read his testimony from the first trial to the jury at the second trial, (C) his due process rights under the Fourteenth Amendment of the United States Constitution were violated when he was prohibited from introducing evidence that minors fabricate stories, and (D) his right to be free from cruel and unusual punishment under the Eighth Amendment was violated when sentenced to three consecutive life sentences plus an additional fifteen years. Application ¶¶ 8, 14, 16-17.

A. Meaningful Defense (First Ground for Relief)

Guzman argues that his Sixth Amendment right to "obtain witness [sic] on his behalf and present a meaningful defense" was violated when Judge Mandel prohibited Guzman's mother, Helen Guzman, from testifying. Application, ¶ 8. In his appeal to the South Dakota Supreme Court, Guzman made a similar argument regarding the exclusion of Helen Guzman's testimony:

> On appeal, Guzman first asserts that the circuit court erred in excluding Helen's testimony because the court had not entered a sequestration order for the second trial. While it is undisputed that a reciprocal sequestration order was entered prior to Guzman's first trial, there is no indication in the record that the parties renewed their motion for witness sequestration prior to the second trial or that the court entered another sequestration order. However, it is clear from the record that when presenting arguments to the court on the exclusion of Helen and Benny as witnesses, both parties believed there was still a sequestration order governing the second trial. Both parties also made requests to the court during the trial to accommodate other witnesses based on the assumption that the sequestration order was still in place. Therefore, we reject Guzman's newly asserted suggestion otherwise.
>
> Guzman further asserts that error occurred because, in his view, the circuit court's exclusion of Helen's testimony violated his right to due process and his Sixth Amendment right to obtain witnesses on his behalf and provide a meaningful defense. He claims the exclusion was prejudicial because Helen's testimony would have been "powerful and non-cumulative[.]" In particular, he emphasizes her testimony that "she did not hear anything on the night of the alleged rape of A.C., despite her bedroom being just down the hall and her bedroom door open."

State v. Guzman, 2022 S.D. 70, ¶¶ 23-24, 982 N.W.2d 875, 885–86. Ultimately, the court held that while Ms. Guzman should have been allowed to testify, the error in excluding her was harmless. *Id.* ¶ 39. As noted previously, res judicata forecloses relitigation of matters that either have been or could have been litigated and decided in a previous proceeding. *Piper v. Young*, 2019 S.D. 65, ¶¶ 21-22, 936 N.W.2d 793, 803–04; *Ramos v. Weber*, 2000 S.D. 111, ¶ 8, 616 N.W.2d 88, 91 ("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."). Since Guzman's current argument regarding the absence of a sequestration order and the trial court's preclusion of Ms. Guzman's testimony was decided on appeal, the claim is barred by res judicata and subject to dismissal.

B. Self-Incrimination (Seventh Ground for Relief)

Guzman asserts that his Fifth Amendment right against self-incrimination was violated when the prosecution read his testimony from the first trial to the jury at the second trial. Application, ¶ 14. In his appeal, Guzman made a similar argument regarding the admission of his testimony from the first jury trial:

> Guzman contends that his right against self-incrimination was violated when the State introduced into evidence a transcript of his testimony from the first trial. Guzman asserts his prior testimony was provoked by the State's introduction of "duplicitous evidence," specifically N.G.'s testimony regarding an additional instance of sexual abuse, in violation of his constitutional due process right to jury unanimity. Guzman claims his testimony from the first trial is "fruit of [this] constitutional violation[,]" warranting its exclusion. We review claims of alleged constitutional violations de novo. *State v. Carothers*, 2005 S.D. 16, ¶ 7, 692 N.W.2d 544, 546 ("[A]n alleged violation of a constitutionally protected right is a question of law[.]" (citations omitted)).
>
> To support his argument that his prior testimony should not be admitted, Guzman relies on *Harrison v. United States*, in which the United States Supreme Court addressed a scenario where a defendant took the stand "only after the [g]overnment had illegally introduced into evidence" wrongfully obtained confessions. 392 U.S. 219, 222, 88 S. Ct. 2008, 2010, 20 L. Ed. 2d 1047 (1968). In such instance, the Court determined that "the same principle that prohibits the use of confessions so procured also prohibits the use of any testimony impelled thereby—the fruit of the poisonous tree[.]" Id. "The question is not whether the [defendant] made a knowing decision to testify, but why." *Id.* at 223, 88 S. Ct. at 2010.

Guzman, 2022 S.D. 70, ¶ 40, 982 N.W.2d at 889. The court held that Guzman's constitutional rights were not violated and that the circuit court did not err in admitting the testimony. *Id.* ¶ 45. Since Guzman's current argument regarding the admission of the transcript of his testimony was decided on appeal, the claim is barred by res judicata, *Piper*, *supra*, and subject to dismissal.

C. Prohibition on Introducing Evidence Concerning Minors (Ninth Ground for Relief)

Guzman argues that his rights were denied when he was prevented from introducing a forensic interview of A.G., a minor who was not a victim in the case, to buttress his defense that minors fabricate stories. Application, ¶ 16. The defense raised similar arguments on appeal regarding the exclusion of A.G.'s forensic interview:

> Guzman asserts that A.G.'s forensic interview was relevant and admissible because A.G. disclosed incidents of sexual conduct similar in nature to those disclosed by his sisters "in response to the same line of questioning, by the same forensic

> interviewer, at roughly the same time as the three named victims[.]" Guzman also asserts that "[w]hether children can fabricate stories of sexual abuse was highly relevant at trial" and that A.G. "made unbelievable allegations of rape by an unnamed male neighbor which were ... obviously untrue." He then suggests that A.G.'s fabrication supports the general notion that all children can fabricate stories of sexual abuse, a notion which in his view supports his claim that the named victims here fabricated their allegations of abuse.

Guzman, 2022 S.D. 70, ¶ 58, 982 N.W.2d at 894. Ultimately, the court held that Guzman "failed to identify any authority supporting the admissibility of evidence that a sibling of a named victim had fabricated an unrelated claim of sexual assault by someone other than the defendant to establish an attenuated claim that the named victim likewise fabricated claims," and that even if the circuit court abused its discretion in excluding the interview, Guzman could not establish that the error was prejudicial. *Id.* ¶¶ 62-63. Since Guzman's current argument regarding the exclusion of A.G.'s forensic interview was decided on appeal, the claim is barred by res judicata, *Piper*, *supra*, and subject to dismissal.

D. Cruel and Unusual Punishment (Tenth Ground for Relief)

Petitioner avers—without any analysis—that his punishment violates constitutional provisions against cruel and unusual punishment. Application, ¶ 17. The claim is summarily dismissed as it is unspecific, conclusory, and speculative, *Hernandez* and *Jenner*, *supra*. Furthermore, the claim is barred by res judicata since it could have been asserted on direct appeal. *Piper*, *supra*.

II. Ineffective Assistance of Counsel

Guzman asserts that his attorney, Mr. Duffy, was ineffective. A claim of ineffective assistance of counsel falls under the third category enumerated by the *Piper* court since effective assistance of counsel is a constitutional right. *Strickland v. Washington*, 466 U.S. 668, 686 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984) (explaining that the right to counsel under the Sixth Amendment is "the right to the effective assistance of counsel.").

Petitioner alleges that he received ineffective assistance from Mr. Duffy on account of his handling of issues related to (A) sequestration of witnesses, (B) requesting evaluations of victims, (C) cross-examinations of victims, and (D) failure to procure a dismissal of the indictment. Application ¶¶ 9-12. Petitioner also alleges Mr. Duffy's errors resulted in (E)

cumulative ineffectiveness. Application ¶ 13. As noted by the South Dakota Supreme Court, a claim of ineffective assistance of counsel is analyzed according to the test set out in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052. *Legrand v. Weber*, 2014 S.D. 71, ¶ 34, 855 N.W.2d 121, 130. To prevail on a claim of ineffective assistance of counsel under *Strickland*, there must be a showing of both (1) deficient performance by counsel and (2) resulting prejudice to the defense:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064. In regard to the performance component, the Court explained that the highly deferential examination of counsel's actions will be based on whether counsel's actions were reasonable under the circumstances:

> [T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. . . . No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.
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> . . . .
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> Judicial scrutiny of counsel's performance must be highly deferential. . . . 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." . . . There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.
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> . . . .
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> [A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.

Id., 466 U.S. at 688-90, 104 S. Ct. at 2065-66 (citations omitted). In regard to the prejudice component, the Court explained that if an error does not cause prejudice, then counsel's assistance is not considered ineffective:

> An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. . . . The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.
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> . . . Even if a defendant shows that particular errors of counsel were unreasonable . . . the defendant must show that they actually had an adverse effect on the defense.
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> It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding.
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> . . . .
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> . . . The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Id., 466 U.S. at 691–94, 104 S. Ct. at 2066–68. Additionally, the *Strickland* court clarified that "there is no reason for a court deciding an ineffective assistance claim to . . . address both components of the inquiry [performance and prejudice] if the defendant makes an insufficient showing on one." *Id.*, 466 U.S. at 697, 104 S. Ct. at 2069.

A. Ineffective Assistance of Counsel: Sequestration Request (Second Ground for Relief)

Petitioner argues that his attorney "failed to request the court that all witnesses be sequestered during the second jury trial of the Petitioner. If this would have been done, Mrs. Guzman would not have briefly entered the trial viewing room, violating a non-existent sequester order and would have been allowed to testify in [his] defense[.]" Application, ¶ 9.

Guzman appears to be reasserting his argument made on appeal that there was no sequestration order in the second jury trial. However, as noted previously, a sequestration order was ultimately in effect:

> On appeal, Guzman first asserts that the circuit court erred in excluding Helen's testimony because the court had not entered a sequestration order for the second trial. While it is undisputed that a reciprocal sequestration order was entered prior to Guzman's first trial, there is no indication in the record that the parties renewed their motion for witness sequestration prior to the second trial or that the court entered another sequestration order. However, it is clear from the record that when presenting arguments to the court on the exclusion of Helen and Benny as witnesses, both parties believed there was still a sequestration order governing the second trial. Both parties also made requests to the court during the trial to accommodate other witnesses based on the assumption that the sequestration order was still in place. Therefore, we reject Guzman's newly asserted suggestion otherwise.

Guzman, 2022 S.D. 70, ¶ 23, 982 N.W.2d at 885. Accordingly, Guzman's claim that his attorney failed to secure a sequestration order is contradicted by the record as there was an existing order and its applicability to the parties was not in question. As a result, Petitioner is unable to show deficient performance on the part of his attorney and the claim is subject to dismissal. *State v. Reed*, 2010 S.D. 105 ¶¶ 15-18, 793 N.W.2d 63, 67-68 (affirming circuit court's dismissal of habeas claim contradicted by the record)).

B. Ineffective Assistance of Counsel: Mental Evaluation of Victims (Third Ground for Relief)

As noted above, Petitioner argues that his trial attorney provided ineffective assistance of counsel when he "failed to request that the alleged victims be evaluated and assessed by qualified mental health professionals regarding their psychiatric fitness, competence and mental states." Application, ¶10. Petitioner contends that this was relevant "given children's propensity to be untruthful and to alter, bend or fabricate stories to satisfy an authority figure[.]" *Id.* Petitioner has offered only personal speculation in support of his assertions that children have a propensity to be untruthful or otherwise contort stories to satisfy an authority figure or that a mental health evaluation would have provided him with the information sought. However, mere speculation is insufficient since, as noted above, "[t]o survive a motion to dismiss under § 12(b)(5), an application for habeas corpus must pass a minimum 'threshold of plausibility.' If an applicant's allegations are unspecific, conclusory, or speculative, the court may rightfully entertain a motion to dismiss." *Jenner*, 1999 S.D. 20, ¶ 13, 590 N.W.2d 463, 469 (citations omitted).

Furthermore, "[f]ailure to hire an expert is not, per se, error." *Spaniol v. Young*, 2022 S.D. 61, ¶ 26, 981 N.W.2d 396, 404 (quoting *Knecht v. Weber*, 2002 S.D. 21, ¶ 20, 640 N.W.2d 491, 500).

> [W]e have often explained that strategic decisions—including whether to hire an expert—are entitled to a "strong presumption" of reasonableness. Defense lawyers have "limited" time and resources, and so must choose from among "countless" strategic options. Such decisions are particularly difficult because certain tactics carry the risk of "harm[ing] the defense" by undermining credibility with the jury or distracting from more important issues.

Id. (quoting *Dunn v. Reeves*, —— U.S. ——, 141 S. Ct. 2405, 2410, 210 L. Ed. 2d 812 (2021) (additional citations omitted). "For an alleged sex abuse victim, the purpose of a psychological or psychiatric exam is to detect any mental delusions that would distort the victim's perceptions, thus casting doubt on credibility." *State v. Cates*, 2001 S.D. 99, ¶ 15, 632 N.W.2d 28, 35 (citing *State v. Logue*, 372 N.W.2d 151, 155–56 (S.D. 1985)). "Inconsistency in testimony alone will not establish a suggestion of mental delusion." *Id.* "To obtain such an examination of the victim, the defendant must make a substantial showing of need and justification." *State v. Osgood*, 2003 S.D. 87, ¶ 13, 667 N.W.2d 687, 691 (citation omitted). Guzman has made no such showing.

