

18-7855

No. 18-2990

4:18-cr-04054LLP

IN THE

SUPREME COURT OF THE UNITED STATES

For The Eighth Circuit

ORIGINAL

Supreme Court, U.S.  
FILED

JAN 22 2019

OFFICE OF THE CLERK

Barry Glenw Thunder — PETITIONER  
(Your Name)

VS.

Douglas Weber — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. Court of Appeals for the Eighth Circuit

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Barry Glenw Thunder  
(Your Name)

700 Conley Lake Road  
(Address)

Deer Lodge, MT. 59722  
(City, State, Zip Code)

(406) 844-1320  
(Phone Number)

### QUESTION(S) PRESENTED

1. Why wasn't the proper tests performed, i.e. D.N.A., forensic scientist (to view and compare my right hand, to the right hand that's clearly seen in the videos) to prove their accusations, allegations, assumptions, and guesses?
2. Why was my interrogation video edited down from over two hours to about five minutes leaving out all of the constant heavy onslaught of badgering coercion, threats, mind games brought on by the detective?
3. Why wasn't the victim's or her sisters' interrogation videos where she was heavily coerced and badgered to lie and say that I did some/anything to her until she cried because she didn't want to lie and say that I did some/anything to her or her sister shown?
4. Why wasn't her sisters' interrogation video where she says that her parents and family took pics/vids with cell phones, and let her and her sister view and look at porn on T.V. and 'magazines and also their mother makes them watch her and her boyfriend, or multiple minors have sex after furnishing with drugs and alcohol?
5. Why are my constant requests to have a forensic scientist (to view and compare my right hand to the right hand that can be clearly seen in those thirty second videos) and D.N.A., plus other tests, things that can and will prove my innocence, always denied?
6. Why were the prosecutor and detective allowed to lie constantly during trial?
7. Why weren't any of the kids who were taking drugs and drinking alcohol, and who I've kicked out of the room (constantly) that had the cell phone, which was ALWAYS IN PLAIN SIGHT, while those kids ran around with just their pumper or underwear and T-shirt on questioned?
8. Why were the prosecutor and detective the only people to glance at the pic, taken by Mr. Ryan Kolbeck, for only one second, while the Judge, Jury, and Nurse, or forensic scientist, were not able to view and compare my hand to the hand in the vids?
9. Why wasn't I able to take the stand?
10. Why wasn't Mr. Kolbeck's ineffective assistance of counsel, which he filed on himself considered?
11. Why is EVERY ATTEMPT I MAKE TO PROVE MY INNOCENCE CONSTANTLY DENIED?
12. Why was the prosecutor the only person who could pick the jury?
13. Why did the mother, who admitted to constantly breaking in and entering the room which had the cell phone IN PLAIN SIGHT, as always, to "retrieve any and all of her property" which there was none, only claim the cell phone after the videos were "discovered"?
14. Why wasn't the boy who "found" the videos interrogated?
15. Why did EVERYBODY involved with my illegal incarceration, one by one, right in order, suddenly "disappear"?
16. Why wasn't the notebook, which contains my thoughts during trial introduced?

## LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[X] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Mr. Ryan Kolbeck, Attorney at Law.  
Mr. Manuel De Castro Jr. Attorney at Law  
Mrs. Nicole Laughlin, Attorney at Law

Mr. Darin Young, Warden S.F.S.P. (retired)  
Mrs. Hope Machesson, Prosecutor (retired)  
Mr. Sean Kooistra, Detective (retired)  
Mr. Joseph Niles, Judge (retired)  
Mr. Darin Young, Warden S.F.S.P.  
Mr. John Strohmaw, Assistant Attorney

## TABLE OF CONTENTS

|                                                        |   |
|--------------------------------------------------------|---|
| OPINIONS BELOW.....                                    | 1 |
| JURISDICTION.....                                      |   |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..... |   |
| STATEMENT OF THE CASE .....                            |   |
| REASONS FOR GRANTING THE WRIT .....                    |   |
| CONCLUSION.....                                        |   |

## INDEX TO APPENDICES

APPENDIX A 1-2-4-17: Response in opposition to petition

APPENDIX B ~~11-29-16 Petition for rehearing by panel filed.~~  
~~11-29-16 Petition for rehearing by panel filed.~~

APPENDIX C 12-22-16 ORDER

APPENDIX D

APPENDIX E

APPENDIX F

~~APPENDIX G~~

~~APPENDIX H~~

~~APPENDIX I~~

## TABLE OF AUTHORITIES CITED

| CASES                                                       | PAGE NUMBER |
|-------------------------------------------------------------|-------------|
| State v. Bruce                                              | 1           |
| State v. Blair                                              | 1           |
| State v. Moss                                               | 2           |
| State v. Bordaand                                           | 2           |
| State v. Pugh                                               | 2           |
| State v. Motzko                                             | 2           |
| State v. Anderson                                           | 2           |
| State v. Running Bird                                       | 4           |
| State v. Bowner / Bruce / Berry v. Ohio / Rakas v. Illinois | 4           |
| State v. Barry Thawder                                      | 5           |
| M. Mann v. Richardson / Bradley v. Weber                    | 5           |
| Streckband v. Washington / U.S. v. Cronin / State v. Brock  | 6           |
| State v. Saunders / State v. Bordaand / State v. Radi       | 6           |
| a.v. al.                                                    |             |

### STATUTES AND RULES

State Constitution and Statutes P. 1  
 A statutory right to court appointed counsel  
 2255 rules (4) (a) and 8 cc) of the rules governing 2254 cases and rules 6(a)(2)(8) cc.  
 of the governing rules 2255 proceedings for the U.S. District Courts.  
 The 14th Amendment to the U.S. Constitution prohibits cruel and unusual punishment.

