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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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 S.D. 66, ¶17, 771 N.W.2d 352, 358-359 (S.D. 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.

PARTIES TO THE PROCEEDING

Petitioner is Briley W. Piper, defendant-appellant below.

Respondent is the State of South Dakota, plaintiff-appellee below, represented by Jason Ravnsborg, Attorney General for the State of South Dakota, 1302 East Highway14, Suite 1, Pierre, South Dakota 57501-5070, atgservice@state.sd.us, (605) 773-3215.

State v. Piper (Piper I), 2006 S.D. 1, 709 N.W.2d 783. Judgment entered January 4, 2006.

Piper v. Weber (Piper II), 2009 S.D. 66, 771 N.W.2d 352. Judgment entered July 29, 2009.

State v. Piper (Piper III), 2014 S.D. 2, 842 N.W.2d 338. Judgement entered January 8, 2014.

Piper v. Young (Piper IV), 2019 S.D. 65. Judgment entered December 11, 2019.

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BRILEY W. PIPER,

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PETITION FOR WRIT OF CERTIORARI

Petitioner Briley Piper respectfully petitions for a writ of certiorari to review the judgment of the South Dakota Supreme Court.

JURISDICTION

The South Dakota Supreme Court denied relief on December 11, 2019. This Court has jurisdiction under 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the United States Constitution, Section 1, provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law.

OPINIONS BELOW

Chester Allan Poage was murdered in a rural mountainous area of the northern Black Hills, located in Lawrence County, South Dakota, in March of 2000. The State of South Dakota prosecuted three young men and sought the death penalty for all three. The first defendant, Elijah Page, waived his jury trial and was sentenced to death by the trial judge. State v. Elijah Page, Lawrence County, South Dakota, File 40c00000430A0. The South Dakota Supreme Court affirmed the trial and Page was executed in 2007. State v. Page, 709 N.W.2d 739 (S.D. 2006). The other defendant, Darrell Hoadley, received life in prison from a Lawrence County jury, with this judgment also affirmed by the South Dakota Supreme Court. State v. Hoadley, 651 N.W.2d 249 (S.D. 2002).

Briley Piper was improperly advised of his rights and then waived his right to a jury trial in 2001 jury trial and sentencing. The trial Court sentenced him to death. The original Supreme Court affirmance of the initial death sentence, Piper I, is cited as State v. Piper, 2006 S.D. 1, 709 N.W.2d 783. Piper II, the first habeas corpus proceeding where the South Dakota Supreme Court determined the plea was not knowingly and intelligently made, but only remanded for resentencing, is Piper v. Weber, 2009 S.D. 66, 771 N.W.2d 352. Piper III, the affirmance of the jury resentencing and denial of Piper's first motion to withdraw his pleas, is cited as State v. Piper, 2014 S.D. 2, 842 N.W.2d 338. Piper IV, the most recent opinion of the South Dakota Supreme Court, containing the denial of the issues presented in this Writ of Certiorari, is Piper v. Young, 2019 S.D. 65.

STATEMENT OF THE CASE

Back in 2001, the trial Court Judge misadvised Briley Piper of the jury function at a sentencing hearing three different times. The first time, the judge explained that the jury would:

> . . . determine whether or not the State has proved one or more aggravating circumstances and then for that jury to decide whether the penalty should be life or death. The verdict of the jury would have to be unanimous. . . .

Piper, Plea, 16.[1]

It would be reasonable from this advisement to conclude that the jury's decision on punishment ("life or death", in the court's words) "would have to be unanimous" either way. Both the prosecutor and Piper's attorney promptly affirmed this advice, and Piper promptly said (for the only time in the entire hearing) that he did not understand and had a question. The Court answered the question by stating:

> Court: What you need to understand is that if you have a jury instead of a judge, all 12 jurors must agree on the penalty…

Piper then said he understood. The Court then, for the third time, misadvised Piper:

> Court: What is significant about what you're doing here today is that if you waive your right to have the jury do the

1 All references to trial transcripts will be name the defendant, the name of the hearing, and page number in the Appendix.