Furthermore, even if it were assumed, arguendo, that defense counsel's performance was deficient for failing to have the victims evaluated, Guzman's claim that the failure hurt his case is speculative. He offers nothing to substantiate the claim—nothing to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068.

Accordingly, Petitioner has failed to meet his burden to demonstrate both deficient performance and prejudice in regard to evaluations for the victims, and the claim is subject to dismissal.

C. Ineffective Assistance of Trial Counsel: Cross-examination of Victims (Fourth Ground for Relief)

Petitioner claims his trial attorney "was deficient by failing to exploit inconsistencies and thoroughly question the victim's [sic] about said inconsistencies during their respective cross examinations in the second jury trial which resulted in the conviction of Petitioner." Application ¶ 11. Petitioner contends that "[i]f counsel had explored these discrepancies, exposing them in

court and showing to the jury how the stories changed and developed over time, becoming more devious, it is likely that no reasonable jury would have found the alleged victims credible and would have convicted the Petitioner." Application, ¶ 11. As noted above,

> [j]udicial scrutiny of counsel's performance must be highly deferential. . . . 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." . . . There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

Strickland, 466 U.S. at 689-90, 104 S.Ct. at 2065-66 (citations omitted). Additionally, as noted by the Eighth Circuit Court of Appeals, "[c]ourts generally entrust cross-examination techniques, like other matters of trial strategy, to the professional discretion of counsel," *Henderson v. Norris*, 118 F.3d 1283, 1287 (8th Cir. 1997) (citing *Barnes v. United States*, 859 F.2d 607, 608 (8th Cir.1988)), and strategy decisions will be accorded deference unless found to be unreasonable. *United States v. Villalpando*, 259 F.3d 934, 939 (8th Cir. 2001).

Guzman does not identify any inconsistencies within the victims' cross-examinations or instances where Mr. Duffy failed to address them, but merely alleges that they exist, are substantial, and would influence a jury. The allegations, and any associated prejudice, fail for being unspecific, conclusory, and speculative. *Hernandez* and *Jenner*, *supra*. As a result, Guzman has not met his burden to demonstrate deficient performance and prejudice in regard to his attorney's cross-examination of the victims, and the claim is subject to dismissal.

D. Ineffective Assistance of Trial Counsel: Failure to Procure Dismissal of Indictment (Fifth Ground for Relief)

Petitioner alleges a violation of his Sixth Amendment right to a speedy trial, as well as ineffective assistance of counsel when his attorney failed to move for dismissal of the indictment on the grounds of a Sixth Amendment speedy trial violation. Application, ¶12. A Pennington County Grand Jury indicted Guzman on March 7, 2018, and a Warrant of Arrest was issued the same day. Guzman was arrested and came into custody on March 14, 2018. A superseding indictment was filed on August 8, 2018. A jury trial was held in January 2020 and ended in a mistrial when the jurors were unable to return a verdict on any of the charges. A second jury trial was held in April 2021 which resulted in Guzman's conviction on all counts.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ." U.S. Const. amend. VI. When analyzing whether there has been a violation of the right to a speedy trial, the United States Supreme Court has identified four factors for courts to assess: (1) length of delay, (2) reason for the delay, (3) whether the defendant has asserted his right, and (4) prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192, 33 L. Ed. 2d 101 (1972). No one factor carries greater weight; rather a court must engage in a balancing process:

> We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process.

Id. 407 U.S. at 533, 92 S. Ct. at 2193 (footnote omitted). Additionally, the high court has noted that "[t]he speedy-trial right is 'amorphous,' 'slippery,' and 'necessarily relative.' It is 'consistent with delays and depend[ent] upon circumstances.' " *Vermont v. Brillon*, 556 U.S. 81, 89, 129 S. Ct. 1283, 1290, 173 L. Ed. 2d 231 (2009) (citations omitted).

1. Length of Delay

The length of delay is both a factor and a triggering mechanism:

> The first of these [speedy trial factors] is actually a double enquiry. Simply to trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from "presumptively prejudicial" delay, 407 U.S., at 530–531, 92 S.Ct., at 2192, since, by definition, he cannot complain that the government has denied him a "speedy" trial if it has, in fact, prosecuted his case with customary promptness. If the accused makes this showing, the court must then consider, as one factor among several, the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim. See id., at 533–534, 92 S.Ct., at 2193–2194. This latter enquiry is significant to the speedy trial analysis because, as we discuss below, the presumption that pretrial delay has prejudiced the accused intensifies over time.

Doggett v. United States, 505 U.S. 647, 651–52, 112 S. Ct. 2686, 2690–91, 120 L. Ed. 2d 520 (1992). A delay of one year is "generally sufficient to trigger judicial review," *Id.*, 505 U.S. at 658, 112 S. Ct. at 2694, and the right to a speedy trial attaches when a defendant is "arrested or formally accused." *Betterman v. Montana*, 136 S. Ct. 1609, 1613, 194 L. Ed. 2d 723 (2016) (citing *United States v. Marion*, 404 U.S. 307, 320–321, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971)). In

the case at hand, more than a year had passed since Guzman was indicted and subsequently tried. Consequently, the length of delay is sufficient to trigger judicial review. Regarding the second part of the analysis, the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim, the *Doggett* court found that six years was inexcusable when combined with government negligence. *Doggett*, 505 U.S. 647, 656-58, 112 S. Ct. 2686, 2693-94. The amount of time stretching beyond the bare minimum here is far less than the delay in *Doggett* and unaccompanied by any significant government negligence (discussed below). Consequently, the Court finds that this factor does not weigh in favor of either party.

2. Reason for Delay

When assessing the reason for the delay, weights are assigned to various reasons:

> Closely related to length of delay is the reason the government assigns to justify the delay. Here, too, different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

Barker, 407 U.S. 514, 531, 92 S. Ct. 2182, 2192 (footnote omitted). Here, several pretrial motions were made by the defense, many of which required arguments, briefs, and judicial decisions, including a Motion for Records of Complaining Witnesses (filed on October 19, 2018), a Motion Regarding Credibility of Complaining Witnesses and Reliability of Statements (filed on April 2, 2019), and Objections to the State's Expert Notices and Daubert Hearing Requests (filed on April 2, 2019). The defense also filed Motions for a Private Investigator and a Psychological Expert, both of whom require time to conduct their work. Following the first jury trial, the State filed a Motion and Order for Transcript (filed January 31, 2020), which was completed on June 17, 2020. Guzman's prior counsel, Mr. Winter, filed a Motion to Withdraw on April 20, 2020, and Mr. Duffy was appointed on May 5, 2020. The second jury trial was scheduled for July 13, 2020. However, on July 6, 2020, the defense filed a Motion to Continue, and the trial was rescheduled for January 4, 2021. On October 20, 2020, the defense made several pretrial motions including three Motions to Require Prosecution to Make Inquiry and Provide Notice Regarding Psychiatric or Psychological Evaluations, Counseling, and Reports of

the victims, three Motions to Allow Inspection and Copying of Rapid City School Department Files of the victims, three Motions to Allow Inspection and Copying of Department of Social Services Files of the victims, and four Objections to State's Notice of Intent to Offer Expert Witnesses. As a result, the trial was rescheduled again to April 2021. The record reflects that the State made one Motion for Continuance on April 3, 2019, resulting in an Evidentiary Hearing being rescheduled from April 12, 2019, to May 14, 2019. Ultimately, aside from the aforementioned continuance, nothing in the record indicates any action on the part of the State to delay the trial. Thus, the Court weighs this factor strongly in favor of the prosecution.

3. Assertion of the Right to a Speedy Trial

In *Barker*, the United States Supreme Court emphasized:

> The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.

407 U.S. at 531–32, 92 S.Ct. at 2192–93, 33 L.Ed.2d at 117–18. Guzman has not pointed to anywhere in the record where he asserted his right to a speedy trial, nor was the Court able to find any instance of the same. Therefore, this factor weighs in favor of the prosecution.

4. Prejudice

The United States Supreme Court has explained that prejudice is analyzed under three categories:

> Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.

Barker, 407 U.S. 514, 532, 92 S. Ct. 2182, 2193 (footnote omitted). Guzman has not identified any specific prejudice other than that after being arrested, "[h]e was unable to post bond and remained in pre-trial detention" and that following the first trial, he "was retained in custody until the second jury trial commenced in 2021." Application, ¶ 12. Guzman was prejudiced to some extent by remaining in custody for the duration of this case. However, regarding category (iii), the possibility that the defense was impaired, Guzman does not identify any specific

prejudice. To overcome the lack of evidence that his defense will be impaired and invoke a presumption of prejudice, there must be both negligence on the part of the government and protracted delay. *Doggett*, 505 U.S. 647, 655-58, 112 S. Ct. 2686, 2693-94. But there is neither. There is no evidence of negligence on the part of the prosecution, and, as noted above, the delay in this case is thirty-seven months. Consequently, this factor weighs slightly in favor of the defense.

Upon weighing the factors, the Court finds that the balance tips in favor of the prosecution. While the slight showing of prejudice weighs in Guzman's favor, the reason for the delay and lack of assertion for a speedy trial weigh more heavily in favor of the prosecution. Accordingly, Petitioner has failed to show that the defense counsel's performance was deficient, *Strickland, supra*, and therefore, this claim is subject to dismissal.

E. Ineffective Assistance of Trial Counsel: Cumulative Ineffectiveness (Sixth Ground for Relief)

Petitioner claims his trial attorney "was deficient given the cumulative effect of counsel's ineffectiveness resulting from the individual errors and grounds previously cited. When viewed under a totality of the circumstances, the performance of counsel was ineffective, deficient and prejudiced the Petitioner, resulting in an unjust conviction." Application, ¶ 13. Cumulative error, however, is not available as a ground for habeas relief. *Foote v. Young*, 2024 S.D. 41, ¶37 n.8, 10 N.W.3d 202, 212 n.8 ("We have previously declined to accept sweeping "cumulative error" arguments 'because to do so would recognize a degree of error that is greater than the sum of its parts.'" (quoting *Young*, 2019 S.D. 63, ¶ 26 n.7, 936 N.W.2d at 124 n.7)). Hence, the claim is summarily dismissed.

III. Actual Innocence (Eighth Ground for Relief)

Petitioner asserts that his "right to not be deprived of liberty without due process of law" was violated because he "is actually innocent of the charges for which he was convicted." Application, ¶ 15. Guzman has not offered any authority to show that habeas corpus can be used to review his freestanding claim of actual innocence. Prior to the passage of SDCL 21-27-5.1, a freestanding claim of actual innocence was not generally a ground upon which habeas relief was available. *Engesser v. Young*, 2014 S.D. 81, ¶ 25, 856 N.W.2d 471, 480. Under SDCL 21-27-5.1(1), freestanding claims of actual innocence may now be asserted in a second or subsequent

application—but this is Guzman's first application. For the sake of argument, however, it will be assumed that Guzman may assert his claim under SDCL 21-27-5.1(1).

Petitioner states, "several factors, which when taken together prove actual innocence." Application, ¶ 15. Specifically, Petitioner highlights that (1) when A.C. was examined her hymen was intact, and there was no physical evidence or evidence of trauma to substantiate the claims of abuse; and (2) at the time of offenses, Petitioner was diagnosed with a sexually transmitted disease that none of the victims tested positive for. Application, ¶ 15. To claim actual innocence, an applicant is required to

> identif[y] newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact finder would have found the applicant guilty of the underlying offense[.]

SDCL 21-27-5.1(1). Petitioner has failed to identify any newly discovered evidence, let alone evidence that "if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact finder would have found the applicant guilty of the underlying offense." *Id.* Rather, Petitioner has reiterated evidence that was supplied to the jury for their consideration at trial. *See* Jury Trial Transcript, Volume II, pp. 320-29 (discussing A.C.'s gynecological examination); Jury Trial Transcript, Volume V, pp. 804-05 (discussing Guzman's gonorrhea diagnosis); Jury Trial Transcript, Volume V, pp. 813-16 (discussing why children might not test positive for a sexually transmitted disease). Accordingly, the claim is subject to dismissal. *Jenner v. Dooley*, 1999 S.D. 20, ¶ 13, 590 N.W.2d 463, 469 ("if pleadings fail to allege a requisite element necessary to obtain relief, dismissal is in order.").

In sum, Guzman has failed to state a claim upon which relief can be granted. Consequently, dismissal under SDCL 15-6-12(b)(5) is appropriate.

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ORDER

The Application is hereby DISMISSED. In addition, pursuant to *Lange v. Weber*, 1999 S.D. 138, ¶12, 602 N.W.2d 273, 276, this Court finds that, for the reasons stated above, there is no appealable issue in this matter. Accordingly, a certificate of probable cause that an appealable issue exists will not issue from this Court under SDCL 21-27-18.1.