### OTHER

Key Facts  
 Common shortcomings of existing statutes  
 Actions not taken  
 Note.

IN THE  
SUPREME COURT OF THE UNITED STATES  
  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,  
☒ has been designated for publication but is not yet reported; or,  
☒ is unpublished.

The opinion of the United States district court appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☒ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

The opinion of the Eighth Circuit Court of Appeals court appears at Appendix B to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

## JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was MAY 22, 17.

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_\_ A \_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was 7-26-16.  
A copy of that decision appears at Appendix B.

☒ A timely petition for rehearing was thereafter denied on the following date: 12-22-16, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_\_ A \_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

My 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 14<sup>th</sup>, and 21<sup>st</sup> Amendment rights were/is being violated, along with my 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, and 8<sup>th</sup> Bill of Rights.

State Constitution and statutes in addition to these Federal protections applying to state cases, the particular states' constitution(s) statute(s) may offer even broader protection. While a state can give its citizens broader rights than those in the U.S. Constitution, it can not narrow the rights set forth in the U.S. Constitution.

Natural law theorist: Refers to a non-originalist who believes that higher moral law ought to override inconsistent positive law.

Non-originalism allows judges to head off the crisis that could result from the reflexable interpretation of a provision in the constitution that no longer serves its original purpose. Non-originalism allows the constitution to evolve to match more enlightened understanding in matters such as the equal treatment of blacks, women, and other minorities.

My imprisonment greatly limits my ability to litigate. The issues involved in my case are complex and will require significant research and investigation. I have limited access to law library and limited knowledge of the law, and I have made repeated attempts to obtain a lawyer.

I do not have a constitutional right to a court appointed lawyer in a Fed habeas corpus proceeding. However, I have a statutory right to court appointed counsel if I am an indigent prisoner with a capital sentence. My case involves complex legal issues: 406 - Slack v. McDaniels, 529 U.S. 473, 477, 120 S.Ct. 1595, 1600, 146 L.Ed. 592, 551 (2000) (reversing and remanding after the court determined that defendant had demonstrated that reasonable jurists could conclude that the district court procedures were wrong.)

Miller-Ell v. Cockrell, 537, U.S. 322, 327, 123 S.Ct. 1029, 1542 L.Ed. 931, 944 (2003). Miller-Ell v. Cockrell, 537, U.S. 322, 336, 375 S.Ct. 1029, 1039, 154 L.Ed. 931, 949-50 (2003) 21 U.S.C. § 848(c) (2000). See also McFarland v. Scott, 512 U.S. 849, 859, 114 S.Ct. 2568, 2574, 129 L.Ed. 2d 666, 676 (1994) & capital defendants should invoke his right to counsel in habeas petition by filing motion requesting his right to counsel. 18 U.S.C. § 3006A(a)(2)(8) (2000); 28 U.S.C. § 2255 Rules (6)(a) and 8(c) of the rules governing § 2254 cases and rules 6(a) and 8(c) of the rules governing § 2255 proceedings for the U.S. District Courts (2005) see also Reese v. Fulcomer 946 F.2d 247, 263-64 (3d Cir 1991) (describing the factors the court should consider before appointing counsel of an indigent. Indigent habeas petitioner as (1) whether the habeas claim was frivolous, (2) whether appointment of counsel will benefit the petitioner, and the court(s). The complexity of the legal or factual issues in the case, and (4) the ability of the petitioner to investigate facts, and present claims.



C<sup>a</sup>/S.P.I 1.

In *State v. Bruce*, The South Dakota Supreme Court adopted two additional factors when viewing the seriousness of child pornography offences. 2011 S.D. 14, ¶ 32, 796 N.W. 2d at 407. Courts must consider: "(1) the specific nature of the material, and (2) the extent to which the offender is involved with that material." *Id.* (quoting *State v. Blair*, 2006 S.D. 75, ¶ 83, 721 N.W. 2d 55, 62 (Koonenkamp, J. concurring in result)). "[T]he more depraved and invasive the abuse and the more involved the offender is with the material depicting it, the greater the seriousness of the offence." *Id.* The judge imposed a sentence of 60 years on the rape, and an additional 4 sentences of 10 years each on the pornography charges. At sentencing the court advised that although the facts of the case were horrendous, "[T]his is not a life sentence case...." However, the judge also advised that I would not be parole eligible until serving 75% of my sentence, making me parole eligible at the age of 83. This makes it extremely likely that I will actually spend the rest of my life in prison. This extremely long sentence is disproportionate to the severity of the crime and in violation of my right against cruel and unusual punishment. In sentencing me, the judge explained that, "Above all else, I have to impose a sentence which I think will make sure that the community itself is protected so that no one else, no other girl, young child, is victimized like these two in this case were victimized." He also noted that although the nature of the offence was "horrendous," it was not among the most serious cases he sees. There was no evidence that the victims would suffer any long-lasting injuries as a result of the abuse. Additionally, although rape is defined as an inherently violent crime, there was no evidence that there was injury inflicted upon the victims in this case. The judge stated that this case was "not as serious in my mind as cases where there's been injuries to the victim or victim was older and suffered psychological damage. Because my case did not