> sentencing, you are trading 12 lay people for one judge to make that call. Do you understand that?
>
> Piper: Yes.

Piper, Plea, 17-18, Appendix C.

It is undisputed that Piper's attorneys, and the trial court, gave two separate but connected faulty advisements before Piper made the decision to plead guilty in a capital murder case. The first undisputed error concerned jury unanimity at the penalty trial, which was the precise issue presented to the South Dakota State Supreme Court and decided in Piper II (at ¶¶11-12 [the judicial advisement] and ¶19 [holding]). The second undisputed error is Piper's certainty, based on what he was told, that the forum for the guilt and the sentencing determinations was legally required to be identical. What the court then told Piper transforms this reasonable interpretation into *the only one which was possible*. (Emphasis added.)

After the initial death sentencing, Piper's attorneys in Piper I argued the South Dakota death penalty statutes were unconstitutional, partially based on Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). In Ring, this Court determined that "a capital sentencing scheme would be unconstitutional if it prevented a defendant who pleaded guilty from having alleged aggravating circumstances found by a jury. Id. at 609. A majority of the South Dakota Supreme Court determined the statutes were constitutional, because "other statutes provide the right" to a jury trial, though the sentencing scheme did not. Piper I, at

¶56.

Piper then sought habeas review, claiming the plea was unconstitutional because it was not knowing and intelligently made. Piper's habeas appellate counsel sought life in prison as the appropriate remedy because that is what SDCL 23A-27A-14, the 2001 death penalty statutes, provided. This time, the South Dakota Supreme Court agreed Piper's waiver of a jury trial was not knowing or voluntary. Piper II, at ¶19. The Court, however, only remanded for a new sentencing proceeding. Id. at ¶21.

Piper then moved in 2009 for the first time to withdraw his guilty pleas pursuant to SDCL 23A-27-11, arguing the legal conclusion that Piper II made: he did not knowing and intelligently waive his right to a jury trial in violation of Boykin v. Alabama, 395 U.S. 238 (1969) and Moran v. Burbine, 475 U.S. 412, 421 (1986). See also North Carolina v. Alford, 400 U.S. 25, 31, 27 L. Ed. 2d 162, 91 S. Ct. 160 (1970) (holding that the standard is whether the plea is a voluntary and intelligent choice among the alternative course of action); Parke v. Raley, 506 U.S. 20, 28-29, 113 S.Ct. 517, 523, 121 L.Ed.2d 391, 403 (1992); McCarthy v. United States, 394 U.S. 459, 466, 22 L. Ed. 2d 418, 89 S. Ct. 1166 (1969).

In Piper III, the South Dakota Supreme Court ruled the trial court had no jurisdiction to entertain the plea-withdrawal motion, as the Piper II remand language for resentencing restricted the South Dakota Supreme Court's jurisdiction. The Piper III decision explicitly noted that the South Dakota Supreme Court was not deciding the merits of Piper's plea-withdrawal claim which, at the time of the Piper III decision, had not been decided by any court. Piper III, ¶44.

The resentencing occurred in 2011, with the jury finding the existence of three aggravating factors and imposing death. This sentence was affirmed on direct appeal by Piper III. Multiple federal constitutional errors are present during this resentencing. Initially, Piper claimed the pleas were not knowing and voluntarily. Further, Piper argued the prosecutor advanced inconsistent arguments and the defense counsel provided ineffective assistance of counsel.

The Constitutional habeas issue regarding the Constitutionality of the plea advisement is squarely governed by the South Dakota Supreme Court's decision in Piper II. The South Dakota Supreme Court in 2019 had a change of mind from 2009, however, and contrary to the case law of this Court, determined the only inference that can be drawn from the record is that Piper's plea was voluntary. Piper IV, at ¶38.

Second, as three individuals were charged with murder, the county prosecutor tried three separate trials. He used an inconsistent timeline, however, when prosecuting both Elijah Page[2] in 2001 and Briley Piper in 2011. These prior statements are mitigation evidence as an inference could be drawn by the admissions of the prosecutor relative to Piper's culpability compared to the other two accused.

