

In The
Supreme Court of the United States

BRILEY WAYNE PIPER,

Petitioner

v.

DARIN YOUNG, Warden South
Dakota State Penitentiary,

Respondent.

On Petition for a Writ of *Certiorari* to the South Dakota Supreme Court

RESPONDENT'S APPENDIX

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Swedlund, Paul

From: Swedlund, Paul
Sent: Friday, March 13, 2020 7:48 AM
To: MSilver@supremecourt.gov; Wald, Sherri
Cc: ryan@kolbecklaw.com
Subject: Briley Piper Petition for Certiorari
Attachments: DOC031320-03132020073514.pdf

Ms. Silver – You were South Dakota’s contact during the Rhines litigation in November. I am contacting you for guidance with regard to another capital defendant’s petition.

The South Dakota Supreme Court denied Briley Piper’s petition for state *habeas corpus* relief on December 11, 2019. A copy of the judgment and cover sheet of the opinion are attached.

Piper mailed his petition for *certiorari* on March 10, 2020, the 90th day.

Yesterday, as I was preparing to work on our response to the petition, I noticed that the petition names The United States of America as respondent. The respondent in the state *habeas corpus* proceedings was Darin Young, Warden of the South Dakota State Penitentiary. A copy of the cover sheet of Piper’s petition is attached as well.

It appears to me that Piper has failed to perfect the court’s jurisdiction over Warden Young or the State of South Dakota within the 90 days permitted by Rules 13.1 and 13.2.

I wanted to bring this to your attention because I am not sure how to respond. South Dakota could file a motion to dismiss except we are not a party. Should we file a motion anyway or should the South Dakota U.S. Attorney file a motion? I do not want to waive a jurisdictional defense by entering an appearance to file a motion to dismiss.

The dismissal of the petition will not cause Piper any legal prejudice. He has not yet exhausted his federal *habeas corpus* process. The claims he raises in his petition for *certiorari* can be brought in federal *habeas corpus* and to this court in the future on a petition for *certiorari* should Piper not prevail in his federal *habeas corpus*. Thanks for your attention to this matter. Paul S. Swedlund, Assistant Attorney General, State of South Dakota.

000001

December 11, 2019

THE SUPREME COURT

STATE OF SOUTH DAKOTA

BY SEVEN CHIEF JUSTICES: David Gilbertson, Justices Janine M. Kern, Steven R. Jensen and Mark E. Salter.

BRADLEY W. RYER,

Petitioner and Appellant.

JUDGMENTDARREN YOUNG, Warden of the
South Dakota State Penitentiary,
Respondent and Appellee.

This cause coming on to be heard on October 1, 2018, at a term of this Court at the Supreme Court Courtroom in the City of Sioux Falls, State of South Dakota, upon the merits of the cause and upon oral argument of counsel, and the Court having advised thereon and filed its decision in writing, now, therefore,

IT IS CONSIDERED, ORDERED AND ADJUDGED that the Order of the Fourth Judicial Circuit Court within and for Lawrence County, appealed from herein, be and the same is hereby affirmed.

AND IT IS FURTHER ORDERED AND ADJUDGED that this cause be and it is hereby remanded to said Circuit Court for further proceedings according to law and the decision of this Court.

AND IT IS FURTHER ORDERED AND ADJUDGED that no post is required.

BY THE COURT:

JAN 06 2020

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT

David Gilbertson, Chief Justice

ATTEST:

Clerk of the Supreme Court
STATE OF SOUTH DAKOTASUPREME COURT
STATE OF SOUTH DAKOTA
FILED

DEC 11 2019

Sgt. A. Johnson
Clerk

0000002

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

* * * *

BRILEY W. PIPER,

Petitioner and Appellant,

v.

DARRIN YOUNG, Warden of
the South Dakota State Penitentiary,

Respondent and Appellee.

* * * *

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

* * * *

THE HONORABLE RANDALL L. MACY
Retired Judge

* * * *

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Sioux Falls, South Dakota

Attorney for petitioner and
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Pierre, South Dakota

Attorneys for respondent
and appellee.

* * * *

ARGUED OCTOBER 1, 2018
OPINION FILED 12/11/19

0000003

CAPITAL CASE NO. _____

IN THE

SUPREME COURT OF THE
UNITED STATES

BRILEY W. PIPER, PETITIONER

vs.

UNITED STATES OF AMERICA,
RESPONDENT

*ON PETITION FOR A WRIT OF
CERTIORARI TO THE SOUTH DAKOTA
SUPREME COURT*

PETITION FOR A WRIT OF CERTIORARI

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Supreme Court
Counsel for Petitioner, Briley Piper

0000004

1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
2 COUNTY OF LAWRENCE) :
3 *****)

4 BRILEY PIPER,)
5 Petitioner,) CIV.06-222
6 vs.) HABEAS CORPUS
7 DOUGLAS WEBER, Warden,) HEARING
South Dakota State) (Vol. 1 of 2)
8 Penitentiary,)
9 Respondent.)
10 *****)

11 BEFORE: THE HONORABLE JOHN W. BASTIAN,
Circuit Court Judge at the courthouse in
12 Deadwood, Lawrence County, South Dakota
on the 17th day of April, 2007.

13 *****
14 APPEARANCES:

15 FOR THE PETITIONER:

16 MR. STEVE MILLER and MR. STEVEN BINGER
17 Attorney at Law Attorney at Law
18 Sioux Falls, South Dakota Sioux Falls, South Dakota

19 FOR THE RESPONDENT:

20 MR. JOHN FITZGERALD and MS. SHERRI SUNDEM WALD
21 State's Attorney Assistant Attorney General
22 Lawrence County Pierre, South Dakota
23 Deadwood, South Dakota

24 RON RYKEN
25 Official Court Reporter
Fourth Judicial Circuit
Belle Fourche, South Dakota

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1 removed so he can write.

7

2 COURT: Is there any security concerns with law
3 enforcement?

4 LAW ENFORCEMENT OFFICER: We can do his right hand, your
5 Honor.

6 COURT: Any other matters?

7 MR. MILLER: Your Honor, I would prefer to make an
8 opening statement.

9 COURT: You may.

10 MR. MILLER: Your Honor, the testimony you are going to
11 hear today will be from, primarily from attorneys.

12 Mr. Rensch and Mr. Duffy represented Briley Piper in the
13 criminal proceedings that are at issue in this habeas
14 proceeding and you'll hear from them.

15 Mike Stonefield is a witness that I will seek to qualify
16 as an expert who will then also testify about the
17 performance that was rendered by Mr. Rensch and Mr. Duffy.

18 It's important to note at this point that the amended
19 application, only one that's at issue here, as far as
20 ineffective counsel goes, claims only that Mr. Rensch and
21 Mr. Duffy were ineffective in their appellant
22 representation.

23 No claim is being advanced today that Mr. Rensch and Mr.
24 Duffy rendered ineffective assistance at any time prior to
25 the presentation of the issues on appeal to the South Dakota

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20
1 in this ineffective counsel claim here, it's only dealing
2 with appellant representation and so any waiver, by
3 operation of law, of the attorney-client privilege, because
4 of the ineffective counsel claim, is similarly lifted.

5 I don't have any problem at all with there being a waiver
6 of the attorney-client application concerning the appeal.

7 I think the law is that way in South Dakota, but that's
8 as far as that waiver goes.

9 In any event, I will represent to the court, I don't know
10 what Mr. Rensch told Mr. Fitzgerald, but I do know what I
11 told Mr. Rensch and what I told Mr. Rensch is, "If I were
12 you, I wouldn't waive a thing on my own. I'd get protection
13 before I did."

14 And my understanding from talking to Mr. Rensch is that's
15 what he told Mr. Fitzgerald; I know it's hearsay, but I'm
16 just telling you what I did, so Mr. Binger can tell you what
17 he did.

18 COURT: All right.

19 Mr. Binger.

20 MR. BINGER: Your Honor, I guess, and maybe I'd like to
21 add another argument to this, to what Mr. Miller has stated.

22 I don't know why a continuance is warranted simply
23 because a witness declined to speak with an attorney; it's
24 no different than a civil proceeding.

25 I don't think Mr. Rensch has any legal duty to speak to

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1 A Yes.

2 Q Did you also represent him on a direct appeal?

3 A Yes.

4 Q We have had discussions and a ruling by the court prior
5 to you coming in and the other party here can correct me if
6 I'm wrong, but I want to tell you what my understanding of
7 that ruling is.

8 My understanding of that ruling is that number one, the
9 attorney-client privilege has been waived from the point
10 that notice of appeal was filed until now, but not before.

11 And number two, there might be questions of

12 attorney-client privilege for conversations between you and
13 Mr. Piper before that, but a ruling hasn't happened yet on
14 that matter.

15 Now, I would just ask the court for Mr. Rensch's benefit
16 if that is a correct statement--

17 MR. FITZGERALD: Excuse me, your Honor, we had a
18 sequestration order in effect and Mr. Duffy just entered--

19 COURT: Thank you, Mr. Duffy.

20 Q (BY MR. MILLER) Backing up just a little bit, I will ask
21 the court if that is a correct statement of what happened so
22 far on this attorney-client privilege question?

23 MR. FITZGERALD: Your Honor, I would just ask that the
24 court explain to Mr. Rensch the ruling rather than
25 paraphrasing by counsel.

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1 regard to those issue that are at issue today.

2 A Yes, your Honor.

3 Q (BY MR. MILLER) I don't know or have a recollection of
4 what the last question was, but just starting with a new
5 one, at some point during your representation, then, between
6 July of 2000 and the change of plea in early January of
7 2001, did you have discussions with Briley Piper about what
8 procedural options were available to him?

9 A Yes.

10 Q What advise did you give him?

11 What options did you tell him about, to rephrase it?

12 A First option that I explained to him was that he had a
13 right to a jury trial on the charges and that related to the
14 murder count where death was a possible penalty; if he was
15 convicted at trial, he had the right to go on to a
16 sentencing jury trial where a jury would decide whether he
17 should get life or death.

18 Q Were there any other options you told him about?

19 A Yes, I also explained to him a number of times during
20 this period that you're talking about that if he were to
21 plead guilty to the charge, plead guilty to the charge of
22 murder, that he would then be waiving his right to a
23 sentencing jury trial; he would be sentenced by a judge.

24 Q And were there any other options you told him about?

25 A No.

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1 Q So for everyone's reference, I'm going to refer to these
2 two options as A and B.

3 My understanding is that then you told him he had options
4 A or B at that point?

5 A Correct.

6 Q Now, what choice, what was the actual decision, the thing
7 that Mr. Piper would have to do with regard to these two
8 options?

9 In other words, was it--Did it relate to decisions he had
10 to make, things he had to do in open court relating to the
11 guilt phase or the sentencing phase?

12 A Well, the choice he had to make was, first of all,
13 whether or not he wanted to plead guilty to the charges.

14 If he didn't want to plead guilty to the charges, then he
15 had a right to a jury trial.

16 If he plead guilty to the charges, I explained to him
17 that he would waive his right to a jury trial on both guilt
18 and the sentencing.

19 Q Was that your--Was that advise given to him based on your
20 understanding of the South Dakota capital punishment
21 statute?

22 A Yes.

23 Q Just to make sure that I understand that, I want you to
24 tell me, the options of A and B that you told Mr. Piper
25 about, for both of those, the effect of his decision on the

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1 guilt phase carries, under operation of law, the consequences
2 of a death penalty, correct? 30

3 A Correct.

4 Q So the penalty phase effect of either A or B were
5 mandatory by operation of law in your opinion?

6 A Yes.

7 Q And is that what you told Mr. Piper?

8 A Yes.

9 Q Did you ever--Now, I'm going to offer option C here and
10 option C would be that a criminal defendant would have the
11 right to plead guilty to criminal charges and still have the
12 right to a jury sentencing on the penalty phase and I'm
13 calling that option C.

14 Did you ever tell Mr. Piper prior to his entry of a plea
15 that he had option C?

16 A No.

17 Q Did you tell him that he didn't have option C?

18 A No.

19 Q So based on what you told him, if that's all he knew, it
20 was where this came from, your mouth to him, would he have
21 any reason to know about option C prior to appearing in
22 court?

23 MR. FITZGERALD: Objection, calls for speculation about
24 what was in someone else's mind.

25 COURT: Overruled.

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1 A No.

2 Q (BY MR. MILLER) No, meaning he would have no reason to
3 know that?

4 A Correct.

5 Q Also, at some point during your representation, did Mr.
6 Piper indicate to you that he had decided to enter a guilty
7 plea to the charges?

8 A Yes.

9 Q And did you represent him in doing that?

10 A I did.

11 Q How long were those discussions about the possibility
12 of pleading guilty to the charges between you and Mr.
13 Piper?

14 A Well, from the onset of representation, I explained the
15 process, explained the effects of someone pleading guilty
16 to the charges and I would say, seriously, before the entry
17 of a plea occurring on January 3, 2001, that those
18 discussions would have taken place in November, December,
19 2000 up through the time of the plea.

20 Q By the way, your office is in Rapid City, correct?

21 A Yes.

22 Q Where was Mr. Piper being held at the time?

23 A In Deadwood.

24 Q Okay. So to speak with him you would have to drive to
25 Deadwood or would you do it over the phone or--

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1 A Both.

2 Q And so what did Mr. Piper decide to do?

3 A He decided to plead guilty.

4 Q Now, there is a transcript of a change of plea hearing on
5 January 3, 2001, the transcript speaks for itself so I'm not
6 going to go down it line by line with you because the court
7 has already taken judicial notice of the entire criminal
8 file; but that hearing on January 3, 2001, was that
9 scheduled as a change of plea hearing?

10 A No, it was scheduled as a motions hearing.

11 Q So when you walked into the courtroom for that hearing on
12 January 3, 2001, had you or to your knowledge had anyone
13 told the prosecuting attorney or the judge what you were
14 planning to do at that hearing?

15 A We did not tell the prosecuting attorney; something may
16 have been said to the judge as we were walking into the
17 courtroom that it was going to be a change of plea and the
18 only reason I say that is that there is a reference by the
19 judge to the fact, but I don't recall that specifically
20 happening.

21 Q By reference by the judge are you referring to the
22 contents of the transcript of that hearing?

23 A Yes.

24 Q And have you reviewed that hearing transcript prior to
25 testifying here today?

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1 penalty statute and that only option A and B were legally
2 available, had that changed in any way from the time that
3 you advised your client, Mr. Piper, that those were his
4 options until the time the sentencing hearing began?

5 A No.

6 Q Had you ever advised Mr. Piper at any time between the
7 time that you first told him about options A and B and the
8 start of the sentencing hearing on January 17 that there was
9 an additional option here?

10 A Not that I can recall.

11 Q Following the sentence of death and the entry of a
12 judgment, a notice of appeal was filed with this case on Mr.
13 Piper's behalf by either yourself or Mr. Duffy, is that
14 correct?

15 A Correct.

16 Q And briefing ensued at that point, is that right?

17 A Correct, yes.

18 Q And I don't expect you to know the exact date, was the
19 argument held, oral arguments held before the South Dakota
20 Supreme Court on the first set of briefs in March, 2002 at
21 the law school in Vermillion?

22 A I don't remember if that was the time, I'm assuming so, I
23 don't know the time.

24 It was at the law school, though.

25 Q So it is true, then, so March 17th was at the law school?

1 had done my work in advance and given it to him and he
2 responded to other issues, so I'm not sure that I did see
3 that before it went out.

4 Q Okay.

5 A I may have, but I don't know.

6 I didn't sign it, but I know that I saw the portion that
7 I wrote which dealt with the Toby Givens issue.

8 Q Okay. A signature appears over your signature line,
9 which would be on the final page of exhibit 22.

10 A I see that and it's Pat Duffy's signature.

11 Q Did you authorize him to sign your name to that brief?

12 A Sure.

13 Q Okay. And so at least you would agree that that is
14 considered your work as well?

15 A No objection to that, I agree.

16 Q Please take a look at, well, I'll give you a little bit
17 of time here, exhibit 9--Pardon me, exhibit 8, 10 and 12.

18 A Okay.

19 Q Are those three separate requests on Briley Piper's
20 behalf to extend the brief deadline for the reply brief?

21 A Yes.

22 Q Please take a look at exhibits 9, 11 and 13--Maybe
23 they're mixed up.

24 A I've got 9, I've got 11 and I've got 13.

25 Q And are those three different Supreme Court orders which

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1 COURT: Pardon?

2 MR. MILLER: I need a break to consult with co-counsel.

3 COURT: Certainly.

4 (Whereupon a brief discussion was held between Mr. Binger
5 and Mr. Miller)

6 Q (BY MR. MILLER) May I approach?

7 COURT: Certainly.

8 Q (BY MR. MILLER) When you read the South Dakota Supreme
9 Court decision on the Ring vs. Arizona issue, my
10 understanding from reading the brief, and correct me if I'm
11 wrong, is that the Ring discussion included a claim that
12 the aggravating circumstances had to be included in the
13 Indictment or Information, correct?

14 A Yes.

15 Q I'm ignoring that issue for the purposes of this habeas;
16 did the Ring issue as was argued in the appeal brief
17 also include an argument that the death penalty statutes
18 themselves were unconstitutional in South Dakota?

19 A Yes.

20 Q What was that argument?

21 A The argument was that in order to enter a plea of guilty
22 to a murder charge where death was a possible sentence, the
23 only thing that was admitted to were the elements of the
24 offense and nothing beyond that; no aggravating
25 circumstances, so the argument was that he admitted to

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1 murder and that the only penalty that could be imposed was
2 life because that's all the elements that were satisfied for
3 the proceeding to go forward and have the hearing on
4 sentencing, the sentencing hearing and to determine the
5 existence of aggravating circumstances would violate Ring by
6 having someone other than a jury determine the elements for
7 which could cause the penalty to go up and therefore having
8 the judge make that decision was violative of Ring vs.
9 Arizona, which applied.

10 Q Good enough for me.

11 Did that argument depend upon the thesis that under the
12 South Dakota death penalty statutes, only options A and B
13 existed?

14 A Yes.

15 Q Did it depend upon the thesis that under the South Dakota
16 death penalty statute, one who pleads guilty to the
17 underlying offense, must, by operation of law, be sentenced
18 by a judge?

19 A Yes.

20 Q And in fact, in the appeal brief, exhibits 20 and 22,
21 you and Mr. Duffy took that same position to the Supreme
22 Court, correct?

23 A That's correct.

24 Q And the position was that we only have two options, A and
25 B?

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1 A Correct.

2 Q Was that consistent with what you had told Mr. Piper
3 throughout your representation?

4 A Yes.

5 Q Was that consistent with what you had explained to Judge
6 Johnson at the beginning of the plea change hearing?

7 A Yes.

8 Q Did you officially ever take a position inconsistent with
9 that one, that the only options were A and B?

10 A Not that I know of.

11 Q Did the Supreme Court opinion, issued in January of 2006
12 recognize that there was an option C?

13 A Yes.

14 Q Is that the first time option C had been recognized
15 unless it was recognized by what Judge Johnson did in the
16 transcript of the change of plea and of the sentencing?

17 A Yes.

18 Q So as I understand what our Supreme Court did, they held
19 that option C can be read into our death penalty statute.

20 A Yes, they did.

21 Q And they held that that can be done without curative
22 legislation?

23 A Yes.

24 Q They were doing it themselves or recognizing that in
25 their view it was true before, one or the other?

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1 A Correct.

2 Q Is that a fair statement?

3 A Yes.

4 Q Did the Supreme Court go further to relate their option C
5 recognition to what actually happened in Briley Piper's
6 change of plea and sentencing?

7 A I think what the Supreme Court did was take Judge
8 Johnson's offer of a jury sentencing and hold that that was
9 enough to satisfy Ring.

10 Q Okay. Did they say that Mr. Piper had actually waived
11 his right to jury sentencing?

12 A Yes, they did.

13 Q And no matter--Excuse me a moment.

14 Your Honor, I just want to make sure that exhibits 1
15 through 22 have been admitted.

16 COURT: They have been.

17 MR. MILLER: That's all the questions that I have of this
18 witness.

19 COURT: Why don't we take a recess. Ten minutes.

20 (Whereupon a brief recess was taken off the record)

21 COURT: Be seated, please.

22 The record may reflect that we're back in session, Mr.
23 Piper is present along with counsel.

24 Mr. Fitzgerald, you may proceed.

25 CROSS EXAMINATION OF TIMOTHY RENSCH

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1 talked to my client about, things of that nature.

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2 Q Are you saying that it might lead the state to discover a
3 potential strategy that you had in this case?

4 A It could be used to do that, yes.

5 Q Because by examination of what you spent your time on,
6 then one might conclude what type of strategy you were going
7 to take?

8 A Correct.

9 Q Do you have any objection, as his defense counsel, at
10 this point in time, to having the matter unsealed so I could
11 take a look at what the contents of that are?

12 MR. MILLER: Yes, I do have an objection to that.

13 In the first place, that would be a matter for Judge
14 Johnson to decide; he's the one that sealed it.

15 And in the second place, there are good reasons for it
16 remaining sealed in light of the limited nature of the
17 attorney-client privilege waiver at this point.

18 The danger that lead to the sealing in the first place
19 still exists today.

20 MR. FITZGERALD: Well, I strenuously disagree with that.

21 Mr. Piper plead guilty, has been sentenced, the case was
22 appealed to the South Dakota Supreme Court and now we are
23 into another proceeding, but it was sealed for trial
24 strategy and that's no longer an issue, it basically does
25 not apply today and that's my point.

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1 Q Is that true?

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2 A There wasn't a conversation from the beginning about him
3 pleading guilty, but the conversations were about the
4 effects of a guilty plea, things of that nature.

5 Talks about actually pleading guilty, that would be the
6 time frame of November, December, 2000, that time frame and
7 early January, of course.

8 Q Was that a strategy?

9 MR. MILLER: I'll object to that, your Honor; it goes
10 beyond the nature of what was discussed on direct
11 examination especially getting into the reasons of strategy
12 and also the question is not limited as to whose strategy it
13 was.

14 COURT: I think if we're discussing the discussion that
15 occurred coming up to the guilty plea, I think those are
16 matters that the privilege has been waived and it can be
17 discussed here including the reasons.

18 MR. MILLER: How about, for example, a question about
19 what Briley told Mr. Rensch about the facts of the offense;
20 I don't believe that's waived.

21 What is the court's limit, I guess, is what I'm asking, I
22 would like to know.

23 COURT: Well, I don't know what Mr. Rensch's testimony is
24 going to be, but you certainly inquired on direct
25 examination the time frame that lead up to the decision to

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1 plead guilty and I think that those discussions are properly 63
2 before the court.

3 MR. MILLER: So my objection is overruled?

4 COURT: It is.

5 Go ahead, Mr. Fitzgerald.

6 Q (BY MR. FITZGERALD) Do you recall the question?

7 A I do; we started talking about the possibility of
8 pleading guilty simply because the facts were very bad for
9 Briley.

10 Q What do you mean by that?

11 A Well, the things that he said, the things other people
12 indicated he said, remarks other people had heard, but even
13 just getting down to the things Briley himself had said and
14 looking at how terrible, terrible the whole fact pattern
15 was, even Briley's words, and what the worry was is that we
16 would have this case go before a jury, the question of guilt
17 would be a really empty one for me and the things a jury
18 would hear, listen to him and decide that he was lying about
19 all of this and becoming angry and wanting to impose the
20 death penalty.

21 And I think the worry was that if we had this case end up
22 in front of a jury, a jury would be more likely to put him
23 to death and so we started discussing it as to what his
24 options were in something like that.

25 And what we kind of arrived at early on and not really,

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1 you know, not really making a decision in November, but what 64
2 we were thinking is that a judge would be more able to view
3 the fact pattern in the context of Briley Piper's life, the
4 context of his age, the context of his past and the context
5 of other people who committed worse crimes in South Dakota
6 and received less than the death penalty.

7 And so the thinking was, as it turned out, you know, as
8 we're starting to talk about it, this is in December of 2000
9 and then we started discussing it with Briley.

10 The thinking was that the last thing we wanted was a jury
11 to decide the death penalty issue because we didn't feel
12 that they would be able to view things in a measured, calm
13 way that we thought a judge would be able to do those
14 things.

15 And there were certain issues here, certain things about
16 this case that to a lay person sitting on a jury who's less
17 qualified, mind you, that would really go against Briley,
18 you know, the concept of homosexuality coming up; the
19 concept of the torture with the acid; the concept of how
20 long everything took; the concept of the way it was reported
21 to people, how they were laughing; all kinds of--Well, they
22 thought it was funny--

23 MR. MILLER: Object as to the narrative at this point--

24 Q (BY MR. FITZGERALD) I'll ask my next question.

25 Mr. Rensch, would you list for us those things that were

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1 thought of as far as strategic reasons for having this
2 sentencing carried out before a circuit judge rather than a
3 jury that you were concerned about.

4 Well, I think if it came down to the reasons, there were
5 many reasons, there were many reasons to have a judge do it.

6 But if you look at the closing arguments that we made to
7 Judge Johnson at the time of sentencing, by having a judge
8 decide this, you first of all have a person whose seen many
9 cases of this type and from that standpoint, would be able
10 to compare this case with the others that he's seen and
11 would be less likely to suffer a significant reaction as
12 opposed to a lay person who has been qualified as a juror
13 who has not had the benefit of the years of experience that
14 Judge Johnson had, deciding how horrible these things are
15 and just using that against Briley.