demonstrate the "most serious combination of criminal conduct and background of the offender," my incarceration until the age of 83, violates my right to be protected from excessive punishment. *Bruce*, 2011 S.D. 14, ¶ 39, 796 N.W. 2d at 409. Petitioner urges this Court to find that the imposition of such a severe punishment violates the rights guaranteed under the Eighth Amendment to the United States Constitution. In determining the sufficiency of the evidence on appeal in a criminal case, the issue before this Court is whether there is evidence in the record which, if believed by the jury, is sufficient to sustain a finding of guilt beyond a reasonable doubt. "State v. Moss, 2008 S.D. 64, ¶ 9, 754 N.W. 2d 626, 629 (quoting *State v. Bordeaux*, 2006 SD 12, ¶ 6, 710 N.W. 2d 169, 172). The court will not usurp the function of the jury. *Swan*, 2008 SD 58, ¶ 9, 753 N.W. 2d at 420 (citing *State v. Pugh*, 2002 SD 16, ¶ 9, 640 N.W. 2d 79, 82). Accordingly, the court will not review the credibility of the witness or resolve conflicts in evidence. *Bordeaux*, 2006 SD 12, ¶ 9, 710 N.W. 2d at 172. "A guilty verdict will not be set aside if the state's evidence and all favorable inferences that can be drawn therefrom support a rational theory of guilt." *State v. Motzko*, 2006 SD 13, ¶ 6, 710 N.W. 2d 433, 437. Therefore, the evidence will be considered in "a light most favorable to the verdict." *State v. Amundson*, 2007 SD 99, ¶ 17, 738 N.W. 2d 919, 924 (quoting *State v. Running Bird*, 2002 SD 86, ¶ 19, 649 N.W. 2d 609, 613).

CONSTITUTIONAL / STATUTORY  
PROVISIONS  
INVOLVED 2

amendment

In the application filed on Dec. 23, 2013, I stated that there was/is insufficient evidence, as any and all types of tests, such as D.N.A., witness validations, rape kits, everything that proper steps and procedures that are taken during investigation(s) etc., were not performed by investigators, detectives, doctors, or even nurses of any kind, to support the jury's verdict, which violated my 8<sup>th</sup> any and all types of rapes always have any and all types of tests, findings, PROOF and witnesses that an actual rape did, in fact, occur.

In my case, the only type of test that had been performed was a doctor who checked to see if the victim was/is still a virgin, which she was/is.

Also, when my lawyer or attorney at the time typed and signed an ineffective counsel on himself, during a hearing a hearing that took place on Tuesday, June 10, 2014 at 1:30 pm, the judge only acknowledged the attorney that had become, and not the novice, public defender who stood in front of a mirror and practiced his argument over and over again because I was, at the time, his first "Big case."

Officers from Sioux Falls Police Dept. arrived at Sanford to investigate the matter. The mom, told them that she saw the videos, indicating that there were videos on the phone. She handed the phone to an Officer who testified he looked at 4 thumbnails, and without clicking on them he could see that 3 of them depicted the privates of a young girl. The officer also pressed play and watched each of the videos. A Detective was called in to work on the case because he has specialized training in recovering data from cell phones. The phone was brought to him, and he got a search warrant to examine it. However, prior to obtaining the search warrant, law enforcement viewed the videos on the phone.

The Eighth Amendment to the U.S. Constitution prohibits cruel and unusual punishment. U.S. Const. Amend VIII: This includes "extreme sentences that are grossly disproportionate"

to the crime." *State v. Bonner*, 1998 SD 30, ¶15, 577 N.W.2d 575, 579 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991)); *Salem v. Helm*, 463 U.S. 277, 282-91 (1983) When determining an appropriate sentence, the trial court must not only review the conduct involved, but the attributes of the defendant. *State v. Bruce*, 2011 S.D. 14, ¶30, 796 N.W.2d 397, 406. "The Eighth Amendment reflects our Nation's belief in the dignity of every human being and the view that legislative and judicial power to punish criminal conduct, though given high deference, is not absolute." *Bonner*, 1998 S.D. 30, ¶14, 577 N.W.2d at 579. Factors to be reviewed include the defendant's "general moral character, mentality, habits, social environment, tendencies, age, aversion, or inclination to commit crime, like family, occupation, and previous criminal record, as well as rehabilitation prospects" *Bruce*, 2011 S.D. 14, ¶30, 796 N.W.2d at 406 (quoting *Bonner*, 1998 S.D. 30, ¶22, 577 N.W.2d at 581).

The Fourth Amendment guarantees the right to be free from unreasonable search and seizure. *Terry v. Ohio*, 392 U.S. 1 (1968) IN order to assert a violation under the Fourth Amendment, a defendant must show that they have a personal expectation of privacy in the place being searched, and that expectation must be reasonable. *Rakas v. Illinois*, 439 U.S. 138, at 143-44 (1978). I assert that because the phone was located amongst my personal possessions in my private, locked room, the warrantless search of its contents must be invalidated. A suppression hearing was held on Sept. 15, 2008, regarding the legality of the warrantless cell phone search. Judge Neiles denied the motion to suppress, finding that I did not have a reasonable expectation of privacy in the phone. After my conviction, I appealed this ruling to the South Dakota Supreme Court and they affirmed Judge Neiles' decision in *State v. Barry Thunder*, 2010 SD 3.

"In all criminal prosecutions, the accused shall enjoy the right..... to have the assistance of counsel for his defense" US CONST. AMEND. VI see S.D. CONST. Article 6, §7. The Sixth Amendment right to counsel exists, and is necessary, to protect the fundamental right of all citizens to a fair trial. *Strickland v. Washington*, 466 U.S. 668, 684 (1984). The Sixth Amendment

### CONSTITUTIONAL 3

recognizes the right to the assistance of counsel because it envisions counsel playing a role that is critical to the ability of the adversarial system to produce just results." *Id.* at 685. The right to counsel is the right to effective assistance of counsel. *Id.* at 686 (citing *McMann v. Richardson*, 397 U.S. 759, 771 (1970)). When counsel is ineffective to the extent that the result of the adversarial process cannot be relied upon as just, a defendant's conviction or sentence must be reversed. *Strickland*, 466 U.S. at 687.