Dated this 20 day of November 2024.

BY THE COURT:

Robert Gusinsky
Circuit Court Judge

ATTEST:

Amber Watkins
Clerk of Courts

By: Deputy

FILED
Pennington County, SD
IN CIRCUIT COURT

NOV 20 2024

Amber Watkins, Clerk of Courts
By Deputy

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 31001

THEODORE GUZMAN,

Petitioner and Appellant,

v.

DANIEL SULLIVAN, Warden,
South Dakota State Penitentiary,

Respondent and Appellee.

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE ROBERT GUSINSKY
Presiding Circuit Court Judge

APPELLEE'S BRIEF

MARTY J. JACKLEY
ATTORNEY GENERAL

Stanton A. Anker
Anker Law Group
1301 W. Omaha St., Suite 207
Rapid City, SD 57701
Telephone: (605) 718-7050
Email:
Stanton@ankerlawgroup.com

ATTORNEY FOR PETITIONER
AND APPELLANT

Matthew W. Templar
Assistant Attorney General
1302 S.D. Highway 1889, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215
Email: atgservice@state.sd.us

ATTORNEYS FOR RESPONDENT
AND APPELLEE

Notice of Appeal filed February 14, 2025

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 31001

THEODORE GUZMAN,

Petitioner and Appellant,

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DANIEL SULLIVAN, Warden,
South Dakota State Penitentiary,

Respondent and Appellee.

PRELIMINARY STATEMENT

Theodore Guzman sexually assaulted two of his daughters and one of their friends. He sought habeas relief, challenging his trial attorneys' actions and claiming actual innocence, as well as other alleged constitutional violations. After his case was dismissed, this Court granted Guzman a certificate of probable cause on four claims—three alleging ineffective assistance of counsel and one alleging actual innocence.

This Court should affirm the dismissal of Guzman's case for three reasons. First, it lacks jurisdiction over most of Guzman's appellate claims because they are not in the certificate of probable cause. Second, Guzman abandoned or waived the claims the Court has jurisdiction over because he didn't brief them, he didn't support them with legal authority, or he raised issues not raised in circuit court. Third, the circuit court

properly dismissed Guzman's claims because they either violated civil pleading standards or failed under the applicable constitutional analyses.

But if the dismissal was erroneous, the only remedy is a remand for an evidentiary hearing. The Court cannot grant a new trial because the habeas record doesn't allow for that remedy. Guzman's attorneys have not had a chance to explain their actions, a necessary part of the review.

In this brief, the State of South Dakota is called "the State." All other individuals are referenced by name or initials. Relevant documents are referenced as follows:

Settled Record (Pennington County Civil File 23-239) ..... SR

Pennington County Criminal File 18-1107[1] ..... CF

Jury Trial Transcript (January 9 through January 17, 2020)..... TT

Status Hearing Transcript (December 11, 2020) ..... SH

Voir Dire Transcript (April 6, 2021)..... VD

Jury Trial Transcript (April 8 through April 15, 2021) ..... JT

2021 Jury Trial Exhibits..... Ex.

Guzman's Appellant's Brief..... AB

[1] This file is Guzman's underlying criminal case, which this Court took judicial notice of on March 11, 2025.

The appropriate page numbers follow all document designations. The appropriate identifiers also follow all exhibit designations.

JURISDICTIONAL STATEMENT

The Honorable Robert Gusinsky, Pennington County Circuit Court Judge, dismissed Guzman's habeas petition for failure to state claim, under SDCL 15-6-12(b)(5), on November 20, 2024. SR:62. Judge Gusinsky also refused to issue a certificate of probable cause. *Id.* Guzman timely sought a certificate of probable cause from this Court on December 9, 2024. *Guzman v. Sullivan*, S.D.S.C. File No. 30917; SDCL 21-27-18.1. This Court issued a certificate of probable cause on January 16, 2025. SR:91-92.

Guzman timely filed and served his Notice of Appeal on February 14, 2025. SR:99-100. Thus, this Court has appellate jurisdiction over this case under SDCL 15-26A-3(2) and SDCL 21-27-18.1. But as explained in Issue I, this Court lacks jurisdiction to consider most of Guzman's appellate claims because they were not specifically listed in the certificate of probable cause.

As explained in Issue II, of the claims this Court has jurisdiction to hear, Guzman abandoned or waived those claims by not briefing them, by not supporting them with legal authorities, or by raising issues for the first time on appeal.

And as explained in Issue III, the state of the habeas record prevents granting Guzman habeas relief, even though the certificate of

probable cause is written in terms of addressing the merits of the authorized claims. If the Court believes Judge Gusinsky erroneously dismissed Guzman's case, its only option is to remand for an evidentiary hearing on the authorized claims. SDCL 15-26A-12.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I

WHETHER THE COURT LACKS JURISDICTION TO REVIEW MOST OF GUZMAN'S APPELLATE CLAIMS?

This issue is being raised for the first time on appeal.

Berwald v. Stan's, Inc., 2025 S.D. 33, 24 N.W.3d 420

Evans v. Sullivan, 2024 S.D. 36, 9 N.W.3d 490

Long v. Knight Const. Co., 262 N.W.2d 207 (S.D. 1978)

SDCL 21-27-18.1

II

WHETHER GUZMAN ABANDONED OR WAIVED THE CLAIMS THIS COURT HAS JURISDICTION OVER BY NOT ARGUING THEM, NOT CITING AUTHORITY TO SUPPORT THEM, OR RAISING NEW CLAIMS ON APPEAL?

This issue is being raised for the first time on appeal.

Ellingson v. Ammann, 2013 S.D. 32, 830 N.W.2d 99

Giesen v. Giesen, 2018 S.D. 36, 911 N.W.2d 750

State v. Patterson, 2017 S.D. 64, 904 N.W.2d 43

III

WHETHER THE APPELLATE RECORD IS SET UP TO ALLOW A REVIEW OF THE MERITS OF GUZMAN'S HABEAS CLAIMS?

This issue is being raised for the first time on appeal.

Dunn v. Reeves, 594 U.S. 731 (2021)(per curiam)

Everitt v. Bd. Of Cnty Com'rs Hughes Cnty, 47 N.W. 206 (S.D. 1890)

In re Noem, 2024 S.D. 11, 3 N.W.3d 465

State v. Vortherms, 2020 S.D. 67, 952 N.W.2d 113

SDCL 15-25-1

SDCL 21-27-18.1

IV

WHETHER JUDGE GUSINSKY PROPERLY DISMISSED GUZMAN'S HABEAS PETITION FOR FAILURE TO STATE A CLAIM?

Judge Gusinsky dismissed Guzman's habeas petition, which, relevant here, contained three ineffective assistance of counsel claims and an actual innocence claim. Judge Gusinsky ruled that two of the ineffective assistance claims violated pleading standards because they were vague, conclusory, or speculative. The other ineffective assistance claim was dismissed because the Sixth Amendment Speedy Trial analysis that underpinned it favored the State. And Judge Gusinsky ruled that actual innocence is not a valid freestanding claim, but if it was, Guzman failed to plead a necessary element to make such a claim—Guzman alleged no new evidence that would lead a reasonable jury to find him not guilty.

Barker v. Wingo, 407 U.S. 514 (1972)

Engesser v. Young, 2014 S.D. 81, 856 N.W.2d 471

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

Strickland v. Washington, 466 U.S. 668 (1984)

SDCL 19-19-801(c)

SDCL 19-19-802

SDCL 21-27-5.1

STATEMENT OF THE CASE

Theodore Guzman was indicted after his daughters, N.G. and L.G., and their friend, A.C., disclosed that Guzman sexually assaulted them. CF:61-62. Guzman faced three counts of First-Degree Rape in violation of SDCL 22-22-1(1), and one count of Sexual Contact with a Child in violation of SDCL 22-22-7, involving N.G. CF:61-62.

Guzman, represented by Paul Winter, had his trial end with a hung jury. TT:1040-41. The Honorable Robert A. Mandel declared a mistrial and ordered another trial. *Id.* Conor Duffy replaced Winter, who withdrew after closing his law practice. CF:953-54. Joining Duffy for part of trial was his law partner, Ilisja Duffy. JT:387.

The jury convicted Guzman on all four charges. CF:2782-83. Judge Mandel sentenced Guzman to life in prison plus fifteen years. CF:3519.

After this Court affirmed Guzman's convictions on direct appeal, *State v. Guzman*, 2022 S.D. 70, 982 N.W.2d 875, he filed a habeas

corpus application. SR:2-13. Guzman raised ten claims; only four are relevant here. First, Guzman claimed Duffy was ineffective because he did not move to have the victims undergo psychiatric evaluations. SR:3-4. Second, Guzman claimed counsel were ineffective because of how they cross-examined the victims. SR:4. Third, Guzman claimed Duffy was ineffective for not moving to dismiss Guzman's indictment under the Sixth Amendment's Speedy Trial Clause. SR:4-5. Fourth, Guzman claimed he "is actually innocent" based on evidence about medical examinations he and the victims underwent. SR:6-7.

Warden Sullivan moved to dismiss Guzman's habeas application, arguing his ineffective assistance claims were conclusory and speculative and that Guzman's actual innocence claim was based on evidence already presented to the jury. SR:24-28.

The Honorable Robert Gusinsky granted the motion, concluding two ineffectiveness claims—failing to seek psychiatric evaluations and challenging how the victims were questioned—were vague, conclusory, or speculative. SR:54-56. Judge Gusinsky dismissed the speedy trial ineffectiveness claim because the applicable balancing analysis favored the State. SR:56-60

As for the actual innocence claim, Judge Gusinsky concluded South Dakota hasn't recognized actual innocence as a freestanding claim. SR:60-61. But even if such a claim exists, Guzman alleged no new evidence. *Id.*

This appeal now follows, after this Court issued a certificate of probable cause, authorizing four grounds for review:

1. Whether Petitioner was deprived of his Sixth Amendment right to effective counsel because trial counsel did not request psychiatric evaluation of the victims.
2. Whether Petitioner was deprived of his Sixth Amendment right to effective counsel because trial counsel did not effectively cross-examine the victims at the second trial.
3. Whether Petitioner was deprived of his Sixth Amendment right to effective counsel because trial counsel did not move for dismissal of the indictment based upon Petitioner's Sixth Amendment right to a speedy trial.
4. Whether Petitioner was innocent of the charges for which he was convicted, based solely upon newly discovered evidence.

SR:91-92.

STATEMENT OF FACTS

In the fall of 2017, Theodore Guzman and his children—N.G., L.G., and A.G.—moved in with Guzman's parents, Helen and Benny Guzman. JT:349. The house had three bedrooms upstairs and a basement with an apartment and a separate laundry room. JT:349-50. Helen and Benny, Nicole (Guzman's sister), and another adult, occupied the three bedrooms. JT:349. Guzman's children slept on couches or blankets piled on the living room floor. JT:355

That November, A.C. had a sleepover with N.G. and L.G. at the Guzman house. JT:138-40. While in the laundry room, Guzman, kneeling in front of A.C., asked to see her "private part." JT:177. A.C. said "no," laughing it off. JT:178.

At bedtime, all the kids slept on the couch and a chair in the living room or made a bed on the floor. JT:179-80. Guzman also slept in the living room. JT:179. A.C. laid on the floor and Guzman laid behind her. JT:182. Guzman showed A.C. pictures of girls' "butts" on Facebook and told her not to tell her mom. JT:201.

Later, A.C. woke up to Guzman "grabbing" her sweatpants, "pulling them down." JT:182. Guzman started "rubbing" A.C.'s "butt" with his penis. JT:183. A bit later, Guzman touched A.C.'s "butthole" with his penis and then penetrated her with it. JT:185-86. A.C. said the penetration felt like "[t]here was . . . a really big poop or something[.]" JT:187. When A.C. tried to get away, Guzman gave her "a smack on the" head. JT:188.

The next morning, Guzman told A.C. not to tell anyone what happened "because his kids needed him." JT:189. Guzman then drove A.C. home, and N.G., who went along, followed A.C. into her room. JT:117, 189. N.G. shut the door, saying she saw what happened and "it's happened to her." JT:190.

A.C. didn't want to disclose Guzman's assault because she was scared. JT:189. But a couple of weeks later, A.C., pacing throughout her house, told her mother, H.C., that she needed to tell her something. JT:119. A.C. said, "Mom, he did it" and started bawling. *Id.* H.C. asked what she meant and who she was talking about. *Id.* A.C. repeated "he

did it." *Id.* H.C. asked if "it" was sex, and A.C. said it was Guzman. JT:119-20. H.C. called the police. JT:120-21.

After the police responded, H.C. took A.C. to the Emergency Room. JT:122. Dr. Brook Eide examined A.C. for physical injuries and tested her for gonorrhea and chlamydia; those tests were negative. JT:224-26. Dr. Eide also referred A.C. to a pediatrician for a sexual assault examination. *Id.* Dr. Cara Hamilton performed that examination, which was "normal" and A.C. tested negative for sexually transmitted disease and pregnancy. JT:316; Ex. 9.