16 In addition to that, Judge Johnson was in a position
17 where he had sentenced people to life.

18 He, himself, I know was a prosecutor on a case in
19 Lawrence County that involved a possible serial killer,
20 involved a number of victims and he, himself, had been on
21 trials that were very graphic, very bloody, very horrific,
22 dealing with people who were much older, dealing with people
23 who had much worse records than Briley Piper had.

24 So I think one of the reasons was that we would stand in
25 front of a judge and try to bring some measured calm, cool

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1 reasoning rather than continuing this highly emotional
2 fashion that we were worried would just take Briley Piper
3 out.

4 In addition to that, in front of Judge Johnson we were
5 able to point out other cases where people had killed more
6 than one person, where they had tortured people and they
7 received life, and other cases, too, where people had gotten
8 life and so what happened was is the decision came down to
9 hopefully Judge Johnson would be able to recognize that
10 Briley Piper was a young man, no prior felony, pleading
11 guilty, saying, "I'm sorry", expressing remorse so that
12 would be of benefit to family and victims because it's
13 better to hear, "I'm sorry for what I've done," than not to
14 at least say that.

15 And we also thought that with Briley's family and past,
16 you know, would show how--

17 MR. MILLER: At this point, your Honor, I'm going to
18 object to the extent that we're getting into work product
19 that the attorney did in preparing for the trial in this
20 case.

21 The whole problem with the privileged thing is, your
22 Honor, is that every time something like this is disclosed,
23 it's additional ammunition for the state if there's a
24 retrial, if the case results in a reversal.

25 Now, I don't mind conversation back and forth about what

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1 should we do and what strategy we should use, but he's
2 getting into all of the details as to why the attorneys
3 might recommend that, that necessarily goes into the work
4 product of something that's been discussed.

5 I should have objected when there was any mention of the
6 family; because that stuff has no place in this hearing
7 whatsoever.

8 How can you say, how can it be said, rather, that just
9 because Briley Piper filed a habeas, he has to give the
10 state ammunition, if he wins, how can that be said?

11 COURT: I'll overrule the objection.

12 I find that this examination is within the privilege that
13 the court has previously waived.

14 Go ahead, Mr. Fitzgerald.

15 Q (BY MR. FITZGERALD) Would you continue, Mr. Rensch.

16 A We talked about, you know, things he'd done in the past,
17 the interview, the record, sentencing phase, the affidavit,
18 to explain the things that this young man had done in the
19 past, so we were trying to redeem those qualities and the
20 long and short of it is after we discussed all of this stuff
21 with Briley and talked about a lot of different things and
22 the decision was made that we didn't want to have a jury
23 deciding whether or not he received the death penalty.

24 This was never about whether or not we can win the murder
25 case; we didn't believe we could; he did not believe we

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1 could and by having or being the first one to come forward
2 and plead guilty, giving him the benefit of careful
3 reasoning of making that decision that wasn't fueled by
4 emotion and we felt that we'd be better off with the judge,
5 as far as I can recall, you know, those are the reasons and
6 the types of things that we discussed and in the end that's
7 why he came in and plead guilty, which was his choice, it
8 was his choice to plead guilty.

9 Q Okay. So let me ask you this, the South Dakota Supreme
10 Court in their decision of State vs. Piper said that this
11 case is an example of the most profound case of torture in
12 the history of South Dakota--

13 MR. MILLER: I'll object to that characterization and I
14 will object to the witness being allowed to answer it, the
15 fact that it's set forth; you've got it right in front of
16 you and we're not here to retry the murder charge.

17 COURT: I'm not sure where you're going with your
18 question, Mr. Fitzgerald?

19 Q (BY MR. FITZGERALD) Maybe I'll just move ahead.

20 What was your concern, Mr. Rensch, about the aspects of
21 torture in this case on a jury's ability to weigh in as to
22 the appropriateness of the death penalty or not?

23 MR. MILLER: I'll object to that as having been
24 previously asked and answered.

25 Mr. Fitzgerald is asking a question that allows a witness

1 to go on for five minutes or so.

2 He has answered the question.

3 COURT: I'll overrule the objection.

4 You may proceed.

5 A Well, the thing that worried me about the torture was the
6 fact that he was given acid and told to drink it and the
7 fact that they decided to kill him and it was discussed
8 right in front of him and that he was then taken out to
9 Higgens Gulch and they took a long time to kill him.

10 And at one point, as I recall, they were talking about
11 letting him into the car and giving him a drink of water and
12 then they decided not to do that and they laughed at him.

13 And down the line, you know, they talked about certain
14 things in front of him, and the whole thing, from beginning
15 to end, you know, it started out that he was pretty nice to
16 these guys and he opened up his house to them and then he
17 had to beg for his life and then they killed him.

18 My worry was that if that got in front of a jury, then,
19 they would be able to sit back and try to decide whether or
20 not he should get the death penalty.

21 The benefit of having Judge Johnson do it was that Judge
22 Johnson had the experience and Judge Johnson might be a
23 little less sensitive to the type of things that happened
24 because really, when you're standing there asking for life,
25 we're not talking about the type of thing that happened;

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1 we're talking about what we do to this person to make it
2 right and whether they need to die.

3 And I thought with the way that torture situation was and
4 since there were other South Dakota cases where people had
5 talked of torture and had committed torture and killed
6 someone, they were sentenced to the penitentiary for life
7 and so that would be one way to try to deal with the
8 argument and try to bring reason to it all.

9 Q (BY MR. FITZGERALD) Mr. Rensch, were those conversations
10 conducted with all three of the participants, yourself, Mr.
11 Duffy and Mr. Piper?

12 MR. MILLER: I'll object to that, your Honor, it's a
13 violation of the privilege.

14 If we're talking about conversations with Mr. Rensch and
15 Mr. Piper, that may fall into your ruling, but bringing in a
16 third party, it does not.

17 COURT: He can state whether or not Mr. Duffy was there.
18 A There were many times when Briley and I spoke about this
19 when Mr. Duffy was involved and he had come to the same
20 conclusion every time when I separately spoke with Briley to
21 make sure that, you know, that this was the way that he
22 wanted to go.

23 And there were times when Mr. Duffy separately spoke with
24 him, Briley. Okay.

25 Q (BY MR. FITZGERALD) Now, those conversations would most

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1 The transcripts themselves of the change of plea hearing
2 indicate representation by Mr.--I believe it does,
3 representation by Mr. Rensch to Judge Johnson that he sees
4 no cognitive problems, I will call them, from Mr. Piper, but
5 it also contains a question and answer exchange between
6 Judge Johnson and Mr. Piper about the same thing.

7 Finally, there is no claim in this habeas whatsoever that
8 Mr. Piper was not competent to make a decision to plead
9 guilty or if it's found to exist, to waive it.

10 This is not part of this habeas at all and therefore the
11 only purpose of this question is for discovery by the state
12 of the retrial in this sentencing hearing after we win,
13 whether we win before you or the South Dakota Supreme Court
14 or the federal district court or the Eighth Circuit Court.

15 The only purpose for this question is more narrow, so I
16 object on relevance.

17 COURT: Competency is not at issue here, Mr. Fitzgerald
18 and I don't know what the relevancy is on this so I'll
19 sustain the objection.

20 Q. (BY MR. FITZGERALD) Was Mr. Piper ever telling you or
21 leading you to believe that he didn't understand what was
22 taking place in his case and his decisions?

23 A. No.

24 Q. Did he at any time indicate to you that he didn't
25 understand the choices that he was making and potential

1 consequences of his choices?

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2 A Not before the plea or sentence.

3 Q Did you consult with any other lawyers in South Dakota
4 about this particular representation?

5 A You know, I think I may have; I don't remember who, but I
6 think I did.

7 Q Did you consult with any counsel outside of the State of
8 South Dakota?

9 A No.

10 Q Do you recall the name or names of the lawyers that you
11 spoke to about this case?

12 A I don't remember the name of the lawyer.

13 Sometimes you ask older lawyers with more experience, I
14 may have done that; I don't recall.

15 Q Okay. Is it true that you did not inform opposing
16 counsel of the decision to plead guilty and ask the judge to
17 determine sentencing--

18 A Yes.

19 Q --in advance?

20 A Yes.

21 Q Was that discussed with counsel, Mr. Duffy, or with Mr.
22 Piper, the defendant?

23 A I don't recall if it came up with Mr. Piper, I don't
24 remember that it was.

25 Q Was that a strategic move to potentially have the

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1 prosecuting attorney, I guess, be unprepared?

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2 MR. MILLER: I'll object, your Honor, as to relevance.

3 COURT: Overruled.

4 A Yes.

5 Q (BY MR. FITZGERALD) And have you reviewed that
6 transcript?

7 A Yes.

8 Q Did you notice in there that the prosecuting attorney did
9 not even bring a file or at least the Indictment to court?

10 A Yes.

11 Q And what happened because of that?

12 A A break was taken.

13 Q Have you had a chance to review, I think it's one of the
14 exhibits by the applicant, the change of plea conducted on
15 January 3, 2001?

16 A I have reviewed that.

17 Q Is it part of the notebook of exhibits given to you by
18 Mr. Miller?

19 A I don't have a copy of it.

20 Q You don't have a copy of it?

21 A No.

22 Q I want to go over some of this with you.

23 Is this an accurate representation of what went on?

24 A Yes.

25 Q Now, is it true that Mr. Piper on the record waived his

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1 and he did.

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2 Q And we can assume that he was very serious and if Mr.
3 Piper had made some sort of objection that the judge would
4 have dealt with it?

5 A I'm assuming so.

6 Q We don't know exactly what he would have done, but he did
7 ask to make sure?

8 A Yes.

9 Q And there's nothing contrary to the record or in your
10 memory?

11 A No.

12 Q That's what he wanted to do.

13 A Correct.

14 Q And he was well aware of the consequence of this plea of
15 guilty and his choice to go with the judge could result in a
16 death sentence or life?

17 A Yes.

18 Q In fact, there was no other option.

19 A Correct.

20 Q And then regardless of his decision to have a judge or a
21 jury determine the consequences for his murder plea, Judge
22 Johnson was going to have to impose sentence for all the
23 other charges, is that correct?

24 A Correct.

25 Q So he was going to have the option to give him a life

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1 10, line 6?

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2 A Correct.

3 Q And 14 days later, before the sentencing commenced, Judge
4 Johnson again indicated or had the defendant and yourself
5 indicate that it was still the choice to waive a jury and
6 proceed with his guilty plea and have sentencing before the
7 court, respondent's exhibit 3 or respondent's exhibit 3,
8 page 4.

9 A Yes, he asked Mr. Piper if he still wanted to proceed and
10 Mr. Piper said, yes.

11 Q Okay. And you didn't believe that that was true at the
12 time, that he had a right to waive?

13 A I didn't care; I wanted the judge to sentence him.

14 Q Did you express at all on the record that you were in
15 disagreement with Judge Johnson's interpretation of the law,
16 that not only did the defendant have to waive, but the State
17 of South Dakota had to waive sentencing before a jury?

18 A No, we wanted the judge to sentence him and that's what
19 we did.

20 Q And that was the choice?

21 A Yes.

22 Q Voluntarily made by a competent individual?

23 A I believe so.

24 Q Who has for his benefit two experienced attorneys.

25 A Correct.

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1 sentenced by a judge and the other one was if you don't
2 plead guilty, you get sentenced by a jury.

3 Q The Supreme Court held that you could waive that right
4 because you did have a right to be sentenced by a jury.

5 A They held what they held, that Judge Johnson's procedure
6 was authorized by statute.

7 Q Was it contemplated or thought about having a jury
8 impaneled and pleading guilty in front of a jury and thereby
9 having a jury?

10 MR. MILLER: I'll object to that; I don't know,
11 contemplated by whom; I guess I just don't know what the
12 question is.

13 COURT: Overruled; you may answer.

14 A You know, I think we thought about what course we'd take
15 and the decision was made that we didn't want to have it in
16 front of a jury.

17 I don't ever remember discussing with Briley pleading
18 guilty in front of a jury and going to a sentencing in front
19 of a jury because he wanted to be sentenced by a judge.

20 Q (BY MR. FITZGERALD) He wanted to be sentenced by a
21 judge, correct?

22 A Well, we were explaining to him that a lot of the stuff
23 here that could hurt him badly with 12 people, that could be
24 somewhat, you know, it might not hurt him as bad in front of
25 a judge.

1 charges that have severe consequences, but beyond that, when
2 a claim is made that someone has been ineffective in their
3 assistance of counsel, one of the prongs is to show that
4 somehow there's been some sort of a major prejudice, that
5 the outcome would have been different, but for the alleged
6 mistakes made by counsel.

7 And so that's why I asked the question, what evidence, if
8 it is true, if he had a jury the outcome would have been
9 different?

10 MR. MILLER: May I speak to that?

11 COURT: Certainly.

12 MR. MILLER: The claim of ineffective assistance of
13 counsel is to appellate counsel.

14 As the prejudice prong does exist, the prejudice prong
15 requires that I show a reasonable probability that had
16 appellate counsel acted differently, the results of the
17 appeal would have been different.

18 I also tend to agree with the theory which Mr. Fitzgerald
19 says about the Strickland prejudice prong as it relates to a
20 claim of ineffective trial counsel, but there is no such
21 claim before this court and that's why the question is
22 irrelevant.

23 COURT: I'll overrule the objection; you may answer.

24 A I don't remember the question.

25 Q (BY MR. FITZGERALD) Okay. I'll see if I can get it

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1 Q Would you agree that the South Dakota death penalty
2 statutes do not say that if you plead guilty in front of a
3 judge only a judge can sentence--

4 A No, they say the opposite.

5 Q And the Supreme Court decided what?

6 A We lost.

7 Q Your Honor, I would ask that the noon recess be taken at
8 this time and leave Mr. Rensch under subpoena because as I
9 explained to the court before we started, I was under the
10 impression when you make one of these claims that Mr. Piper
11 had a right to talk to counsel and I was not able to talk to
12 Mr. Rensch and so I would like to ask that the noon hour be
13 taken now to kind of digest things to see if I left anything
14 out.

15 COURT: It's just a few minutes before noon and I think
16 the request is appropriate, and so let's take a recess.

17 Let's come back at 1:15.

18 Court will be in recess.

19 (Whereupon a noon recess was taken off the record)

20 COURT: Be seated, please.

21 The record may reflect that we are back in session; Mr.
22 Piper is present along with the attorneys.

23 Mr. Fitzgerald, you may continue.

24 MR. FITZGERALD: Could I have this marked as an exhibit.

25 (Whereupon Respondent's Exhibit D was marked for

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1 Q (BY MR. FITZGERALD) Well, Mr. Rensch, I summarized what
2 I believed were two issues which you wanted to raise; do you
3 want to clarify or amplify what it was that you wanted to
4 raise in the rehearing?

5 A Yes, what I wanted to raise in the rehearing, the new
6 argument and I don't know if it was really a new argument,
7 but what I thought of that I didn't think about before was
8 that when you look at 23A-27A-6 in the context of the other
9 statutes, it seems more clear that there was no right to a
10 jury sentencing upon a guilty plea and I was asking the
11 Supreme Court to look at that statute in the context of the
12 other statutes and in the context of the general police
13 statutes which states when you plead guilty to something,
14 you waive your right to jury trial.

15 That is it.

16 Q Hadn't that been basically dealt with?

17 A Well, it had been dealt with, but I thought it was a new
18 slant on the argument because it didn't look like 23A-27A-6
19 had been evaluated in the context of the other statutes
20 around it, but to make it appear more clear that there was
21 no right to a jury sentencing in the event of a guilty plea.

22 Q Okay. Well, if that was considered by the South Dakota
23 Supreme Court in State vs. Piper how was Mr. Piper
24 prejudiced now by not considering what you wanted reversed?

25 A Well, I don't know that he is prejudiced; on rehearings

1 they're often granted and we made the argument; I thought it
2 was a new argument and if there was something to it, it
3 should be brought to the light of day.

4 Q Okay. When you consulted with Mr. Piper about his
5 decision to choose judge versus jury, did you talk about
6 the potential for say a hung verdict so to speak by a jury
7 in a death penalty case?

8 A Yes.

9 Q What did you tell him about that?

10 A Well, I explained to him that a jury would have to listen
11 to his case and in order for them to sentence him to death
12 they would have to have a unanimous decision in that regard.

13 And that if we hung one of the twelve, the sentence would
14 be life.

15 So in essence, they'd have to convince all twelve for
16 death, but if we hang up one of the twelve for life, it will
17 hang the jury, then life would be appropriate.

18 Q Did he have any questions or comments or want a
19 reexplanation of that point?

20 A No, he did not.

21 Q Would Mr. Duffy, as best you can recall, have been present at that time for that conversation?

23 A I think so, yeah.

24 Q And I realize it's hard without access to the times in
25 the billings, but do you remember how many times that came

1 up?

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2 A Well, it came up about the last month and a half before
3 the plea and we talked about it a number of times and it
4 came up in the entire process even before November of 2000.

5 We had talked about what was necessary in order for him
6 to receive the death penalty and so if we include that time,
7 it probably would have been provided to him from nearly the
8 first meeting throughout the process about how the process
9 worked, that if he were convicted at a jury trial and then
10 go on to the sentencing phase, it would have to be unanimous
11 for the death penalty.

12 Q When you represent somebody in a criminal case, how do
13 you, I guess, insure to yourself that the choices that the
14 clients are making are his and his alone?

15 A Well, I explain to my clients that, "Briley, you have a
16 right to a jury trial and if you want to have a jury trial,
17 you will have it. If you want to plead guilty, that's your
18 business. You have to make sure that that's the choice you
19 want to make."

20 Because as I told him, you know, nobody can make any
21 promises to you and if you plead to something, you have to
22 be ready for the possibility of the maximum punishment,
23 while we hope for something less and you want to be really
24 sure of it because it's your choice here.

25 And so I make sure that they know it's their choice, tell

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1 Q At that point in this hearing including this passage, had
2 anyone waived the right to a sentencing by a jury?

3 A I think up to this point we had notified the court that
4 we felt that it was the court's obligation to sentence him
5 upon a guilty plea and cited 23A-27-6.

6 As far as us saying it out loud, nobody before that said
7 we were waiving that right.

8 Q Okay. And so no waiver had happened yet in your opinion?

9 A No, we just indicated to the judge that we wanted the
10 judge to sentence us.

11 Q So it was an expression of intention, but no waiver yet,
12 is that correct?

13 A Correct.

14 Q Next--Well, the next thing that happened was the judge
15 begins to advise Mr. Piper of the elements of the offense,
16 offenses, from the middle of page 10 through the bottom of
17 page 12; go ahead and look.

18 A Yes.

19 Q Is there any waiver of a right to jury sentencing in that
20 part of the transcript?

21 A No.

22 Q Has a waiver of a right to jury sentencing actually
23 happened?

24 A No.

25 Q Next the judge advises of maximum possible penalties,

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1 A No.

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2 Q Line 25, page 20, the court to Mr. Piper, "And if you
3 make that decision I will hear the evidence and I will
4 follow the law and I will make a decision."

5 At that point, had any waiver occurred yet?

6 A Well, he says he agrees that's what he wants the judge to
7 do, but he doesn't say that.

8 Q Okay. So what are you saying there?

9 A He says, "I will follow the law and I will make a
10 decision, is that what you want me to do?" Answer, "Yes."

11 Q Is it your position that that, by itself, is a waiver of
12 jury, right there?

13 A My position is that Briley Piper wanted the judge to do
14 the sentencing.

15 Q That Briley Piper is saying, "I do want the judge to do
16 the sentencing," is that where you argued in your appeal
17 brief that a waiver has occurred?

18 Would you argue, orally, to the Supreme Court that he did
19 waive it twice, words from your mouth, is that what you're
20 referring to, those very lines?

21 Is that your version of waiver, yes or no?

22 A No, that's not what he said.

23 Q So the waiver hadn't occurred yet, had it?

24 Well, if you make that decision, is this a waiver, had he
25 just waived his right to jury trial in your opinion?

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1 '06, would you agree with this statement, that what the
2 Supreme Court recognized was the right to jury sentencing
3 which survived a guilty plea?

4 A Yes.

5 Q And you had advised your client that he had no right to
6 sentencing that survived a guilty plea?

7 A Correct.

8 Q You had advised him of options A and B, but not option C,
9 correct?

10 A Correct.

11 Q And it is option C that the Supreme Court recognized in
12 the Piper appellate decision?

13 A Correct.

14 Q In reading the entire transcript through the end which
15 you have just done, section by section, did Judge Johnson
16 ever advise Briley Piper of option C?

17 A Well, you know, I don't know how you want to characterize
18 it.

19 He asked him if he wanted a jury sentencing and Briley
20 said he wanted him to sentence him--

21 Q Well, is it true--

22 A He said what he said.

23 Q Is there any specific waiver language that occurred after
24 the entry of a plea in that transcript?

25 A No.

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1 Q If it's true that a waiver, that a right to jury
2 sentencing survived the guilty plea, how can that be waived
3 before the plea?

4 A I don't know the answer to that--

5 Q You know what, it was unfair for me to ask you that
6 question.

7 You gave a litany of reasons as to why you, the defense I
8 should say, chose the option of pleading guilty and being
9 sentenced by a judge in this case, you did that in cross
10 examination when you were being cross examined by Mr.
11 Fitzgerald.

12 Do you remember that testimony?

13 A I remember explaining the factors, some of the factors
14 that were involved.

15 Q Was one of the factors that you mentioned that you had a
16 very small chance of success at trial on the merits of the
17 charges?

18 A Well, I mentioned that we had a small chance of success
19 on the merits of the charges; I don't know that that was
20 what made us want to go in front of a judge for sentencing
21 as opposed to a jury.

22 We wanted the judge to sentence him; we thought he would
23 be more receptive to the requests we were making.

24 Q Were you able to argue to the judge at the sentencing
25 hearing that Mr. Piper's guilty plea, his decision to plead

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1 guilty rather than going to trial, was a mitigating
2 circumstance?

3 A Yes.

4 Q Was that argument available had there been a jury
5 sentencing under the option A or B?

6 A Sure.

7 Q How would have it been available with a jury?

8 A Well, no, I mean, if they would have granted a jury
9 sentencing, which the Supreme Court said that could have
10 been done under option C, that would have been available,
11 but it would not have been available under A and B.

12 Q Under how you had--Well, were you able to argue the
13 acceptance of responsibility by way of the guilty plea to
14 the Supreme Court in oral arguments, the proportionality
15 issue?

16 A I think so.

17 Q After Mr. Piper received the death sentence and the
18 judgment was entered and notice of appeal filed, what was
19 the scope, in your mind, of that appeal?

20 A To get it reversed.

21 Q To get what?

22 A Get the sentence reversed.

23 Q There was no attempt made, was there, to reverse the plea
24 of guilty, too?

25 A Not at all.

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1 Q So the only objective of that appeal was reversal of the
2 death sentence, is that true?

3 A Correct.

4 Q Okay.

5 A We also wanted a new sentencing hearing date based upon
6 information that didn't authorize a trial.

7 Q And the effect of which would be a reversal of the death
8 sentence, correct?

9 A Yes.

10 Q As I understand or my understanding of some of these
11 issues would have resulted in reversal of the death sentence
12 and guarantee imprisonment for life?

13 A Yes.

14 Q And others resulted in reversal of the death sentence and
15 remand for a new sentencing hearing.

16 A That's correct.

17 Q And the common denominator of all of these, however, is
18 reversal of the death sentence?

19 A Yes.

20 Q From the time of the change of plea on January 3rd until
21 the time of the--Well, no, actually, I'll withdraw that
22 question.

23 May I have just a moment, your Honor?

24 COURT: Certainly.

25 MR. MILLER: That's all that I have.

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1 line 1?

2 A Well, yes, but it does not specifically say waiver there;
3 although he's plead guilty, he's telling the judge he wants
4 him to sentence him.

5 Q And again, starting on page 19, line 23 through page 20,
6 line 17, there, there's talk again about him giving up that
7 right, is that fair?

8 A Well, at that point the topic had come up if he
9 understood what was going on, at the top of the page, line
10 3, explaining aggravating circumstances, what they are and
11 if a jury finds aggravating circumstances, they could impose
12 the death sentence and so I don't know that there's a
13 waiver, it's more of an explanation of finding aggravating
14 circumstances.

15 Q On a number of occasions before he ever went to court you
16 had explained to Mr. Piper that he would be waiving a right
17 and be sentenced by the court, is that true?

18 A I explained to him that if he plead guilty, the judge
19 would sentence him and we discussed also what happens if he
20 plead not guilty and were found guilty and then he would
21 have a jury sentencing.

22 We all decided, Briley included, that we didn't want to
23 have a jury sentencing, we wanted a judge sentencing and so
24 we went in and plead guilty.

25 Q So again, from the backdrop of reading the transcript,

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1 Mr. Piper had an understanding of what was going to take
2 place even before he went into court.

3 A Yes, we wanted to have a judge sentencing.

4 Q What was the reason for not informing the state that at
5 the hearing there was going to be a change of plea?

6 A I was hoping that he might just sentence him to life
7 right then and there.

8 Q Strategy?

9 A Yes.

10 I also didn't want you to have an opportunity to pick and
11 choose which strategy to use.

12 Q And I did ask for a continuance?

13 A I believe you did.

14 Q About a half hour.

15 A Correct.

16 Q And the judge seemed to have more of an understanding of
17 what was about to transpire from reading the record, is that
18 a fair statement?