South Dakota adheres to the *Strickland* test when determining whether a defendant has received effective assistance of counsel as guaranteed by our state constitution. *Bradley v. Weber*, 595 N.W.2d 615 (S.D. 1999) (citing S.D. Const. Art. 6 § 7); see *Jennerv. Dooley*, 590 N.W.2d 463 (S.D. 1999); *Grooms v. State*, 320 N.W.2d 149 (S.D. 1982). According to *Strickland*, the "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686.

In order to bring a successful claim of ineffective assistance of counsel, a convicted defendant must first show that counsel's performance or non-performance was deficient. ~~minimum~~ *Id.* at 687. This requires a showing that counsel made serious errors or omissions to the extent that counsel was not functioning as "counsel" guaranteed by the Sixth Amendment of the Constitution. *Id.* In addition, the defense must show that counsel's deficient work prejudiced the defendant. *Id.* This requires showing that counsel's errors were serious enough to deprive defendant a fair trial. *Id.* Once a defendant makes out a claim of ineffective assistance, and identifies acts or omissions of counsel which are alleged to constitute unreasonable professional judgment, then the court must determine whether, in light of all the circumstances, those identified acts or omissions were outside the range of professional competent assistance. *Id.* at 690. The court must keep in mind that counsel's function is to make the adversarial testing process work in the process work in the particular case. *Id.* In considering whether prejudice exists, actual or constructive denial of assistance of counsel altogether is legally presumed to result in prejudice. *Id.* at 692.

The proper standard for attorney performance is that of reasonably effective assistance. *Id.* at 687. Defense counsel has a duty to bring to bear

such skill and ~~knowledge~~ knowledge as will render the trial a reliable adversarial testing process. *Id.* at 688. "From counsel's function as assistant to defendant derive the overarching duty to advocate defendant's case, and more particular duties to consult with defendant on important decisions and to keep defendant informed of important developments in the course of the prosecution." *Id.*

To raise a successful claim of ineffective assistance of counsel, a convicted defendant must show that he was prejudiced by counsel's performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1994). This requires a showing that counsel's errors were serious enough to deprive defendant a fair trial. *Id.* The presumption that counsel's assistance is essential requires reviewing courts to conclude that the trial is unfair if the accused is denied counsel at a critical stage. *McBride*, 763 N.W. 2d at 531 (citing *U.S. v. Cronk*, 466 U.S. 648, 659 (1984)). If counsel is denied at a critical stage, no specific showing of prejudice is required, because the adversarial process itself is presumptively unreliable. *Id.*

I know that there is insufficient evidence to support the jury verdict, the sentence imposed by the trial court violated my Eighth Amendment right to be free from cruel and/or unusual punishment, that my Fourth Amendment right against unreasonable search and seizure was violated when the cell phone found in my room was searched without my consent, and that ineffective assistance of counsel pursuant to the Sixth and Fourteenth Amendments of the United States Constitution and Article VI, Section 7 of the South Dakota Constitution

No set rule or standard exists under which a trial court addresses a request to withdraw a guilty plea, each case must be considered in light of its unique record. *State v. Enoc* 269 Mont. 8, 11, 887 P.2d 125, 177 (1984)

Because a criminal defendant waives numerous constitutional rights when pleading guilty, "it is a well settled legal principle that a guilty plea must be a voluntary, knowing, and intelligent choice among the alternative courses of action open to the defendant." *State v. Sanders*, 1999 MT. 136, ¶14, 294 Mont. 539, ¶14, 982 P.2d 1015, ¶14, citing *State v. Bowley*, 1997 MT. 282, 282 Mont. 298, 304, 938 P.2d 592, 595 (1997) (citing *State v. Radi* 250 Mont. 155, 159, 818 P.2d 1203, 1206 (1991)) Thus prior to accepting a guilty plea,

C.A.S. P. 1.

The trial court must satisfy the statutory requirements set forth in MONT. CODE ANN. § 46-12-210 and 46-14-105.

The trial court may permit the plea of guilty to be withdrawn, at any time before or after judgment, for good cause shown. MONT. CODE ANN. § 46-16-105 (2001). Good cause may include discovery of new exculpatory evidence, an inadequate plea colloquy, or intervening circumstances that did not exist when the defendant pled guilty. *State v. Lora Elk*, 2005 MT 36, ¶ 19. If the court, the prosecutor, defense counsel, or some other party induced the plea, however slight, by threats or promises, that evidence indicates involuntariness. *Id.* ¶ 21. Further, the defendant must be mentally competent to enter a plea and any medication he or she is taking must not render him/her mentally incompetent to plea. *Id.*

When a plea is rendered involuntary because of the deficient performance of counsel, the defendants must also prove there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *United States v. McCoy*, 215 F.3d 102, 107

(9<sup>th</sup> Cir. 2000) quoting *United States v. Taylor*, 139 F.3d 924, 929-930 (D.C. Cir. 1998); citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The court will permit a change of plea "if it fairly appears that the defendant was in ignorance of his rights and the consequences of his act." *State v. Schaft*, 1998 MT 104, ¶ 17, 288 MONT. 421, ¶ 17, 958 P.2d 682, ¶ 17. Prejudice is determined by weighing the potential strength of the state's case, as well as the likelihood of success of the actions counsel failed to take. *Hill v. Lockhart*, U.S. 52, 59-60, 106 S.Ct. 306, 371, 88 L.Ed.2d 203, 210-11 (Ark. 1985)

"If there is any doubt that a guilty plea was not voluntarily or intelligently made, the doubt must be resolved in favor of the defendant." *State v. Melone*, 2000 MT 118, ¶ 14, 299 MONT. 442, ¶ 14, 2 P.3d 442, ¶ 14; see also. *State v. Keys*, 1999 MT 10, ¶ 12, 293 MONT. 81, ¶ 12, 973 P.2d 812, ¶ 12 (1999)

Although I've not plead guilty, I believe that more than half may refer to my case and situation due to the coercion brought on by the detective, along with my ~~counsel's~~ counsel's performance.

