CAPITAL CASE NO. 19-1338

IN THE

SUPREME COURT OF THE UNITED STATES

BRILEY W. PIPER, PETITIONER

vs.

DARIN YOUNG, WARDEN, STATE OF SOUTH DAKOTA, RESPONDENT

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

REPLY BRIEF ON THE MERITS

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QUESTIONS PRESENTED

CAPITAL CASE

The South Dakota Supreme Court has ruled that Briley did not knowingly and intelligently waive his right to a jury trial. But the South Dakota Supreme Court only remanded sentenced Piper to a resentencing, not for a new trial. *Piper v. Weber* (*Piper II*), 2009 SD 66, ¶17, 771 N.W.2d 352, 358-359 (SD 2009). The initial question is whether the faulty pre-plea advising, applies to both the wavier of jury trial and waiver of jury sentencing, requiring a remand to allow Piper to make a knowing and intelligent decision about whether to waive his Sixth Amendment right to a jury trial. The second question is whether the same prosecutor who argued two different timelines, depending on who was on trial, should have had his prior inconsistent statements admitted as admissions by the State in Piper's resentencing. The final question is whether trial counsel's cumulated errors provided Piper ineffective assistance of counsel.

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STATEMENT OF THE CASE AND FACTS

Petitioner incorporates by reference its STATEMENT OF THE CASE as set forth in its PETITION FOR WRIT OF CERTIORARI at pages 4-9 as well as the ARGUMENTS and authorities included in the initial PETITION.

The Reply Brief will be confined to addressing and responding to factual assertions and arguments in the Government's Respondent's Brief in Opposition to Petition for a Writ of Certiorari. Any argument advanced in Petitioner's Brief and not addressed in this Reply Brief is not intended to be waived.

Petitioner notes that Respondent concedes that the trial judge's advice "would later be found deficient with regard to Piper's waiver of jury sentencing because it failed to explicitly inform him that jury unanimity pertained only to death and that if only one juror dissented from a death sentence he would be sentenced to life in prison." BRIEF IN OPPOSITION, page 9.

Petitioner's waiver of constitutional rights was based on inaccurate advice from both the trial court and trial counsel regarding the law regarding the relative role of court and jury in capital sentencing. The South Dakota Supreme Court unanimously so held. Therefore, even if the initial plea was facially voluntary, the initial plea was not knowing

and intelligent, because it was based on faulty advice and constitutionally defective.

SUMMARY OF ARGUMENT

Respondent's reliance on *res judicata* as an "adequate and independent state ground" sufficient to defeat Petitioner's claims is misplaced. The cases cited by Respondent, with the exception of *Brady v. United States,* 397 U.S. 742 (1970), were not death penalty cases. Death is different, as this Court noted in *Gregg v. Georgia*, 428 U.S. 153, 188 (1976), when noting how accurate sentencing information is an indispensable prerequisite to a reasoned (sentencing) determination. *Id.*

If Petitioner's initial plea appeared to the State to be facially voluntary, it nevertheless failed to pass constitutional muster because it was not knowing and intelligent.

Second, a long line of cases, cited in the PETITION at pages 21-22, have reinforced the rule that the Constitution requires that a capital defendant be given "wide latitude" to present mitigating evidence. *Roper v. Simmons,* 543 U.S. 551, 568, 125 S. Ct. 1183, 161 L.Ed.2d 1 (2005). Inconsistent statements by the prosecution can be an effective form of mitigation evidence. *Bradshaw v. Strumpf*, 125 S.Ct. 2398 (2005); PETITION, pages 24-25. Respondent's argument that the statements were not in fact inconsistent defies a plain reading of

the State's closing arguments in the Piper and Page sentencing hearings.

Finally, the Respondent is dismissive of Petitioner's ineffective assistance of counsel claims, making only a passing reference to *Strickland v. Washington,* 466 U.S. 668, 694 (1984) and a cursory attempt to distinguish this Court's recent decision in *McCoy v. Louisiana,* ___ U.S. ___,138 S.Ct. 1500 (2018). However, an even more recent decision, *Andrus v. Texas,* ___ U.S. ___, 140 S.Ct. 1875, 207 L.Ed. 2d 335 (2020) (Per Curiam) decided June 15, 2020, bears a striking similarity to the present case and should help determine the outcome of Petitioner's ineffective assistance of counsel claim. *Andrus v. Texas*, ___ U.S. ___, 140 S.Ct. 1875, 1881-82, 207 L.Ed. 2d 335, 342 (2020) (Per Curiam) (reversed and remanded to address the prejudice prong of *Strickland*).