19 A I think it is.

20 Q So did you talk to Judge Johnson briefly to advise him at
21 least what was going to take place?

22 A I must have.

23 Q Do you remember what you told him?

24 A You know, I think I said we're going to be entering a
25 plea; I think it was here in open court, people were

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1 brief here.

2 I reviewed more comparatively that part of it which dealt
3 with the issues that you asked me to. I believe it's issue
4 number 6, their reply brief that was filed in February, '04,
5 the appellate's reply brief was with that.

6 You asked me to read the Supreme Court opinion in Mr.
7 Piper's case; I reviewed it earlier and reviewed it since
8 then.

9 You asked me to read Ring vs. Arizona, I've read that and
10 I've reviewed it again since that time again and I've also
11 reviewed a few other cases, cases that you had asked me to
12 review.

13 Q Did you review some of your own research?

14 A Yes.

15 Q At this time I would ask that you be declared, Mr.
16 Stonefield, to be an expert witness and that the court state
17 a position one way or the other.

18 COURT: Mr. Fitzgerald.

19 MR. FITZGERALD: If he's an expert witness on a habeas
20 corpus, I'm not sure exactly whether he's qualified as an
21 expert witness.

22 Obviously he's an experienced lawyer in legal matters,
23 but I don't believe he's qualified to give a legal
24 conclusion, I believe that's for the court to make.

25 COURT: I find that you've laid sufficient foundation to

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1 not, but that would have been a challenge and the result
2 that they could have achieved would have been to vacate the
3 death penalty sentence.

4 Q Were you sitting in here today and heard Mr. Rensch
5 concerning the advise he would have given to Mr. Piper
6 concerning jury unanimity?

7 A Did you hear Mr. Rensch's testimony?

8 Q He testified about--Are you asking me what it was he
9 advised him?

10 Q Well, we'll start with that; what do you think he said?

11 A Your opinion based upon what you're thinking.

12 Q I understand.

13 A He testified that he advised Mr. Piper correctly about
14 unanimity, that under the law of South Dakota that a hung
15 jury, you know, "sentencing jury" would result in a life
16 sentence. That's what I understood that he told to him and
17 that, as I understand it, that's the state of the law.

18 Q Okay. So just to make sure that I understand it, are you
19 saying that your impression of Tim Rensch's testimony is
20 that he correctly advised Mr. Piper in this area of the law?

21 A Yes.

22 Q And that the judge's formal advisement incorrectly
23 advised Mr. Piper on this area of the law?

24 A Is that what you're saying?

25 A I'm not sure if Tim said that the judge, no, no, no.

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1 in that place it appears that the judge here differentiates 155
2 between the two, between the right to have a jury hear your
3 guilty plea and right to have a jury hear your sentencing.
4 It appears that in his mind and maybe it's before that, but
5 I think it's in another place that the transcript reads the
6 same way, it looks like here, page 14, line 20 and below,
7 there's a discussion about whether Mr. Piper, when they
8 first began to discuss this, the possibility of pleading and
9 then the judge says and that includes the possibility of
10 having the court deal with sentencing, so it appears again
11 there that he's differentiating the two.

12 And so at least early on in the transcript I see the
13 judge having, what I believe to be the correct mindset or
14 correct grasp of the situation; that there are two separate
15 things here that need to be addressed.

16 Q So you believe that Mr. Rensch and Mr. Duffy apparently
17 had never covered it?

18 A Never believed that it was a possibility, never believed
19 that he cold have a jury sentencing if you plead guilty.

20 Q And that's what's called option C, as I recall?

21 A Yes.

22 Q And are you saying the judge could be sitting on the
23 thought of option C possibility?

24 A Well, it would appear to me that he did think that.

25 Q Okay. So once we start the actual advisement of rights

1 A Yes.

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2 Q And as I recall, they thought they would be better off
3 going in front of just a judge rather than a jury, do you
4 recall that?

5 A Yes, I believe that's what he said.

6 Q And that the defendant wanted that to occur.

7 A Yes, that's what he said.

8 Q Okay. So he waived the right to have a jury determine
9 penalty?

10 A Well, he waived it on options A and B, option C had not
11 been presented to him, the ability to plead guilty and take
12 all of the mitigating evidence and factors that would be
13 involved and be sentenced by a jury?

14 A According to Mr. Rensch, Mr. Rensch and Mr. Duffy did not
15 tell Mr. Piper that was an option, they believed it was not.

16 Q Okay. You heard Mr. Rensch testify that he told Mr.
17 Piper on numerous occasions that it was his legal opinion
18 that if the jurors were unable to reach a unanimous decision
19 on the question of death, it would be equal to or equate out
20 to a life sentence, is that correct?

21 A I'll have to look at my notes here, I think you have it
22 right, but I just want to be sure; yes, he did say that.

23 Q So Mr. Rensch in your opinion had properly advised the
24 applicant of the ramifications of a non-unanimous verdict on
25 the question of the death sentence, is that true?

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1 testified that he did, but I don't know if he included the
2 issues or just wanted to file the document to enlarge the
3 time, I don't know.

4 Q Do you take issue with Mr. Rensch in that he did not
5 raise during that period of time the issue of the judge
6 advising him of the consequences of a non-unanimous verdict
7 on the death penalty?

8 A They could have raised that early on, in the direct
9 appeal; they didn't have to wait until the rehearing to do
10 that, so if you want to say that was ineffective not to have
11 done so on rehearing, yeah, ineffective all the way along.

12 So what I believe was ineffective was not to have raised
13 it, waiver of jury sentencing, on the petition for rehearing
14 because at that point and for the first time, at that point
15 they had become aware that their reading of the statute was
16 wrong, according to the Supreme Court.

17 The Supreme Court had told them, then, and they had not
18 been told before, that their reading of the statute was
19 wrong and so it was deficient for them not to have raised it
20 on the petition for rehearing.

21 Q Even knowing their client didn't want a jury sentencing?

22 A Correct.

23 Q Would it also be true that it was available, and Mr.
24 Rensch testified to this that if Mr. Piper had wanted to go
25 and be sentenced by a jury, it was available?

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

BRILEY PIPER,)
Petitioner,)
vs.) CIV. 06-222
DOUGLAS WEBER, Warden,) HABEAS CORPUS
South Dakota State) HEARING
Penitentiary,) (Vol. 2 of 2)
Respondent.)

1 BEFORE: THE HONORABLE JOHN W. BASTIAN,
1 Circuit Court Judge at the courthouse in
1 Deadwood, Lawrence County, South Dakota,
1 on the 18th day of April, 2007.

1 APPEARANCES: For Petitioner:

1 MR. STEVE MILLER and MR. STEVEN BINGER
1 Attorney at Law Attorney at Law
1 Sioux Falls, South Dakota Sioux Falls, South Dakota

1 For Respondent:

2 MR. JOHN FITZGERALD and MS. SHERRI SUNDEM WALD
2 State's Attorney Assistant Attorney General
2 Lawrence County Pierre, South Dakota
2 Deadwood, South Dakota

2 RON RYKEN
2 Official Court Reporter
2 Fourth Judicial Circuit
2 Belle Fourche, South Dakota

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10
yes. I understand the issues in this case and yes, they are not prejudged.

11 MR. MILLER: Thank you.

12 MR. BINGER: Your Honor, just for the record, it's my interpretation of what your Honor ruled yesterday that the attorney-client privilege was waived as to any matters related to the appeal because that's the only issue of ineffective assistance of counsel that has been raised.

13 Other issues concerning the waiver or the alleged waiver are just based on the record alone and so we would ask that 14 we have a standing objection and we do object to any ruling by the court that says that anything prior to the appeal is waived because we are not alleging ineffective assistance of 15 counsel when it comes to the issue of pleading guilty.

16 The rest of it is simply a matter of what's on the record 17 and how we have been interpreting that ever since, so it is 18 our position that there is not a waiver until the notice of appeal was filed.

19 Anything prior to that is not waived.

20 That's our position.

21 COURT: I recall it a little differently yesterday and of course the record will say what it says, but I understood it 22 that--I do agree that you're not claiming ineffective 23 assistance of counsel for anything that occurred prior to 24 the notice of appeal, correct?

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1 MR. BINGER: That's correct.

2 COURT: And that it's clear that the attorney-client
3 privilege is waived from that point forward.

4 I also think that it was--I guess I'm making my own
5 record, but I think it was also clear that to get to that
6 point there were certain conversations and certain things
7 that occurred leading up to that; Mr. Rensch talked about
8 them, and that's when he got into the discussion about the
9 reasons and the strategies for entry of guilty pleas and
10 making a decision to put the matter before the judge for
11 sentencing rather than a jury.

12 I find all of that necessary and incorporate any waiver
13 that Mr. Piper gives by virtue of the filing of this habeas.
14 I can understand how there are a lot of things that the
15 privilege doesn't include, but I don't think that yesterday
16 we drew a line at the filing of the appeal and in fact
17 discussed things that lead up to the decision, that appeal
18 and the sentencing decision.

19 So that's my posture with Mr. Duffy's testimony as well,
20 and again, having said that, I understand your record and
21 the standing objection and I don't quarrel with that, but as
22 we go along, if there's some specific areas that you wish to
23 object to in addition, you certainly may.

24 MR. MILLER: May I just make one additional, final point?

25 COURT: Certainly.

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Q Ultimately were there discussions about this defendant pleading guilty to the charges lodged against him?

A Yes.

Q Okay. Can you tell us when those discussions first took place, as best you can remember.

A can't give you a time frame.

I can tell you that there was a signature of events that took place during the course of the investigation and preparation that lead Mr. Rensch and me to begin discussing whether or not this case should be tried before a judge or a jury.

Q Could you explain or elaborate about what you term a signature of events, please.

A I think there's probably three; the first was, I went to Alaska for nine days. During the course of my trip to Alaska, I can't tell you everybody that we met; former teachers; I examined a box of documents--

MR. BINGER: Objection, your Honor, if I may object, this is attorney work product, it is not relevant or material to the discussions.

I believe the court has ruled that the discussions leading to the plea may have some relevance to this case, although we've objected to that ruling, but the attorney work product or what he did during his own investigation is beyond the scope of this hearing; it is not--It is not

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covered by the court's previous ruling, this is protected by attorney-client privilege and it's just not, you know, what the factual reasons were or what he did during his own investigation in this case has no pertinence to this case.

COURT: Mr. Duffy, these signature events that you are referring to and you are about to testify to, were these things that you considered internally or things that you discussed with your client during the time that you were discussing or contemplating a guilty plea rather than a jury trial?

A. One, I discussed in some detail with my client; the other two I can't say for certain I discussed it with my client, but I did discuss them with Mr. Rensch.

MR. MILLER: May I be heard in regard to one other point?

COURT: Yes.

MR. MILLER: We all know that there was a guilty plea and the guilty plea is not even being challenged.

The fact that the attorney may have recommended to Mr. Piper that he plead guilty and the events actually following that advise, we're not challenging and we never have.

So at this point, if Mr. Duffy knows something that was damaging about Mr. Piper or that might hurt him or make it look bad, this is still covered by work product, it's still covered by attorney-client privilege and it is not material to assist the state in showing whether there was a waiver.

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the only issue in the case is waiver, not the guilty plea and so if there's some sort of negative information about Mr. Piper, this should not be disclosed; I don't know if it was or not, but it has no relevance to this case.

It does not assist the state or the court in resolving the real issue which is waiver.

COURT: I think what's significant and I'll sure take comments, but I think what's significant to me is that the guilty plea and the alleged waiver of a sentencing jury happened really at the same time and I don't think that you can separate out one from the other; these events came along together, as I understand the evidence that I've heard so far

that these decisions were made jointly and so I don't know how you can separate out the guilty plea from the waiver issue.

MR. BINGER: But at the same time, your Honor, this witness does not need to tell us any specifics on what their own investigation of Mr. Piper disclosed.

If they told him, for example, and I think Mr. Rensch said this yesterday, all the facts looked bad, you're going to lose, you can't win the trial so you might as well plead guilty, we can leave it at that, you know.

At this point this witness is very likely, is very possibly going to divulge information that was previously

unknown to the state or anybody else and it should remain that way because it's enough for him to just say, we thought the facts looked bad and that our client plead guilty.

There is absolutely no need for him to get into specific details about what he found out when he went to Alaska or when he went and interviewed witnesses A, B, C and D, there is no reason for that.

If he just testifies that we told our client the facts looked bad, go ahead and plead guilty because this is of great concern to us because if this habeas corpus action is successful, then our client will eventually be coming back for a resentencing and now everything that his attorneys know or knew will be known to the state and what's the reason for that? There is no reason.

It is far more prejudicial than it is probative and it's enough for him to just say, just like Mr. Rensch did, the facts looked bad, the best thing for you to do is plead guilty.

Do we need to go any further than that?

Why does he need to disclose all his work product?

COURT: Mr. Fitzgerald.

MR. FITZGERALD: Just trying to establish on the record why things happened as they did in this case.

His co-counsel has been accused of ineffective assistance of counsel and I'm trying to dispute that by showing that

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there was a careful, thorough analysis of the facts and the circumstances of this case and that their client made his decision with full knowledge of his choices and then the consequences that were going to take place.

COURT: I think what's relevant here is the discussion that Mr. Duffy may have had with Mr. Piper leading up to the decision to plead guilty and jointly waive the sentencing jury, so perhaps the best way to approach this is rather than discuss Mr. Duffy's signature events, to discuss those things that he discussed with his client and if we go into some of those areas, so be it, but what's important here is those discussions that lead up to that ultimate decision, so to that extent, the objection raised by petitioner is overruled.

1 will continue to entertain any objections that you
1 make.

1 MR. DUFFY: Judge, just so I'm clear, are you telling me
1 that I do have to testify as to these matters; the questions
1 put to me, do I have to testify to these matters?

2 COURT: Yes, subject to the objections that may be raised
2 by petitioner's counsel that I will be ruling on.

2 MR. DUFFY: All right.

2 COURT: I understand Mr. Binger's argument and I
2 appreciate the argument that there are things that I'm sure
2 that you and Mr. Rensch discovered in your investigation

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that, first of all, would probably be under the continuing attorney-client privilege and second of all, would not be relevant to the decision that was made by Mr. Piper to plead guilty and waive jury trial, so the focus of the court and the intention of the court to waive probably the attorney-client privilege pertains to the reasons that Mr. Piper plead guilty and allegedly waived, and I know I continue to use the term waiver because I think it's easy to use, but I'm aware that he did plead guilty and waived jury trial, jury sentencing.

1 So with that, maybe we ought to just handle it question
1 by question.

1 And Mr. Duffy, if you're not clear, when you're being
1 questioned by either Mr. Fitzgerald or Mr. Binger, if
1 you're not clear whether the privilege attaches, raise it.

1 MR. DUFFY: I'd rather not testify against my own client--
1 COURT: But I've waived any privilege for the areas that
1 we discussed.

1 MR. DUFFY: All right.

2 COURT: Mr. Fitzgerald, you may proceed.

2 Q (BY MR. FITZGERALD) Could you explain about the
2 signature events.

2 MR. BINGER: Objection, your Honor, that question is too
2 general; each question needs to be very specific because, if
2 I may, if I--

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COURT: I don't mean to cut you off, but this is my concern, Mr. Fitzgerald; I don't know whether these signature events had anything to do with Mr. Piper's decision to plead guilty and request a court sentencing. That's what I think we need to focus on.

Q (BY MR. FITZGERALD) There was a reason in your mind why you have characterized three signature events as having lead to the discussions that ultimately ended up with Mr. Piper pleading guilty and waiving a jury on the issue of punishment for murder in the first degree; is that an accurate assessment?

A Yes and no; I mean, I take issue with the characterization of pleading and waiving because it was my position then and I think a fair reading of the statute, and of course the Supreme Court overruled me, but I think it was a fair reading is that once you plead before a judge, you cannot get to a jury for sentencing, but yes.

Q We'll get to that later, Mr. Duffy; I understand that that's an issue that I think needs to be discussed, but let me see if I understand this; you went up to Alaska and gained certain information that lead you to believe that it would be prudent to have conversations with your client about ultimately, I guess, accepting responsibility for what he had been charged with--

MR. BINGER: Objection--

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Q BY MR. FITZGERALD) --is that accurate?

MR. BINGER: Objection, leading the witness.

MR. FITZGERALD: Well, your Honor, if I could be heard on that; I'm being forced to lead here because if I ask open-ended non leading questions, everything is being objected to as attorney-client and I would defer to the court on that.

COURT: I'll overrule the objection, I find that the question can be answered yes or no and I find based on our conversation, our discussion here that it's foundational.

I think Mr. Duffy can say whether or not he learned this from something that caused him to be concerned and so I'll overrule the objection.

Q BY MR. FITZGERALD) Do you remember when that event to Alaska took place, approximate time frame?

A I can remember exactly where I was sitting, I can remember what I was doing, but I can't give you the exact date.

Q Okay. Would it be more than a month prior to the change of plea on January 3, 2001?

A I don't know.

Q Okay. Let's talk about the second signature event; when did it occur?

A I don't know; it occurred before the trip to Alaska.

Q Okay. Would there be a way without going into

potentially objectionable attorney-client privilege matters to give us a way so we could characterize what that event was a way to give a short--

A Yes.

Q Yes, there's a way to do that?

A Yes.

Q Please give us that way.

A It was my discussion with Mr. Rensch about potential possibilities of psychiatric testimony in this case.

Q What was before Alaska, then?

A I'm pretty sure it was, John.

Q Okay. And the third one, the same way; could you give us a way of understanding without going into detail what type of event it was that, in your mind, that lead you to the conclusion?

A Yes, I had more or less dispatched Mr. Rensch up here to Deadwood; I was working on something else and it was a specific area that I wanted him to discuss with Mr. Piper.

I have a vivid memory of it and I have a vivid memory of the conversation that I had with Mr. Piper after my discussions with Mr. Rensch concerning what Mr. Piper told him when he came up here to speak to him.

Q Is there any way you can elaborate on that?

MR. BINGER: Objection, your Honor, once again, I don't--

COURT: I don't want to get into the facts of the

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discussion; I understand the objection over here and maybe I'll change my mind as we go along, and I'm trying to keep it relevant to the issues and I don't want to completely open it up--

MR. FITZGERALD: I'll withdraw the question and move on to another area.

JUDGE: Thank you.

Q (BY MR. FITZGERALD) So Mr. Duffy, when--In terms of months, how many months prior to January 3, 2001 did the first event occur, as best you can recall?

A I don't know.

Q Would it have been more than a month?

A I think so, yes.

Q After these three events were there discussions after each event about the potential of pleading guilty and having a judge determine competence or was it after all three events had occurred that ultimately there were discussions?

A Both.

Q Now, these discussions that I'm talking about, we'll say pleading guilty and having a judge determine sentence on the murder charge, were those conducted by yourself alone with Mr. Piper or were they with Mr. Rensch or both?

A Both.

Q Okay.

A In particular, I mean, in particular that the discussions

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that I had with Mr. Piper and Mr. Rensch was present as well, was after the third event that I described to you; the conversation that Mr. Rensch had with Mr. Piper, Mr. Rensch spoke to me of what Mr. Piper's response was and then after a very short period of time, we then began meeting with Mr. Piper.

Q Okay.

A And I'm almost certain that both Mr. Rensch and I were present at that discussion and that is--

1 MR. BINGER: Well, objection, he's answered the question
1 at this point.

1 The question was if he talked to him alone or did he talk
1 with Mr. Rensch and the answer already was, both, and at
1 this point he's answered and then there's more narrative.

1 COURT: You may ask your next question.

1 Q (BY MR. FITZGERALD) How many times did you talk to him
1 about it alone, how many times did you talk to him with Mr.
1 Rensch, as best you recall?

1 A I think every time I talked to Mr. Piper about pleading,
2 the impact of pleading, the options that he had, how the
2 system would work, I was with Mr. Rensch.

2 Q Okay. Now, prior to these discussions about a change of
2 plea and a judge deciding sentencing, had you talked with
2 him about the right to trial by jury?

2 A Yes, but I can't tell you when.

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Q Okay. What did you tell him about a jury's unanimous verdict in a death sentence?

A You mean the punishment phase?

Q Right, at the punishment phase.

A Well, what or when?

Q What.

MR. BINGER: I specifically object because we don't have sufficient foundation as to when the conversation did take place so objection, lack of foundation regarding the conversation.

MR. FITZGERALD: Maybe I can lay a little foundation.

COURT: Certainly; go ahead.

Q (BY MR. FITZGERALD) Mr. Duffy, were there discussions held between yourself and Mr. Rensch and Mr. Piper about the aspect of, I think it's called unanimity, meaning, what happened in the death penalty stage of sentencing if a jury were not to be able to come back with a unanimous recommendation of the death sentence?

A Yes.

Q Okay. How many times was that discussed, that issue, approximately?

A I don't know.

Q Over what period of time were these discussions?

A The first vivid memory I have was going through the issue of jury unanimity with Mr. Piper was after Mr. Rensch had

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reported to me the concerns that I described to you.

And the subject matter of that conversation was that I needed to get up here and talk to him about it and so then I don't know how many other times, but then for certain, I vividly remember and then of course on the date of the pleas.

Q What did you tell him?

A Told him in order to sentence him to death it required unanimity on the part of the jury.

Q Just so we're clear, what do you mean by unanimity?

A That every juror had to vote for the death penalty.

Q And did you tell him that if one was against it, what would happen?

A Yes.

Q What did you say?

A Told him if one was against it, told him that death would not be imposed.

Q And what would be the consequence?

A Life without parole.

Q When those words were spoken to Mr. Piper, did you question whether he understood what you were saying?

A No, he understood what I was saying.

Q Why can you be so sure?

A Because I had some very vivid conversations with him beginning, I'll say, maybe two months ahead of time, I

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believe, and so I would say within a month prior to his decision to plead, I had gone over with him in detail and had explained to him several times over so I was confident he understood what I was telling him.

Q Did he seem intelligent enough to perceive or understand what you were telling him?

MR. BINGER: Objection, it calls for a conclusion that the defendant was intelligent or what the defendant--I guess I would object to the form of the question, it calls for a conclusion by the witness as to someone's ability to understand.

COURT: Overruled, I think that the foundation has been laid that Mr. Duffy spent numerous hours with Mr. Piper leading up to the type of general conclusion and I think that's really all he's asking.

Overruled; go ahead.

Q (BY MR. FITZGERALD) Your answer was?

A Highly intelligent.

Q And that's said after you had spent numerous hours with him, right?

A Right.

Q And in your 20 years that you've practiced you've probably run the gambit of clients that were highly intelligent to ones who were less intelligent?

A All the way from genius to retarded people.

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A Right.

Q Can you describe for us the conversations that took place between you and Mr. Rensch and Mr. Piper concerning his decision to plead guilty to murder and the other charges and have the judge impose sentence.

MR. BINGER: Again, your Honor, I'll object as to it does not cover specific facts.

He thought the evidence was overwhelming, that's enough and we don't need to get into the specifics.

COURT: I would ask you to generalize when you answer that question.

A Could I hear the question again?

Q (BY MR. FITZGERALD) Could I have Mr. Ryken read it back for him.

COURT: Sure.

(Whereupon court reporter read back last question)

A That's going to be very difficult; I don't know how to describe the conversation, generally. I just don't want to run afoul of any of the rulings; I don't know how to describe the conversations in general here.

Q (BY MR. FITZGERALD) Well, I'll ask you to describe specifically.

MR. BINGER: Your Honor--

COURT: You know, what's difficult and I'm not being critical, but I don't know, it's hard for me to, you know,

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case of torture in the history of murder in South Dakota?

MR. BINGER: Objection, your Honor, we don't need the opinion; that's his conclusion; not relevant.

COURT: Sustained.

Q (BY MR. FITZGERALD) Did you discuss with him the strength of the evidence?

A Yes.

Q What did you tell him about the strength of the evidence?

MR. BINGER: Objection, we don't need to get into the specifics; we already know what he was told, he plead guilty, the evidence was strong and that's not even disputed by Mr. Miller and myself.

We never took that position, your Honor.

COURT: I think Mr. Duffy can testify as to how he characterized, generally, whether the evidence was overwhelming, words of that nature.

A The evidence?

COURT: Correct.

A I thought the evidence was overwhelming.

In my conversations with him, I told him that I thought between the attitude that he had expressed to me and Mr. Rensch about this killing, combined with the evidence as such, that he needed the judge on this.

Q What had he said?

MR. BINGER: Objection, your Honor, we don't need to go

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this far.

COURT: Sustained.

Q (BY MR. FITZGERALD) Mr. Duffy, did you discuss with him the fact that there was at least evidence gathered by law enforcement to suggest that he had found humor or found laughter in the suffering of Mr. Poage?

A Yes, I did, at some length.

Q Was that a concern to you?

A Yes, it was.

1 Q What was your concern?

1 MR. BINGER: Objection, not relevant, cumulative and
1 it's going further than the evidence needs to go.

1 COURT: I'm not sure--Well, why don't you rephrase your
1 question and be more specific.

1 Q (BY MR. FITZGERALD) Okay. Was the aspect of Mr. Piper's
1 laughing or taking pleasure in the suffering of Mr. Poage a
1 large concern to you as his lawyer?