Thank you for your time and assistance,  
Both are very much needed, as well as appreciated. Respectfully,  
Beta & Thunder

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED



Sorry

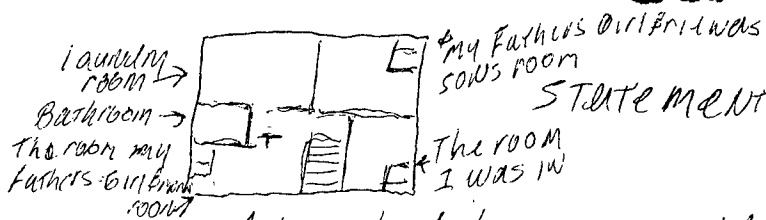
## STATEMENT OF THE CASE

My 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 14<sup>th</sup> and 21<sup>st</sup> Amendment rights have been violated, along with my 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 8<sup>th</sup> Bill of Rights.

While a state can give its citizens broader rights than those in the U.S. Constitution, it cannot narrow.

During incarceration, the son of my Father's girlfriend "Found" 3 three 30 second videos in which he then showed his sister, the victim's mother, who then took the victim to the hospital to have both of her daughters checked. My Father's girlfriend gave him the phone, and had it activated after about 1 1/2 years, she also let me use it as an alarm clock so I'd get up for work. It was not activated, but I did set 3 of the alarms, as I had to get up at different times of the week. The mother of the girls had a boyfriend who was often incarcerated. During those times, the mother would, as her mother told her "Every time he's in jail, you let EVERYONE know by spreading your legs!". Which was/is true because those girls, HER girls would sit by me when I was watching T.V. and if they saw 2 people kissing or in bed (commercial) they would start to tell me "I saw mommy and daddy/or, that boy (graphic)...". But I'd stop them. The mother would always try to leave them with me, I'd always make something up so I could leave, except for 1 time, I watched them for 1 hr. I couldn't make up an excuse.

So, when my Father moved, his girlfriend's daughter (the mom) also moved in to the house w/ her boyfriend and 2 daughters. Of course, I'd always leave whenever possible, the girls were always crying because their mom would slap them around. One Day just as I was going to leave, the 4 yr. old came crashing through the door backwards with her hands held in front of her, arms straight, like she wanted her mom to stop yelling "Don't hit me!" over and over. It didn't help. They'd come back drunk, the mom would fall down the stairs, the dad would yell "Be fxxxxin quiet!" And somehow, I'd get the blame. If someone ate something out of the fridge that was "Theirs" I'd get the blame. So, it got to the point to where I'd just go there to sleep. I had food in the room, juice, and I'd shower at a family or friend's house. And go back at 9:00 PM hoping that my Father would be back from bingo. When he wasn't I'd go back and there would be a lot of minor boys, the mom and her brother in her brother's room doing drugs drinking alcohol, with music blasting. I'd almost always find boys in the room, the cell in a different place, the girls running around in just their underwear or pampers shirt on. The boys got allowances, so they'd give it to the mom to get the drugs + alcohol. My Father would always call before he and his girlfriend came back from bingo so, the boys would scatter like cockroaches. and they would never know.



## STATEMENT OF THE CASE Pt. 2

A boy ~~who was in the room~~ would stay in the brother of the mom's room so he could have sex with the mom later. When I got into an argument with my Father's G.F., she called the cops because I asked her "Why don't your daughter or her boyfriend get jobs? All they do is sponge off of my Dad! At least I pay the electric bill!" She didn't want to hear anything negative about her kids. Her son told me he'd always "take up" before school, he used to be chubby, then he lost a lot of weight, my Father asked him, "What are you taking? You used to be fat." No comment. He was taking speed to counter the pot. I got thrown in, they opened a locked door, (Broke in) "found" the cell in plain sight, got it activated, the son "found" "A lot of pictures, but got rid of them" Then, out of "coincidence" he "found" "Three Thirty second videos, showed the mom, who took the girls to the hospital, had them checked, found a cop, ~~gave~~ him the cell, who went through the cell without a warrant, found another cop, who did the same, and took it to a detective who hooked it up to three highly complex memory extractors, and then, the son mentioned the twenty-something "pictures". Although the detective tried, all he could find the videos. When I was getting out, I was very tired and hungry. The detective then told me to go with him, which I did. He took me to an interrogation room, told me that there was "inappropriate touching" of the girls, and seemed kind of helpful, but although I told him multiple times that I didn't know anything about what had happened, he got pretty obnoxious, beligerant, badgering, and acted like he knew what had happened. He told me to "admit you did it" multiple times with "We have pictures of your face!" To which I responded, "Show me." which he didn't. He left, came back, and I expected to see some "pictures" but instead he told me that he "knew" everything and to write an apology. So, I wrote "I'm sorry about what happened" (like, I heard what happened and I'm sorry. NOTHING like that should happen to any female, no matter the age.) "If I did anything to hurt them, I don't remember because I might've been too drunk." And, after constant badgering and coercion, the lies, threats, tiredness, and hunger amounted to a false "confession" after lies about letting me go home and eat. I "demonstrated" "penetration" with the very, very tip of my finger. I then went out got into a car, waited for a while, and he came out and said "You're going to prison for rape!!!" and I went back to jail. After a couple of weeks, my attorney showed up told me what was going on and said he'd get the evidence, and left. A while passed, he came back, we went into a room, he showed me a video, it showed a girl's privates, and a hand, a right hand. The second video showed a penis, the 3 year old, sitting by it, and then she went