ARGUMENT

I. RES JUDICATA DOES NOT BAR REVIEW OF PETITIONER'S CHALLENGE TO HIS GUILTY PLEA WHERE THE INITIAL PLEA WAS NOT KNOWING AND INTELLIGENT.

Respondent argues that Piper's challenge to his guilty plea was based on an adequate and independent state law ground of *res judicata*, and

that Piper's guilty plea was voluntary and intelligent. BRIEF IN OPPOSITION, pp. 20-21. But a "voluntary" plea is not truly voluntary, and it can certainly not be seen as knowing and intelligent, if it is based on a mis-advisement of rights prior the formal waiver of those rights. *Piper II* definitively made the determination that Piper was misadvised by the trial court and by counsel. *Piper v. Weber (Piper II)*, 2009 SD 66, ¶¶ 17, 21, 771 N.W.2d 352, 358-59, 360.

Respondent relies primarily on *Harris v. Reed,* 489 U.S. 255, 260 (1989):

> This Court long has held that it will not consider an issue of federal law on direct review from a judgment of a state court if that judgment rests on a state-law ground that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision."

Id.

Respondent mis-characterizes Petitioner's alleged "strategic aim" as fact. BRIEF IN OPPOSITION, pp. 9-16, 19. Petitioner's later motion to withdraw his guilty plea clearly opposes that alleged "strategic aim." No person can make a decision deemed 'strategic' when the aim is not knowingly and intelligent, and not based on a full grasp of the consequences of actions.

However, a party must have had a sufficient opportunity to litigate the claim in order for claim preclusion to apply. *Piper v. Young (Piper IV),* 2019 SD 65, ¶ 22, 936 N.W.2d 793, citing *Ramos v. Weber,* 2000 SD 111, ¶ 8, 616 N.W.2d 88, 91, and two civil cases.

A guilty plea must be knowing, voluntary and intelligent, in order to comport with the Sixth Amendment right to jury trial in a capital murder case. The claim is not "independent" of a federal claim – and that claim was never adjudicated by any state appellate court and is therefore a proper claim to raise in this Petition. As this Court recently stated in *Foster v. Chatman,* ___ U.S. ___, 136 S.Ct. 1737, 1746-1747 (2016):

> When application of a state law bar "depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded." *Ake v. Oklahoma,* 470 U.S. 68,75, 105 S.Ct. 1087, 84 L.Ed.21d 53 (1985); see also *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.,* 467 U.S. 138, 152, 104 S.Ct. 2267, 81 L.Ed.2d 113 (1984).
>
> . . .
>
> In light of the foregoing, it is apparent that the state habeas court's application of res judicata to Foster's Batson claim

> was not independent of the merits of his federal constitutional challenge. That court's invocation of res judicata therefore poses no impediment to our review of Foster's Batson claim. See *Ake,* 470 U.S. at 75, 105 S.Ct. 1087, 84 L.Ed.2d 53.

Id.

The *Piper IV* court's "double default" analysis was also flawed. Piper had not received sufficient advice from either the trial court or counsel to make an informed decision regarding his plea, or to raise that issue in *Piper I.* PETITION, pages 10-21. See, *Martinez v. Ryan,* 566 U.S. 1 (2012), *In the case of Wellons v. Hall,* 558 U.S. 220, 222, 130 S. Ct. 727, 730, 175 l.Ed.2d 685, 687 (2010) (Per Curiam), this Court was presented with a similar situation. The state court refused to review the merits of an inmate's claims on the ground that it had already done so. However, a precedent had not then issued at the time of the appellate court's decision. This Court granted certiorari and held (7-2) that the appellate court's erroneous finding of a procedural bar was an error that warranted further consideration. The case was remanded for further consideration.

The Respondent's "double default" argument is premised on the faulty assumption that Petitioner did, in fact, have the ability to effectively raise all challenges in an earlier state proceeding, and that the state court finally adjudicated the issues

presented on independent state grounds based on well-settled law. However, procedural defaults may be excused where the petitioner relies on counsel who do not raise potentially meritorious claims. As stated in *Martinez v. Ryan*, 566 U.S. 1, 9 (2012):

> To protect prisoners with a potentially legitimate claim of ineffective assistance of trial counsel, it is necessary to modify the unqualified statement in *Coleman* that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default. This opinion qualifies *Coleman* by recognizing a narrow exception: Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance of counsel.