1 MR. BINGER: Objection, he's already answered that
1 question.

2 COURT: Overruled, you may answer.

2 A As to what?

2 Q (BY MR. FITZGERALD) Was there a concern about that
2 evidence coming before a group of lay people selected from
2 the community?

2 A Yes.

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Q What was that concern that you had?

MR. BINGER: Objection, concern is enough; we don't need to get into the details.

COURT: I don't think the question calls for details; overruled.

A That was a concern.

Q (BY MR. FITZGERALD) What was the concern?

A My concern was that a jury of 12 people who had not seen the kind of photographs, until you have a murder case or a case of incredible violence, the first time you see pictures and the first time you hear a story of the violence of this magnitude, it is numbing and my concern was that I had on one hand a trained jurist--Before, and by the way, I wanted to make a point and I want to do it here, great respect for Judge Johnson. He was the Supreme Court's go-to-judge among circuit court judges in death penalty cases until this case, so he was trained.

He was also no stranger to violent crimes.

My concern was that the effect of the violence of this killing would not be well received by a jury.

Q In your assessment, was it better to have a judge hear that aspect of the case at that time?

A Yes.

Q For those reasons that you just set forth?

A For those reasons that I just set forth and for the

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Q Okay. Mr. Duffy, do you think that in some respects it was strategic to let or put the burden on just one person, a judge, versus giving it to a jury where there was at least comfort in numbers versus just one imposing the death sentence?

A I don't know if I would characterize it that way, but was it a strategic component in my mind, yes; to have a judge make the decision to kill someone as opposed to 12 people, yes. I think it was a strategic decision.

Q You've been involved in other murder defenses, have you not?

A I have.

Q From your view was there more gruesome mental torture involved in this case than any other that you've been involved in?

A Yes.

Q You were present in court on January 3rd, 2001 when there was a change of plea made in this case?

A I was.

Q This is already an exhibit, although my copy is not marked, but I would ask you to just look at it and see if this looks like a genuine, authentic copy--

A I'll take your word for it.

COURT: And it was admitted as state's--Excuse me. respondent's exhibit B.

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1 STATE OF SOUTH DAKOTA)
2 COUNTY OF LAWRENCE)
3)
IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

4 BRILEY PIPER,)
5 Petitioner,)
6 VS.)
7 DARRIN YOUNG,)
8 Respondent.)
9)
Hearing on Writ of
Habeas Corpus
CIV. 14-98

10

11 BEFORE: THE HONORABLE RANDALL L. MACY
12 Circuit Court Judge
13 Deadwood, South Dakota
July 21, 2016, at 9:00 a.m.

14

15

APPEARANCES:

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25

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16	DIRECT EXAMINATION BY MR. KINNEY
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1 get?

2 A Both sides by statute get 20 strikes. The judge gave us
3 each one additional. We had requested additional
4 preemptory strikes because of the publicity and the
5 nature of the case.

6 Q And, again, just how many jurors does it take in a
7 verdict to spare the death penalty?

8 A One. If it's a nonunanimous verdict, then life is
9 automatic.

10 Q So really what you're looking for is just one juror to
11 not impose the death penalty to have the success of your
12 appointment?

13 A It's kind of an adage in that business of the death
14 penalty defense business that you select a juror, if you
15 can.

16 Q So strikes really matter in this case?

17 A Yes, they do. They're the essence of the case. The
18 case in many respects is over by the time you pick the
19 jury.

20 Q So if you believe that there are constitutional
21 violations here, or if one were to argue, what sections
22 of the United States Constitution parallel --

23 A Well, obviously if -- if the judge were to determine
24 that I erred then that would be a denial of the Sixth
25 Amendment Right to Counsel, and of course the judge's

1 give this Court a little history as to who this witness
2 was?

3 A Yes. He was in jail at the same time or part of the
4 time that Briley, Elijah Page, and Darrell Hoadley were
5 in the Lawrence County Jail. Mr. Curtis had, what I
6 considered, a fairly involved relationship with one or
7 another of these co-defendants. He was at the same time
8 taking some money from Briley, eventually, when he was
9 released and simultaneously providing information to the
10 State, jailers about alleged plans to escape, as well as
11 Curtis's recitation of what he claimed various people
12 had said, the defendants, in particular Briley.

13 Q Was there questions -- was Mr. Curtis asked questions
14 about the murders truths and facts?

15 A Yes.

16 Q And did he testify to those in detail?

17 A Yeah, some detail. He had testified at the sentencing
18 hearing, as I recall, and then he reiterated various
19 things. Some things were limine'd out, such as talk
20 about bisexuality. But there was a recitation of facts.
21 He claimed that Briley was a pretty noisy, big-mouth
22 cellmate or cellie, jail inmate, and that Briley made a
23 number of admissions in his presence.

24 Q Did he also testify as to the 2- or 3-part planning of
25 how to escape?

1 a half; correct?

2 A Yes.

3 Q So the disclosure that you got may have been dated due
4 to Mr. Curtis's new criminal activity?

5 A Yeah. I could have easily thought about a career
6 criminal like him having a continuous, fluid criminal
7 existence.

8 Q Had you ever requested from Mr. Fitzgerald an updated
9 rap sheet of Tom Curtis right before?

10 A I don't recall that I did.

11 Q When did you find out that there was -- did you find out
12 that there was more criminal history that Mr. Curtis had
13 amassed that wasn't disclosed to you?

14 A Okay. I already mentioned what he said, I believe, were
15 8 cocaine-related false convictions that a jury had just
16 imposed on him recently, just before his testimony
17 sometime. After the case was done, I had my legal
18 assistant check his record, and I found out that I think
19 it was concurrent with the 8 cocaine distribution case
20 -- charges that he was convicted on, there were several
21 rape charges he was also convicted of. Curtis only
22 admitted the cocaine convictions in front of the jury
23 when I questioned him.

24 Q He also admitted his misdemeanors in --

25 A Yes.

1 Q -- Lawrence County; correct?

2 A Well, at least the -- simple assault I recall because
3 that was the charge -- there was an aggravated assault
4 charge pending, as I recall, at the time that he claimed
5 to have heard Briley say things in the Lawrence County
6 Jail.

7 Q Was there a request for any sort of plea deal or
8 arrangement or any sort of consideration Mr. Curtis
9 would receive in exchange for testifying against Mr.
10 Piper?

11 A I asked Mr. Curtis on the stand. I did not -- I can say
12 now I failed to ask Mr. Fitzgerald for an updated rap
13 sheet given the guy comes into the courtroom, to my
14 surprise, in a jail outfit, and I think he was manacle.
15 He was pending sentencing we learned. I failed to ask
16 for an updated rap sheet or whether or not there was any
17 consideration even being discussed by Mr. Fitzgerald and
18 the Utah attorney or the Utah prosecutor.

19 Q Despite Mr. Curtis's felony history and his testimony,
20 do you have any information or reason to believe that
21 there was some consideration given to him for testifying
22 at trial, or do you think he was --

23 A I think that's inferential from the circumstances, but I
24 don't know that there was any consideration. It could
25 have been a consideration from the Utah prosecutor. Go

1 to another state and testify and we'll give you a break
2 if we get a good report notwithstanding anything Mr.
3 Fitzgerald did or didn't say, but I don't know whether
4 there was an agreement.

5 Q Was there -- did you ever ask Mr. Fitzgerald during the
6 trial or at any time: Did anything change, there's a
7 new agreement in place, anything like that?

8 A I didn't do that.

9 Q Okay. Did it occur to you that, okay, now we see this
10 guy in chains, that there's probably even more of a
11 reason for him to receive consideration for testifying?

12 A Certainly. And his history indicated that that's how he
13 operated.

14 Q Did you find it -- understand these are facts that don't
15 leave someone's head no matter what role you play in
16 this, but did you feel that Mr. Curtis needed to be
17 impeached on the amount of detail that he gave about Mr.
18 Piper's apparent confessions and storytelling in the
19 jail?

20 A Mr. Curtis was a fairly compelling witness despite his
21 history. Anything that was legitimately available,
22 which of course convictions are, is useful and, in fact,
23 my duty to find. I learned of the rape convictions
24 several weeks after the trial. I think that the rape
25 convictions, had they been disclosed and used for

1 We were fairly close to trial. I'd say March,
2 maybe, and we went to trial in July. And we had a
3 number of witnesses who were listed from the
4 penitentiary. We didn't have addresses. We had to get
5 addresses or contact information. The information that
6 we eventually got, I believe through Mr. Fitzgerald's
7 office, was penitentiary. And then we ran into
8 additional obstacles as far as talking with or
9 contacting those people.

10 So the Court knows, many of these witnesses
11 testified as to their opinions and observations, at
12 least to a limited degree, of Briley as an incarcerated
13 person. Whether he was manipulative and that type of
14 thing a lot of times. We tried to reach them. There's
15 a -- this is a bureaucracy you're dealing with, but it
16 is the State and the State, of course, is prosecuting
17 the case, and we couldn't get through to many of the
18 witnesses initially.

19 Then we had to go through corrections department
20 attorney named Loen I think his name was. The last name
21 started with an L, and he wasn't particularly helpful.
22 He gave us e-mail addresses eventually to try and
23 contact these people. We went -- we e-mailed of course,
24 and we called and left messages. A few of them
25 responded. Some of them didn't. I don't remember what

1 the response rate was. I know Mr. Stonefield talked to
2 some of them, my legal assistant talked to several of
3 them, I talked to several of them.

4 When we got to trial, after several of them had
5 been -- and I can't even tell you who they are right now
6 -- several had been quite laudatory of Briley on the
7 telephone. They changed the pitch anyway, the tone of
8 presentation of information at trial.

9 Q In consulting the transcript during your pretrial
10 argument -- you don't have this in front of you -- you
11 argued that it was hard to get ahold of these people and
12 that you were, quote, "chasing people down a rabbit
13 hole."

14 A Yes, we were, because we went from, okay. We've got a
15 list of names and where they're employed to try and
16 contact them through the switchboard of the
17 penitentiary. Then being told we had to go through Mr.
18 Loen, or whatever the attorney's name was, then to be
19 limited to -- being limited to e-mail addresses.

20 I argued to the judge a case that I had won on and
21 it ended up being appealed. It's a Grooms case out of
22 the State Supreme Court. We had a right to know these
23 folks' home addresses so that we could investigate them
24 in their communities of residence, and I believe that
25 continues to be part of the laws as far as investigating

2 It was frustrating. I didn't go to Sioux Falls and
3 try to run them down. I didn't have an investigator do
4 that or anybody else on my team. This was a fairly
5 massive undertaking at that point in this case, and we
6 were trying to do a number of things simultaneously.
7 Should I have done that? Probably. I didn't have any
8 other choice. Would they have talked to me? That's a
9 different question. And that's with regard to the
10 penitentiary witnesses. I could talk about Dr. Pesce,
11 if you wish. Dr. Pesce was somebody who was added
12 fairly late.

13 Q Psychiatrist; correct?

14 A Yes. And I know -- I, several times, objected based on
15 notice, and simply, you know, ability to actually
16 confront Dr. Pesce. I think we were into jury selection
17 before we may have even got his CV. I didn't know a
18 thing about him and really didn't have an idea of what
19 he was gonna say. I didn't, but I suppose I could have
20 asked for a deposition mid-trial.

21 Q Okay. And obviously a lot of your testimony today talks
22 about looking back and wishing, you know, we could do
23 things better, which is what we do as lawyers when we
24 don't win a case, but I want to point something out
25 about this subject. You made an argument to Judge

1 Eckrich about this issue, and after you made the comment
2 about chasing people down a rabbit hole, I think you
3 state -- you've been doing that for the last two weeks,
4 and I'm going to read the quote. "You cannot say I'm
5 effectively representing this man under these
6 circumstances with regard to these witnesses."

7 A Yes.

8 Q So you recall stating that?

9 A Yes, I do.

10 Q And that -- is it true that -- your state of mind is
11 that this is important and we're not getting a chance to
12 be prepared for these people, and it troubled you?

13 A Yes, it did. We weren't adequately prepared to confront
14 those people. *W.W.*

15 Q And then no action then effectively precludes the
16 State's testimony at trial because the trial was just
17 the next day or the -- you know, right around the
18 corner; correct?

19 A I understand, yes.

20 Q But, yet, you did brief it. It's not that you didn't do
21 anything. It's just that you were troubled, and is it
22 clear -- am I right in understanding that your testimony
23 is that perhaps we should have went to Sioux Falls,
24 hunted these people down, did something of that nature?

25 A I can tell you from my experience -- well, first of all,

1 himself.

2 Q Another judge was assigned to the case?

3 A Yes.

4 Q And then you had the better part of the two years to
5 prepare for the trial?

6 A Yeah, probably a year and eight months.

7 Q Okay. About a year and eight months?

8 A Eight or ten.

9 Q When did you start getting the discovery matters in this
10 case?

11 A Oh, we had a lot of information from the start. I
12 didn't feel like you were hiding discovery at all.

13 Q Well, that wasn't the question, but when did you start
14 getting it?

15 A I don't remember. Fairly early because you did
16 inventory so, again, that's -- you filed the inventories
17 with the discovery notices, as I recall. So what was
18 discovered -- I think we started getting them, John,
19 within two to three months, maybe even earlier, of
20 appointment, and you and I had met and we discussed a
21 lot of those things.

22 Q And if I -- would it be true that you got the discovery
23 from all three of the co-defendants' cases?

24 A I believe so. I don't know what the extent of it was.
25 We didn't compare it that way, but we had a lot of

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1 overlapping information from different cases.

2 Q Okay. And you're saying you didn't get Thomas Curtis's
3 criminal history?

4 A No, no. I'm saying I got his criminal history.

5 Q When did you get it?

6 A Well, I don't remember. You had --

7 Q Could you have gotten it --

8 THE COURT: Well, hold it, Mr. Fitzgerald. Just slow
9 down a little bit. Let him finish.

10 A I know we had his rap sheet; usually what we call a
11 Triple I. I didn't have knowledge of the immediate Utah
12 issue. That's the only thing I was talking about that
13 we didn't have.

14 Q (BY MR. FITZGERALD, continuing) When was the rap sheet
15 run and given to you?

16 A I don't remember.

17 Q Wouldn't it be dated?

18 A Oh, sure. Yeah.

19 Q And it would be in your file?

20 A Yes.

21 Q So you would know exactly when you got it?

22 A If I had the file and the document in front of me. I'm
23 not saying you didn't provide his rap sheet. Not at
24 all.

25 Q And you're aware that when he testified, he testified

1 specifically about every transcript that he had had
2 access to and had knowledge of?

3 A Yeah. Whatever he stated was what he stated.

4 Q Do you have any evidence that there were any other
5 statements besides the one that he said he had reviewed
6 before he testified?

7 A No, I don't.

8 Q Was -- so anything that he had said -- jeez, this would
9 have been 10 years before -- was documented in those
10 interviews?

11 A Right.

12 Q Okay. And did you have -- you're not saying it's
13 because of your heart. You weren't able to point out
14 any inconsistencies in what he said before versus what
15 he said in 2011, are you?

16 A No. No, I'm not saying that at all.

17 Q Okay. Now, talk a little bit about the motion to
18 withdraw the guilty plea. What formed the basis of the
19 reason behind that motion when the case was sent back or
20 remanded for resentencing?

21 A Mr. Stonefield and I felt -- or thought that that had
22 hadn't been adequately addressed at any point along the
23 way, and it obviously hadn't been appealed. And we
24 analyzed the case and decided that that was a topic that
25 was colorable and that we wanted to litigate. And my

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1 A No. It's because I was tired, John.

2 Q All right. So you said that then after the trial you
3 learned that Thomas Curtis was convicted in addition to
4 what he disclosed about distribution of cocaine --

5 A That's what he disclosed.

6 Q -- of rape?

7 A He disclosed the cocaine convictions during his
8 testimony, as I recall. And I understand since then --
9 since the trial, we learned that he'd been convicted of
10 several counts of rape at the same trial.

11 Q And you're saying that because you were tired, that was
12 something that you didn't explore?

13 A No. I'm saying -- I'm saying I should have asked you at
14 that point, "What else is there?" I did not do that,
15 and you didn't tell me whether there was --

16 Q Wouldn't the rap sheet have shown what the State had?

17 A The rap sheet did not show the Utah convictions, all
18 right? He came into that courtroom, he had a jail
19 uniform as I recall, and I believe he was shackled at
20 least around his feet. And we asked at that point, as I
21 recall again, on cross or maybe you asked on direct,
22 "Why are you in jail clothes?" And he said what he said
23 about his cocaine convictions. He didn't say anything
24 about the rape convictions.

25 Q Okay. And you're saying that there was some sort of

1 undisclosed deal made with Mr. Curtis?

2 A I don't know.

3 Q What evidence do you have that there is, or is that just
4 speculation?

5 A He said that he thought he'd probably get something out
6 of it eventually.

7 Q From whom?

8 A I don't know.

9 Q Okay. There was a plea agreement made in his case in
10 South Dakota.

11 A Yeah. There was here, yeah. And we went through that.

12 Q And that had been 10 years before?

13 A Yes, and you disclosed that fully.

14 Q And so now you think that there was some other deal --
15 well, did you follow it up after?

16 A What I followed up was the convictions, and I talked to
17 Mr. Miller about the possibility of a remand to get this
18 straight.

19 Q Yeah. And what did you find out then about what
20 considerations he got in Utah?

21 A I didn't. I only found out about the additional
22 convictions. I handed it off to Mr. Miller at that
23 point with specific disclosures.

24 Q Did you have a jury consultant in this case?

25 A You know, it seems like we had, like I said, Jody

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1 psychiatry?

2 A Yes.

3 Q And you then encouraged your client to meet with the
4 neuropsychiatrist?

5 A Yes.

6 Q Was it Dr. Wortzel? Is that how it was pronounced?

7 A I misspelled it. Wortzel.

8 Q He was from Colorado?

9 A Denver, I believe.

10 Q He had some credentials from --

11 A He had wonderful credentials. And by the way, I think
12 you did a great job of cross-examining him.

13 Q Well, thank you. Mr. Van Norman, you then allowed your
14 client to talk with the psychiatrist --

15 A We did.

16 Q -- did you not?

17 A Yes.

18 Q And your client told the psychiatrist, who then repeated
19 in court, that your client had admitted to stabbing the
20 deceased; is that right?

21 A As I recall, yes.

22 Q And then the psychiatrist also said that your client had
23 admitted his involvement in all of the crimes; is that
24 right?

25 A Yes.

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1 Q And then the psychiatrist was allowed to testify about
2 the fact that your client was laughing when the deceased
3 was being struck in the head with a knife; is that true?

4 A That part I don't remember specifically. I remember
5 talk about laughter during this whole scenario. I don't
6 remember specifically.

7 Q Okay. Would you agree, in a general sense, sir, that
8 your own witness gave testimony that was indicative of
9 the existence of aggravating circumstances?

10 MR. KINNEY: I'll make my objection again. Beyond the
11 scope of direct.

12 THE COURT: Overruled.

13 A You're talking about this Wortzel?

14 Q (BY MR. FITZGERALD, continuing) Yeah, Wortzel, yeah.
15 He said that this man, Chester Allan Poage, was killed
16 for money, according to your own client.

17 A Yes.

18 Q Your client said that he had killed him for money and
19 that they tortured him.

20 A Right.

21 Q And that they had killed him, obviously, I think he
22 said, to eliminate a witness.

23 A Yes.

24 Q So you had a psychiatrist testify about conversations
25 that you allowed to take place with your client where

1 all of the aggravating circumstances were basically
2 admitted by your own witness; is that true?

3 A Yes. And you may be pointing out a failure by me.

4 THE COURT: I'm sorry. What?

5 THE WITNESS: He may be pointing out a failure by me if
6 that's how that could have been twisted, because I
7 didn't think about that.

8 Q (BY MR. FITZGERALD, continuing) Am I twisting it, Mr.
9 Van Norman?

10 A No, how that could be presented, John. I'm not saying
11 you're twisting it. I can use words without impugning
12 you. That isn't what I was doing. You're pointing out
13 something that hadn't occurred to me that could well
14 have been a failure by Mr. Stonefield and me. I had
15 never thought of that.

16 Q Who presented that witness? Was it you --

17 A I believe I did.

18 Q -- or Mr. Stonefield?

19 A I believe I did. Or Mr. Stonefield might have. I don't
20 remember.

21 Q So explain the purpose in presenting a witness that told
22 the jury that your client admitted to the aggravating
23 circumstances. Was that strategy?

24 A Of course.

25 Q Okay. What was the strategy?

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1 A Strategy is we present someone who talks about --
2 knowledgeably, hopefully, about the case, who also has
3 advanced learning. And one of the bigger issues was the
4 prefrontal development and the discussion of young men
5 in particular and their impulse control problems and
6 that sort of thing. That was the main issue as we were
7 concerned.

8 The facts of this case weren't particularly
9 contested as to what happened. He already pled guilty,
10 and the factual statements at the time of the guilty
11 plea persisted, and you presented them. And, yes,
12 you're absolutely correct. We presented a witness who
13 provided, from my client, the aggravating circumstances
14 evidence.

15 Q Okay. When you talked to Mr. Hoadley, did he describe
16 an event in Eugene, Oregon, in which he and Briley Piper
17 had taken a frying pan to try to beat a man to death?

18 A Yes.

19 Q Do you know the man's name?

20 A Someone that befriended them. I can't remember his
21 name.

22 Q And that was consistent with what Hoadley told Dr.
23 Gummow that your client had, for a period of time,
24 discussed wanting to kill somebody for the thrill.

25 A I think that's right. I'm not thinking you're

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1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
2 COUNTY OF LAWRENCE) FOURTH JUDICIAL CIRCUIT
3
4 _____)
5 BRILEY PIPER,)
6 Petitioner,)
7 VS.)
8 DARRIN YOUNG,)
9 Respondent.)
10
11 BEFORE: THE HONORABLE RANDALL L. MACY
12 Circuit Court Judge
13 Deadwood, South Dakota
14 July 21, 2016, at 9:00 a.m.
15
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1 effect the outcome of a trial? Not this particular one.
2 In general.

3 A Well, there -- Mr. Fitzgerald's argument here -- the
4 theme of this case was -- a main theme was that Briley
5 Piper was a leader and a manipulator from the time of
6 the crime all the way up to 2011 when this occurred.
7 And, you know, I also read the closing arguments, and he
8 referenced this incident with Sister Crowley in his
9 closing arguments, further evidence that he continues to
10 manipulate people.

11 And so, you know, this was -- I can remember the
12 feeling at the time that this was a blow. This was
13 damaging. We have this witness here that we thought was
14 going to present Briley in a positive way, and it ended
15 up -- maybe the final image or thought left with people
16 was negative. So was it damaging in my opinion? Yes.

17 Q Would the use of an objection to the admission of the
18 exhibit or the representation that there was a policy in
19 place may have mitigated all that impeachment?

20 A Yes. I -- you know, when I reread this and looking at
21 it again now, I handled this really badly. I didn't
22 know what policy he was asking her about, but she
23 appeared to -- through her answer, I don't know if she
24 really did or not, but I -- you know, as with different
25 things when you review work, you see things that could

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1 been denied. There was more -- there was more record
2 made on that, but ultimately, it was denied.

3 Q What was the basis of the Trial Court's denial of your
4 motion?

5 A Well, again, you know, the records, if there was a
6 written opinion, would speak for itself. What the judge
7 said at the time of the trial would speak for itself.
8 As I remember, generally it was the -- these were
9 arguments of an attorney and that you could not hold him
10 to the kind of clarity, if you will, that we were trying
11 to hold him to.

12 Q Are you aware of any civil case law that prevents
13 lawyers from taking different positions after
14 representations --

15 A Well, I think, Matt, that most -- I think that a good
16 part of the authority here on this issue was civil.
17 Although I think that -- if I remember right, I think I
18 did most of the research on this. I think that there
19 was some criminal authority, but I think a lot of it was
20 civil. And I know -- I can think of a case or two from
21 our Supreme Court where civil plaintiffs said the same
22 attorney argued conflicting sets of facts to different
23 jurors -- to different juries. And, you know, there's
24 definitely a body of case law on this issue of the
25 issuance of party opponents.

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1 issue, you know, and so you might have one or three or
2 23 particular issues in a case that you would say, "The
3 representation on this point is what was so poor that it
4 rises to this high constitutional standard."

5 I've never looked at it as an accumulative kind of
6 thing. Were there issues here that rise to that
7 standard? I'm not the one to say that. But, you know,
8 I can point to a couple of the things that you talked
9 about here today as -- and say, "You know, if I had this
10 to do over, I'd do it differently." I know that.

11 Q What would you do differently without asking you the
12 ultimate question of --

13 A The Sister Crowley issue. I would have -- I would have
14 approached it differently. The issues with the
15 different prison workers and how they came in and how we
16 hadn't talked to all of them, or we -- some of them I
17 don't know -- there may have been some we haven't talked
18 to at all. I would say that there were a number that we
19 hadn't talked to in a way that I would have wished we
20 had. Those are -- those are a couple of points right
21 there.