In 2001, the Lawrence County prosecutor argued Elijah Page started it all:

> *That's when it all started is when he [Elijah Page] pointed the gun at Chester*

2 State v. Elijah Page, Lawrence County, South Dakota, File 40C00000430A0.

> *Allan Poage to facilitate this kidnapping. . . . The Defendant [Elijah Page] is the one that started the assault with pulling the gun.*

Appendix D: Page, Sentencing, 947. (Emphasis added.)

In 2011, the same Lawrence County prosecutor argued it was Briley Piper:

> *And he [Briley Piper] was the one that did the first act of actual aggression to knock the man unconscious*.

Piper, Re-Sentencing, 1807. (Emphasis added.)

Arguing the 2001 statements were inconsistent with the arguments made in 2011 and were proper mitigation evidence, the defense moved to admit these inconsistent statements as an Admission of Party Opponent. This motion was denied. Piper Re-Sentencing, 1721-1730. Piper appealed this issue, and the South Dakota Supreme Court dismissed the claim and held the statements were not inconsistent, and the issue was precluded based on res judicata and Ramos v. Weber, 616 N.W.2d 88 (2000).

Third, during the 2011 resentencing, numerous cumulative deficiencies exist to show the attorneys provided ineffective assistance of counsel pursuant to Strickland v. Washington, 466 U.S. 668, 687 (1984). First, the defense called two experts during the mitigation phase who admitted to the three aggravating factors within SDCL 23A-27A-1 that the State of South Dakota needed to prove to impose the death penalty. Piper Re-Sentencing, 1572 – 1573, 1641, 1647, 1655, 1689. With this testimony, the

nature of this proceeding shifted from to adversarial to non-adversarial, in violation of U.S. v. Cronic, 466 U.S. 648 (1984). The South Dakota Supreme Court ruled that while the decision to call the experts was deficient, the court could not conclude the tactical decision impacted the resentencing. Piper IV, at ¶56.

Next, though the time between the two sentencing trials was nearly a decade, the defense did not obtain an updated criminal history of a jail informant witness named Tom Curtis. An updated criminal history would have revealed several rape charges the defense did not know about, and could not use for impeachment purposes. Piper Habeas Trial, 50, 52, 364. Finally, during the testimony of a Catholic nun who befriended Piper, the defense team permitted the prosecutor to mislead the jury about whether Piper violated a prison policy, impeaching the essential mitigation witness. Piper, Re-Sentencing, 1806. The South Dakota Supreme Court again found there was no prejudice in allowing the testimony. Piper IV, at ¶67.

REASONS FOR GRANTING THE WRIT

The Court should grant a writ of certiorari to recognize adherence to well-established precedent that a person must knowingly and intelligently waive his right to a jury trial, let alone in a death penalty case. Since the waiver of jury sentencing was constitutionally invalid, so is the guilty plea waiver. Applying res judicata when the law was unclear is an error as it would have required trial counsel to engage in judicial guessing when the parties did not yet know the legal conclusion of Piper II. As a result, any prior

motions to withdrawal the guilty plea would have been premature. In essence, a judicially determined faulty pre-plea advisement should immediately bring the case back to when the advisement occurred, prior to any change of plea hearing.

The Court should also grant the writ of certiorari to recognize that all mitigation evidence, including arguments made by a prosecutor that reduced Piper's culpability, shall be admitted into trial. Finally, this writ of certiorari should be granted as trial counsel, by failing to subject the evidence to adversarial testing, provided ineffective assistance of counsel.

I. AFFIRMING THE DECISION WILL PERMIT AN UNCONSTITUTIONAL WAIVER OF A SIXTH AMENDENT RIGHT TO A JURY TRIAL IN A CAPITAL MURDER CASE.

The South Dakota Supreme Court recognized in 2009:

> "Piper's attorneys advised him that the statute did not allow for a jury trial on the penalty phase after a guilty plea to first degree murder. . . . The judge's explanation did not clearly dispel that misunderstanding."