After A.C.'s disclosures, the Department of Social Services took custody of N.G., L.G., and A.G. JT:477-79. L.G. and N.G. were placed in a foster home together. JT:360. Around Christmas, N.G. told her foster mom that Guzman sexually abused her. JT:379. N.G. disclosed that when she was about ten, she and Guzman drove to the store. JT:370. While driving, Guzman placed N.G.'s hand on his penis, forcing her to stroke it. JT:370-71.

N.G. also disclosed that Guzman abused her at her grandparents' house. JT:372-74. She was in bed when Guzman laid down behind her. *Id.* Guzman pulled N.G.'s pants down while she tried to keep them up. JT:374. Guzman then put his penis in N.G.'s vagina; N.G. said "ow" because it hurt. JT:375-77. Guzman told N.G. to "shut up and be quiet." *Id.* Afterward, Guzman said N.G. was "filling in for his

girlfriend[,]" who was in jail. JT:378. He also said if she told anyone "he was going to go away for a long time." *Id.*

In July 2018, L.G. told her foster mom that Guzman raped her, too. JT:594, 624. When L.G. was six, she, her siblings, and Guzman lived with Guzman's sister. JT:637-39. L.G., her siblings, and Guzman slept on the living room floor. JT:639-40. One night, L.G. woke up to Guzman putting his "front part" in her "butt" repeatedly. JT:641-42.

Tifanie Petro, from the Children's Home Advocacy Center, completed forensic interviews with all three girls. Ex. 5, 11, 15, 18. During their interviews, A.C. and L.G. reiterated their disclosures. Ex. 5, 18. N.G. did not disclose any abuse during her interview. JT:499. But after disclosing abuse to her foster mom, she admitted to lying in her interview because she was scared Guzman would go to prison, and she didn't like Petro. JT:361. In a second interview, N.G. disclosed the details about her father's sexual abuse. JT:544-45. But N.G. didn't tell Petro everything because she believed the less she told Petro, the better chance she had to go home. JT:423.

Guzman's trial defense was simple: I'm innocent, the girls are lying. VD:134. To put this into practice, Duffy questioned whether someone planted ideas in the girls' heads, leading them to fabricate their disclosures. JT:199, 620, 694. He also faulted police for not collecting physical or digital evidence and for not swabbing for DNA. JT:463-64, 466-67.

Counsel were also pleasant with the girls, attacking their credibility by pushing hard with the State's experts during cross-examination. For example, while trying to get an idea of what Guzman was doing before A.C. said he raped her, Duffy saved her from having to rehash the details of the abuse. JT:200-01. But then he attacked A.C.'s disclosures and her motivations by asking about what her family and Petro said about keeping other kids safe. JT:199, 280, 288-98. Duffy also questioned whether A.C. had been coached because Dr. Hamilton and A.C. used the same "large poop" analogy. JT:326. Duffy also questioned the veracity of A.C.'s disclosures because her medical exams were "normal." JT:326-28. He focused on A.C.'s negative STD tests, arguing Guzman couldn't have raped her because at the time of her allegations he was being treated for gonorrhea. JT:328, 804-05.

Finally, Duffy faulted Petro for telling N.G. that A.C. had made a disclosure and for asking what he believed were repetitive questions to get N.G. to make a disclosure. JT:502-06.

STANDARDS OF REVIEW

Whether this Court lacks appellate jurisdiction over a claim "'is a legal issue which is reviewed de novo.'" *Wright v. Young*, 2019 S.D. 22, ¶11, 927 N.W.2d 116, 119 (quoting *State v. Medicine Eagle*, 2013 S.D. 60, ¶38, 835 N.W.2d 886, 900).

This Court also uses that standard to review the dismissal of a habeas "petition as a matter of law and without receiving evidence."

Ceplecha v. Sullivan, 2023 S.D. 63, ¶28, 998 N.W.2d 351, 338 (citing *Steiner v. Weber*, 2011 S.D. 40, ¶4, 815 N.W.2d 549, 551).

ARGUMENTS

This Court should affirm the dismissal of Guzman's habeas action for three reasons. First, it lacks jurisdiction over most of Guzman's appellate claims because they aren't in the certificate of probable cause. Second, Guzman abandoned or waived the claims the Court has jurisdiction over because he didn't brief them, he didn't support them with legal authority, or he raised issues that weren't presented to Judge Gusinsky. Third, Judge Gusinsky properly dismissed Guzman's claims for either violating civil pleading standards or because they failed under the applicable constitutional analyses.

But if this Court concludes dismissal was erroneous, the only remedy is a remand for an evidentiary hearing. The Court cannot grant Guzman a new trial because the state of the appellate record does not allow for that remedy.

I

THE COURT LACKS JURISDICTION TO CONSIDER MOST OF GUZMAN'S APPELLATE CLAIMS BECAUSE THEY ARE NOT IN THE CERTIFICATE OF PROBABLE CAUSE.

This Court "'has only such appellate jurisdiction as may be provided by the legislature.'" *Berwald v. Stan's, Inc.*, 2025 S.D. 33, ¶25, 24 N.W.3d 420, 429 (quoting *Wegner v. Siemers*, 2018 S.D. 76, ¶4, 920 N.W.2d 54, 55). Its appellate jurisdiction in habeas cases comes from

SDCL 21-27-18.1, requiring a certificate of probable cause before an appeal can be brought.

But even when a certificate of probable cause is issued, it doesn't create a blank slate for an appellant to appeal any issue they want. Habeas appeals are limited to the issues identified in the certificate of probable cause. *Evans v. Sullivan*, 2024 S.D. 36, ¶22 n.5, 9 N.W.3d 490, 498 n.5. The Court's jurisdiction is limited to addressing whether Guzman received ineffective assistance because counsel did not seek mental health evaluations of the victims, did not move to dismiss the case under the Speedy Trial Clause, and because of how they cross-examined the victims. SR:91. Its jurisdiction is also limited to addressing Guzman's claim that he is innocent based on newly discovered evidence. *Id.*

Given the limited scope of appeal, this Court lacks jurisdiction to consider whether Guzman received ineffective assistance because Mr. Duffy was allegedly biased against him, that his due process rights were violated by Judge Mandel's evidentiary rulings, and that his life sentences are cruel and unusual under the Eighth Amendment.[2] AB:14-

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[2] Even if this Court had jurisdiction to consider these claims, Guzman's evidentiary ruling challenges and Eighth Amendment argument are barred by the res judicata doctrine, which prohibits raising claims "that were 'either litigated on direct appeal or could have been'" raised in that proceeding. *Evans*, 2024 S.D. 36, ¶23 (quoting *Ceplecha*, 2023 S.D. 63, ¶25). The evidentiary ruling claims were considered on direct appeal. *Guzman*, 2022 S.D. 70, ¶¶23-39 (Judge Mandel's decision excluding Helen Guzman's testimony was harmless error); 2022 S.D. 70, ¶¶58-63 **Continued. . .**

23. Because this Court lacks jurisdiction over these claims, Respondent doesn't argue their merits. *See Evans*, 2024 S.D. 36, ¶22 n.5 ("[T]hat both parties have briefed the merits of claim 6 . . . does not change this uncomplicated jurisdictional analysis."); *Long v. Knight Const. Co.*, 262 N.W.2d 207, 209 (S.D. 1978)(parties cannot create appellate jurisdiction by stipulation or agreement).

Given this Court lacks jurisdiction over most of Guzman's claims, it should dismiss those claims and focus on the four issues in the certificate of probable cause.

II

GUZMAN HAS ABANDONED OR WAIVED THE CLAIMS THIS COURT HAS JURISDICTION OVER BY NOT ARGUING THEM IN HIS BRIEF, FAILING TO SUPPORT THE ARGUMENTS HE DID MAKE WITH LEGAL AUTHORITIES, OR RAISING NEW ISSUES.

Even though this Court issued a certificate of probable cause on whether Mr. Duffy was ineffective for not having the victims evaluated by a mental health professional, Guzman's brief makes no specific arguments on that score. *See generally* AB:10-23. Instead, he makes a general argument that Duffy was ineffective for not having "any experts

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(Judge Mandel's decision excluding A.G.'s forensic interview as irrelevant was a permissible evidentiary decision that did not prejudice Guzman). And Guzman could have raised his Eighth Amendment claim on direct appeal. *See Ramos v. Weber*, 2000 S.D. 111, ¶8, 616 N.W.2d 88, 92-93 (affirming dismissal of Fourteenth Amendment challenge under the res judicata doctrine because it could have been raised on direct appeal when Ramos raised his Eighth Amendment claim). Thus, Judge Gusinsky correctly dismissed these claims under the res judicata doctrine. SR:49-51.

testify on [Guzman's] behalf to contradict anything said by the State's experts." AB:12. He also generically claims Duffy was ineffective because he "did not have the alleged victims interviewed or evaluated by his own experts." *Id.* But he does not expand on who these experts are or what their area of expertise is. *Id.*

Guzman also cites no authority to support either of these conclusory claims. AB:12-13. And he makes no specific arguments about how Duffy was ineffective under *Strickland v. Washington's* two-pronged analysis.[3] AB:12-13. Guzman's citation and argument failures violate SDCL 15-26A-60(6) and waives this issue on appeal. *E.g.*, *State v. Patterson*, 2017 S.D. 64, ¶31, 904 N.W.2d 43, 52; *State v. Fool Bull*, 2009 S.D. 36, ¶46, 766 N.W.2d 159, 169.

On top of that, Guzman makes no arguments about his cross-examination ineffectiveness claim or his actual innocence claim. *See generally* AB:10-23. Claims "'not briefed and argued [are] deemed abandoned.'" *Giesen v. Giesen*, 2018 S.D. 36, ¶23, 911 N.W.2d 750, 756 (quoting *Sabhari v. Sapari*, 1998 S.D. 35, ¶1 n.3, 576 N.W.2d 886, 888 n.3). Nor can Guzman fix that by raising the issues in his reply brief. *Ellingson v. Ammann*, 2013 S.D. 32, ¶10, 830 N.W.2d 99, 102.

Likewise, Guzman does not challenge Judge Gusinsky's dismissal of his speedy trial ineffectiveness claim under *Barker v. Wingo's* four-

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[3] *Strickland v. Washington*, 466 U.S. 668 (1984).

factor analysis.[4] *See generally* AB:13-14. Instead, he raises a new argument that Duffy was ineffective because he continued the trial against Guzman's wishes. *Id.* Because Guzman doesn't specifically challenge Judge Gusinsky's speedy trial analysis, that claim is abandoned. *Giesen*, 2018 S.D. 36, ¶23. Guzman's argument about Duffy continuing the case without his consent is waived because he cannot raise a claim for the first time on appeal. *Ellingson*, 2013 S.D. 32, ¶10.

Simply put, Guzman abandoned or waived the issues this Court has jurisdiction to review, so it should affirm Judge Gusinsky's dismissal. Despite Guzman's procedural problems, Respondent addresses the effect of the current habeas record on this Court's review and its options, as well as why Judge Gusinsky properly dismissed Guzman's habeas application.

III

THE HABEAS RECORD IS INCOMPLETE TO ALLOW THE COURT TO GRANT GUZMAN RELIEF.

Even under the best circumstances, habeas review "is limited because it 'is a collateral attack on a final judgment.'" *Piper v. Young*, 2019 S.D. 65, ¶21, 936 N.W.2d 793, 803 (quoting *Miller v. Young*, 2018 S.D. 33, ¶12, 911 N.W.2d 644, 648)(cleaned up). Inmates must "prove by a preponderance of evidence that" they are entitled to relief. *Ally v.*

[4] *Barker v. Wingo*, 407 U.S. 514 (1972).

Young, 2023 S.D. 65, ¶32, 999 N.W.2d 237, 249. That proof requirement is especially weighty in the ineffective assistance context because we presume trial counsel acted competently and reasonably. *Id.* ¶34. And "'*the absence of evidence* cannot overcome th[at] strong presumption. . . .'" *Dunn v. Reeves*, 594 U.S. 731, 733-34 (2021)(per curiam)(quoting *Burt v. Titlow*, 571 U.S. 12, 23 (2013))(emphasis added).

Dunn's rule holds true here. Because Judge Gusinsky dismissed Guzman's case without taking evidence, no evidence rebuts the presumption that counsel provided reasonable assistance. There's no record for this Court to overturn Guzman's convictions based on alleged ineffective assistance, using *Stricklands* two-pronged analysis. *Ally*, 2023 S.D. 65, ¶33.

The effect of the case's procedural posture is not unusual. This Court refuses to consider ineffective assistance claims on direct appeal because the record "does not afford a basis to review the performance of trial counsel." *State v. Vortherms*, 2020 S.D. 67, ¶30, 952 N.W.2d 113, 120. That is because "trial counsel is not afforded the opportunity to explain or defend his or her actions." *State v. Phillips*, 2018 S.D. 2, ¶22, 906 N.W.2d 411, 417. Because counsel have not had the chance to explain their actions, there is no functional difference between Guzman's ineffectiveness claims and a direct appeal ineffectiveness claim.