22 Q Mr. Stonefield, we've received permission from the Court
23 to allow Mr. Piper to ask a few questions --

24 A Sure.

25 Q -- with Mr. Van Norman.

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1 saying, "I was in a program as a volunteer at the
2 penitentiary," and the response was, "Okay." And the
3 reply from her was, "Yes, and there were restrictions."
4 And the question then was, "There were restrictions on
5 South Dakota State Penitentiary inmates writing to other
6 penitentiary inmates; is that correct?" And she said,
7 "That's right." "All right. And were you aware of
8 that?" And she responds that she was aware of that.

9 But nowhere does Mr. Fitzgerald ask Sister
10 Gabriella Crowley in her role as a volunteer, you know,
11 at the penitentiary, "Was there a difference in being a
12 volunteer in the penitentiary versus being somebody's
13 visitor later after her volunteer service had been
14 discontinued?" So by not going into that, is it fair to
15 say that he might have misrepresented the relationship
16 between herself and myself?

17 A Yeah. It might have been misrepresented.

18 Q Because clearly inmates writing to one another is a
19 violation and is not allowed, so I just want to make
20 that clear. But asking somebody to write to somebody to
21 express a willingness to -- you know, in regard -- in a
22 third-person context is not a violation because it is
23 not prisoner to prisoner communication, which is covered
24 in the volunteer rules --

25 THE COURT: Well, just a minute. Do you have a

1 A I think that's right.

2 Q Okay. And so we were given additional strikes then for
3 the extra positions?

4 A You know, I think I read that recently. I think he gave
5 us each one extra. I think we both had 21.

6 Q 21 strikes and 15 jurors to start with?

7 A Yeah. The method he did -- yeah, that would have been
8 right because I remember reading the method he did. We
9 had to pass 57 people to get -- to finish the
10 questioning.

11 Q And the judge is the person who is in charge of making
12 sure that a jury gets selected and seated; isn't that
13 true?

14 A Sure.

15 Q So sometimes judges do get involved in asking questions
16 of jurors, potentially, so that the process can move
17 forward because ultimately, if it's a challenge, it's
18 the judge that makes the call?

19 A Sometimes they do, yeah.

20 Q And that's permissible to do that, is it not?

21 A Yes.

22 Q Okay. Are you finding some areas of critique for the
23 trial judge in this case that he got involved too often
24 in the --

25 A Well, the one particular juror that I was looking at,

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1 Q Okay. But it would be true that there were two
2 attorneys for the defendant, and so if one were to get,
3 say, tired, it could be assigned, the chore of the next
4 juror, to the other attorney. And isn't that what
5 happened in this case?

6 A We traded off, I wouldn't say every time, but we -- I
7 would say we did probably close to an equal number.

8 Q Was there a plan in place where you would do one and
9 then Mr. Van Norman would do the next, or did you assign
10 it by doing one morning and then another lawyer for the
11 afternoon?

12 A We kind of -- as I recall, we kind of just alternated
13 and, you know, sometimes you would have a person whose
14 time was very short. They might only be there for 90
15 seconds, and then the same attorney might have handled
16 the next one. Or once in a while there would be someone
17 that one or the other one of us would know, and we might
18 want to talk to that person particularly, but for the
19 most part it was just shared.

20 Q Okay. And Judge Eckrich took this chore of getting a
21 jury very serious, did he not?

22 A I believe that he did, yes.

23 Q And, in fact, he kept a pretty close eye on the jury
24 during the trial, did he not?

25 A I believe he did, yes.

1 A Yep.

2 Q And then the Supreme Court reversed that portion of the
3 case dealing with sentencing and sent it back; is that
4 true?

5 A Yes, that's right.

6 Q And, in fact, you and he have been intertwined in this
7 case for some time; is that correct?

8 A Yes.

9 Q Because you were an expert witness called by Mr. Miller
10 and Mr. Binger in the original habeas proceedings.

11 A In the habeas evidentiary trial, yes, I was.

12 Q That was the one conducted in front of Judge Bastian?

13 A Yes.

14 Q So it would seem that you were familiar with his skills
15 as an appellant lawyer, Mr. Miller?

16 A Yes. His skills as an appellant lawyer many times over
17 the years have been very, very good. Very high.

18 Q Because didn't he at one point -- this is going back to
19 the '80s. He wrote the South Dakota State's Attorney's
20 Manual of Procedures, did he not?

21 A He wrote a long procedural manual book that when I began
22 practicing in the '80s was still updated and still being
23 used by many people.

24 Q Okay. So he has a known skill in this area?

25 A Definitely.

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1 exceptions, say, to the hearsay rule?

2 A Yeah, what you said is fair.

3 Q I mean, you can't introduce -- well, in the sentencing
4 hearing in this case, Elijah Page's statements were not
5 allowed in to the triers of fact out of Pennington
6 County; correct?

7 A That's right.

8 Q So, I mean, just by the variation of the rules of
9 evidence and who the defendants are, some of the
10 evidence is going to have to be a little bit different?

11 A Sure.

12 Q And you're saying that that was another grounds that Mr.
13 Miller should have appealed, would be the arguments that
14 you presented about the State's inconsistent arguments
15 that should have been allowed?

16 A I'm saying that, in my opinion, it was -- it was an
17 issue that had been preserved and it was a colorable
18 issue, and I -- and again, you know, I can just give you
19 my opinion. If I had been doing the appeal, I would
20 have raised it. I thought it was strong enough to raise
21 it in the way that I did to the Trial Court, and so had
22 I been the appellant attorney, I would have raised it,
23 yes.

24 Q Okay. And you talked to Darrell Hoadley in the
25 penitentiary?

1 the Supreme Court.

2 Q Did the -- okay. So we're talking Piper II here;
3 correct?

4 A Yes.

5 Q Okay. In Piper II, was there ever a motion or was there
6 ever a legal argument raised as to the validity of his
7 guilty plea?

8 A No.

9 Q Okay. And --

10 A May I correct that?

11 Q Sure.

12 A The argument that was raised would go as well to the
13 discipline as well as to the waiver of the jury
14 sentencing. But in the habeas proceedings in front of
15 Judge Bastian, we were careful not to challenge the
16 plea. We only challenged the waiver of the jury
17 sentence.

18 Q And what was the reason behind that?

19 A It was based upon -- it was based upon a discussion that
20 I had with Briley, and it was a decision that we made.

21 Q Can you give us some details as to that discussion?

22 A I cannot do so unless I get a judicial order that the
23 attorney-client privilege has been waived.

24 Q Okay.

25 MR. KINNEY: Judge Macy?

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1 that he would have a different judge, and I told him
2 that at that time his new attorneys could accurately
3 advise him as to the pros and cons of leaving his plea
4 in place or withdrawing it. The very things I didn't
5 feel qualified to advise him of.

6 And basically -- and I also told him that he did
7 not have to release the plea challenge in the habeas
8 proceeding in order to preserve it for later because I
9 knew that there was case law that said that unless
10 required to raise an issue the first time that it's
11 available, you don't have to do so. And that he was not
12 required to because the state law gave him the
13 opportunity to in the criminal case. And the second
14 reason -- I forget where I was going with this. You'll
15 have to remind me.

16 Q When approximately in the case procedure was this
17 conversation? Was it at the beginning? Was it after
18 Piper II's decision, or was it before?

19 A It was much before. It was at the time that we were
20 filing the habeas application of Piper II, and so my
21 best guess is it would have been August of 2006.

22 Q Had you uncovered the ruling of the advisement given by
23 Judge Johnson prior to filing the habeas application, or
24 is that something you discovered after you were
25 appointed counsel?

1 A It was after I was appointed counsel, but I was
2 appointed in the springtime at about the same time I
3 believe that its --

4 THE COURT REPORTER: I didn't get that.

5 Q (BY MR. KINNEY, continuing) Could you -- the court
6 reporter advised me she did not -- there was a little
7 glitch in the Internet here. Could you repeat some of
8 that last response?

9 A Sure. I think I was appointed around March of 2006, and
10 it was -- I think it was about the time that the warrant
11 of execution was being issued. I would have discovered
12 Judge Johnson's faulty advice before I filed the first
13 habeas application and before I had this conversation
14 with Briley. And I believe that that habeas -- the
15 first habeas application was filed in August of 2006.
16 It was sometime towards the end of summer.

17 Q Do you believe Briley relied on your advice as to how
18 you just described it previously?

19 A He told me he did, and he agreed with me.

20 Q So we were gonna do the habeas, and then upon reversal,
21 he will probably have new attorneys where he could
22 proceed with his motion to withdraw a guilty plea?

23 A He would have new attorneys and he would be placed back
24 in a position where the motion was possible, and he
25 could decide at that time, based upon competent legal

1 advice, whether he wished to do it or not. Basically
2 what I told him is: You don't have to make that
3 decision now. It is premature.

4 Q So you believe that the motion to withdraw guilty plea
5 was not right at the Piper II stage; correct?

6 A What I believe is that the withdrawal of the guilty plea
7 could have been raised as a habeas decision. I have
8 never disputed that in all the briefs I've written, but
9 I believe that it was -- for practical reasons, it was
10 premature to make that decision at that time. And for
11 legal reasons, he did not have to make it at that time.

12 Q My knowledge of your habeas case may be a little more
13 limited than the time I've spent with the sentencing
14 trial and the appeal. Let me ask you this: During the
15 habeas proceeding, was it alleged that Attorneys Rensch
16 and Duffy erroneously advised Mr. Piper of the concept
17 of the judge takes the plea, the judge takes -- decides
18 the sentence? Advice that you had described earlier,
19 was that raised as an ineffective assistance of counsel
20 claim?

21 A No.

22 Q Was it not discovered that they advised him that way at
23 that time or what --

24 A Yes, it was discovered, and they raised that -- it was
25 important to Piper I, and it was in the decision on

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1 Piper I that the Supreme Court decided that the two
2 forums did not have to be identical. So at the time
3 they advised him, I believed that their advice could
4 have been considered reasonable and based on the way the
5 statutes are worded.

6 In fact, to tell you the truth, I tend to agree
7 with their advice. I think the Supreme Court had
8 twisted the statutes to reach a different result. I'm
9 not complaining to the Court for that. I'm just saying
10 that I had always thought that if you plead guilty, you
11 do not get to do the sentence over, and so I did not
12 raise that as an ineffective assistance of counsel
13 issue.

14 Q In hindsight, do you believe that should have been
15 raised or do you think the merits of -- or do you
16 believe Mr. Piper's rights were not effected by that
17 decision?

18 A Well, I think I'm gonna give you a third answer, and
19 that is: I don't think it should have been raised
20 because he certainly would have lost, and he would have
21 lost because the advice -- that advice, when it was
22 given to Briley, was not so unreasonable that he would
23 have won. I don't like to pursue issues that I know I'm
24 going to lose, and I would not have raised that for that
25 reason.

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1 the trial attorneys?

2 A We talked about it, yes. That was more Mr. Van Norman
3 than Mr. Stonefield.

4 Q And what did Mr. Van Norman believe was appealable from
5 that record?

6 A What I remember about it is the claim was that the
7 witness had reached some sort of a deal with the State,
8 I think, in return to receive lenient treatment, I
9 believe, in Utah. I may be wrong about that. And that
10 arrangements were not disclosed to the defense before
11 the witness testified, or in fact, any time the witness
12 testified. That was the gist of the complaint that I
13 received from Mr. Van Norman.

14 There may -- you know, there may have been other
15 things with regards to Mr. Curtis. He might be the
16 witness that the complaint was made that Mr. Fitzgerald
17 talked to him right before his testimony over at the
18 jail, and I just kind of shrugged at that because why
19 can't the prosecutor talk to a witness the night before
20 he testifies?

21 At any rate, that's the gist of what I remember the
22 complaint to be. But once again, the record does not
23 reflect that there was any undisclosed deal or promises
24 of leniency. And again, the record could be developed
25 by way of a habeas proceeding, and so it was a bad

1 appeal issue because the record wasn't sufficient. It
2 was a potential habeas issue, and so I left it alone.

3 Q How about denials of juror challenges? Was that
4 discussed, or did you find in reviewing the record that
5 a viable appealable issue was present?

6 A I read the entire record, and I don't specifically
7 recall that, but what I concluded was that I had no
8 issue that was even arguably close to the strength of
9 the issue that I raised, and that's why I chose to raise
10 only the issue that I did.

11 And I'm not talking about the second issue, the
12 automatic appeal one. That I threw in because I figured
13 I had to. But where I thought I had choices, I found
14 nothing that had even close to the arguable merit of the
15 one that I did raise, and that's why I decided to go
16 with that.

17 Q And I'll just go through a couple more of these issues
18 and just please advise if you either recall these issues
19 or if you made a decision about these issues, if you do
20 recall them. Availability of certain witnesses. There
21 was a State witness that was unavailable, and it was
22 allowed that his testimony be read -- or prior testimony
23 be read into the record. His name was Kenneth Tingley.
24 Again, it was kind of one of these jailhouse-snitch-type
25 deals. Do you know of that issue being discussed as an

1 appealable issue?

2 A I don't think it was ever discussed between myself or
3 Mike or Van Norman. And I don't have any recollection
4 of that issue at all.

5 Q How about an issue of whether the prior statements of
6 Briley being interviewed in Alaska by law enforcement?
7 Those were litigated in Piper I, and they -- well, not
8 during the appeal, but during that phase of the case --
9 and then there was a motion in limine issued or
10 submitted here and denied, and thus the statements came
11 in to the jury. Was that an issue that was discussed
12 for an appeal?

13 A You know, that one might have been discussed at some
14 point. But I didn't -- I don't specifically remember my
15 thought process except for the general thought process
16 that I gave you.

17 Q Okay. Was there any discussion of appealing the Court's
18 refusal to deny extra time at the pretrial stage for the
19 defense attorneys to interview State witnesses from the
20 penitentiary that they couldn't contact within
21 sufficient time of their disclosure?

22 A I don't remember that being discussed, but if it was, I
23 chose to appeal only what I appealed for the reasons I
24 told you earlier.

25 Q I appreciate that. I'm just gonna go through a couple

1 more of these here.

2 A Sure.

3 Q How about, there was a mistrial motion made by Mr. Van
4 Norman when Mr. Fitzgerald had apparently asked the
5 penitentiary unit manager that -- of what Mr. Piper's
6 privileges were, specifically television privileges, and
7 that was answered and the mistrial motion was denied.
8 Do you believe that is a viable issue and should that
9 have been litigated on appeal?

10 A I don't have any recollection of that at all.

11 Q Okay. With regard to jury selection, you know what
12 death-qualified jurors are in South Dakota; correct?

13 A Yes.

14 Q Okay. Was it ever discussed that an appeal should be
15 raised in an attempt to overturn that law?

16 A I don't recall that being discussed. I just don't have
17 any recollection of that. I would have chosen not to
18 raise it if that would have been discussed because that
19 is clearly citing the law.

20 Q With regard to an issue that Mr. Van Norman and Mr.
21 Stonefield both testified about, and that was
22 inconsistent prosecutor arguments that were made with
23 the co-defendants' sentencing trial -- or sentencing
24 hearings and wanting to advance those in the Piper
25 sentencing trial. In other words, when Mr. Fitzgerald

1 said?

2 A That's what the lawyer said.

3 Q Okay. They both said that, didn't they?

4 A That's what both lawyers told him. He testified to that
5 at the habeas.

6 Q Okay. Could you say that one more time? You cut out,
7 Mr. Miller.

8 A Certainly. Both lawyers did testify to that at the
9 hearing before Judge Bastian.

10 Q Okay. And, sir, isn't it true that both of the lawyers
11 said that this was their strategy was to plead in front
12 of the judge and specifically ask that the Court impose
13 or conduct this sentencing hearing rather than a jury
14 because they thought something about the graphic nature
15 of the testimony and the photos was gonna be very
16 difficult for a jury to deal with?

17 A I believe that that is what they testified to.

18 Q Okay.

19 A The transcript would tell the truth, but I believe
20 you're correct.

21 Q All right. What statute is it, sir, that says if you
22 plead guilty in front of a judge to a capital murder
23 charge, you have to have the judge impose the sentencing
24 versus the option for a jury after you plead guilty?

25 A You know, I don't know that I could -- I don't have the

STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
) ss	
COUNTY OF LAWRENCE)	FOURTH JUDICIAL CIRCUIT
<hr/>		
STATE OF SOUTH DAKOTA,)	CRI 00-431
Plaintiff,)	
)	
vs.)	DEFENDANT'S AMENDED MOTION
)	TO WITHDRAW GUILTY PLEA
BRILEY W. PIPER,)	
Defendant.)	

COMES NOW, the above-named Defendant, through his attorneys, Matthew J. Kinney and Kimberly R. de Hueck, and moves this Honorable Court for an Order permitting the Defendant to withdraw the five pleas of guilty that he entered in this case on January 3, 2001, for all of the reasons stated below.

Facts surrounding guilty pleas: Procedural history

Defendant was charged with five separate crimes, including several alternative counts, from his actions in the death of Chester Poage in March, 2000. The crimes included first degree murder, kidnapping, first degree robbery, first degree burglary, and grand theft. Settled Record of the court file, 140-142 (hereafter SR). Just days before his capital murder trial was scheduled to begin in January, 2001, Defendant appeared before Judge Warren G. Johnson, the trial judge in the case, with his attorneys, Timothy Rensch and Patrick Duffy, and entered guilty pleas to every one of the non-alternative crimes in the indictment. January 3, 2001, Change of plea hearing transcript, 26 (hereafter COP). That Defendant intended to enter guilty pleas clearly came as a surprise to the trial court and to the State's Attorney. COP 2-4. The State persisted with its request that Defendant receive a death sentence for his murder conviction. The parties all agreed that the trial judge would then conduct Defendant's sentencing trial and be the sentencer, rather than have a jury make the decision to impose a life imprisonment sentence or a death sentence. COP 9-10, 22-23.

The sentencing hearing was held, later in January, 2001. At the close of the hearing, the trial judge sentenced Defendant to death on the murder conviction. He further sentenced

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Defendant to life imprisonment on the kidnapping conviction, and to consecutive, maximum, sentences on the other three convictions. SR 748-751; Sentencing hearing transcript, 482-484 (hereafter SEN). So, Defendant's sentences were death, a separate life imprisonment sentence, and then 60 more years of imprisonment, all consecutive to the life sentence.

In July 2009, the South Dakota Supreme Court overturned Defendant's death sentence, on an appeal from the denial of a writ of habeas corpus in the habeas trial court.

Piper v. Weber, 2009 SD 66, 771 N.W.2d 352 [hereinafter *Piper II*]. The case was remanded to the criminal trial court to conduct a new sentencing hearing. *Id.*, at 21, 771 N.W.2d at 360. The Supreme Court's opinion did not address the validity of, or any issues surrounding, any of Defendant's underlying convictions.

On December 18, 2009, a hearing was held on Defendant's Amended Motion to Withdraw Guilty Pleas before the Honorable Jerome A. Eckrich. The motion alleged four separate grounds justifying a withdrawal of Piper's guilty pleas: (1) misadvisement of the options open to Piper, thus rendering his pleas invalid, (2) failure to advise of consecutive sentences; (3) a defective factual basis, and (4) a failure to obtain a specific waiver of Piper's *Boykin* rights. Piper filed his final submission regarding the Motion in February 2010. On November 8, 2010, the Motion was denied by Judge Eckrich as set forth by Memorandum Decision and the Court's Findings of Fact and Conclusions of Law dated November 19, 2010.

In its Memorandum Decision, this Court stated that it "will import no more than what

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the Supreme Court said [in *Piper II*.]” Mem. Dec. at 4. By citing three cases, this Court determined that its purpose of remand was for a sentencing by jury trial and not relief for determining whether a guilty plea was invalid. However, the trial court also found authority and concluded it had jurisdiction to decide whether Piper’s guilty plea could be considered as constitutionally invalid. (Conclusion of Law #1; Mem. Dec. at 5).

An intermediate appeal was sought by Piper, permission of which was denied by the South Dakota Supreme Court on December 23, 2010, with its Order “express[ing] no opinion as to the merits of the appeal.”

A sentencing jury trial was subsequently held during July 2011 and the jury returned its verdict on July 29, 2011, finding the existence of three (3) aggravating factors and sentencing Piper to death. Formal judgment and sentence was filed on August 9, 2011. Piper filed his Notice of Appeal on September 1, 2011. Piper alleged the Motion was improperly denied and that the death sentence was disproportionate to the life sentence imposed on co-defendant Darrell Hoadley. By its Opinion of January 8, 2014, the Supreme Court affirmed the sentence, holding that, among other things, the trial court’s consideration of Piper’s Motion was authorized on remand. *State v. Piper*, 2014 S.D. 2, ¶¶ 9-13, 842 N.W.2d 338 (“hereinafter *Piper III*). The *Piper III* Court held that the trial court’s consideration of Piper’s Motion was “in excess of what was permitted by [the Supreme Court’s] limited remand” authorized by the Court in *Piper II*. Despite ruling that the trial court did not have dispositional power *following remand* with regard to Piper’s Motion, the

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possibility of remanding the case to the circuit court for the explicit purpose of permitting Piper to withdraw his guilty pleas." *Piper III*, 2014 S.D. at ¶12 (citing *State v. Apple*, 2008 S.D. 120, ¶¶ 22-23, 759 N.W.2d 282, 291).

Therefore, Piper argues that his Motion to Withdraw Guilty Pleas has yet to be decided on the merits and therefore submits his Motion accordingly for the trial court's consideration now that the matter is no longer on remand from the Supreme Court.

The law regarding the withdrawal of guilty pleas

1. A defendant's guilty plea must be both knowing and voluntary to constitute a valid conviction. *Parke v. Raley*, 506 U.S. 20, 28 (1992). A valid plea must of course include a full explanation by the court of the *Boykin* rights, and the court must establish a defendant's knowledge and understanding that a guilty plea is a waiver of those rights. A valid plea also must include more than mere compliance with *Boykin*. "...[A] plea of guilty is more than an admission of conduct; it is a conviction." *Boykin v. Alabama*, 395 U.S. 238, 242 (1969). "What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence." *Id.* at 243-244 (emphasis added).

Factors regarding whether a plea is knowing, voluntary, and intelligent include whether the defendant received incorrect advice from the court, whether the defendant had a misunderstanding of the effects of the plea, and whether the defendant possessed reasonable

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expectations arising from the government, or from statements of the court. *State v. Lohnes*, 344 N.W.2d 686, 688 (S.D. 1984); *State v. Grosh*, 387 N.W.2d 503, 506 (S.D. 1986). In deciding whether a plea was knowing, voluntary, and intelligent, the totality of the circumstances regarding the plea should be examined. *State v. Goodwin*, 2004 S.D. 75 ¶ 11, 681 N.W.2d 847, 852. "The fundamental test is whether the plea of guilty was an intelligent act done with sufficient awareness of the relevant circumstances and likely consequences." *State v. Thin Elk*. 2005 S.D. 106, ¶ 15, 705 N.W.2d 613, 618 (emphasis added).

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

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

3. Many South Dakota cases have held that the trial court's discretion in considering a pre-sentencing plea-withdrawal motion should be "exercised liberally in favor of withdrawal," unless the prosecution of the defendant would be prejudiced. See e.g. *State v. Engelmann*, 541 N.W.2d 96 (1995). Absent prejudice, a defendant "need only state a tenable reason why withdrawal should be permitted, a reason based on more than a mere wish to have a trial." *Id.*, at 100. (emphasis added). "When deciding whether to allow a criminal defendant to withdraw his plea, the trial court must look at the reasons why the plea is sought to be withdrawn and if the request to withdraw is obviously frivolous, the trial

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court need not grant it." *State v. Wahle*, 521 N.W.2d 134, 137 (S.D. 1994). If a defendant enters a plea without full knowledge of the consequences, a court's discretion should favor allowing withdrawal. *Id.*

4. Reasons to allow Defendant to withdraw his guilty pleas.

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

A. based on his attorneys' advice, by entering a guilty plea to capital murder, he would thereby assure himself that he would be sentenced by the trial judge, rather than by a jury,

and

B. based on his attorneys' advice, by pleading guilty to all charges, he would demonstrate his remorse for his involvement in Chester Poage's death. Habeas Corpus hearing transcript, 63-66. (hereafter HCH).

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

i. Nothing in the many records of this case establishes that Defendant was ever informed, by the trial court or by his attorneys, that he could have a jury trial on the indictment against him and have a jury determine his guilt or innocence, and then have the judge determine his capital murder sentence, if in fact he was found guilty of a count of capital murder. He was not informed of this right by the court at the plea hearing. Further,

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his attorneys informed him of only two procedural options: 1) guilty-phase jury trial and sentencing by the trial jury; and 2) guilty plea to murder and sentencing by the court. HCH 28-30.

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

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

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Defendant was pleading guilty.

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

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

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

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

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Further, the record reveals no inquiry of Defendant about whether Defendant agreed to waive his constitutional rights. In *Monette v. Weber*, 2009 S.D. 77, ¶¶ 13-15, 71 N.W.2d 695, this failure by the court contributed to the ruling that the defendant's plea was involuntary. The trial court's lack of a finding of voluntary, knowing, and intelligent rights waivers, and its further failure to make a specific waiver inquiry of Defendant are additional grounds for finding that the guilty pleas were not knowing, intelligent, and voluntary.