Id. (referencing *Coleman v. Thompson,* 501 U.S. 722, 753-754, 111 S.Ct. 2546, 115 L.Ed.2d 5640 (1991). The *Martinez* holding was not extended to ineffective assistance of appellate counsel. *Davila v. Davis,* ___ U.S. ___, 137 S. Ct. 2058, 198 L.Ed.2d 603 (2017)

Furthermore, federal habeas review is not barred every time a state court invokes a procedural rule to limit its review of a state prisoner's claims. *Cone v. Bell,* 556 U.S. 449, 129 S. Ct. 1768, 1780, 173 L.Ed.2d 701 (2009). When a state court declines to review the merits of a petitioner's claim on the

ground that it has done so already, it creates no bar to federal habeas review. *Id.* 129 S. Ct. at 1781.

> The question whether a state procedural ruling is adequate is itself a question of federal law. *Beard v. Kindler, 556 U.S. 53*, 375, 122 S. Ct. 877, 151 L.Ed.2d 820 (2002). We have framed the adequacy inquiry by asking whether the state rule in question was "firmly established and regularly followed." *Id.* at 376, 122 S. Ct. 877, 151 L.Ed.2d 820 (quoting *James v. Kentucky,* 486 U.S. 341, 348, 104 S. Ct. 1830, 80 L.Ed.2d 346 (1984)).

Beard v. Kindler, 556 U.S. 53, 60, 130 S. Ct. 612, 617-18, 175 L.Ed.2d 417 (2009). (holding discretionary state procedural rule can serve as an adequate ground to bar federal habeas corpus).

Respondent cites four cases to support the argument that even if a defendant was confused about some aspect of his plea, if the record as a whole shows the defendant understood his rights and the consequences of his plea, the plea will be upheld. These cases, such as *Brady v. United States*, 397 U.S. 742 (1970), rely upon a knowing and intelligent initial guilty plea, something that is not present in this case. Another case, such as in *United States v. Dominguez Benitez,* 542 U.S. 74 (2004), the question centered on Federal Rule of Criminal Procedure 11, not a due process violation like what occurred in this case. *Id. at 83.* In, *United States v. Timmreck,* 441 U.S. 780 (1979), another drug case, failure to comply

with formal requirements of Rule 11 was not a sufficient basis to withdraw a guilty plea.

The other cases relied upon by Respondent are drug cases, not death penalty cases. *Halliday v. United States,* 394 U.S. 831 (1969) is a pre-*Boykin* case that has no relevance in the post-*Boykin* era. Interestingly, the Court expressly noted *McCarthy v. United States,* 394 U.S. 459 (1968), which held that a defendant whose guilty plea was accepted in violation of Fed. Rule. Crim. Proc. 11 must be afforded an opportunity to plead anew, would be applied prospectively only, so *Halliday* did not benefit from that non-retroactive decision. (*McCarthy* has since been abrogated by subsequent Rule 11 amendments.)

In conclusion, Respondent's brief does not materially change any arguments originally made by the Petitioner as this claim is not barred by res judicata, and this Writ should be granted.

II. THE STATE'S REFUSAL TO ALLOW MITIGATION EVIDENCE IN THE FORM OF INCONSISTENT STATE ARGUMENTS REGARDING RINGLEADER STATUS IS NOT BARRED BY RES JUDICATA, AND IS IN CONFLICT WITH THIS COURT'S DECISIONS RELATING TO THE CRITICAL IMPORTANCE OF

MITIGATION EVIDENCE IN CAPITAL SENTENCING CASES.

This Court recently acknowledged the critical importance of mitigation evidence in a capital sentencing proceeding, when it found ineffective assistance of counsel based on inadequate mitigation at sentencing. *Andrus v. Texas,* ___ U.S. ___, 140 S.Ct. 1875,1887, 207 L.Ed. 2d 335, 348 (2020) (Per Curiam):

> We conclude that Andrus has shown deficient performance under the first prong of *Strickland* and that there is a significant question whether the Court of Criminal Appeals properly considered prejudice under the second prong of *Strickland.* We thus grant Andrus' petition for a writ of certiorari and his motion for leave to proceed *in forma pauperis,* vacate the judgment of the Texas Court of Criminal Appeals, and remand the case for the court to address the prejudice prong of *Strickland* in a manner not inconsistent with this opinion.

Id.