and laid down, it looked like she trusted the male, and knew what to do. The 3<sup>rd</sup> video was the right hand and the 3 year olds privates. I told him "who ever it is isn't drunk" But I was looking at the right hand, and told him "that aint my hand." He paused it and we studied the hand. In One of the videos there is a little "Heh, Heh," But nothing else, like they did it before, in the room. Although we saw no penetration, I still didn't want to review them again. I went back to the block and waited again. The next time he showed up, he took a picture of my hands. Then, the c.o. told me that there was someone to see me, and took me to the room where I saw the videos. A man with a psycho-sexual test tested me. After that, he left and when I got back to the block, about half of the people said that their tests were almost exactly the same in the "comments" They had different points, but the same "comments". After a long time, I was taken to jury wash. We got to pick a couple of people, but the prosecutor would "trump" my attny, and pick someone who was abused as a child. Most were female. Before trial, my attny. told me that he didn't want me to take the stand, I wanted to but he advised me not to. He told me that he practiced in front of a mirror and was ready. I asked him about a hand expert, he said that he was "working on it." He then gave me a composition book and told me to write down whatever I wanted to say. It wasn't introduced into the trial. My Father's girlfriend took the stand, the detective showed her a bag and opened it and asked "Is this the sheet that was on the bed?" she answered "Yes." "Did he keep the door locked?" "Yes." "And you knew how to open the door?" "Yes." The same with her son, and when the mom took the stand, same thing but when asked "So, you always broke into the room?" "Yes, to <sup>find</sup> take any of my property that he might have taken" "And you saw the phone everytime?" "Yes, but I didn't think anything of it." But, every time she "looked to find, i.e. dig around in my property to find any money that I might have left, she's VERY, VERY money hungry, she stole a stack of blank 3 party checks from a good friend of my Father's and I, forged his name, the amount, and told her boyfriend to try to cash them. Then, she claimed that it was her cell. But, if it was, why didn't she take it the first time she broke into the room? Instead of "Not thinking anything of it." Every time she broke into the room? The boy took the stand, saw the bedsheet answered "Yes" to "Did he keep the door locked?" And said "Everybody went into the room." But, he left out all of his friends, who went in when my Father and his girlfriend was at bingo. The next day, I asked about the hand expert, my attny. said "I'll show the pictures." I asked about D.N.A and other tests.

# Statement of the case 3

with no response, then, a "nurse" picked by the prosecutor, was going to show the videos and "something" went "wrong" so the prosecutor was allowed to bring in the cell, which was agreed by both as something that will not be introduced in trial by both. So, the "nurse" had the detective hook the cell to the T.V. When I told the detective to show me the pictures and videos, he told me that he was a "cell phone virgin." And, "Didn't even know how to make a call" or "The first thing or anything about cell phones." Now, he's introduced as an "Electronics expert." After hooking it up the cell, the videos were shown, and it took multiple times to find the "penetration." The detective took the stand and said that there was "No coercion" Then, admitted to lying about that, he lied UNDER OATH and then, lied again. The nurse said that: "The ew. vagina is very durable and can actually heal its self after being penetrated at that age." And "the hymen will heal its self" and "Bruising will heal very quickly, within an hour or so," and, when it finally was the time to show the picture of my hand, it was only shown to the prosecutor and detective, not the jury. I wondered why. My attorney had requested a hand expert, but it was and still is being denied, and none of the minor boys were called to take the stand, The victim's interrogation video where she started to cry from all of the badgering and coercion for her to say that I did some/anything to her, with her sister's interrogation video where she was asked "who has pictures of naked people?" and she answers "Mommy and Daddy" and "who has movies of naked people?" and she answers "mommy and Daddy." "Who takes pictures with cell phones?" "Mommy, auntie, grandma, the boy, and others." I wasn't mentioned. If one, or both said that I'd done any/something to them, they or she would have been right there on the stand. But, they didn't so, they were both then, deemed "too young to take the stand." The fact that I only went to my Father's was to sleep didn't come up. I was blamed for anything lest so they could break in and go through my personal property whenever I was gone, which was all the time. I'd get off work, look down the road, and see their car in the driveway, and take the long way around in front of King's liquor to go to "Center of Hope." Where I volunteered to help the homeless, or people who didn't have much also went. I was even trusted with the whole building, and ran it when the head honcho left. It's also where I met a good friend, and became an advocate for the homeless, I'd unload trucks full of clothes and sort them, and give them to people. I also worked on, fixed bicycles for people who needed them. That NEVER came up during trial. Nor did the fact that I'd

scored a 3 <sup>out of 12</sup> on the psycho-sexual test, and 2 of those points were given to me just because of the "Nature of the crime." The 1 point is what anybody will score, and that everyone who took the psycho-sexual test had the exact same comments written about them, so did my test match up with others. The fact that my hand has enlarged knuckles from playing basketball years ago, along with the burn mark, and scars which are clearly visible was never brought up, the fact that ALOT of both people I knew and people that I didn't know was dismissed. It is like "As long as the phone was found in his room, in plain view, at all times, with people constantly breaking in he's guilty. The mom pointed her finger, sounded poor, that's it, we got him, we don't need ANY types of tests performed, and as long as a hand expert doesn't get involved, he's going to sit 60 years. During a "hearing", the judge only viewed and acknowledged the atty. he'd become, not the newbie he was, as, I was his "First BIG case." and again, any and all amendment and constitutional rights were NOT taken into consideration, and the hand expert never showed. Since then, the prosecutor, her dept. the detective, the judge, and even the warden one by one, "Retired"