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

The trial court began an inquiry into a factual basis. COP 26. After just four questions, however, Attorney Rensch took over, and said he would provide the basis. He then went on for almost three pages of the transcript. COP 27-30. Mr. Rensch's comments did not satisfy the court, however, so several more pages are devoted to Defendant and the court disputing whether Defendant had in fact stabbed Poage. Not until the court's request to include the unlawfully-obtained June 9 statement did the court find a factual basis. COP 30-34.¹

¹ Defendant requests that the Court take judicial notice of the transcript of co-defendant Elijah G. Page's change of plea on January 9, 2001, in criminal file number 00-431. The contrasts between the factual bases established for the guilty pleas in that case, on the same charges as in Defendant's case, are startling, in part, because the details by

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

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

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

element per charge are reviewed and found. (If the court wishes to have counsel provide it with a copy of the

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not established.

5. The entry of all of these guilty pleas in January, 2001, was tainted by several constitutional violations. As Defendant is currently awaiting a jury sentencing on a murder conviction, he does not have a heightened burden to show that he should be able to withdraw his guilty plea to the murder charge. He has shown much more than "a tenable reason" why permission to withdraw that plea should be granted. *Engelman, supra*, 541 N.W.2d at 100. Moreover, these five guilty pleas were all part of one package. They were and are inseparable from each other. They were all done, at one time, for the most two reasons. If only the murder plea were allowed to be withdrawn, Defendant would be put into an untenable position. His still-existing kidnapping and robbery pleas would provide the State with already existing, on-the-record proof of an element of two of the three alternative counts of murder.

In *Piper v. Weber*, the State Supreme Court acknowledged that "...we accord higher scrutiny to capital sentencing determinations..." For this reason, in a death penalty plea, more so than in other pleas, the trial court has the duty to ensure 'that the defendant truly understands the charges, the penalties, and the consequences of a guilty plea.'" *Piper II*, 2009 S.D. at ¶ 19, 771 N.W.2d at 360.

In summary, Defendant moves this Court, based on the argument and analysis incorporated above, to grant Defendant's Amended Motion to Withdraw Guilty Plea.

transcript, or any other transcripts from these voluminous files, it will do so).

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DATED this 25th day of September, 2015.

KINNEY LAW, P.C.

By: /s/ Matthew J. Kinney

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below, by depositing the same in the U.S. Mail at Spearfish, South Dakota, by electronic service through Odyssey File and Serve.

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

Dated this 25th day of September, 2015.

/s/ Matthew J. Kinney
Matthew J. Kinney

23A-27A-1. Mitigating and aggravating circumstances considered by judge or jury.

Pursuant to §§ 23A-27A-2 to 23A-27A-6, inclusive, in all cases for which the death penalty may be authorized, the judge shall consider, or shall include in instructions to the jury for it to consider, any mitigating circumstances and any of the following aggravating circumstances which may be supported by the evidence:

- (1) The offense was committed by a person with a prior record of conviction for a Class A or Class B felony, or the offense of murder was committed by a person who has a felony conviction for a crime of violence as defined in subdivision 22-1-2(9);
- (2) The defendant by the defendant's act knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;
- (3) The defendant committed the offense for the benefit of the defendant or another, for the purpose of receiving money or any other thing of monetary value;
- (4) The defendant committed the offense on a judicial officer, former judicial officer, prosecutor, or former prosecutor while such prosecutor, former prosecutor, judicial officer, or former judicial officer was engaged in the performance of such person's official duties or where a major part of the motivation for the offense came from the official actions of such judicial officer, former judicial officer, prosecutor, or former prosecutor;
- (5) The defendant caused or directed another to commit murder or committed murder as an agent or employee of another person;
- (6) The offense was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim. Any murder is wantonly vile, horrible, and inhuman if the victim is less than thirteen years of age;
- (7) The offense was committed against a law enforcement officer, employee of a corrections institution, or firefighter while engaged in the performance of such person's official duties;
- (8) The offense was committed by a person in, or who has escaped from, the lawful custody of a law enforcement officer or place of lawful confinement;
- (9) The offense was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of the defendant or another; or
- (10) The offense was committed in the course of manufacturing, distributing, or dispensing substances listed in Schedules I and II in violation of § 22-42-2.

Source: SL 1979, ch 160, § 7; SL 1981, ch 186, § 3; SL 1989, ch 206; SL 1992, ch 173, § 2; SL 1994, ch 178, § 1; SL 1995, ch 132.

23A-27A-2. Presentence hearing required--Relevant evidence.

In all cases in which the death penalty may be imposed and which are tried by a jury, upon a return of a verdict of guilty by the jury, the court shall resume the trial and conduct a presentence hearing before the jury. Such hearing shall be conducted to hear additional evidence in mitigation and aggravation of punishment. At such hearing the jury shall receive all relevant evidence, including:

- (1) Evidence supporting any of the aggravating circumstances listed under § 23A-27A-1;
- (2) Testimony regarding the impact of the crime on the victim's family;

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- (3) Any prior criminal or juvenile record of the defendant and such information about the defendant's characteristics, the defendant's financial condition, and the circumstances of the defendant's behavior as may be helpful in imposing sentence;
- (4) All evidence concerning any mitigating circumstances.

Source: SL 1979, ch 160, § 5; SL 1994, ch 178, § 2.

23A-27A-3. Jury to determine existence of mitigating or aggravating circumstances--Instructions to jury.

Upon the conclusion of the evidence, the judge shall give the jury appropriate instructions. After arguments of counsel, the jury shall retire to determine whether any mitigating or aggravating circumstances, as defined in § 23A-27A-1, exist. The instructions as determined by the trial judge to be warranted by the evidence shall be given in his charge and in writing to the jury for its deliberation.

Source: SL 1979, ch 160, § 5; SL 1990, ch 175.

23A-27A-4. Aggravating circumstance and recommendation of death penalty required for Class A felony death sentencing--Life imprisonment--Bench trial or guilty plea.

If, upon a trial by jury, a person is convicted of a Class A felony, a sentence of death shall not be imposed unless the jury verdict at the presentence hearing includes a finding of at least one aggravating circumstance and a recommendation that such sentence be imposed. If an aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. If a sentence of death is not recommended by the jury, the court shall sentence the defendant to life imprisonment. The provisions of this section shall not affect a sentence when the case is tried without a jury or when a court accepts a plea of guilty.

Source: SL 1979, ch 160, § 4.

23A-27A-5. Written designation of aggravating circumstances required.

The jury, if its verdict is a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. Upon the findings of the jury, the judge shall fix a sentence of death.

Source: SL 1979, ch 160, § 5.

23A-27A-6. Designation by judge in nonjury cases--At least one aggravating circumstance required for death penalty imposition.

In nonjury cases the judge shall, after conducting the presentence hearing as provided in § 23A-27A-2, designate, in writing, the aggravating circumstance or circumstances, if any, which he found beyond a reasonable doubt. Unless at least one of the statutory aggravating circumstances enumerated in § 23A-27A-1 is so found, the death penalty shall not be imposed.

Source: SL 1979, ch 160, § 6.

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23A-18-1. (Rule 23(a)) Trial by jury unless waived by parties.

Cases required to be tried by a jury shall be so tried unless the defendant waives a jury trial in writing or orally on the record with the approval of the court and the consent of the prosecuting attorney.

Source: SL 1978, ch 178, § 230.

23A-45-13. (Rule 57(b)) Procedure not specifically prescribed by statute or rule.

If no procedure is specifically prescribed by statute or rule, a court may proceed in any lawful manner not inconsistent with this title or with any other applicable statute.

Source: SL 1978, ch 178, § 561.

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1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
2)ss
3 COUNTY OF LAWRENCE) FOURTH JUDICIAL CIRCUIT
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STATE OF SOUTH DAKOTA,)
Plaintiff,) CRIMINAL SENTENCING TRIAL
vs.) Crim. #00-431
) VOLUME 4 of 11
BRILEY W. PIPER,) July 21, 2011
Defendant.)
9

10 BEFORE: THE HONORABLE JEROME A. ECKRICH, III,
11 Circuit Court Judge, and a Jury of 12, at
12 Rapid City, South Dakota, on July 5, 6, 7,
13 8, 11, 12, 13, 14, 18, 19, 20, 21, 22, 25,
14 26, 27, 28 & 29, 2011.
15

16 APPEARANCES:
17 For the State: MR. JOHN H. FITZGERALD
18 State's Attorney, &
19 MR. BRUCE L. OUTKA
20 Deputy State's Attorney
21 Lawrence County
22 Deadwood, South Dakota
23
24

25 For the Defendant: MR. ROBERT W. VAN NORMAN &
26 MR. MICHAEL STONEFIELD
27 Attorneys at Law
28 Rapid City, South Dakota
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1 A Approximately 2000 to 2004.

2 Q Okay. And did you end up having some legal difficulties in

3 South Dakota?

4 A Yes, I did.

5 Q All right. Do you recall how you ended up getting arrested

6 and in the Lawrence County Jail in May of 2000?

7 A I was arrested for assault.

8 Q Okay. And what happened with those charges?

9 A They -- the simple assault, I was found guilty of a

10 misdemeanor on that, and I think the DUI was dismissed, and

11 the driving without insurance was.

12 Q Okay. Did you end up going back to the jail? How many

13 times were you in and out of jail in that period of time?

14 A Maybe two times.

15 Q Okay. I am going to show you a letter that's marked as

16 State's Exhibit #115 and ask if you can identify what that

17 is, Mr. Curtis?

18 A It's a plea agreement that I entered into.

19 Q Okay. And who signed that letter?

20 A Yourself.

21 Q Okay. And who is it addressed to?

22 A To myself, Thomas Curtis.

23 Q All right. And can you tell us --

24 (Whereupon, the Bailiff un-handcuffed the witness)

25 Q (By Mr. Fitzgerald, continuing) Okay. What were you

1 would just close the door and they would laugh, they're not
2 going to let two inmates out.

3 Another one was that he was going to go to the
4 library, and he tried to get myself to kill one of the
5 guards by the name of Tony, he was probably six foot tall,
6 a big guy, a lot shorter than what Piper is, and then
7 himself --

8 Q Do you know Tony, the corrections officer?

9 A Tony was a corrections officer, yeah, he's now with the
10 police --

11 Q You don't know his last name?

12 A No. He's now a police officer with Deadwood though.

13 And then he was recruiting another by the name of
14 Tony -- Tobe Givens, who is a short guy, to try to kill one
15 of the females guards. If there was two females guards
16 Piper was also going to kill one of the other ones.

17 Q What was the plan to kill them? How was it going to
18 happen?

19 A To come up behind them and strangle them, if that doesn't
20 work take a pencil and stab it into their throat.

21 Q Okay. What did he claim he would give you if you helped
22 him?

23 A \$50,000 that he had gotten from some kind of inheritance --
24 or, not inheritance, he got something, investments or
25 something in Alaska, I'm thinking it was.

1 A Yes, it is.

2 Q What have you been promised to be here today --

3 A I --

4 Q -- or suggested to you you might get out of this?

5 A Nothing. Nothing whatsoever. As a matter of fact, as I
6 said, before I was in jail I had talked with the District
7 Attorney, they had called me up about a subpoena and I was
8 going to come down, so --

9 Q From Vernal?

10 A Yes.

11 Q And then --

12 A No, actually from Magna, that's where I was living at when
13 I was got ahold of by the District Attorney.

14 Q Okay, is that place pretty close to Vernal?

15 A No, it's probably a 300-mile distance.

16 Q Still in Utah?

17 A Yes, still in Utah.

18 Q And what were you doing over there other than being falsely
19 accused of drug dealing?

20 A I was on disability.

21 Q And have you been subject to any urinalysis tests since you
22 have been incarcerated?

23 A No, I was not.

24 Q Did you get a UA or urinalysis test upon --

25 A No, I did not.

1 consequence for their behavior?

2 MR. VAN NORMAN: Assuming facts that aren't even asked
3 here.

4 THE COURT: Would you rephrase your question.

5 Q (By Mr. Fitzgerald, continuing) Sure. When a person has an
6 Antisocial Personality Disorder, assume that as a fact,
7 when they are apprehended for their behavior do they feel
8 sorry for themselves or do they feel sorry for the person
9 that they victimized?

10 A Overwhelmingly the regret is the fact that they allowed
11 themselves to get caught, as opposed to expressing remorse
12 for the victim and what they have done to the victim.

13 Q Okay. Are you generally familiar with who makes the
14 decisions as to whether or not a juvenile in the court
15 system goes to a residential treatment facility versus goes
16 on probation?

17 A I don't know for a fact in South Dakota but I know that --
18 MR. VAN NORMAN: Okay, let's stop right there then. I
19 object.

20 THE COURT: You'll have to rephrase your question more
21 specifically.

22 Q (By Mr. Fitzgerald, continuing) Okay. Do you know from
23 this particular case who it was that decided to put the
24 defendant Briley Piper on probation rather than send him to
25 a residential treatment facility? Who made the call?

1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
2) ss
3 COUNTY OF LAWRENCE) FOURTH JUDICIAL CIRCUIT
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STATE OF SOUTH DAKOTA,)
Plaintiff,) CRIMINAL SENTENCING TRIAL
vs.) Crim. #00-431
) VOLUME 6 of 11
BRILEY W. PIPER,) July 22, 2011
Defendant.)
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BEFORE: THE HONORABLE JEROME A. ECKRICH, III,
Circuit Court Judge, and a Jury of 12, at
Rapid City, South Dakota, on July 5, 6, 7,
8, 11, 12, 13, 14, 18, 19, 20, 21, 22, 25,
26, 27, 28 & 29, 2011.

15 APPEARANCES:
16 For the State: MR. JOHN H. FITZGERALD
17 State's Attorney, &
18 MR. BRUCE L. OUTKA
Deputy State's Attorney
Lawrence County
Deadwood, South Dakota
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For the Defendant: MR. ROBERT W. VAN NORMAN &
MR. MICHAEL STONEFIELD
Attorneys at Law
Rapid City, South Dakota
25

Jack Ken Howell, RPR
Court Reporter

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1 Q Is this defendant allowed to go?
2 A I understand he did take some classes at one time.
3 Q All right. And who would have to authorize that?
4 A That would have to come from Associate Wardens.
5 Q Okay. Is that an unusual thing, that they allow people to
6 go to college?
7 A Yes, it never -- it really never ever happens.
8 Q Okay. All right. Can the inmates communicate through
9 third parties?
10 A No.
11 Q Is that a restriction or a violation?
12 A That's a rule infraction. Whether --
13 Q Does it happen?
14 A It happens, yes.
15 Q Okay.
16 A Whether it happens via the mail, or if they get ahold of
17 another inmate's pin number. In our inmate phone system,
18 each inmate has an account --
19 MR. VAN NORMAN: I would object, Your Honor, at this point,
20 again the same topic that we had before.
21 THE COURT: Sustained at this point.
22 Q (By Mr. Fitzgerald, continuing) Okay. There is a phone
23 system for the inmates?
24 A Yes, sir.
25 Q Okay. And could you give a brief overview of how it works.

1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
2) ss
3 COUNTY OF LAWRENCE) FOURTH JUDICIAL CIRCUIT
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STATE OF SOUTH DAKOTA,)
Plaintiff,) CRIMINAL SENTENCING TRIAL
vs.) Crim. #00-431
) VOLUME 7 of 11
BRILEY W. PIPER,) July 25, 2011
Defendant.)
9

10 BEFORE: THE HONORABLE JEROME A. ECKRICH, III,
11 Circuit Court Judge, and a Jury of 12, at
12 Rapid City, South Dakota, on July 5, 6, 7,
8, 11, 12, 13, 14, 18, 19, 20, 21, 22, 25,
26, 27, 28 & 29, 2011.
13
14

15 APPEARANCES:

16 For the State: MR. JOHN H. FITZGERALD
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18 MR. BRUCE L. OUTKA
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For the Defendant: MR. ROBERT W. VAN NORMAN &
MR. MICHAEL STONEFIELD
Attorneys at Law
Rapid City, South Dakota
25

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Jack Ken Howell, RPR
Court Reporter

1 Q Okay.

2 A And he discussed that --

3 Q I'm going to stop you, Mr. Tingley, and I'll just try to

4 bring you to these areas that we need to talk about.

5 How long had you been in the same block with him when

6 it was first brought up?

7 A Not very long, actually.

8 Q Okay. How did it get brought up the first time?

9 A I could -- really don't know specifically how it was

10 brought up.

11 Q Okay. How many times did he talk to you about the murder?

12 A It was brought up on various occasions, depending on the

13 people -- like -- I don't know, like any other time, you

14 know, new person comes in has to hear about it, so, you

15 know, it was discussed.

16 Q How would you describe his demeanor, his actions when he

17 would describe the murder?

18 A Well, I mean, I'm not trying to be rude or anything, but it

19 didn't seem like he cared.

20 Q Okay.

21 A It was sad.

22 Q Can you explain to us what Piper said or how Piper

23 explained this thing starting. How did it happen?

24 A Well, he discussed about -- about them planning it, you

25 know, on getting out of town. Their intention --

1 A Um, I don't really know specifically how it came up, but it
2 was brought up about him and the Children of the Real --"

3 MR. OUTKA: The Court Reporter speaking now. "The Real?"

4 A Yeah, like R-e-a-l. -- and everything. It was brought up
5 like that. You know, he wanted me to do some -- some kind
6 of --

7 Q What was the plan, Mr. Tingley?

8 A Well, the plan was to -- for me to take out one guard and
9 Tobe Givens to take out another guard while he grabbed the
10 keys and he went and -- you know, he was going to leave Eli
11 there. He was going to get Darrell Hoadley and they were
12 going to go outside, out the back door, and they were going
13 to go to the pigpen and push the buttons, you know, that
14 release these doors that just automatically open that lead
15 to the outside where they were going to meet Calla Richards
16 and run for it.

17 Q Who did you see Piper actually talk about this plan with?

18 A Um, I didn't see him talk with Marc Payet, but it was
19 discussed with Marc Payet. It was discussed with me. It
20 was talked about with Tobe Givens, and cellmate Tom. I
21 don't know Tom's last name.

22 Q Did he promise you anything in return for helping?

23 A \$10,000.

24 Q Okay. Mr. Tingley, did he discuss what he wanted you to do
25 to the guard?

1 A Take him out.

2 Q Meaning what?

3 A Cancel him, kill him, whatever you want -- kill him. Sorry
4 about that.

5 Q Mr. Tingley, did he tell you how he wanted you to kill the
6 guard?

7 A I think it was just a spur of the moment thing, however you
8 could do it.

9 Q Okay. And which one were you supposed to kill?

10 A The female guard.

11 Q Which -- what was her name, do you know?

12 A Um, she just worked last night, too. I can't remember her
13 name. I'm sorry. Tony was one. He was the male guard,
14 Tony, and then -- I'm sorry. I can't remember.

15 Q Mr. Tingley, what did Piper want Tobe to do?

16 A Take out Tony.

17 Q And do what to Tony?

18 A To kill him, as far as I know.

19 Q And then how were the keys going to be gotten at that
20 point?

21 A Well, because they have a set of keys right here, you know.
22 Piper was going to grab them and he was going to make a run
23 for it. By the time anybody found out, they said they
24 would be long gone.

25 Q Okay. Did Piper ever bring up any of his skills as far as

1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
2) ss
3 COUNTY OF LAWRENCE) FOURTH JUDICIAL CIRCUIT
4

5 STATE OF SOUTH DAKOTA,)
6 Plaintiff,) CRIMINAL SENTENCING TRIAL
7 vs.) Crim. #00-431
8 BRILEY W. PIPER,) VOLUME 8 of 11
9 Defendant.) July 26, 2011
10)
11)
12)

13 BEFORE: THE HONORABLE JEROME A. ECKRICH, III,
14 Circuit Court Judge, and a Jury of 12, at
15 Rapid City, South Dakota, on July 5, 6, 7,
16 8, 11, 12, 13, 14, 18, 19, 20, 21, 22, 25,
17 26, 27, 28 & 29, 2011.
18
19

20 APPEARANCES:
21 For the State: MR. JOHN H. FITZGERALD
22 State's Attorney, &
23 MR. BRUCE L. OUTKA
24 Deputy State's Attorney
25 Lawrence County
Deadwood, South Dakota

26 For the Defendant: MR. ROBERT W. VAN NORMAN &
27 MR. MICHAEL STONEFIELD
28 Attorneys at Law
29 Rapid City, South Dakota

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1 are using marijuana is that as they're using the marijuana
2 they will eat a lot of different things and sometimes as
3 part of that whole cycle of their use.

4 Q And that can lead to what kind of changes in their
5 physiognomy?

6 A They will gain lots of weight.

7 Q Did Briley have a history, based on documents you had as
8 well as statements that he gave to you, of cannabis use
9 then?

10 A Yes, he did.

11 Q And based on the information you have from all the sources
12 you looked at what level of use would you ascribe to him?

13 A I think that if I would have been seeing him at that time I
14 would have called him cannabis dependent, which means that
15 he is needing to keep using cannabis to feel like things
16 are normal for him.

17 Q With regard to the use of LSD, did he describe that and did
18 you get additional information from the documents you
19 reviewed?

20 A He did describe that, and again I would think that he was
21 what we would call hallucinogenic dependent on that point
22 where he was using significant amounts over short periods
23 of time and was dependent on that chemical as well.

24 Q Dependence on LSD means what? What do you see as far as
25 the consequences? You have talked about effects of LSD,

1 but what are the consequences to an individual of being
2 dependent?

3 A Dependency on LSD is different than what we would on a
4 depressant drug. The thing to remember, people are
5 familiar with it, when people use alcohol and they are at a
6 dependent level and they quit using alcohol they will go
7 through withdrawals. The serious forms of withdrawals is
8 what we call DT's, less serious are things like tremors and
9 shaking in their body.

10 When people go through withdrawal from hallucinogens
11 they have a lot of clouded areas of reasoning, they will
12 have memory impairment, they will also have a significant
13 his -- or, a significant symptom called tracers. Tracers
14 are when they see something, rather than seeing the hand
15 move like this (indicating) they see an imprint of the hand
16 that moves on an ongoing basis. So there is several issues
17 of visual perception that can take place.

18 That can also be something that people experience
19 when they're actually under the influence of LSD, that they
20 may have tracers or some of those milder symptoms when they
21 haven't been using the chemical.

22 Q Let's talk about Briley's history -- diagnostic history in
23 addition to what you have just talked about with regard to
24 drug use, cannabis and LSD . Going back a bit, did you
25 have any other diagnoses from history or from Briley as to

1 what problems he had had?

2 A Briley mentioned some difficulties with attention deficit,
3 and he had a very good pediatric workup when he was -- I'll
4 get the date here. In February of 2000 -- or, excuse me,
5 1994, just before he turned 13 years old, that led to the
6 diagnosis of Attention Deficit Disorder.

7 Q And did you when you reviewed his history, including the
8 documents and also interviewed Briley, disagree with that
9 diagnosis of ADHD?

10 A No, I did not.

11 Q And ADHD again stands for?

12 A Attention Deficit-Hyperactive Disorder.

13 Q Let's talk about that a little bit more. Can that
14 condition be debilitating? And describe what that may mean
15 to you.

16 A Okay. The first thing to understand about Attention
17 Deficit Disorder, it is a diagnosis that you use when you
18 have ruled everything else out. And what it amounts to is
19 a combination of symptoms that are not abnormal behaviors,
20 in other words, all children will display, and sometimes
21 adults, difficulties with paying attention, or difficulties
22 with motor activity or impulsivity. What distinguishes
23 Attention Deficit Disorder is the frequency. It is at a
24 very high, consist, abnormal frequency to work with.

25 When we assess for Attention Deficit Disorder now we

1 clown, and also I think when he started using substances
2 that became the main coping mechanism for him.

3 Q What evidence did you determine was in the records,
4 separate from these conclusory diagnoses, indicating that
5 he had Attention Deficit-Hyperactivity Disorder?

6 A I think the entire focus of his inattention and his
7 difficulty to maintain kind of expected standard behaviors,
8 getting in trouble in school and in the community, all
9 reflect that disorder.

10 Q What are some of the main characteristics of that disorder
11 and if you compare it with a Conduct Disorder that might
12 cross over?

13 A Well, Conduct Disorders are a violation of rights of
14 others. Conduct Disorders are very specific in the types
15 of areas that you're going to look for those kinds of
16 problems. I think in my mind that Briley was showing more
17 oppositional responses than he was conduct responses. He
18 had one episode that got him into trouble with the courts
19 which then led to the idea that he may have some conduct
20 issues. He certainly was not an all-star pupil, nor
21 necessarily the good boy in the classroom, but I'm not sure
22 that he was violating or pushing other people's rights to
23 the extent to call him Conduct Disordered.

24 Q Okay, so you're using a distinction there that you weren't
25 certain of.

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2 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
3 COUNTY OF LAWRENCE) ss
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STATE OF SOUTH DAKOTA,)
Plaintiff,) CRIMINAL SENTENCING TRIAL
vs.) Crim. #00-431
BRILEY W. PIPER,) VOLUME 9 of 11
Defendant.) July 27, 2011
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15 BEFORE: THE HONORABLE JEROME A. ECKRICH, III,
16 Circuit Court Judge, and a Jury of 12, at
17 Rapid City, South Dakota, on July 5, 6, 7,
18 8, 11, 12, 13, 14, 18, 19, 20, 21, 22, 25,
19 26, 27, 28 & 29, 2011.
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APPEARANCES:

For the State: MR. JOHN H. FITZGERALD
State's Attorney, &
MR. BRUCE L. OUTKA
Deputy State's Attorney
Lawrence County
Deadwood, South Dakota

For the Defendant: MR. ROBERT W. VAN NORMAN &
MR. MICHAEL STONEFIELD
Attorneys at Law
Rapid City, South Dakota

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Jack Ken Howell, RPR
Court Reporter

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1 treatment indications. They are not necessarily good
2 evidence of risk assessment nor do they necessarily give
3 you a lot of information about specific behavioral
4 patterns someone is likely to show, they're simply a
5 qualification of the symptoms.