This Court had indicated in *Bradshaw v. Strumpf,* 125 S.Ct. 2398 (2005) that a prosecutor's inconsistent arguments could serve as mitigating evidence. The Respondent argues that exclusion of the mitigating evidence in this case was harmless,

citing *Skipper v. South Carolina,* 476 U.S. 1, 106 S. Ct. 1669, 1673, 90 L Ed. 2d 1, 9 (1986). Ironically, *Skipper* held that the exclusion of relevant mitigating evidence denied defendant a fair sentencing hearing:

> The exclusion by the state trial court of relevant mitigating evidence impeded the sentencing jury's ability to carry out its task of considering all relevant facets of the character and record of the individual offender. The resulting death sentence cannot stand, although the State is of course not precluded from again seeking to impose the death sentence, provided that it does so through a new sentencing hearing at which petitioner is permitted to present any and all relevant mitigating evidence that is available. *Eddings*, 455 U.S., at 117. The judgment of the Supreme Court of South Carolina is therefore reversed insofar as it affirms the death sentence, and the case is remanded for further proceedings not inconsistent with this opinion.

Skipper v. South Carolina, 476 U.S. 1, 8-9, 106 S. Ct. 1669, 1673, 90 L. Ed. 2d 1, 9 (1986).

In *Bradshaw v. Strumpf*, 545 U.S. 175, 187-88 (2005), this Court noted a defendant's "principal role in the offense was material to (a) sentencing determination," and remanded to allow for a

determination of whether the prosecutor's use of inconsistent theories impacted Strumpf's sentence. Although the Court reserved ruling to a later day as to whether the use of inconsistent statements would constitute a Due Process violation, that day has now dawned.

Respondent's argument that the statements were not in fact inconsistent defies a plain reading of the State's closing arguments in the Piper and Page sentencing hearings. PETITION at pages 21-22. The Lawrence County prosecutor portrayed Piper as the "leader" of the three individuals involved in the death of Chester Poage. PETITION, p. 23. However, in Elijah Page's case, the same Lawrence County prosecutor portrayed Page as the "leader" of the group.

Justice Sabers, in his dissenting opinion in *State v. Piper (Piper I),* 2006 SD 1, ¶¶ 116-117, 709 N.W.2d 783, 822, noted:

> In a stunning reversal from its argument in the Hoadley case, the State now argues that Hoadley is less culpable in this horrendous crime than Piper and Page . . .. Yet, the circuit court and the majority opinion parse selected facts, microanalyzing the events of the night to determine whether Piper and Page were worse than Hoadley.

Id.

Respondent once again relies on *res judicata*, more accurately characterized as claim preclusion in this instance. Despite the strong hint from Justice Sabers in *Piper I*, appellate counsel did not raise the state's inconsistent closing arguments in the direct appeal from the resentencing. *State v. Piper (Piper III),* 2014 SD 2, 842 N.W.2d 338. He chose to appeal what he perceived to be the strongest issue, the denial of Piper's motion to withdraw his plea. BRIEF IN OPPOSITION, page 31.

However, in this case, appellate counsel knew that Justice Sabers was highly critical of the State's inconsistent statements regarding relative culpability of the three individuals charged in connection with Chester Poage's death. *State v. Piper (Piper I),* 2006 SD 1, ¶¶ 116-117, 709 N.W.2d 783, 822. The case of *Cochrun v. Solem,* 397 N.W.2d 94, 96 (1986), had been decided, so counsel knew that when a petitioner takes a direct appeal he cannot thereafter, in a post-conviction proceeding, raise any matter of which he was aware at the time of the direct appeal but did not raise. Counsel knew that the Anti-Terrorism and Effective Death Penalty Act (AEDPA) incorporated the state law remedy exhaustion requirements of 28 U.S.C. § 2254(b). Knowing all this, appellate counsel nevertheless chose to appeal only his "best" issue, leaving the Petitioner and subsequent defense counsel at a decided disadvantage.

Petitioner takes issue with Respondent's conclusory statement of facts, and particularly with the Respondent's assertion at page 5 of BRIEF IN

OPPOSITION that "Piper instigated the scheme and was the group's ringleader." As discussed more fully in Argument II, the same Lawrence County prosecutor who argued Petitioner was the ringleader had made directory contradictory statements indicating that his cohort, Elijah Page, was the instigator and actor, while Piper was "the mouth." Page Sentencing, 947. Appendix D and Piper, Re-Sentencing, 1807, quoted at pages 23-24 of PETITION.

In conclusion, the Respondent hopes we ignore the statements made by the prosecuting attorney in Page, as such statements are in clear contradiction to the argument before this Court. We cannot ignore the statements used to put Page to death and wish they were not made. As such, this Writ should be granted.

III. INEFFECTIVE ASSISTANCE OF COUNSEL AT RESENTENCING PREVENTED PETITIONER FROM EFFECTIVELY CONFRONTING ADVERSE WITNESSES, ALLOWED MITIGATION WITNESSES TO ADMIT AGGRAVATING FACTORS, AND ALLOWED MITIGATION WITNESSES TO BE WRONGFULLY IMPEACHED WITHOUT EFFECTIVE CHALLENGE.