What's more, this Court shouldn't lean on its original habeas jurisdiction to excuse the lacking record to reach the merits of Guzman's

claims. *See* S.D. Const. Art. V., § 5 (granting authority for "the Supreme Court or any justice thereof [to] issue any original or remedial writ. . . ."); SDCL 21-27-1 (giving people the ability to seek habeas relief from "the Supreme or circuit court, or any justice or judge thereof. . ."). There are three reasons for not leaning on that original jurisdiction. First, this Court's original jurisdiction "is reserved for the consideration of matters of prerogative, extraordinary, and general concern." SDCL 15-25-1. This case doesn't fit that bill. It is an ordinary habeas case that circuit courts deal with daily.

Second, long ago this Court said its constitutional jurisdiction is primarily appellate jurisdiction. *Everitt v. Bd. Of Cnty Com'rs Hughes County*, 47 N.W. 206, 297 (S.D. 1890)("[T]he primary and principal object of the creation of the supreme court was to make it an appellate court. . . ."). This point was reiterated in 2024: "We are principally a reviewing court . . . ill-equipped to find facts as a trial court does." *In re Noem*, 2024 S.D. 11, ¶10, 3 N.W.3d 465, 471. But even more applicable here is the recognition that the Court is "prohibited, as all courts are, from speculating about unknown facts." *Id.* And to grant Guzman relief on the merits, given the lacking appellate record, requires speculation.

Third, the Court's original jurisdiction is inapplicable because this case is brought under the Court's appellate jurisdiction. It granted Guzman a certificate of probable cause under SDCL 21-27-18.1, which is

undoubtably an appellate jurisdiction statute, given that it establishes how this Court gains appellate jurisdiction in habeas cases.

Simply put, despite the merits-focused wording of the certificate of probable cause, the appellate record isn't set up to make a merits ruling that grants Guzman a new trial. At most, the record is poised for a single decision: Did Judge Gusinsky properly dismiss Guzman's petition?

IV

JUDGE GUSINSKY PROPERLY DISMISSED GUZMAN'S PETITION UNDER SDCL 15-6-12(b)(5).

Habeas corpus proceedings are civil cases, so the Rules of Civil Procedure (SDCL ch. 15-6) apply if they are consistent with the habeas statutes (SDCL ch. 21-27). *Jenner v. Dooley*, 1999 S.D. 20, ¶13, 590 N.W.2d 463, 469. Thus, a respondent can move to dismiss a habeas petition under SDCL 15-6-12(b)(5) when the petition does not state a claim for which relief can be granted. *Jenner*, 1999 S.D. 20, ¶13.

But before reaching why Judge Gusinsky properly dismissed Guzman's case, Respondent urges the Court to clarify the proper standard for granting a motion to dismiss a habeas case.

A. This Court should no longer use the Schlosser/Jenner standard for habeas cases and instead use the Sisney standard that applies in all other civil proceedings.

Rule 12(b)(5) motions test "the legal sufficiency of the pleading[.]" *N.Am. Truck & Trailer, Inc. v. M.C.I. Commc'n. Servs.*, 2008 S.D. 45, ¶6, 751 N.W.2d 710, 712. Precedent has created two incongruent standards

to test that sufficiency. The *Schlosser/Jenner* standard says a Rule 12(b)(5) motion can be granted "only if it appears beyond doubt that the petition sets forth no facts to support a claim for relief." *Jenner*, 1999 S.D. 20, ¶13 (citing *Schlosser v. Norwest Bank South Dakota*, 506 N.W.2d 416, 418 (S.D. 1993)). In other words, a pleading survives dismissal if it passes "a minimum 'threshold of plausibility.'" *Jenner*, 1999 S.D. 20, ¶13 (citing *Dellenbach v. Hanks*, 76 F.3d 820, 822-23 (7th Cir. 1996)).

On the other hand, the *Sisney* standard says a pleading survives if it includes "'more than labels conclusions, and formulaic recitation of the elements of a cause of action. . . .'" *Sisney v. Best, Inc.*, 2008 S.D. 70, ¶7, 754 N.W.2d 804, 808 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554-55 (2007)). And factual allegations must "'raise a right to relief above the speculative level. The pleading must contain something more than a statement of facts that merely creates a suspicion of a legally cognizable right of action on the assumption that all the allegations in the complaint are true (even if doubtful in fact).'" *Id.* (cleaned up). Said another way, a pleading must make "'a showing,' rather than a blanket assertion, of entitlement to relief." *Sisney*, 2008 S.D. 70, ¶7 (quoting *Bell Atlantic*, 550 U.S. at 555 n.3).

The coexistence of these two standards have caused confusion in habeas cases. Judge Gusinsky used the *Sisney* standard when dismissing Guzman's petition. SR:46-47. Other judges have dismissed habeas petitions by using the *Schlosser/Jenner* standard. *E.g.*, *White v.*

Fluke, Minnehaha County File No. 49CIV24-3934, Order Denying Petition for Writ of Habeas Corpus (filed September 19, 2024). Therefore, this Court should definitively clarify which of these standards applies.

At first blush, it might appear that the *Schlosser/Jenner* standard applies because it was used in *Steiner v. Weber*, 2011 S.D. 40, 815 N.W.2d 549, and *Riley v. Young*, 2016 S.D. 39, 879 N.W.2d 108, which are habeas cases. But there are three reasons why the *Sisney* standard should be used.

First, the analytical foundation of the *Schlosser/Jenner* standard is no longer good law. The *Schlosser/Jenner* standard's legal base comes from the language in *Conley v. Gibson* "'that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Schlosser*, 506 N.W.2d at 418 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). That "no set of facts" standard was continually questioned until 2007. *Bell Atlantic Corp.*, 550 U.S. at 562. That year, the Supreme Court concluded *Conley's* "no set of facts" language "described the breadth of opportunity to prove what an adequate complaint claims, *not the minimum standard of adequate pleading to govern a complaint's survival.*" *Bell Atlantic Corp.*, 550 U.S. at 563 (emphasis added). As explained above, the *Sisney* standard (adopting the *Bell Atlantic* standard) became operative when the Court,

through Justice Zinter, decided it was time to retire the *Conley/Schlosser/Jenner* standard. *Sisney*, 2008 S.D. 70, ¶8.

Second, because this Court has said Rule 12(b)(5) applies in habeas cases, *Jenner*, 1999 S.D. 20, ¶13, it makes little sense to use a pleading standard in habeas cases that isn't used in any other civil case. Consistency here also creates consistency between the Federal Rules of Civil Procedure and the State Rules of Civil Procedure. *See Sander v. Geib, Elston, Frost Professional Ass'n*, 506 N.W.2d 107, 122-23 (S.D. 1993)("South Dakota has generally adopted the Federal Rules of Civil Procedure" so it is "appropriate to 'turn to the federal court decisions for guidance in their application and interpretation.'" (quoting *Wilson v. Great N. Ry. Co.*, 157 N.W.2d 19, 21 (S.D. 1968); *Brasel v. Myers*, 229 N.W.2d 569, 570 (S.D. 1975))). And South Dakota's federal courts apply the *Bell Atlantic/Sisney* standard when ruling on motions to dismiss in habeas cases. *E.g.*, *DeCory v. Pfiefle*, 2024 WL 331655, *2 (D.S.D.); *Olivares v. United States*, 2023 WL 11999303, *7 (D.S.D.); *Graham v. United States*, 2022 WL 621112, *2 (D.S.D.).

Third, a habeas petition is "more susceptible to dismissal" than ordinary civil complaints because it is "a collateral attack on a final judgment." *Jenner*, 1999 S.D. 20, ¶13. So it makes little sense to use the less exacting *Schlosser/Jenner* standard when an inmate attacks a final judgment, while using the more exacting *Sisney* standard when a litigant seeks to create a final judgment in the first place.

Simply put, this case provides the perfect opportunity for the Court to correct the legal oversight that is the continued use of the *Schlosser/Jenner* standard after the *Sisney* standard replaced it.

B. *Regardless of the standard used, Judge Gusinsky properly dismissed Guzman's habeas petition.*

If a habeas petition's "allegations are unspecific, conclusory, or speculative," a circuit court can dismiss them. *Jenner*, 1999 S.D. 20, ¶13. A petition can also be dismissed when it "fail[s] to allege a requisite element necessary to obtain relief. . . ." *Id.* Judge Gusinsky used these rationales to dismiss Guzman's petition. SR:47.

As explained in the following sections, Judge Gusinsky properly dismissed Guzman's habeas claims because of their procedural faults and because they failed under the applicable United States Supreme Court analyses.

1. *Judge Gusinsky properly dismissed Guzman's claims that counsel was ineffective for not seeking mental health evaluations for the victims and for how they were cross-examined as unspecific, conclusory, and speculative.*

Guzman alleged that his right to effective assistance of counsel was violated because Mr. Duffy did not seek mental health evaluations based on the allegation that children lie "or fabricate stories to satisfy an authority figure." SR:3-4. Guzman also alleged that his right to effective assistance was violated because of how counsel cross-examined the victims when their testimony on retrial allegedly "differed greatly from the testimony given by them in the first trial. . . ." SR:4.

Judge Gusinsky dismissed the mental health evaluation claim because Guzman "offered only personal speculation in support of his assertions" and "mere speculation is insufficient" to avoid dismissal. SR:54. He also rejected the cross-examination claim because it was "unspecific, conclusory, and speculative," so Guzman had "not met his burden to demonstrate deficient performance and prejudice" under *Strickland*. SR:56.

Judge Gusinsky properly dismissed these two claims. Guzman's pleadings are a textbook example of "speculating", which means "to take to be true on the basis of insufficient evidence." Meriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/speculating (last visited October 6, 2025). Guzman offers nothing to support his claims. He makes no mention of his basis for saying children generally lie or fabricate, or that A.C., N.G., and L.G. fabricated their disclosures of sexual abuse because of some underlying mental health issue. *See generally* SR:3-4. And neither Respondent nor the courts are required to play legal or factual whack-a-mole to figure out what Guzman is arguing or what information he is using to support his pleadings.

Similarly, Guzman gives no details about the inconsistencies he believes counsel failed to exploit on cross-examination. *See generally* SR:4. Instead, "he merely alleges that they exist, are substantial, and would influence a jury." SR:56.

What's more, the speculation of these claims is shown by comparing them to a claim where Guzman included enough factual allegations to avoid a speculative or conclusory determination. While not overwhelmingly detailed, Guzman's claim that Mr. Duffy was ineffective for not moving to dismiss the case for an alleged speedy trial violation was detailed enough to avoid summary dismissal. *See* SR:56-60 (dismissing that claim because it failed under the *Barker v. Wingo* balancing test). There, Guzman pled the general timeframe of when he was arrested, when his first trial was held, and when his second trial was held, and then claimed the three years that had passed violated the Sixth Amendment. SR:4-5.

The contrast between the minimal details about the speedy trial claim and the missing details about the mental health evaluation and cross-examination claims shows Judge Gusinsky properly dismissed them.

2. *Alternatively, Judge Gusinsky properly determined that Guzman could not satisfy both prongs of Strickland v. Washington's analysis for the lack of mental health evaluations.*

Guzman faults Mr. Duffy for not having "any experts testify on his behalf to contradict anything said by the State's experts." AB:12. He also compares Duffy's representation and Mr. Winter's, suggesting that Winter was effective because he had Dr. Dewey Ertz testify at the first trial. AB:12-13. Guzman's analysis is wrong on three fronts.

First, as Judge Gusinsky correctly noted, "'failure to hire an expert is not, per se, error.'" SR:55 (quoting *Spaniol v. Young*, 2022 S.D. 61, ¶26, 981 N.W.2d 396, 405). Likewise, Judge Gusinsky's decision follows the well-accepted ineffective assistance law that "'the decision to call (or not to call) an expert is a matter of trial strategy,' and 'this Court will not second guess experienced counsel regarding trial tactics or strategy.'" *Spaniol*, 2022 S.D. 61, ¶26 (quoting *Knecht v. Weber*, 2002 S.D. 21, ¶21, 640 N.W.2d 491, 500) (cleaned up). Judge Gusinsky's decision also followed the well-accepted point that an inmate cannot prove prejudice by relying on "'[c]onjecture or speculation. . . .'" *Knecht*, 2002 S.D. 21, ¶20 (quoting *Kluck v. State*, 30 S.W.3d 872, 876 (Mo. App. 2000)); *see Parker v. Scott*, 394 F.3d 1302, 1324 (10th Cir. 2005)(rejecting claim that counsel should have sought psychological testing for child sexual assault victim because the claim was speculative).