6 Q With regard to Briley then specifically, were there any
7 crossover between those two diagnoses, ADHD on the one
8 hand and Conduct Disorder of symptomology?

9 A Yes, there would be. When people are more impulsive in
10 their patterns of behavior they're more likely then to do
11 things without thinking and infringe on the rights of
12 others.

13 Q Is there, as far as you know based on your reading and
14 experience over the many years you have been a
15 psychologist, a genetic basis for Conduct Disorder?

16 A There appears to be. We find Conduct Disorder which is
17 later diagnosed after 18 years of age as Antisocial
18 Personality Disorder to have strong systems that run
19 within family patterns and they tend to be parts of how a
20 person's brain, the term we sometimes use is hardwired,
21 they -- they come about over a period of life, but there
22 tends to be predispositions to those types of behaviors
23 and symptoms.

24 Q Now, I would like to turn to another topic, and we have
25 heard a fair amount before you were a witness in this

1 Q Assuming then that Briley came from a family with a
2 history of problems, legal problems, and also assuming
3 that the family utilized strict physical discipline, and
4 recognizing that he has an ADHD condition and a learning
5 disability, do you have an opinion on how those matters
6 interacted as -- to produce the person we have now?

7 A Yes, I do.

8 Q What is that opinion?

9 A My opinion is that it was very difficult for Briley to
10 learn prosocial, which is a term we use for interacting
11 appropriately with people, behaviors and ways of viewing
12 his world when he was in a fairly harsh environment and
13 was being treated on more of a punitive level.

14 Q Did you view that as a significant, or if you put it on a
15 scale or a continuum of one to 10, set of factors in
16 Briley's development?

17 A I think they were very major factors, especially when we
18 get to another parallel part of development which we call
19 moral development. A gentleman by the name of Kohlberg,
20 spelled with a K, has done a great deal of research on
21 this particular area and found that -- that children tend
22 to develop in certain stages based upon their thinking and
23 how they interact with society over a period of time, and
24 so there are certain characteristics at different ages
25 that you see.

1 interesting outcome because over two-thirds of the people
2 who were research subjects continued to turn the dial up,
3 give the shocks at ranges that were -- on the dial looked
4 like were very lethal while the person was showing pain
5 and reaction to the electric shock.

6 Q What was the age of most of the people involved in that
7 experiment who were administering the shocks?

8 A Most of them would have been sophomores in college. An
9 interesting part about American psychology is that most of
10 our data base have come from white rats and sophomores in
11 college, because those were the people taking the
12 introductory classes in psychology who got points to come
13 in and volunteer for the research. That's changed now
14 with some ethical issues that we look at in research. So
15 they would be individuals from 18 to 20 years of age,
16 which would be the same age that Briley, Darrell and
17 Elijah was when this took place at Higgins Gulch.

18 Q Did Briley during his conversations with you indicate
19 anything about remorse, or what you could term as remorse?

20 A Yes, he did, he showed part of the remorse in the sense
21 that as he would go through the first interview and talk
22 about what took place in that creek bed facial
23 expressions, movement, sometimes needing to pace as he was
24 dealing with these particular issues, showing that he was
25 bothered by the events that took place and the things that

1 Q He said that Briley Piper was the leader, right?

2 A Yes.

3 Q Okay. And did your client -- did you ask your client then
4 after they tied him up and he was coerced into drinking
5 acid what Chester Allan Poage's reaction was to drinking
6 the acid?

7 A I didn't ask him that.

8 Q Okay. And I assume then he didn't express any remorse at
9 that point about having done that.

10 A Well, I think he was expressing through his behavior,
11 especially his non-verbal behavior, remorse through all of
12 that three-hour discussion with me as we went through that
13 whole history.

14 Q Okay. And then did he tell you how the three of them had
15 sat there and discussed in Chester Allan Poage's presence
16 the methodology of how they were going to murder him?

17 A Yes, I was aware of that.

18 Q Okay. Tell me the types of murder plans that they -- your
19 client talked about participating in.

20 A I didn't go through those in specifics.

21 Q Okay. You're aware then and you don't dispute the fact
22 that the three of them together in Chester Allan Poage's
23 presence talked about how they were going to slice his
24 throat, correct?

25 A I think that was one of the things that were talked about,

1 three of them involved committing the murder, and there
2 are various points in that scenario where there were
3 impulsive actions and other points when there weren't.

4 Q It wasn't an impulsive crime to drive him out in the
5 country, it was something that was planned.

6 MR. VAN NORMAN: I'm going to object, Your Honor, we're
7 plowing the same ground.

8 THE COURT: Asked and answered. Sustained.

9 Q (By Mr. Fitzgerald, continuing) Let me move on to a
10 different area and ask you, you saw what you have said was
11 remorse?

12 A Yes.

13 Q Okay. And you're familiar with his psychological record
14 from the penitentiary?

15 A I have read it, yes.

16 Q And would you say that it is true that it's documented in
17 that file that as late as April of 2004, that your client
18 was saying that guilt is an emotion he does not feel?

19 A I believe that's correct. Is that Dr. Pesce's record.

20 Q That would be Dr. Leafgreen.

21 A Okay.

22 Q It was April 20th of 2004.

23 A I'm having trouble finding that particular document or
24 reference; do you have it?

25 Q Sure. Give me a minute.

1 (Whereupon, Mr. Fitzgerald handed said document to the
2 witness)

3 Q (By Mr. Fitzgerald, continuing) It was right on the page
4 that I opened it to.

5 Is that what it says?

6 A Yes, it does. This is a psychologist doing therapy,
7 correct?

8 Q And you're a psychologist.

9 A Yes.

10 Q And then it -- apparently she gives him a homework
11 assignment on the topic of guilt, is that right?

12 A Yes.

13 Q And so would you agree that at this point the defendant is
14 in a situation where he would like to put his best face
15 forward, so to speak, on this proceeding?

16 A I think to a large extent that has some truth to it.

17 Q Now, in 2004 he would have been 24 years of age.

18 A Yes.

19 Q And he's telling his psychologist that guilt, that's just
20 an emotion he does not feel.

21 A And I would expect that from a 24-year-old.

22 Q Even one that had committed a murder like this?

23 A Oh, sometimes ones that have done much more than that. We
24 still have fairly strong evidence that the frontal lobes
25 of the brain don't reach maturity until 25, so it's fairly

1 Q Let's talk about age first. How is that psychiatrically
2 important or significant?

3 A So there is -- there is a couple of ways to break that
4 down. We all know that young persons, adolescents, young
5 men tend to be more impulsive, not consider consequences
6 of their actions as much, I mean, in fact the -- this is
7 why the age 18 is something that we have arbitrarily
8 established as a society and that's the cutoff point at
9 which you cannot execute someone, the Supreme Court has
10 decided that because of a person's immaturity, it's --
11 it's mitigating enough that they have created --

12 MR. FITZGERALD: I'm going to object, it's a matter of
13 law.

14 THE COURT: Well, it is, but it's also accurate.

15 Q (By Mr. Van Norman, continuing) Yes. Why don't we just go
16 on from there. Let's talk more about other age factors.
17 Is there anything about the brain that's peculiar or
18 particular to an 18 to 20-year-old?

19 A Well, I mean, so this is an area where science and sort of
20 common sense converge a little bit. As I was saying, we
21 don't need science to know that, you know, 18, 19-year-old
22 men are less mature than 38, 39-year-old men, but it turns
23 --

24 Q A little slower.

25 A Sorry. But it turns out that they have -- various

1 investigators have looked at the brains of younger persons
2 and studied what is called the white matter, the wires
3 that connect the brain get coded or myelinated over time.
4 Younger persons have less myelination in the frontal parts
5 of their brain, and that process on average doesn't finish
6 until early 20's, 23, 24, or something like that. The
7 point being that younger persons, the wiring of their
8 brain hasn't fully encoded, and it's thought -- it's
9 hypothesized or believed that that in part explains why
10 young people act like young persons and are more impulsive
11 and less considerate in their actions.

12 Q Now, you mentioned youth with regard to Briley's situation
13 as one factor that you saw as significant, correct?

14 A Yes, sir.

15 Q And let's move to the next point you make, which was?

16 A Substance abuse.

17 Q And would you tell the jury what you considered in that
18 regard.

19 A Well, again, it's sort of considering how -- how
20 deliberate, how considered, you know, how thoughtful an
21 action was, substance abuse is obviously something that
22 impairs or has consequences in terms of how a person
23 thinks. So if you take a young person who is already
24 prone to immaturity, impulsiveness, not considering
25 consequences, and then you add in then substance abuse,

1 which will further make a person impulsive, less
2 considerate, impair judgment, it's a combination that
3 makes for a setting where highly impulsive, poorly
4 considered actions might transpire.

5 Q All right. Did you find in your reading and research with
6 regard to this case, in addition to your conversations
7 with Briley, that he had any substance abuse history?

8 A Very much so.

9 Q All right, what was that?

10 A Well, probably the two leading substances of abuse at that
11 time would have been marijuana and LSD, or what people
12 commonly call acid. Briley described to me very, very
13 dense acid use that year, I think -- you know, I think
14 these things transpired in March, and by that time he
15 described doing literally hundreds of tabs of acid already
16 in that calendar year, but in addition to which various
17 other substances of abuse, methamphetamines on occasion,
18 narcotic pain medications, which can be, of course, abused
19 or misused as a substance of abuse, alcohol at times, I
20 think there was some shrooms or other hallucinogens
21 pointed in there, and then in looking at records even some
22 other things like huffing, or when people inhale things
23 like gas or paint to get high, there was even an instance
24 where he used medications that one typically wouldn't use
25 to get high to induce an altered state of consciousness.

1 A So, I mean, he was clearly in acknowledgement what he had
2 done was -- was, in fact, very, very wrong, that he
3 couldn't ever make amends for it, and that he, I mean, I
4 think described in my -- and in my estimation very
5 sincerely while he has had, you know, years to learn how
6 to deal with what he's done, meaning, I mean, he did these
7 things and he's trying to survive and has to figure out a
8 way though cope, but that it's something he has to cope
9 with every day.

10 Q And when you're talking about coping with it every day, it
11 just isn't incarceration, is it? You're talking about --

12 A No, I'm talking about, you know, every day thinking about,
13 you know, what he did, the loses that occurred because of
14 his behaviors, and the impact that that has had on a
15 multitude of people.

16 Q Who did he include in the multitude of people?

17 A Well, I mean, you know, of course the victim, the victim's
18 family, you know, his own family, I mean, I think more
19 broadly just sort of the way something like this rocks a
20 relatively small community or state like this.

21 Q Did you talk to him about his life as it is now?

22 A Yes, sir.

23 Q What did you talk to him about?

24 A I mean, we talked a lot about how he has -- how he is
25 coping. A lot of that has to do with his studies, he

1 spends some -- it sounds like a good bit of time taking
2 college level courses with the goal that when these things
3 are settled and if he has the -- ever has the opportunity
4 to do so perhaps potentially being able to help other
5 incarcerated adults sort of do what he's doing, figure out
6 a way to cope and move towards prosocial outlets for --
7 prosocial outlets for -- you know, to -- you know, to
8 cope, to make it through.

9 Q Did you talk with him, and from your studies of the
10 documents in this case that you had, anything about the
11 dynamics on the night of the murder?

12 A Yes. So, I mean, well, we discussed that in depth in our
13 meeting but that was also something that was, of course,
14 apparent in the records.

15 Q And what did you talk about? Or, let's put it this way:
16 what did you conclude about the dynamics given all the
17 information you had?

18 A Well, I mean, the group dynamics, you know, and -- you
19 know, I might have in, you know, giving my -- sort of my
20 short list of age, substance abuse and the group dynamic,
21 you know, maybe should have put group dynamic one, because
22 I think that's -- it's a really vital component to all of
23 this in that if you -- I mean, in talking to Briley and
24 looking at the reports, you know, the various things that
25 have come out in all this, you know, this thing happened

1 because of group dynamics. It took -- it took the three
2 of these guys, you know, these kids getting together under
3 these circumstances for these events to transpire. No --
4 no single one of them would have accomplished this the way
5 it happened. It -- it really was an unfortunate sort of
6 culmination of -- you know, of these three personalities,
7 their interaction on that night, sort of simultaneously
8 fueling each other on and -- and not restraining each
9 other.

10 Q All right. From your review of the records and talking
11 with Briley did you detect from a psychiatric standpoint
12 any ambivalence or hesitation by any of the actors here?

13 A Well, so I think that's a -- I mean, that's a really
14 important point, is that when you look at what happened
15 and the way it happened, I mean, it's obviously a terrible
16 thing, I mean, there is no getting around it, but the
17 reason it was this drawn out -- the reason it was so drawn
18 out and horrendous wasn't because these guys got together
19 and decided to make it drawn out and horrendous, it was
20 drawn out and horrendous because they really couldn't get
21 together to get it done, nobody -- there was this
22 ambivalence about going there, it was this sort of, you
23 know, "I'm not really going to -- you know, you do it, you
24 do it, you know, I --" they obviously struggled to get --
25 you know, to get on board to finish the job that they had,

1 weren't you?

2 A Yes, I understand.

3 Q Okay. And my point is just simply this, and you can say
4 it's true or not true: not in one note is the word
5 "Chester Allan Poage" or "remorse" mentioned in this.

6 MR. VAN NORMAN: Asked and answered repeatedly, Your
7 Honor.

8 THE COURT: Overruled.

9 THE WITNESS: That would be true, to my recollection.

10 Q (By Mr. Fitzgerald, continuing) All right. In fact, the
11 earlier reports back to May of '01, say that he's never
12 regretted anything that he's done in his life, is that
13 true?

14 A There are themes of that, yes.

15 Q Okay. Well, there are specific quotes, is that true?

16 A Again, I can't specifically quote from thousands of pages
17 of documents, but, as I said, I recollect there being
18 themes to that effect.

19 Q "He said he had no regret or sense of responsibility for
20 the crime, only irritation with the Court and the system."

21 A I believe that's -- again, that theme is there.

22 Q Okay, it says, "As is typical, his problems are the fault
23 of somebody else, he takes the victim's stance." Is that
24 true?

25 A I think that was something written by one of the

1 there.

2 Q Okay. That's been your pattern for years?

3 A Quite a few years.

4 Q Now, Mr. Piper, I would like to direct your attention to

5 April of 2000. Do you remember anything happening with

6 Briley then?

7 A Well, that's when he was in court down here, I believe

8 somewhere around that area.

9 Q Okay, did you see him in jail after he was arrested for

10 the murder of Chester Allan Poage?

11 A I seen him in jail in Anchorage, Alaska.

12 Q Did you give him any advice at that time?

13 A I told him not to talk to anybody except his lawyer. And

14 I did get him a lawyer up there.

15 Q After that have you seen Briley since that time?

16 A I see him once a year, approximately.

17 Q And where do you see him once a year?

18 A In the prison over in Sioux Falls.

19 Q You make a trip down from Alaska, I take it?

20 A Yes.

21 Q And when you see him how do you get to interact with him?

22 A Through glass, telephone.

23 Q Is it a little cubicle with a phone and glass and you talk

24 to him?

25 A Right.

1 SISTER GABRIELLE CROWLEY,
2 called as a witness herein, having been first duly sworn
3 was examined and testified as follows:
4 DIRECT EXAMINATION
5 Q (By MR. STONEFIELD) Good afternoon.
6 A Good afternoon.
7 Q Would you tell the jury your name.
8 A My name is Sister Gabrielle Crowley.
9 Q Where do you live at?
10 A I live in Sioux Falls, South Dakota.
11 Q Where were you born?
12 A In Henry, South Dakota.
13 Q Henry?
14 A Henry.
15 Q Okay, that's up near Watertown?
16 A That's right.
17 Q All right. Would you tell the jury about your education.
18 A I was educated in nutrition, and I have a bachelor of
19 science in dietetics, and I got the degree from St.
20 Catherine's in St. Paul.
21 Q Okay. I would like you to tell us also -- give us a bit
22 of a rundown about the work that you have done in your
23 life.
24 A All right, I --
25 Q And before you start, maybe -- you're kind of soft-spoken,

1 maybe you could bring the microphone up.

2 A All right.

3 (Whereupon, the witness complied)

4 Q (By Mr. Stonefield, continuing) Yeah, it will adjust.

5 A Okay. I was in hospital dietetics for 14 years, and we
6 have hospitals, Presentation Sisters, and I left that work
7 and went to Mobridge, South Dakota, to work with the
8 Lakota people. And from there I spent 16 years in the
9 missions in the state of Guerrero in Mexico. Then when I
10 came back from Mexico I took a position in a day shelter
11 called Good Shepherd, and I was there for a number of
12 years, and then our sisters opened a ministry to the
13 Hispanic people in the Sioux Falls area, so I have been
14 there since then, and I -- my work mostly is as a
15 receptionist meeting the people and connecting them with
16 people that I work with depending on what their needs are.

17 Q Okay. And you're a nun, is that right?

18 A That's right.

19 Q And how long have you been a nun?

20 A I have been a nun for 58 years.

21 Q Now, at some point in the past few years did you come to
22 know Briley Piper?

23 A I did.

24 Q And is Briley -- is Briley sitting here at the table?

25 A Yes, he is.

1 Q Okay. Do you remember when it was that you first came to
2 know him?

3 A I -- I came to know Briley probably three and a half years
4 ago, and Father Gary Ternes, who is the chaplain -- or,
5 the -- yeah, the chaplain at the prison called our office
6 and he said, "I have the acquaintance of a young man here
7 in the prison and he is trying to learn Spanish and would
8 there be someone in your office who would be able to speak
9 with him, because he wants to develop his skills in
10 Spanish." So I offered, because the other people I work
11 with have full schedules, and Father said, "I'm quite sure
12 I can arrange for him to connect with you by telephone."
13 And so -- which Father did. And so every Wednesday
14 evening Briley would call our home at 7:00 o'clock and we
15 had a 20-minute time and we would work on our Spanish
16 then.

17 Q Okay. Did that continue for some time?

18 A It did for a number of months, yes.

19 Q And during that time that you had these phone calls -- and
20 is it correct that you hadn't yet actually met him?

21 A That's right, that's right.

22 Q Okay. Was your contact with him, did it begin simply
23 because of the Spanish speaking, or did it begin because
24 he was about to be baptized?

25 A No, there was nothing in the conversation at that point

1 that he was going to be baptized, I believe I did not even
2 know that he was studying to become a Catholic.

3 Q Okay, at some point did you become aware of that?

4 A I became aware probably at the time when Father Gary
5 called and said he had talked to Briley and that he would
6 need a godparent to be baptized, and that he had talked to
7 him if he would be willing to accept me as a godmother,
8 and so I -- I would say that was the first time that I was
9 aware of his studying to be a Catholic.

10 Q Okay. Did Briley actually become baptized at some point?

11 A Yes, he did.

12 Q Do you remember when?

13 A It was -- the -- I believe it was April 30th, it was the
14 last part of April in 2008.

15 Q And that was where?

16 A That was in the prison. And I was allowed to go in and to
17 be his godmother.

18 Q Okay, was that -- was that the first time that you
19 actually met him?

20 A Yes, that's right.

21 Q But you were at the baptism ceremony.

22 A I was.

23 Q Do you remember who else was there?

24 A Father Gary was there, and he had invited the Bishop to
25 come and be present for that baptism and confirmation.

1 Q Okay.

2 A There were the three of us there with Briley.

3 Q Now, you mentioned something about a discussion about

4 becoming his godmother.

5 A Yes.

6 Q Had that happened at the time of the baptism?

7 A No, that was before. No, Father had -- Father called me

8 and asked me if I would be willing to be his godmother,

9 yes. So that was later.

10 Q What does it mean to be a godmother to someone?

11 A A godmother is a person responsible to continue being with

12 them in their spiritual journey.

13 Q Okay. And is that the relationship that you and he have

14 now today still?

15 A It's a spiritual journey but it's also a friendship

16 journey, so I would say that, yes, there would be two

17 components there.

18 Q Now, after the baptism did a point come when you were

19 allowed to visit Briley at the prison?

20 A That's right, he asked permission for me to come in for

21 visits so that -- then I began going up to the prison and

22 visit him, yes.

23 Q Do you remember when that began?

24 A I do not, I -- I think it was not so very long after that,

25 because I have been visiting him now probably close to

1 three years --

2 Q Okay.

3 A -- uh-huh.

4 Q When you visit with him are you together in the same room,
5 or is it more structured than that?

6 A I go into this waiting room where people can meet their
7 families in -- in this open room, and then there is a wall
8 of windows with phones, and so then I sit at the phone and
9 talk to him through the glass.

10 Q Okay. So you can actually see him but you're --

11 A That's right, uh-huh.

12 Q -- you're looking through a glass.

13 A That's right, uh-huh.

14 Q And your conversations are over a telephone.

15 A Yes.

16 Q Has it always been that way?

17 A Yes, it's always been that way, except -- except we were
18 face-to-face when I went for the baptism, we were in a
19 small room for that.

20 Q Okay. Now, obviously there is a significant difference in
21 the ages of you and Briley.

22 A That's right, uh-huh.

23 Q Okay. What kinds of things do you talk about when you
24 meet with him?

25 A Well, quite often it will be his family, he'll share

1 how -- how his family are, and he's very close to his
2 nieces so he talks about family.

3 Q Did you know his -- have you ever met any of Briley's
4 family?

5 A I have met his mother and father, because they come for
6 visits, and so I -- when they come to Sioux Falls then
7 I -- we get together, yes, so I know his family.

8 Q Okay.

9 A In the beginning I did not, and I don't know when that
10 first happened, so -- and he's very close to his nieces,
11 he talks about them.

12 He talks about his studies, because he's taking
13 classes, so he -- he shares quite a lot about that, how
14 he's doing with his classes, and the grades he's getting,
15 and that he's working hard to please his parents, and
16 if -- if he gets a grade back on a test that he thinks
17 isn't quite so good that displeases him because he wants
18 to please his parents.

19 I --

20 Q Do you --

21 A -- I share too -- I'm sorry.

22 Q Go ahead.

23 A I share too about -- I live with four other sisters so I
24 -- he's interested in our life and what we're doing.

25 He -- he reads a lot so we share -- he shares books

1 that he's read, and -- and also we talk spiritual matters,
2 that we often get into how -- how his life is going, how
3 his spiritual life is going, so that's part of the
4 conversation at times.

5 Q Do you -- do the two of you share any kind of common
6 interests?

7 A Well, we both like to read. He's shared that he -- he
8 loves music, he's always loved music, that in the school
9 that he was in a chorus and he played an instrument, he
10 played a keyboard. He likes sports, and I -- I listen to
11 him when he talks about sports but I don't understand
12 sports, but he's a great sport lover, and so, yes, we do.
13 And he's interested -- he's interested in what the
14 sisters' activities are too.

15 Q Okay.

16 A He's also shared at times of his childhood and his youth
17 and the difficulty of going through certain years of his
18 life and --

19 Q Do -- you mentioned education, do you and he talk about
20 his education?

21 A Yes, very frequently, yes.

22 Q Does his education seem important to him?

23 A Yes. He's now working toward an associates degree in
24 sociology, and when he completes that he will go on to his
25 -- he would like to go on and get a bachelors in

1 sociology.

2 Q Did I -- did I understand you correctly, do you see him
3 every week?

4 A I try to, I try to visit him every Tuesday night, which
5 I'm allowed to do, and there are occasions when I have a
6 meeting, but I try to make a point to visit him every
7 Tuesday, and on -- I am allowed one weekend day visit a
8 month. So quite often I am able to get there five times a
9 week.

10 Q And how long are the visits?

11 A The visits are an hour and 15 minutes, and sometimes I
12 can't get in right away or we're cut short for some reason
13 but it's usually at least an hour.

14 Q Sister, let me ask you this: what does your relationship
15 to Briley mean to you?

16 A Well, I -- I think because of our spiritual connection
17 that that's -- that's very -- it's a very deep
18 relationship, and that he is able to share with me his
19 growth process, so I feel very -- I feel like family to
20 him, like I belong to their family.

21 Q Do you serve as a godmother to any other prison inmate?

22 A I do not, no.

23 Q Do you visit any other prison inmate?

24 A No.

25 Q Are you hoping -- let me ask you this: do you anticipate

1 that your friendship with Briley is going to continue?