My criminal history going into sentencing was relatively minor, I have never been convicted of a sex crime or even an assaultive offense. I had 3 convictions for driving under the influence in N.D., S.D., and Neb., one disorderly conduct, and furnishing alcohol to a minor. Which I don't remember how I got. All of these crimes were more than a decade, now two decades ago. If released from prison, I have the potential to be a productive member of society again. Prior to this, I am educated, and consistently employed. Another distinguishing factor in my case is that there was no evidence that these pictures were ever shared with anyone. No one testified that they saw images before the son "happened" upon them. The fact that the phone containing the images/videos was not activated to have the ability to transmit the information indicates that the person that took the videos did not have any intent to distribute them. In my case there is insufficient evidence to prove that I was the person that was depicted sexually molesting the girl in the video, or that I was even present while the videos were taken on the cell phone. I have maintained my innocence throughout this case, only apologizing when the detective lied and told me that I could be seen on the video. Even then I stated that I didn't remember anything like this ever happening.

The videos contained footage of a hand and a penis. There were no

## STATEMENT of the case 4

other distinguishing or identifying features of the perpetrator. I have several ~~distinguishing features~~ on my hands. I have a burn mark with discoloration of the skin, and enlarged knuckles. None of these attributes were reported to be seen in any of the videos. On cross examination the detective admitted that he didn't really pay attention to my hands, and didn't bother to examine them. In fact, during the two and a half hours that he spent interrogating me, he testified he never once took the time to look at my hands, nor did a forensic scientist, of who I asked for since day 1.

The only evidence tying me to the crime was the fact that the phone was "found" in my room, and that the videos appear to have been taken in my bedroom. This is NOT enough evidence to prove beyond a reasonable doubt that I committed these crimes. There were many people that lived, and went in the home. Although there was testimony that I usually kept the door locked like everyone else, everyone knew that the door could be easily opened with a coat hanger, or, straight object. Further, the phone had been used by several members of the family and others. It had not been activated in several years and was registered to no one.

Anybody could have easily gained access to the room and use the cell phone to record the crimes

Based on all analysis, I request that the Court find that the lengthy sentence imposed by the trial court violates the rights guaranteed to me under the Eighth Amendment, because it is disproportionately severe in nature, amounting to a de facto life sentence. I also ask this Court to find that there was insufficient evidence to support my conviction, that the evidence gleaned from the cell phone should have been suppressed, and that I received ineffective assistance of counsel

NOTE: Your Honors,

To be perfectly honest, I don't know who did what happened, NO male, female, baby, toddler, tween, teen, adult, middle aged, or senior should EVER have to go through ANY type of abuse, consensual, even if it may have appeared to be, which is way worse, because if trust was, and maybe, STILL is, who knows how many times he's or she's gotten away with repeating his/her actions since?

At first, I thought it may have been the son, as I did see him rubbing his toes against the 4 yr. old's privates, while laying at each end of the couch. ~~04-20~~ I made direct eye contact with her, and nodded to her to

"Follow me." I went into my room and she walked slowly when she got to the door, I then motioned her to keep going as, her ~~grandma~~ was in my Father's and her's room, she did and I thought that she was going to tell what her son was doing. I still don't know if she did or not, either way, I know that nothing would've been done, as HER son could and would NEVER do ANYTHING like that.

He was babied, and if I said anything, it would have been taken as "jealousy" and I would've gotten negative feedback.

Then when we moved to my Father's house, A LOT of teen boys and a couple of men were constantly entering and exiting my Father's house, so, I figured one, or two, or all of them may be responsible, the mom of the girls is VERY, VERY money hungry, and I wouldn't put it past her if she let someone, or, all let them/him touch her girls for money, and I've prayed that that was a situation(s) that was NOT evolving or happening, the mom would rule with an iron fist, literally.

I was actually asked "Who do you think did it?" and "Do you know who did it?" My answer was, is, and always will be. "Yeah, the guy or girl who doesn't go to my Dad's house anymore." Maybe they did.....

The ONLY person who did, and maybe still does is the girl herself. But, we'd never know because any and all proper steps and procedures WERE NEVER TAKEN, why?

Because they were so focused and hell bent on blaming me.

I was going to tell the mom's boyfriend when he got out of jail, the mom knew, and that's when all this happened.

I've been writing to innocence projects and organizations ever since, and although I've given up on trying to find out just who did it, I've put more focus on writing and waiting. Most projects require D.N.A., but, as we're very well aware, all it took was a pointed finger, and a sob story.

Even though the mom must or might have brainwashed the girl by now, it's still very clear that NOTHING in any way was said negatively about me, by them, even when being constantly coerced. I caved, THEY DIDN'T, even when a witness validation test, something that was not, not evidently taken, as was any/all tests that should've, but was not taken, along with the rest of them..... Why? Please help, I've begged for Quid now. Thank you, and God speed, Respectfully, Deja Q. Olinde P:7



## REASONS FOR GRANTING THE PETITION

Your Honors, if you reviewed, studied, and dissected my case, trial, and conclusion, you will discover all of the errors made by both offense and defense.

I know that it's the job of the prosecutor to put people in jail, and prison, but in this case, all it took was the simple fact that my attorney was totally dominated by both the prosecutor, and detective, if they were not allowed to edit my interrogation tape; lie, before and after trial, and suppress the girls interrogation tapes, along with have full say and picks during jury wash, if it was fair and not one-sided, we would've had a chance.

If my attny. and myself was able to have our say, picks, hand expert, any and all tests, I wouldn't be here now.

I've written to innocence projects, and organizations, only to be also denied over and over, even by the "Justice Denied" org, but I'm still waiting for other responses, and will keep writing and asking for assistance until EVERY project and organization within the U.S. has been asked.

Even after that, I will seek help from celeb's, government officials, and even the President of the U.S.