Second, Guzman cannot compare Winter's and Duffy's diverging legal strategies about experts because "a difference in trial tactics does not amount to ineffective assistance of counsel." *Piper*, 2019 S.D. 65, ¶67. Nor can he claim that Duffy's strategy must have been prejudicially deficient because it resulted in convictions while Winter's strategy led to a hung jury. The ineffective assistance analysis is not concerned with who won at trial, its concern is whether a defendant had a fair trial, meaning to receive relief the trial had to have been "fundamentally unfair," *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993), which happens

only when there is "a breakdown in the adversary process that renders the results unreliable." *Strickland*, 466 U.S. at 697. And as a review of the entire record shows, there was no breakdown in the adversary process here. *See Dillon v. Weber*, 2007 S.D. 81, ¶11, 737 N.W.2d 420, 425 ("Claims of ineffective assistance of counsel must be evaluated in light of the totality of the circumstances.").

Focusing on the hung jury in the first trial also puts too much stock in that outcome for prejudice purposes. We do not know how many jurors were leaning toward guilty or not guilty during the first trial—it could have been eleven for guilty and one not guilty. But we will never know because evidence on that score is inadmissible. SDCL 19-19-606(b)(1). Besides that, it doesn't matter what that first jury did compared to the second because the prejudice analysis "must exclude the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed." *Strickland*, 466 U.S. at 695.

Third, Guzman is incorrect that the State's experts' testimony went unchallenged. Duffy used those experts themselves to help the defense's case. For example, his cross-examination of Hollie Strand drew out helpful information about comments, questions, and actions that can taint or call into question a forensic interview. JT:82-95. He then used that information to attack Tifani Petro and how she conducted her

forensic interviews. JT:270-93, 500-10, 566-75, 692-702. He also attacked the comments made to the victims by parents, foster parents, and DSS employees before their forensic interviews, suggesting that those comments caused fabrications. *E.g.*, JT:85-87, 199, 697. And then he weaved all those attacks together in his closing argument. JT:859-77. Simply put, Duffy's decision to draw out this helpful information from the State's witnesses is a strategic decision that cannot "render counsel ineffective." *See Ally*, 2023 S.D. 65, ¶¶52-55 (rejecting ineffective assistance claim about how counsel used live testimony instead of interview videos to support the defense's theory because counsel gets to choose how to present helpful evidence to the jury).

Additionally, because the Court reviews the ineffectiveness legal question de novo, it can affirm Judge Gusinsky's dismissal "if it is right for any reason." *Erickson v. Weber*, 2008 S.D. 30, ¶17, 748 N.W.2d 739, 744. There are several other reasons Judge Gusinsky could have dismissed Guzman's experts claim.

Had Duffy asked for mental health evaluations, he ran "the risk of 'harming' the defense,'" *Dunn*, 594 U.S. at 739 (quoting *Harrington v. Richter*, 562 U.S. 86, 108 (2011))(cleaned up), because if evaluations came back normal or showed no mental disease or illness that would predispose the girls to lying, then his blanket claim that they are lying folds. At that point, arguing that the girls were lying without some explanation or motivation to do so, would "undermin[e Duffy's and the

defense's] credibility with the jury. . . ." *Id.* This approach is no different than one where counsel decides to not seek DNA testing, worrying the test results may close the door on potential avenues of defense. *E.g.*, *Baker v. State*, 577 S.E.2d 282, 286 (Ga. App. 2003)(rejecting claim that counsel was ineffective for failing to seek DNA testing); *People v. Manning*, 2020 WL 4437302, *4-5 (Ill. App. Ct.)(same); *Graham v. State*, 2024 WL 5055247, *4-5 (Tenn. Ct. App.)(same).

Additionally, "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Strickland*, 466 U.S. at 691. And Guzman, as the father of N.G. and L.G., failed to allege or show that he expressed concerns about their mental health to Duffy. *See Jacobson v. United States*, 258 F.App'x 45, 48 (7th Cir. 2007)(Jacobson's pleadings "gave the district court no reason to believe that Jacobson ever gave [his attorney] any information that would alert him to the need" to seek fingerprint or DNA testing on the gun Jacobson ultimately pled guilty to possessing).

Finally, this Court can affirm Judge Gusinsky's no prejudice determination because this Court described the State's case against Guzman as "very strong." *Guzman*, 2022 S.D. 70, ¶39. That strong evidence must be considered in the prejudice analysis because courts "must consider all the evidence—the good and the bad—when evaluating prejudice." *Wong v. Belmontes*, 558 U.S. 15, 26 (2009)(per curiam). And when there is "overwhelming record support" for a conviction, then

alleged errors of counsel "will have had an isolated, trivial effect." *Strickland*, 466 U.S. at 696.

Simply put, this Court should affirm Judge Gusinsky's alternative ruling that Mr. Duffy was not ineffective for not seeking mental health evaluations of the victims.

3. *Alternatively, Judge Gusinsky properly determined that Guzman could not satisfy both prongs of Strickland v. Washington's analysis for how the victims were cross-examined.*

On top of dismissing Guzman's cross-examination claim as speculative and conclusory, Judge Gusinsky also dismissed it because "Guzman has not met his burden to demonstrate deficient performance and prejudice. . . ." SR:56. On the deficient performance analysis, that decision correctly rules that "'[t]here are countless ways to provide effective assistance in any given case.'" *Id.* (quoting *Strickland*, 466 U.S. at 689). It also correctly notes that how to conduct cross-examination is a strategic decision left to counsel that cannot be second-guessed later. SR:56 (quoting *Henderson v. Norris*, 118 F.3d 1283, 1287 (8th Cir. 1997)).

This Court can also affirm Judge Gusinsky's analysis because had counsel went scorched earth on the victims, which is what it seems Guzman wanted them to do, they risked alienating the jury and "undermining [the defense's] credibility. . . ." *Dunn*, 594 U.S. at 739. Questioning vulnerable witnesses about sensitive or uncomfortable topics forces counsel to walk a tightrope about how to best approach it.

Here, counsel delicately questioned the victims, but they put down the roses and picked up a sword when it came to questioning Tifani Petro and the other adult witnesses. *E.g.*, JT:280, 288-89, 326, 502-06, 620, 694. And Guzman doesn't get to pick that apart years later. *Reay v. Young*, 2019 S.D. 63, ¶14, 936 N.W.2d 117, 121.

As for the prejudice analysis, Judge Gusinsky was right, again, that prejudice cannot be based on speculation. SR: 56; *Knecht*, 2002 S.D. 21, ¶20. So Guzman's unspecific and conclusory claim that drawing out unidentified inconsistences would have led to a different result at trial must fail.

Moreover, counsel had already attacked the victims' credibility. For example, Mr. Duffy got A.C. to admit that N.G. has a history of lying. JT:199. He pointed out that N.G. denied being raped by Guzman but then disclosed abuse in her second forensic interview. JT:503, 567. And he theorized that someone planted the idea of abuse, leading the girls to fabricate that Guzman abused them. *E.g.*, JT:99, 620, 694. So more evidence attacking their credibility would have been cumulative, which cannot establish prejudice. *New v. Weber*, 1999 S.D. 125, ¶21, 600 N.W.2d 568, 576; *Bucklew v. Luebbers*, 436 F.3d 1010, 1019-20 (8th Cir. 2006); *see Belmontes*, 558 U.S. at 22-23 (the lack of "more humanizing evidence about Belmontes' 'difficult childhood'" did not cause prejudice because "[a]dditional evidence on these points would have offered an insignificant benefit, if any at all.").

Because Guzman's scant petition could not establish deficient performance and prejudice, this Court should affirm the dismissal of his cross-examination ineffectiveness claim.

4. Judge Gusinsky properly dismissed Guzman's claim that counsel should have moved to dismiss his indictment under the Speedy Trial Clause because the Barker v. Wingo analysis favored the State.

Guzman claims he received ineffective assistance because Mr. Duffy didn't move to dismiss the case under the Sixth Amendment's Speedy Trial Clause given the time that passed between his arrest and the start of his retrial. SR:4-5.

The United States Supreme Court created a four-factor balancing test to assess speedy trial claims in *Barker v. Wingo*, 407 U.S. 514, 530 (1972). Those four factors are: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id.* Judge Gusinsky reviewed each of these factors before concluding the balance tipped in favor of the State. SR:57-60.

Despite Judge Gusinsky's clear reliance on the *Barker* factors, Guzman doesn't address that analysis. AB:13-14. He focuses solely on his unsupported allegation that Mr. Duffy sought two continuances without his consent. *Id.* The next subsections address, in turn, why Duffy acted appropriately and Judge Gusinsky properly applied *Barker*.

a. Counsel did not need Guzman's consent to move for a continuance and Guzman's unsupported claim that he refused such consent cannot lead to a deficient performance determination.

A speedy trial "is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself." *United States v. Ewell*, 383 U.S. 116, 120 (1966). Despite the importance of this right, it's not one of the "fundamental decisions" that cannot be made "without the express, knowing and voluntary consent of the defendant." Brian R. Means, Postconviction Remedies Volume 2, *§ 35:4 First category of cases: general ineffectiveness claims under Strickland*, pg. 508 (Thomson Reuters 2016). There are only four such "fundamental decisions"; they are whether to (1) plead guilty, (2) waive the right to a jury trial, (3) testify or not, and (4) appeal a conviction. *Id.* (citations omitted). So Mr. Duffy didn't need Guzman's consent.

Further, Guzman's claim that he refused to consent to Mr. Duffy's continuances is unsupported by the record. Nowhere in the criminal file did Guzman express displeasure with Duffy's decisions or disagree with them. *See generally* CF:1-5436. Nor does Guzman cite any information on that score in his brief. AB:13-14. Thus, the only thing to support this allegation is his self-serving statement, which this Court should be skeptical of because Guzman has an "'obvious motive to fabricate. . . .'"

Thornell v. Jones, 602 U.S. 154, 160 (2024)(quoting *State v. Medrano*, 914 P.2d 225, 227 (Ariz. 1996)).

Simply put, Mr. Duffy was in a no-win situation. If he didn't ask for continuances, he wouldn't have the time he needed to prepare for trial, when the case had already been litigated for almost two years. CF:1-2; TT:1. That it took him a year to get up to speed and prepare for trial is no surprise. Had he not taken the time needed, he would have opened himself up to an ineffectiveness claim for failing to prepare for trial. *See Johnson v. Lockhart*, 921 F.2d 796 (8th Cir. 1990)(considering ineffectiveness claim that counsel failed to prepare for trial).

Regardless, the next sections explain why Judge Gusinsky properly determined Guzman's speedy trial right was not violated.

b. The length of delay factor favored neither party.

"The length of delay is both a factor and a triggering mechanism." SR:57. While the speedy trial right becomes operative when a defendant is "arrested or formally accused[,]" *Betterman v. Montana*, 578 U.S. 437, 441 (2016), it doesn't usually "trigger judicial review" until the time between arrest and trial reaches one year. *Doggett v. United States*, 505 U.S. 647, 658 (1992). But the length of delay is not the end-all be-all; the speedy trial analysis's "'essential ingredient is orderly expedition and not mere speed.'" *Ewell*, 383 U.S. at 120 (quoting *Smith v. United States*, 360 U.S. 1, 10 (1959)).

Guzman was indicted on March 7, 2018, and he was arrested a week later. CF:1-2, 8. His first trial began on January 9, 2020, TT:1, and his second trial began on April 6, 2021, VD:1. Because more than a year had passed, Judge Gusinsky rightly determined that the speedy trial analysis was triggered. SR:58. Even though three years passed between Guzman's indictment and the start of his second trial, Judge Gusinsky decided this factor was neutral because it was far shorter than the delay in *Doggett* that led to a speedy trial violation. *Id.* In *Doggett* there was an eight-and-a-half-year delay that included six years of federal agents making "no serious efforts to test their . . . assumption that Doggett was living abroad, and, had they done so, they could have found him within minutes." *Doggett*, 505 U.S. at 652. *Cf. Barker*, 407 U.S. at 533-36 (rejecting speedy trial claim based on a five-year delay between arrest and trial).

Judge Gusinsky could have also found that this factor weighed in favor of the State and still been correct. In *Ewell* the Supreme Court concluded that if a defendant must be retried, there is no speedy trial violation solely because of the delay caused by the retrial. 383 U.S. at 121. It even stated: "It has long been the rule that when a defendant obtains a reversal of a prior, unsatisfied conviction, he may be retried in the normal course of events." *Id.* This logic should extend to a second trial because of a hung jury in the first. In both instances the defendant

has the presumption of innocence and, if they are in custody, they are being restrained of their liberty pending the outcome of the second trial.

Additionally, Guzman's case had several moving parts and thousands of pages of documents to review. Given the scope and complexity of the case, the Constitution tolerates a longer delay. *See Barker*, 407 U.S. at 531 ("the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.").

c. *The reason for the delay factor weighed "strongly in favor" of the State.*

There are host of reasons a trial may be delayed, so "different weights should be assigned to different reasons." *Barker*, 407 U.S. at 531. Intentional delays "to hamper the defense" and negligent delays, like crowded dockets, weigh against the government, but valid reasons for delays, like missing witnesses, "justify appropriate delay." *Id.* While these categories focus on the actions of the government, the analysis must consider "other circumstances as may be relevant." *Id.* at 533. One such circumstance is that delay "may work to the accused's advantage. Delay is not an uncommon defense tactic." *Id.* at 521.