2 A Yes. Yes, I do.

3 Q All right. That's all the questions that I have. Thank
4 you.

5 A Thank you.

6 CROSS-EXAMINATION

7 Q (By MR. FITZGERALD) My name is John Fitzgerald.

8 A Good afternoon.

9 Q A few questions for you. Your relationship began about
10 three and a half years ago with him?

11 A Yes, more or less, yes, I -- approximately, yes.

12 Q All right. And you share with him a spiritual
13 relationship?

14 A That's right.

15 Q And a friendship relationship?

16 A That's right.

17 Q So he's become kind of a friend.

18 A That's right.

19 Q All right. Sister, has he asked you -- are there
20 restrictions on who they can write to in prison?

21 A I believe there are, yes.

22 Q Do you have to go through training at the penitentiary?

23 A I -- I was in -- I was in a program as a volunteer at the
24 penitentiary --

25 Q Okay.

1 A -- yes, and there were restrictions, yes.

2 Q There is restrictions on South Dakota State Penitentiary
3 inmates writing to other penitentiary inmates, is that
4 correct?

5 A That's right.

6 Q All right. And you were aware of that?

7 A I -- I was aware of that, yes.

8 Q All right. And apparently he came out to the Lawrence
9 County Jail sometime in June, May or June of this year.

10 A Uh-huh.

11 Q And he met Tracy Pavon, are you aware of that?

12 A I am, uh-huh.

13 Q And then did he ask you to write to her for him?

14 A He did.

15 Q Okay. And you knew that was a violation of the rules.

16 A I -- looking back, yes. I did not think of it at the
17 time, yes.

18 MR. FITZGERALD: Okay. Let's see if I can have this one
19 marked.

20 (Whereupon, State's Exhibit #178 was marked for
21 identification)

22 Q (By Mr. Fitzgerald, continuing) Sister, I'll show you
23 what's marked State's Exhibit #178 and see if you can
24 identify what that is.

25 A Yes, I wrote that letter.

1 Q Okay. And that was to an inmate in the Women's
2 Penitentiary.
3 A That's right.
4 Q And that was an inmate that Mr. Piper had met when he had
5 been brought out to the Hills pursuant to this trial.
6 A That's right, uh-huh.
7 Q And he asked you to write a letter to her.
8 A Uh-huh.
9 Q And he knew or you knew it was a violation of the rules,
10 is that right?
11 A I -- I did not -- I did not think of it at the time, and
12 now, yes, I know that is, but I -- when I wrote the letter
13 I did not realize it.
14 Q Okay. But Mr. Piper wanted you to do it because it was
15 something that he couldn't do on his own.
16 A That's right, uh-huh.
17 Q Okay. And he wanted to establish this relationship with a
18 woman in the South Dakota Women's Penitentiary in Pierre.
19 A Yes, yes.
20 MR. FITZGERALD: All right. I would offer Exhibit 178.
21 MR. STONEFIELD: I have never seen it.
22 (Whereupon, Mr. Stonefield examined said exhibit)
23 MR. STONEFIELD: I don't have any objection, Judge.
24 THE COURT: 178 is received.
25 Q (By Mr. Fitzgerald, continuing) So, Sister, is it true

1 that Mr. Piper has manipulated your friendship to get you
2 to do something that he's not allowed to do?

3 A I -- as I say, when I wrote the letter the -- I did not
4 look at it that way, because I did not recall about that I
5 should not have written the letter.

6 Q But, Sister Crowley, it is true that the letter does have
7 an explanation by you in it that you are writing because
8 you know that he's not allowed to write to an inmate.

9 A That's right, that's right, uh-huh.

10 MR. FITZGERALD: Okay, that's all the questions I have.
11 Thank you.

REDIRECT EXAMINATION

13 Q (By MR. STONEFIELD) Does Briley have a nickname for you?

14 A Yes, uh-huh.

15 Q. What is it?

16 A He calls me Nena.

17 Q Do you know why?

18 A He had a friend in the penitentiary who was Hispanic and
19 said that the Hispanics call their godmother Madrina, and
20 for short they call her Nena, so he asked if I would be
21 willing to let him call -- him to call me Nena, which I
22 said yes, it was fine.

23 Q Is that what he calls you?

24 A Yes.

25 MR. STONEFIELD: Okay. I don't have anything else.

1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
2) ss
3 COUNTY OF LAWRENCE) FOURTH JUDICIAL CIRCUIT
4)
5 STATE OF SOUTH DAKOTA,)
6 Plaintiff,) CRIMINAL SENTENCING TRIAL
7 vs.) Crim. #00-431
8) VOLUME 11 of 11
9 BRILEY W. PIPER,) July 29, 2011
10 Defendant.)
11)
12)
13)
14)

15 BEFORE: THE HONORABLE JEROME A. ECKRICH, III,
16 Circuit Court Judge, and a Jury of 12, at
17 Rapid City, South Dakota, on July 5, 6, 7,
18 8, 11, 12, 13, 14, 18, 19, 20, 21, 22, 25,
19 26, 27, 28 & 29, 2011.

20 APPEARANCES:
21 For the State: MR. JOHN H. FITZGERALD
22 State's Attorney, &
23 MR. BRUCE L. OUTKA
24 Deputy State's Attorney
25 Lawrence County
Deadwood, South Dakota

26 For the Defendant: MR. ROBERT W. VAN NORMAN &
27 MR. MICHAEL STONEFIELD
28 Attorneys at Law
29 Rapid City, South Dakota

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30 Jack Ken Howell, RPR
31 Court Reporter

32 0000175

1 So I believe if you examine the evidence that was
2 submitted here in the last couple of weeks the State has
3 proved aggravating circumstance number one, that Chester
4 Allan Poage was killed for his money and his property.

5 The second one is that this crime itself was
6 outrageous, it involved torture to the victim, and it was a
7 depraved killing by this defendant. And these are all kind
8 of intertwined together so I'm going to have to just kind
9 of discuss them all together.

10 This depraved, torturous murder started when Elijah
11 held a gun to Chester Poage, ordered him to the ground, and
12 then this man here kicked Chester Allan Poage in the head
13 with his combat boots. Chester was outnumbered three to
14 one, and after he was knocked unconscious they took the
15 opportunity to tie his hands behind his back and his feet,
16 and then this defendant put the tire iron on his ankles, I
17 guess so he couldn't be at all able to kick back, to defend
18 himself in any fashion, and while he was tied up in that
19 fashion then Elijah Page and Darrell Hoadley forced him to
20 drink some sort of an acid. You know, that -- that thought
21 alone of forcing somebody after you take a gun to their
22 head and you tie them up and you put them in a chair and
23 then you force them to drink some sort of an acid, exactly
24 how strong it was or exactly what it was we're not going to
25 know at this point, his body was in the water for six weeks

1 he gets the angel, he cons the angel into doing his dirty
2 work, the thing he's not supposed to do, for him. She
3 didn't do anything wrong, she got conned, she got taken
4 advantage of. He does manipulate.

5 Manipulated his psychologist into thinking that
6 somehow he got a bad set of friends and he's the victim of
7 group dynamics. No, not at all, not at all. He's
8 responsible just like everybody else for his behavior.

9 There is no evidence of what's in the man's heart,
10 but the Father said that his faith is strong enough that it
11 will sustain him no matter what kind of a sentence you
12 determine is appropriate under these facts.

13 And don't -- please don't let the defendant downplay
14 his prominent role in this case by trying to shift the
15 blame over to Elijah Page and Darrell Hoadley. They are
16 also responsible.

17 This murder was the combination of all three of these
18 individuals acting in concert, but I believe the evidence
19 has shown that it was the defendant's idea, at least
20 according to his friend Hoadley, to commit robbery and to
21 murder. And he was the one that did the first act of
22 actual aggression to knock the man unconscious. He drove
23 the Blazer to the place where the man was going to be
24 murdered. He forced and ordered this man to strip, and he
25 participated in trying to bury the man alive. He kicked

1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
2 COUNTY OF LAWRENCE) FOURTH JUDICIAL CIRCUIT
3

4 STATE OF SOUTH DAKOTA,)
5 Plaintiff,) SENTENCING
6 vs.) Crim. 00-430
7 ELIJAH PAGE,)
8 Defendant.) Vol. V of V
9
10 (Pgs. 821 - 992)

COPY

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

15 APPEARANCES:

16 FOR THE STATE: MR. JOHN FITZGERALD
17 - and -
18 MR. BRUCE OUTKA
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20 90 Sherman Street
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- and -
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Rapid City, SD 57709

1 Court knows in State versus Moeller, the 2000 case,
2 that the Supreme Court defined depravity as corrupt or
3 perverted or immoral state of mind, indifference to
4 life or suffering, committing an aggravated battery or
5 torture on a living human being, or subjecting the
6 body of a deceased to mutilation or serious
7 disfigurement or relishing or gaining a sense of
8 pleasure for the murder.

9 Torture is defined as when a victim is still alive
10 and conscious, the defendant intentionally inflicts
11 severe, unnecessary physical or mental pain or anguish
12 on the victim. It could include a victim's serious
13 mental anguish in anticipation of serious physical
14 harm.

15 Aggravated battery is serious physical abuse of a
16 victim that renders a member of his body useless or
17 seriously disfigures his body and, at the time, the
18 defendant had the specific intent to inflict
19 unnecessary pain to the victim.

20 In this case, the facts support all three,
21 depravity, torture, and aggravated battery upon
22 Chester Allan Poage at the hands of the Defendant
23 beyond a reasonable doubt; and they're all
24 intertwined, so I'll discuss them at once.

25 It starts when the Defendant pulled a gun and

1 pointed it at the head of his victim, which rendered
2 him helpless to Piper, who then kicked him in the head
3 unconscious. It continued when he was tied up and he
4 was made to drink some sort of a concoction. The
5 depravity and the torture continued when he was hit
6 and slapped, when he was tied up and helpless.

7 It continued again when they discussed methods of
8 murdering Chester Allan Poage in front of him while he
9 was tied up and outnumbered three to one. They
10 discussed drowning him, they discussed hitting him in
11 the head with a fire extinguisher, and they discussed
12 slitting his throat in his presence when he was
13 helpless to defend himself and he was outnumbered.
14 That was depraved and that was torture for the victim
15 to suffer through.

16 And it was only decided not to slit his throat --
17 it was not out of compassion for him, but it was
18 because Elijah Page, this Defendant, didn't want to
19 make a mess in his house with the blood of his
20 defenseless victim. Didn't want to get Preston
21 Willuweit, his roommate, involved. And that was an
22 act of depravity on behalf of Elijah Page and it was
23 torture for the victim, Chester Allan Poage, to
24 suffer.

25 The torture and depravity continued when they

1 forced him into his own vehicle. Tied, he was taken
2 to a remote area of Lawrence County to be murdered,
3 and he knew he was going to be taken up there and
4 murdered because they discussed that. That was
5 depraved and that was torture for the victim.

6 They got him out and they stripped him naked. It
7 was deep snow around. They went through his pockets,
8 and the Defendant stole right out of his pockets. All
9 the time Chester Allan Poage knew that they were going
10 to murder him. And they forced him to go and lie down
11 in deep snow naked, and as they did, they all covered
12 him up in snow, and at that time he was begging for
13 mercy, and that was depraved and that was torture for
14 Chester Allan Poage to go through.

15 And when the victim escaped, the Defendant chased
16 him; and when he did, he got his boots wet and he got
17 his pants wet; and when he recaptured him, he punished
18 him for trying to escape. He punished this victim for
19 trying to do just a real human act, which was Chester
20 Allan Poage ran for his life. He wanted to live. And
21 this is what the Defendant did: He brought him back
22 and he punished him for running off, and the
23 punishment was he forced a naked man to lie down in
24 the freezing stream in a remote area of this county in
25 the wintertime, and that was depraved on behalf of

1 Elijah Page, and that was torture for Chester Allan
2 Poage to suffer through.

3 The Defendant admits that he kicked the
4 defenseless victim with his boots on until his own
5 feet were sore from kicking that victim in the head.
6 It's no wonder that the victim, when he was found on
7 April 22nd, didn't have any ears on either his right
8 or his left side of his head. That was an act of
9 depravity and that was torture for Chester Allan Poage
10 to go through.

11 And he described to the police that he gave
12 Chester Allan Poage full football kicks to his head.
13 As that victim screamed, he would kick him. And all
14 the time the victim begged and he pleaded for mercy;
15 the Defendant showed him absolutely none.

16 And then after he kicked him in the head for a
17 while, they argued in front of this defenseless man
18 who was outnumbered about who was going to stab him.
19 And that was an act of depravity to do that in front
20 of your victim, and it was an act of mental torture
21 for Chester Allan Poage to endure.

22 And then it took an action of depravity. He went
23 down to the river, the creek, where Chester Allan
24 Poage was and he put his arm around Chester Allan
25 Poage, and Chester Allan Poage said to him, "What are

1 2000. When he committed this crime, he was fully
2 accountable at law for his actions, and he shouldn't
3 be allowed to minimize his responsibility by blaming
4 others.

5 The fact is, the Defendant was a man of action in
6 this murder. He's the one that stole the gun that was
7 used in the first acts of aggression. That's when it
8 all started is when he pointed the gun at Chester
9 Allan Poage to facilitate his kidnapping. Nothing
10 would have happened had he not pointed the gun at
11 Chester Allan Poage's head.

12 He was the one that forced him to the floor. And
13 he told Dr. Perrenoud that it was his idea to tie
14 Chester Allan Poage up. This crime all started at the
15 Defendant's house. And when the victim made a valiant
16 effort to try to escape from an overwhelming force,
17 while others debated what to do, the Defendant went
18 into action. He chased Chester Allan Poage down. He
19 recaptured Chester Allan Poage so that they could
20 murder him. And I'll quote from 187, it says that
21 "When Chester Allan Poage escaped, we were just
22 standing there going, 'Okay. He's getting away. One
23 of us better go after him.' And we just sat there and
24 watched him as he almost got to the top of the other
25 side of the hill. Finally, I was like, 'Well, fuck

1

Interview with Briley Piper

2

April 28, 2000

3

PH = Pat Humphrey CE = Chad Evans BP = Briley Piper

4

5

6 PH: That's why we're here. Because we have some versions of the
7 story...what happened to old Alan. And uh...we're here to get yours, so.
8 Starting over again, Piper, you have the continuing right to remain silent and to
9 stop questioning at any time. Anything you say can be used as evidence against
10 you. You have the continuing right to consult with and have the presence of an
11 attorney, and if you cannot afford an attorney, an attorney will be appointed for
12 you. Do you understand these rights?

13 BP: Yeah.

14 PH: Do you wish to waive these rights and talk to us at this time?

15 BP: Yeah, sure...I'll talk to you guys.

16 PH: Ok. That's good.

17 BP: What choice do I got?

18 PH: You always have a choice in life. Life is full of choices. I always like...like
19 to think it is, anyway. Well anyway, like I said, we're all the way up here from
20 South Dakota to talk about Alan. We've been talking to the people down there,
21 um...Alan's body has been found...and we have reason to believe, well, we have
22 reason to know that um...that you had a role in Alan's death. And...

23 BP: Oh, you guys know this.

1 PH: March Twentieth. Ok, so...a while before that. Ok, so what happened?

2 BP: Well, one night, Alan just came over and uh...

3 PH: Over where?

4 BP: Over to Fourteen Thirty-Three Third Street.

5 PH: Ok. That's where you were living over there with Eli?

6 BP: Nah, I was staying.

7 PH: Staying.

8 BP: Eli...Eli was not there.

9 PH: Ok.

10 BP: The time I was there, Eli was not.

11 PH: Ok.

12 BP: And it was just me and Darryl more or less.

13 PH: Ok.

14 BP: Uh-huh. Well, it was me, Darryl, Eli, and Alan. And we'd been over at

15 Alan's house playing Play Station. And Eli was looking around, and...and he

16 was noticing all of E...all of Alan's nice things. I was wrapped up in smoking

17 cigarettes and playing Play Station with Darryl. I go outside to have a cigarette,

18 and Eli follows me. He says "Hey man, why don't we just get the jump on him,

19 and we'll loot him for what he's got." I said "Hey man, I don't really know this cat.

20 I don't really like him, I don't really don't like him. I mean, you guys get into a

21 fight and he looks like he's whippin' your ass, I'll jump in. But...you know, what

22 more can I do after that." And uh...in a little locked box in Alan's mom's closet,

23 there was a little...I don't even know what size gun it was, a little six shooter.

1 BP: When he was down on the floor.

2 PH: Ok...ok. Go ahead.

3 BP: And I moved my foot real back...back real fast, and...and I kicked him.

4 PH: Where'd you kick him at?

5 BP: I kicked him square straight in the face.

6 PH: Ok. So...why did you do that?

7 BP: 'Cause he reached for me. He grabbed at me.

8 PH: Ok. Probably grabbing 'cause uh...because Eli was...working him over a

9 little bit?

10 BP: Well, whatever the reason.

11 PH: Ok. Ok. Good enough.

12 BP: I don't even like people touching me, let alone (inaudible) trying to grab

13 me.

14 PH: Ok. So you...so you kicked him in the head, then what happened?

15 BP: Eli tied him up, put him in the chair.

16 PH: Ok. Did anyone help Eli tie him up?

17 BP: I think Darryl made a comment.

18 PH: What was the comment?

19 BP: Saying "Wire worked good".

20 PH: Ok. What he ends up, uh, getting tied up with eventually? Who went and

21 got the stuff to tie him up with?

22 BP: I don't remember who walked out of the room to get it.

23 PH: Could've been you?

1 PH: Ok. And what was going on in this ten or fifteen minutes?

2 BP: Eli...I remember Darryl just going "Eli, what are you gonna do?"

3 (inaudible).

4 PH: So he woke up. He snapped out of it.

5 BP: Yeah.

6 PH: Ok.

7 BP: He was awake by then.

8 PH: Ok. Then what happened?

9 BP: He just kept asking Eli why is he doing this. And...Eli said "Cause. You

10 see all that shit that you have? It's all the shit that I don't. But it's all the shit that

11 I'm gonna have."

12 PH: Ok.

13 BP: And Alan said "Hey man, you can have everything I own. Don't do this."

14 And Eli said "Oh sorry man, we're...we're doing this." And...I looked...

15 PH: Doing what?

16 BP: And I looked at...

17 PH: What were you...

18 BP: ...I looked at Eli and I said "We're...we're...there's no "we" motherfucker.

19 You're not...we're...we're not doing shit. You set this whole thing off. You're

20 dealing with it." And that's all I said.

21 PH: Ok...what happened next?

22 BP: We got him...we put him in the car.

1 PH: What'd you do?

2 BP: Stole that lady's pen. I asked her to borrow a pen, and...

3 PH: Oh.

4 BP: ...to write something down, and I got back in the car with it.

5 PH: Ok. Where'd you guys go to the...the ATM's at?

6 BP: Big Springs, Nebraska.

7 PH: Ok. Who had the card?

8 BP: Well we all had it. We all did it together.

9 PH: Ok. Why don't ya tell me how that worked.

10 BP: We walked in uh...to the uh...Basselman. That's what it was called. And

11 uh...Eli and Darryl are...are like...I was like "Hey Eli, you still got his ATM card?"

12 "Oh yeah." Ran back out to the blazer, ran back in, and he was like "Try it." I

13 was like "Whatever man." Put it in there and...two hundred dollars came out.

14 Tried it again, two hundred dollars came out. Tried it one more time, two

15 hundred dollars came out.

16 PH: Who was doing that?

17 BP: (inaudible)...six hundred...all three of us...were right there doing it all

18 together.

19 PH: Who knew the pin? Did you all know it?

20 BP: Oh yeah. He...Alan had told Eli, and we were all just happened to be

21 standing around. And I got a really great memory for numbers. And um...

22 PH: What was the number?

23 BP: No...no...no.

1 BP: My...my feet were...well I wasn't wet 'cause I was wearing my boots,
2 but...like...Eli'd gotten back in the car and like...I don't know, like...if you know
3 about it or not, but he's got a pretty bad foot problem and his feet stink pretty
4 bad. So he like took off his boots and put 'em right next to the heater and...
5 PH: You're...you're not the first person who's told me that.
6 BP: I bet not.
7 PH: Yeah. That...that...that's...that's something that kinda....
8 BP: (unintelligible) shitty diapers all day.
9 PH: ...that's something that kinda sticks out in a person's mind, too. Isn't it?
10 Yeah. So did...do you remember hearing Lee...Eli say anything of a sexual
11 nature at all?
12 BP: I remember he made one comment.
13 PH: What was that?
14 BP: I laughed about it because I thought it was...well, it wasn't really funny, but
15 it kinda was. Talking about Russell. Eli looked over and said "You know what? I
16 could have Russell come down here and just rape your ass." And I was like
17 "(suppressed laughter)". I was just...I looked at...I looked at Darryl and Darryl's
18 like "Sorry man." I was...I just remember Darryl going "Man," that's what made
19 me laugh about it...when he said that I was just like "Ohh...like that would suck."
20 Er...I said that out loud.
21 PH: Ok.
22 BP: But other than that, anything...
23 PH: So...you kinda laughed, you thought that was kinda funny.

1 BP: Well, just when he said the part about bringing Russell down here.

2 PH: Yeah. So, was this all kind of a good time for you that night?

3 BP: Oh yeah, I had a blast. I had a blast enjoying my friend go off the deep

4 end, and...and...

5 PH: Hey...no...I...I...I'm being serious. I'm being serious.

6 BP: Well yeah, what kind of question is that?

7 PH: Well, you laughed about the sexual deal. I mean, it seems like most

8 people in a...you know...a situation like that...(unintelligible).

9 BP: Well you know, I didn't know if my number was next, if...if Eli had a plan to

10 do us all in.

11 PH: Well, and you see, that's the other part of it that doesn't make...make

12 sense, Piper. I mean, you're a big boy. Uh...you didn't have to...let's just go

13 along with your version for it right now...you didn't have to...to go along with

14 what was going on in the house, didn't have to stand on the tire iron, you didn't

15 have to get behind the wheel of that blazer and drive and go up Higgin's Gulch...

16 BP: Yeah, I didn't have to do anything.

17 PH: ...so how come you're doing all that?

18 BP: Well when somebody...

19 PH: Unless you're in on it (inaudible).

20 BP: ...somebody...somebody comes out and threatens me, threatens my

21 life...

22 PH: What do you mean he threatened your life? This is the first time I heard

23 that.

1 BP: No... no, this is not... this is not make believe. No.

2 PH: Yea... no you're right.

3 BP: No

4 PH: Pretty serious stuff isn't it?

5 BP: I don't... I don't get put under spells.

6 PH: Okay, but then how come if you were... If you were doing this cause you

7 thought you had to, how come you were participating in kicking the living hell out

8 of... out of Alan while he was laying naked in the creek?

9 BP: Well I don't think I... I don't think I sat there and kicked him and beat him

10 forever.

11 PH: Okay, how... let's get back to how many times did you kick him? You

12 weren't keeping score you said, I know, but I just... we need to know.

13 BP: I probably kicked him four or five times, a couple shots to the body and a

14 couple to the head.

15 PH: Okay where at in the head?

16 BP: I don't know, wherever I could get to and that would be

17 PH: Okay... okay and what was going through your mind at that exact

18 moment?

19 BP: I don't know. I guess I really didn't have any particular thoughts.

20 PH: Okay.

21 BP: I drowned it out of my mind and made it a blank.

1 PH: I think we're back to the ass-kickin' now, you told us that I think that
2 (unintelligible). You brought up the word ass-kickin', those were your, either ass-
3 kickin' or ass-whippin', was that going through your mind?

4 BP: No... well what would you think if you were on the ground getting the ever-
5 living shit beat out of you? Yea, I would take that as an ass-kickin'. Now I've
6 gotten my ass kicked, you ever gotten your ass kicked before?

7 PH: I sure have.

8 BP: All right, well you know what an ass-kickin' is then.

9 PH: Yep, I sure do.

10 BP: I mean I don't understand your question.

11 PH: The question is what was going through your mind when you were doing
12 that, because you told us before that you were going to either (unintelligible) ass-
13 kickin'.

14 BP: Personally, I think, I think, I think Eli had something going on with this kid.

15 PH: What do you mean something going on?

16 BP: I don't know, I don't think Alan was always on the up and up and he spent
17 a lot of time over at Eli's house and spent some time with his old roommate,
18 Natasha. I think that's how he got into that whole crowd and he got, he was
19 definitely into some bad shit.

20 PH: What kind of bad shit?

21 BP: I don't know, drugs that I didn't wanna fuck with.

22 PH: Okay, was anyone high that night?

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1 BP: Well, if you're asking for my best guess on what he was saying, I think he
2 was implying on how, which...which method he was gonna use to dispose of this
3 problem...that he had so intelligently brought upon himself.

4 PH: Ok. And what problem was that again?

5 BP: Well I imagine now that he was gonna try to rip off Alan, you know...that
6 he's not really...he couldn't just like, leave him somewhere tied up and...to where
7 he could like point him out.

8 PH: D-d-did you guys or anybody...think Alan was a snitch?

9 BP: I remember liking Alan. Seemed like a cool guy. He came over, picked
10 us up...

11 PH: Well, some snitches are likeable.

12 BP: ...he let us roll in his truck.

13 PH: D-did anyone talk that night...er did you ever in conversations with Eli that
14 he was a snitch for the cops on the dope?

15 BP: Oh no. I don't think...I...I don't even think that was possible.

16 PH: Ok.

17 BP: So...

18 PH: I don't know

19 BP: ...I really have no reason to argue that point.

20 PH: Ok. All right. Good enough.

21 BP: Because the people that were involved...he...yeah man, you were all
22 (unintelligible) the driveway, and he was just like "Huh! What the fuck? What's
23 going on?" Man, I don't know, you know. I'm...I'm not a very smart guy, but...I