Respondent argues that Piper's claims of ineffective assistance of counsel do not meet Rule 10 criteria, and the do not meet the *Strickland* standard for ineffective assistance of counsel. BRIEF IN OPPOSITION, page 34. Respondent does not claim *res judicata* as a bar to Petitioner's ineffective assistance of counsel claims.1

United States Supreme Court Rule 10(c) allows review where a state court has decided an important question of federal law in a way that conflicts with relevant decisions of this Court. The Sixth Amendment right to counsel requires effective assistance of counsel in order to preserve the fundamental right to a fair trial guaranteed through the Due Process Clause. *Strickland v. Washington,* 466 U.S. 668, 684-686, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). PETITION, pages 26-27. The Ninth Circuit also found due process violations where cumulative errors and omissions by counsel rendered a criminal defense "far less persuasive than it might [otherwise] have been." *Parle v. Runnels,* 505 F.3d 922, 927 (9th Cir. 2007).

The South Dakota Supreme Court's rejection of Piper's ineffective assistance of counsel claims in *Piper IV* conflicts with two recent cases of this Court: *McCoy v. Louisiana,* ___ U.S. ___, 138 S .Ct. 1500,

1 The South Dakota Supreme Court generally does not consider ineffective assistance of counsel claims on direct appeal. *State v. Hauge*, 2019 SD 46, ¶ 18, 932 N.W. 2d 165, 171; *State v. Kiir*, 2017 SD 47, ¶¶ 19-22, 900 N.W.2d 290, 297-298.

200 L.Ed.2d 821 (2018) and *Andrus v. Texas*, ___ U.S. ___, 140 S.Ct. 1875, 207 L.Ed.2d 335 (2020).

McCoy v. Louisiana, 584 U.S. ___, 138 S. Ct. 1500, 200 L. Ed. 2d 821 (2017) held that it was structural error for an attorney to admit his client's guilt without the client's authority. Although the Respondent attempts to distinguish *McCoy*, based on the fact that Piper had confessed. However, Petitioner fails to see a meaningful distinction where, as here, defense counsel elicited testimony from two expert witnesses, a psychologist, and a neuropsychologist, admitting three aggravating factors, without a waiver from Piper. It was not, as the State argues, Piper's obligation to object to his counsel's actions in open court. Rather, it was defense counsel's obligation, before eliciting such damning testimony from "defense" experts, to consult with their client and obtain a waiver before the sentencing trial.

The second recent case is *Andrus v. Texas,* ___ U.S. ___, 140 S. Ct. 1875, 207 L.Ed.2d 335 (2020), decided June 15, 2020. In that capital case, defense counsel failed to present effective mitigation evidence. In *Andrus,* as in the present case, defense counsel performed almost no mitigation investigation, failed to present effective mitigation evidence, and what evidence was presented "backfired by bolstering the State's aggravation case." Defense counsel in *Andrus*, also failed to investigate the State's aggravating evidence, resulting in ineffective impeachment. This Court concluded that "[t]aken together, those deficiencies

effected an unconstitutional abnegation of prevailing professional norms." *Andrus v. Texas*, ___ U.S. ___, 140 S.Ct. 1875, 1881-82,207 L.Ed.2d 335, 342 (2020).

Respondent makes only factual arguments, citing no authorities other than *Strickland,* to refute Petitioner's specific claims of ineffectiveness in expert witness preparation, ineffective impeachment of professional snitch Tom Curtis, and ineffectiveness in rehabilitating the testimony of Sister Crowley after the State falsely accused her of violating a prison policy. The Respondent's additional arguments do not change the original arguments made in this petition, and the Writ should be granted.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted this 10th day of August, 2020.

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IN THE SUPREME COURT OF THE UNITED STATES

BRILEY W. PIPER,

Petitioner, Certificate of Service

vs.

State of South Dakota,

Respondent.

Dated this 10th day of August, 2020, Ryan Kolbeck, attorney of record for Briley W. Piper, hereby certifies that three true and correct copies of the Reply Brief on the Merits was served upon Respondent's counsel by mailing three copies of the same to Jason Ravnsborg, Attorney General for the State of South Dakota, 1302 East Highway14, Suite 1, Pierre, South Dakota 57501-5070 by first class mail, postage prepaid and by electronic service at atgservice@state.sd.us. This Reply brief has been taken to the printer, and bound copies will be provided to the Court and Respondent immediately upon receipt from the printer, no later than August 17, 2020.

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