Judge Gusinsky found that all but one delay was caused by the defense's motions to continue; motions to help the defense prepare for trial; motions challenging the State's proposed evidence; and motions to review the victims' psychiatric, school, and DSS records. SR:58-59.

Thus, Judge Gusinsky correctly determined that this factor weighed "strongly in favor" of the State. SR:59; *see State v. Goodroad*, 521 N.W.2d 433, 439 (S.D. 1994)("'We are unimpressed by a defendant who moves for dismissal on speedy trial grounds when his other conduct indicates a contrary desire.'" (quoting *United States v. Tranakos*, 911 F.2d 1422, 1429 (10th Cir. 1990))).

What's more, rather than weighing this factor in the calculus, Judge Gusinsky could have properly ruled that given most of the delays were caused by the defense, Guzman may have waived the ability to assert his speedy trial right. *See Barker*, 407 U.S. at 529 ("We hardly need add that if delay is attributable to the defendant, then his waiver may be given effect under standard waiver doctrine. . . .").

d. The assertion of the speedy trial right factor weighed in favor of the State.

A "defendant's assertion of his speedy trial right . . . is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." *Barker*, 407 U.S. at 531-32. But "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Id.* at 532.

Judge Gusinsky found that Guzman points to nothing in the record "where he asserted his right to a speedy trial, nor was the Court able to find any instance of the same." SR:59. A keyword search reveals that the phrase "speedy trial" was never uttered in Guzman's criminal

case. *See generally* CF:1-5436. So Judge Gusinsky correctly determined that this factor "weighs in favor of the prosecution." SR:59; *see Goodroad*, 521 N.W.2d at 439-40 ("'The Speedy Trial Clause primarily protects those who assert their rights, not those who acquiesce in the delay—perhaps hoping the government will change its mind or lose critical evidence.'" (quoting *United States v. Aguirre*, 994 F.2d 1454, 1457 (9th Cir. 1993))).

e. While the prejudice factor weighed in Guzman's favor, it was outweighed by the factors in favor of the State.

Analyzing prejudice in the speedy trial context requires looking at the three interests the Sixth Amendment protects. *Barker*, 407 U.S. at 532. Those interests are "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Id.* The last interest is "the most serious . . . because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id.*

Judge Gusinsky correctly identified these interests and then determined Guzman's petition only focused on his pretrial incarceration. SR:59. He also correctly noted that "Guzman does not identify any specific prejudice." SR:59-60. Given that, Judge Gusinsky turned to *Doggett's* point that there must be a long delay that is the fault of the prosecution, whether that fault be negligence or bad faith. SR: 60 (citing *Doggett*, 505 U.S. at 655-58). Judge Gusinsky decided this factor

weighed "slightly in favor" of Guzman because while "[t]here is no evidence of negligence on the part of the prosecution, . . . the delay in this case is thirty-seven months." SR:60.

Despite that slight prejudice determination, Judge Gusinsky compared it with the reason for delay and Guzman's failure to assert his speedy trial right, concluding that the balancing tipped in favor of the State, meaning Guzman's speedy trial right was not violated. SR:60; *see Goodroad*, 521 N.W.2d at 441 ("While the length of time before he was tried was substantial, the majority of the delay was attributable to Goodroad himself[,]" so no speedy trial violation occurred).

f. Because the Barker v. Wingo analysis favors the State, it would have been futile for counsel to move to dismiss the case.

Given that the speedy trial analysis weighed in favor of the State, and Guzman's Sixth Amendment right was not violated, Judge Gusinsky determined that Mr. Duffy couldn't be ineffective for not making a speedy trial motion. SR:60. This is the correct decision because attorneys cannot be ineffective for not filing motions that are "futile or fruitless." *Garrett v. United States*, 78 F.3d 1296, 1303 n.11 (8th Cir. 1995). Because Judge Gusinsky properly applied both the speedy trial and ineffective assistance analyses, this Court should affirm the dismissal of this claim.

5. *Judge Gusinsky properly dismissed Guzman's actual innocence claim because the law does not recognize a freestanding claim of actual innocence, and he did not allege newly discovered evidence that shows he is innocent.*

Guzman claimed his due process rights were violated because he is innocent given the results of medical examinations he and the victims had undergone. SR:6-7. Judge Gusinsky dismissed this claim, concluding South Dakota has not recognized actual innocence as a freestanding constitutional claim. SR:60-61. But even if such a claim exists, Guzman failed to allege new evidence exists. *Id.* These decisions are correct, and this Court should affirm the dismissal.

a. *There is no freestanding actual innocence claim for an inmate to raise.*

In dismissing Guzman's claim, Judge Gusinsky noted that traditionally "a freestanding claim of actual innocence was not generally a ground upon which habeas relief was available." SR:60 (citing *Engesser v. Young*, 2014 S.D. 81, ¶25, 856 N.W.2d 471, 480). This holds true today, despite the passage of SDCL 21-27-5.1, which allows successive habeas petitions based on newly discovered evidence.

By enacting SDCL 21-27-5.1, the Legislature didn't create a freestanding claim of actual innocence. *See Engesser*, 2014 S.D. 81, ¶27 (Habeas cases are "'a civil action which *exists solely under statutes passed by our Legislature.*'" (quoting *Haase v. Weber*, 2005 S.D. 23, ¶8, 693 N.W.2d 668, 670 (Gilbertson, C.J., dissenting))(emphasis added). It created a procedural exception to the strict prohibition on successive

habeas petitions. This point is proven by SDCL 21-27-5.1's plain language, mandating a "judge shall enter an order denying leave to file a second or successive application for a writ of habeas corpus unless" one of two exceptions are met. *See Benson v. State*, 2006 S.D. 8, ¶72 n.15, 710 N.W.2d 131 (we presume "the Legislature said what it meant and meant what it said from the text of the statute.").

By limiting actual innocence to an exception to successive litigation, the Legislature paralleled federal law. There, actual innocence is a "gateway" that excuses a procedurally defaulted habeas claim, not a standalone basis for relief. *Schlup v. Delo*, 513 U.S. 298, 315 (1995).

Because actual innocence is not a freestanding claim recognized by either state or federal law, this Court should affirm the dismissal of Guzman's claim.

b. Even if a freestanding claim exists, Judge Gusinsky properly dismissed the claim because Guzman did not plead newly discovered evidence to support the claim.

Judge Gusinsky assumed "[f]or the sake of argument" that Guzman could bring an actual innocence claim under SDCL 21-27-5.1. SR:61. Judge Gusinsky then dismissed the claim because the evidence presented was not "new." *Id.*

Guzman focused on A.C.'s medical exam revealing no physical injuries and that all three girls tested negative for sexually transmitted diseases. SR:6-7. According to Guzman, this points to his innocence because had he raped A.C. she would have had physical injuries, and the

girls would have tested positive for gonorrhea because he had that disease. *Id.* All this information was already presented to the jury, so it cannot be "new" for actual innocence purposes. *See* JT:320-29 (discussing A.C.'s sexual assault examination); JT:804-08 (discussing Guzman's gonorrhea diagnosis); JT:809-16 (discussing STD transmission rates and why children might not test positive for those diseases).

Given that Guzman's petition offered nothing new to support his innocence claim, Judge Gusinsky correctly dismissed it because "if pleadings fail to allege a requisite element necessary to obtain relief, dismissal is in order." *Jenner*, 1999 S.D. 20, ¶13.

c. Recantation evidence cannot support an actual innocence claim.

When Guzman sought a certificate of probable cause from this Court, he claimed that he provided new evidence to support his innocence claim when he responded to Warden Sullivan's motion to dismiss. *Sullivan*, S.D.S.C. File No. 30917, Motion for Issuance of Certificate of Probable Cause, pg. 7-8; SR:38-39. According to Guzman, that new evidence is one of his daughters—he doesn't say which daughter—recanted when talking to Guzman's sister—he doesn't identify who his sister is, either. *Guzman*, S.D.S.C. File No. 30917, Motion for Issuance of Certificate of Probable Cause, pg. 7-8. But this alleged evidence cannot support an actual innocence claim.

Importantly, Guzman's "new" evidence is classic hearsay because he relies on his sister's assertion of what his daughter told her, and he is

using that for the truth that she recanted. SDCL 19-19-801(c). That evidence is inadmissible, SDCL 19-19-802, so it could not lead a jury to find him not guilty. SDCL 21-27-5.1(1).

More importantly, recantation evidence cannot support an actual innocence claim. First, "'recanting testimony is exceedingly unreliable, and is regarded with suspicion[.]'" *Pickering v. State*, 260 N.W.2d 234, 235 (S.D. 1977)(quoting 24 C.J.S. Criminal Law, § 1454, p. 185).[5] Second, because "recantation testimony is inherently unreliable[,]" it "must be corroborated by other newly discovered evidence." *State v. McCallum*, 561 N.W.2d 707, 711-12 (Wisc. 1997); *see also Bennett v. State*, 508 P.3d 410, 414 (Nev. 2022)(per curiam)(Nevada law prohibits a claim of newly discovered evidence by relying "'solely upon recantation of testimony by a witness. . . .'"(quoting Nev. Rev. Stat. § 34.960(2)(b)(2) (West 2019))). Yet Guzman offers no evidence to corroborate the alleged recantation. And his claim is even more suspect given he doesn't identify whether it was N.G. or L.G. that allegedly recanted.[6]

Given these failings, this Court should affirm the dismissal of Guzman's actual innocence claim.

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[5] Other states agree on this point. *E.g.*, *Adcock v. State*, 528 N.W.2d 645, 648 (Iowa Ct. App. 1994); *Grant v. State*, 198 So.3d 400, 407 (Miss. Ct. App. 2016)(En Banc).

[6] Because Guzman's recantation allegation focuses on one of his daughters, even if that recantation were taken as true, it would not affect Guzman's convictions involving A.C. and his other daughter. Thus, it does not call into doubt those convictions or his sentences for those crimes.

CONCLUSION

Based on the above arguments and authorities, Respondent respectfully requests that this Court affirm Judge Gusinsky's dismissal of Guzman's habeas action. If that dismissal was erroneous, the Court should remand for an evidentiary hearing.

Respectfully submitted,

MARTY J. JACKLEY
ATTORNEY GENERAL

/s/ Matthew W. Templar
Matthew W. Templar
Assistant Attorney General
1302 S.D. Highway 1889, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215
Email: atgservice@state.sd.us

CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellee's Brief contains 9,508 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 365.

Dated this 17th day of October, 2025.

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 17th day of October, 2025, a true and correct copy of Appellee's Brief in the matter of *Theodore Guzman v. Danial Sullivan*, was served via the Odyssey electronic filing system upon Stanton A. Anker, Stanton@ankerlawgroup.com.

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

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

Appeal No. 31001

THEODORE GUZMAN,
Petitioner/Appellant,

vs.

DANIEL SULLIVAN, Warden, South Dakota State Penitentiary,
Respondent/Appellee.

Appeal from the Circuit Court, Seventh Judicial Circuit
Pennington County, South Dakota

The Honorable Robert Gusinsky

APPELLANT'S REPLY BRIEF

Stanton A. Anker
Anker Law Group, P.C.
1301 West Omaha Street, Suite 207
Rapid City, South Dakota 57701
Telephone: (605) 718-7050
Email: stanton@ankerlawgroup.com
Attorneys for the Appellant

Marty J. Jackley
South Dakota Attorney General
1302 E. Hwy 14, Suite 1
Pierre, South Dakota 57501
Telephone: (605) 773-3215
Email: atgservice@state.sd.us
Attorneys for the Appellee

Sarah L. Thorne
South Dakota Assistant Attorney General
1302 E. Hwy 14, Suite 1
Pierre, South Dakota 57501
Telephone: (605) 773-3215
Email: sarah.thorne@state.sd.us
Attorneys for the Appellee

Matthew W. Templar
South Dakota Assistant Attorney General
1302 E. Hwy 14, Suite 1
Pierre, South Dakota 57501
Telephone: (605) 773-3215
Email: matthew.templar@state.sd.us
Attorneys for the Appellee

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Lara Roetzel
Pennington County State's Attorney
130 Kansas City Street, Suite 300
Rapid City, South Dakota 57701
Telephone: (605) 394-2191
Email: larar.roetzel@pennco.org
Attorneys for the Appellee

Alexa Moeller
Pennington County Deputy State's Attorney
130 Kansas City Street, Suite 300
Rapid City, South Dakota 57701
Telephone: (605) 394-2191
Email: allexa.moeller@pennco.org
Attorneys for the Appellee

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INTRODUCTION

The State's Appellee's Brief devotes most of its discussion to procedural hurdles rather than the substance of Mr. Guzman's constitutional claims. It contends this Court lacks jurisdiction, that Mr. Guzman waived his claims by "inadequate briefing," and that the circuit court's dismissal was proper under a heightened civil pleading standard. These arguments fail.

Each issue raised in the Appellant's Brief falls squarely within the Certificate of Probable Cause issued by this Court on January 16, 2025. Mr. Guzman's claims—three alleging ineffective assistance and one asserting actual innocence—were specifically authorized for appellate review.