It's either absolutely outrageous, or, goes full circle to genius to know that: 3 random questions, a peek at a bed sheet, suppression of evidence, bringing in evidence that was supposed to be suppressed, lies, accusations, allegations, and assumptions, video editing, suppression of videos, not letting us have any people to speak in my behalf..... You know what? I can list everything that went wrong but

Sooner or later, either way, After release, I'm just gonna do what I've been doing for the past 43 years, ~~clerk~~ help people who have none, feed the hungry, give the homeless a place to go. fix bikes for people who have no transportation, continue to advocate for the homeless, help find work for people who need jobs, give a bed to people who need sleep, and enjoy a good shot of whiskey on a warm summer evening. I've been doing the same in here, Although I live with actual rapists, thieves, arsonists, and most of my Brothers are killers who have no chance of release, I've learned that almost half of them were "in the wrong place at the right time." You may be able to witness or hear about my doings in your lifetime, or witness it from above, along with all of my loved ones that my Family and Friends have lost during my incarceration. My life is in your hands, you decide whether I continue to advocate or not. I can, and will continue to beg and plead to deaf ears because I know someone will listen. My Families name is dying. I've always prayed, yeah, with my Mother, at night before bed. She'd stand at the door. After awhile, I've prayed not only at night, but every Morning. "Thank you for yesterday and The Days before, Today, and tomorrow, along with The Days after." Ending with, "Please let me hear something good about my case." I can still hear her voice. praying with me, "Our Father..." Believe me, I'm not trying to "guilt trip" you I can still try to have a baby of my own, making my Parents, Grandparents. Hell, if Mick Jagger can do it. But of course, my Parents won't be here anymore. I've refused to let this facility brainwash me with prison mentality. And give to Toys For Tots every Year. I haven't told my Parents about this yet, I don't want them to get their hopes up. My Friends also. I really don't know why the people who have the ability, means, or "power" to help, won't. But I do know that I



I will not let you down, That's NOT the Lakota/Dakota way.  
but only make you proud. That's the Lakota/Dakota way.

I haven't "found" Tunkasila, (Grandfather) or, Wakana Tanka,  
(Great Spirit) in prison, like everybody else.

Because they've been with me my whole life, I've known  
that since birth.

And they will continue to be until I die, and join them.

I'm done trying to figure out who did what.

The thought hasn't entered my mind for about 3 Years  
now, but the only thing that does is "Why didn't they just  
ask the girls instead of trying to coax them into saying  
that I did anything?"

Kids that age don't lie.

I still have some more projects and organizations  
to write to.

I still have some more begging and pleading to do.

I say a prayer before I put letters to them in the  
mailbox.

I used to call my friend Fred Wilgenberg, who is a  
pastor, who ran center of hope, where I volunteered, to  
visit for a little while.

After the voice says "you have 1 minute left." He always  
said a prayer.

It's getting harder and harder to call family, not only  
because we miss each other, but ~~also~~ because the  
"Fatality List" grows longer.

Too many family and friends have passed since this  
happened.

People that I could've seen before they went and left  
us.

And I know that sooner or later, my Mother, Father,  
Big Brother, and sister might be next.

Please, don't take the ability to see, visit, help, get help  
from, take a trip with, or, simply call at any time you

want for granted, and cherish every second.

Because sooner or later, God is gonna want them back.

Even if you're angry, or have a grudge with someone.

Well your Honors, thank you so much for your time and assistance, both are very much greatly needed as well as appreciated.

I will now put this in the mailbox and continue to pray.

Respectfully,

Sam & Da  
Thunder

I believe in everything, nothing is sacred.

I believe in nothing, everything is sacred.

Although I haven't seen anybody for the past 9 1/2 years, Family, Friends, as I'd put in the transfers to Bismarck, N.D., where I do have Family and Friends. I've both met and made many new Brothers from all over MT.

I've seen many of them leave and return.

And although they've come to mean a lot to me, my Family outweighs, and means more.

And I'm praying that I'd be able to knock on my Fathers, Mothers, Big Brothers, and Little Sisters, and everyone I know's doors again.

This case, my case, is sss oooo easy.

Please, find it in your heart to take time to review and assist, I've been denied way too many times.

Thank you again.

Respectfully,

Sam & Da  
Thunder

## Key Facts:

Requirements around the preservation of evidence are usually embedded in D.N.A. testing access statutes.

In 2004, Congress passed the Justice For Act. (H.R. 5107), which provides financial incentives for states to preserve evidence and withholds those same monies for states that do not adequately preserve evidence.

## Common shortcomings of existing Statutes.

Some legislation limits the preservation of evidence to only certain crimes.

Nearly every state with legislation calling for the preservation of evidence allow for its premature disposal.

By failing to sanction parties responsible for the disposal or corruption of evidence, most states do not adequately deter those who might destroy evidence.

Ideally, legislation requires the preservation of evidence will include the following provisions:

If biological evidence is destroyed, the court may vacate the conviction, grant a new trial, and instruct the new jury that the physical evidence in the case, which could have been subjected to D.N.A. testing, was destroyed in violation of the law.

The court will also instruct the jury that if it finds that the evidence was intentionally destroyed, it may presume that the results of the D.N.A. testing could have been exculpatory.

## ACTIONS NOT TAKEN,

1. Failure to investigate my case properly and thoroughly.
2. Failure to provide effective assistance of counsel.
3. Failure to show crucial evidence to the jury.

4. Failure to provide adequate testings of crucial evidence.
5. Failure to ~~provide~~ perform thorough tests on any/all crucial evidence.
6. Failure to provide thorough test on crucial evidence i.e. hand expert.

### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Barry D. Thundor

Date: 1-19-19