Moreover, the circuit court's dismissal under S.D.C.L. § 15-6-12(b)(5) applied the wrong legal standard and deprived Mr. Guzman of any opportunity to develop the factual record necessary to assess trial counsel's performance. At the very least, the record presents sufficient factual allegations to require an evidentiary hearing.

Mr. Guzman therefore respectfully requests that this Court reverse the order of dismissal and remand for an evidentiary hearing on all certified claims.

ARGUMENT

I. The State Misstates the Jurisdictional Scope of the Certificate of Probable Cause

The State asserts that this Court "lacks jurisdiction" to consider most of Mr. Guzman's issues because they allegedly extend beyond the Certificate of Probable Cause. *Appellee's Brief pgs 13-15.* That argument distorts the certificate's language and this Court's precedent.

The Certificate of Probable Cause authorized review of four questions:

1. Ineffectiveness for failure to request psychiatric evaluation of the victims;

2. Ineffectiveness in cross-examining the victims;

3. Ineffectiveness for failing to move to dismiss under the Speedy Trial Clause; and

4. Actual innocence based upon newly discovered evidence.

Each of the arguments advanced in Mr. Guzman's principal brief fits directly within those categories. His discussion of trial counsel's bias against him is directly related to, and a necessary part of, the ineffective assistance of counsel claims contained in the Certificate of Probable Cause. It is not necessarily a new claim, but simply elaborates on the factual bases of those certified claims.

Habeas corpus can be used to review (1) whether the trial court had jurisdiction of the crime and the defendant; (2) whether the sentence was

authorized by law; and (3) whether the defendant was deprived of basic constitutional rights. Miller v. Young, 2018 S.D. 33 ¶ 12.

Mr. Guzman, acting *pro se*, filed his own Application for Writ of Habeas Corpus, outlining ten issues. All ten issues were denied by the court in its Memorandum Decision. Again, acting *pro se*, Mr. Guzman filed his own motion for a certificate of probable cause. An evidentiary hearing should have been held on all issues. It was error to not have the hearing and develop a record.

The Court has appellate jurisdiction over all issues raised.

II. Mr. Guzman Preserved and Properly Briefed His Certified Claims

The State contends that Mr. Guzman "abandoned or waived" his arguments by failing to supply detailed citations or multiple authorities. *Appellee's Brief pgs 15-17.* This is inaccurate and unfair.

Mr. Guzman's opening brief identified each of the certified issues and discussed specific deficiencies in trial counsel's performance and resulting prejudice, applying those to the standards outlined in Strickland v. Washington, 466 U.S. 668 (1984).

Furthermore, the limited record below explains any perceived brevity: the circuit court dismissed the habeas petition before discovery or hearing, leaving Mr. Guzman without transcripts, affidavits, or counsel testimony to cite. It is important to note that the majority of cases decided by this Court

related to habeas relief come after a hearing on the issues, at which the trial counsel testifies. Mr. Guzman was not afforded the opportunity to present his claims and establish a record. The habeas court denied the application without hearing.

It would be inequitable to find waiver caused by the very dismissal he now challenges.

III. The Habeas Court Applied the Wrong Standard in Dismissing the Application

The habeas court dismissed under SDCL 15-6-12(b)(5), invoking Sisney v. Best, Inc., 2008 S.D. 70, 754 N.W.2d 804. The State formulates that the record is posed for a single decision: did the habeas judge properly dismiss Mr. Guzman's petition. The answer simply, is no. The correct standard to use is that laid out in Jenner v. Dooley, 1999 S.D. 20, 590 N.W.2d 463.

As the State points out, the coexistence of the Sisney standard and Schlosser/Jenner standard has caused confusion in habeas cases. The State is asking this Court to clarify the proper standard, arguing that the Schlosser/Jenner standard for habeas appeals should no longer be used. *Appellee's Brief pg 20.* Instead, the State is asking for the Sisney standard to be used. This Court should maintain that Schlosser/Jenner be applied to habeas cases.

"A court may dismiss a habeas corpus petition for failure to state a claim under SDCL 15-6-12(b)(5) only if it appears beyond doubt that the

petition sets forth no facts to support a claim for relief. See Schlosser v. Norwest Bank South Dakota, 506 N.W.2d 416, 418 (S.D. 1993)." Jenner v. Dooley, 1999 S.D. 20, ¶ 13, 590 N.W.2d 463. "Fact allegations must be viewed in a light most favorable to the petitioner. Stumes v. Bloomberg, 1996 S.D. 93, ¶6, 551 N.W.2d 590, 592 (citations omitted)." Id.

"A motion to dismiss under §12(b)(5) challenges the legal sufficiency of the petition. Stumes, 1996 S.D. 93, ¶6, 551 N.W.2d at 592 (citation omitted)." Id. "As the United States Supreme Court noted, when a court 'reviews the sufficiency of a complaint, before the reception of any evidence ... its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.' Scheuer, 416 U.S. at 236, 94 S.Ct. at 1686." Id.

For over twenty-five years, this Court has applied the Schlosser/Jenner test in habeas cases. The Schlosser/Jenner threshold reflects the constitutional importance of a writ of habeas corpus and ensures that potentially meritorious claims receive an evidentiary hearing.

Adopting the Sisney standard, as the State urges, would erect an unprecedented barrier to habeas review and conflict with decades of South Dakota precedent. Habeas petitions—though civil in form—are quasi-criminal and remedial. Applying the same plausibility standard used for

commercial disputes risks foreclosing constitutional review based on drafting formality.

This Court should reaffirm Jenner and hold that Guzman's allegations, if true, state viable claims.

IV. Mr. Guzman's Application for Writ of Habeas Corpus was sufficient to have an evidentiary hearing

Under Strickland, a petitioner must show (1) deficient performance and (2) prejudice. Strickland v. Washington, 466 U.S. 668, 687 (1984). Mr. Guzman's application meets that test.

a. Failure to seek mental-health evaluations of the victims violated Mr. Guzman's Constitutional Right to effective assistance of counsel

Trial counsel's decision not to seek mental-health or competency evaluations of the child witnesses was objectively unreasonable given the limited record.

Each of the three alleged victims had made inconsistent or evolving disclosures. The forensic interviews were repeatedly interrupted by suggestive questioning, and at least one child recanted portions of her story before trial. It is reasonable for Mr. Guzman to believe, and expect, his trial counsel to have sought independent psychological assessments to evaluate credibility, memory, and suggestibility.

Prejudice is also evident: expert testimony regarding child suggestibility or false-memory dynamics could have materially affected credibility assessments in a case that turned entirely on witness testimony.

As Justice O'Connor stated, "[I]n assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." Wiggins v. Smith, 539 U.S. 510 527 (2003). "Even assuming Schlaich and Nethercott limited the scope of their investigation for strategic reasons, *Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to a sentencing strategy." Id. "Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy." Id.

The State's claim that such a decision was "strategic" is speculative; the record contains no testimony from trial counsel. Because the circuit court dismissed the application without hearing, this Court cannot presume a reasoned tactical basis. The proper course is remand for an evidentiary hearing.

b. Failure to move for dismissal based on speedy-trial violated Mr. Guzman's Constitutional Rights

Mr. Guzman was arrested in 2018, and his second trial did not occur until April 2021—nearly three years later. During that time he remained incarcerated. The delay here stemmed from continuances requested by

defense counsel without Mr. Guzman's consent. Counsel's acquiescence deprived him of his Sixth Amendment right to a speedy trial.

Had counsel moved for dismissal, there was a reasonable probability the motion would have been granted or, at minimum, resulted in earlier trial and preserved witness memory. This is precisely the type of claim requiring an evidentiary hearing to assess communications between counsel and client. The State argues the Barker factors "favor the State", with those factors being length of delay, reason for the delay, Mr. Guzman's assertion of his right to a speedy trial, and the prejudice Mr. Guzman received. Barker v. Wingo, 407 U.S. 514, 530 (1972). The State further argues that the allegations are unsupported. *Appellee Brief pg. 33.*

The reason the allegations are unsupported is because the Habeas Court did not give Mr. Guzman a hearing on his application, and he did not have the opportunity to support the allegations with testimony and other evidence. Instead, the Habeas Court dismissed the application without hearing. A determination of a violation of Mr. Guzman's rights is an inquiry that cannot be resolved on a bare record. That is why this case needs to be remanded for an evidentiary hearing.

c. Mr. Guzman was deprived of his Constitutional Rights to Effective Assistance of Counsel by his trial attorney's inadequate cross-examination of Witnesses

As John H. Wigmore stated, cross-examination is the "greatest legal engine ever invented for the discovery of truth." California v. Green, 399 U.S. 149, 158 (1970).

However, Mr. Guzman was deprived of this by his trial counsel's failure to confront the child witnesses with prior inconsistent statements, contradictions between interviews, and material omissions. Further, this can be seen by the perceived bias against Mr. Guzman. Can it be said that Mr. Guzman received effective assistance of counsel if his attorney admittedly was unable to cross-exam witnesses?

During his closing statement, Mr. Guzman's attorney admitted that the cross-examination of A.C. was too much for him, so he begged his wife to cross-examine the other children and to "get me out of it." 2nd Tr. 858. He stated that he just wanted to get up out of his chair and "hug" them. Id. This statement could have telegraphed to the jury that his own attorney did not believe in him.

This cannot be explained as strategy. Effective cross-examination is not optional when the prosecution's case rests entirely on testimonial credibility. At a minimum, the pleadings raise serious questions of deficient performance and prejudice under Strickland, which warrant an evidentiary hearing.

V. The Habeas Court Erred in Rejecting the Freestanding Claim of Actual Innocence

The habeas court dismissed Mr. Guzman's claim of actual innocence, ruling that he had failed to identify any newly discovered evidence. However, no hearing was held on the application, so there was no ability to present any testimony or other evidence regarding newly discovered evidence.

Mr. Guzman's application alleged that medical and forensic evidence contradicted the allegations of penetration and that subsequent recantations corroborate his innocence. Those assertions warrant a hearing.

Dismissal at the pleading stage precluded any factual inquiry into the reliability of this evidence. Credibility and corroboration cannot be resolved on paper.

VI. Guzman's Constitutional Rights were violated by the trial court's ruling regarding witnesses and evidence he was prohibited from introducing

Although not specifically referenced in the Certificate of Probable Cause, the issues of the trial court's rulings were part of Mr. Guzman's Application for Writ of Habeas Corpus and his Motion for a Certificate of Probable Cause. The documents were filed *pro se*, and Mr. Guzman argues they should be considered as part of the totality of this case, and whether the habeas court erred in dismissing his application.

VII. Guzman's sentence is unconstitutionally cruel and unusual

Likewise, Mr. Guzman had also challenged his sentence in his Application for Writ of Habeas Corpus and his Motion for a Certificate of Probable Cause. He again asks this Court to consider this as part of the totality of this case and the dismissal of his application.

VIII. Remedy

Even the State concedes (*Appellee's Brief pgs. 2, 45*) that if dismissal was erroneous, the only proper remedy is remand for an evidentiary hearing. The habeas record is insufficient for this Court to make factual findings, but it more than satisfies the threshold for further proceedings.

CONCLUSION

The habeas court's summary dismissal of Mr. Guzman's habeas application deprived him of the opportunity to prove substantial constitutional violations. His claims are properly before this Court, were adequately preserved, and, if true, establish ineffective assistance of counsel and actual innocence. Mr. Guzman respectfully requests that this Court reverse the order dismissing his application and remand for an evidentiary hearing on his claims.

Respectfully submitted this 17th day of November, 2025.

ANKER LAW GROUP, P.C.

Stanton A. Anker, Esq.
1301 West Omaha Street, Suite 207
Rapid City, South Dakota 57701
Telephone: (605) 718-7050
Email: stanton@ankerlawgroup.com
Attorneys for the Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to S.D.C.L. § 15-26A-66, the foregoing brief is typed in proportionally spaced typeface in Century Schoolbook style font 12 point, does not exceed twenty pages, and does not exceed the word limit. The word processor used to prepare this brief indicated that there are no more than 2,255 words, excluding the Table of Contents, Table of Authorities, any addendum materials, and any certificates of counsel.

Stanton A. Anker, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of November, a true and correct copy of Appellant's Reply Brief was served electronically through Odyssey File and Serve upon:

upon:

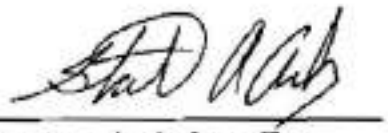
Marty Jackley
South Dakota Attorney General
atgservice@state.sd.us

Sarah Thorne
South Dakota Assistant Attorney General
sarah.thorne@state.sd.us

Matthew W. Templar
South Dakota Assistant Attorney General
matthew.templar@state.sd.us

Lara Roetzel
Pennington County State's Attorney
larar@pennco.org

Alexa Moeller
Pennington County Deputy State's Attorney
alexa.moeller@pennco.org



Stanton A. Anker, Esq.