Piper II, 2009 S.D. 66 at ¶17. The South Dakota Supreme Court went on to confirm that:

> "The defendant's plea cannot be considered knowing and voluntary without a clear explanation and

> understanding of this concept. The judge's explanation fell short of the required clarity in this case….Consequently, without an adequate explanation by the judge that one juror could, in effect, choose life, Piper's waiver of a jury trial on the death penalty cannot be considered knowing or voluntary. Furthermore, the finality of a death sentence requires that we accord higher scrutiny to capital sentencing. (Citing California v. Ramos, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983)).

Id. at 19.

Piper's attorneys told him explicitly that if he had a jury trial on guilt, he had to have a jury trial on sentencing. They also told Piper that if he waived his right to a trial in the guilt phase, and pleaded guilty instead, he had to be sentenced by the judge. We also know, from the plea-taking transcript, that the judge (at the beginning of the hearing, in Piper's presence) was told the same thing by defense counsel. The judge, in Piper's presence, took a break. When he returned to court, he ratified this advice by his silence -- he said nothing at all to tell Piper that this was not correct advice. We also know that what the judge ended up telling Piper explicitly confirmed this advice -- that jury-sentencing waiver was a "consequence" of the plea, and that once the plea was entered, judge sentencing would happen next. That's just what happened. A plea (to the charges) was entered, and no further waiver of any kind took place.

This pre-plea mis-advising is a substantive

free-standing Constitutional due process claim. If Piper's purported waiver of his jury trial right was not made knowingly and intelligently, it is "void" as a violation of due process. Boykin v. Alabama, 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). In Boykin, the Court held that if a guilty plea is not a "voluntary and knowing" waiver of the right to jury trial, "it has been obtained in violation of due process and is therefore void."

"We have been unyielding in our insistence that a defendant's waiver of his trial rights *cannot be given effect* unless it is 'knowing' and 'intelligent'." Illinois v. Rodriguez, 497 U.S. 177, 183, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990) (Emphasis added.) A wavier is defined as an intentional relinquishment of a "known right or privilege". Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct.1019, 1023, 82 L.Ed.1461, 1466 (1938) (pointing out that "courts indulge every reasonable presumption against waiver" of fundamental constitutional rights and that we "do not presume acquiescence in the loss of fundamental rights").

> The importance of a valid informed waiver cannot be underestimated. "What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequences." Boykin, at 244. In Iowa v.Tovar, 541 U.S. 77, 81, 124 S.Ct. 1379, 1383, 158 L.Ed.2d 209, 215-16 (2004), the Court determined that for a valid waiver, the defendant must

> *fully understand* the nature of the right and how it would apply in the circumstances. (Emphasis added.)

Here, we know Piper did not understand his rights at all. As explained in Moran v. Burbine, 475 U.S. 412, 421 (1986) (citations omitted):

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

Piper's plea fails both parts of the Burbine test. First, Piper was never given "a full awareness of both the nature of the right being abandoned" and its consequences. He was advised only of a version of the right which has now twice been held invalid. He was not told of the version which is Constitutionally guaranteed -- a jury trial as to guilt which is independent of the penalty forum, without the coercive unanimity misadvice.

Second, Piper's plea was not a "free and deliberate choice rather than intimidation, coercion, or deception" (Burbine, supra). He was told that if he exercised his right to a jury trial and was found guilty, a jury sentencing was mandatory and the verdict unanimous. Piper II, at ¶17. The unanimity misadvise, therefore, taints the guilty plea itself,

because the confluence of those two misadvisements has an unconstitutional, impermissibly coercive effect, rendering the plea involuntary.

In Bousley v. United States, 523 U.S. 614, 618-619, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998), this Court emphasized the importance of the plea as a waiver of several Constitutional rights. This Court found that when the lower Court, counsel and the Defendant all misunderstood the essential elements of a crime, the plea is constitutionally invalid. Id. at 618-619. With this adherence to the significance of the event, it is non-sensical to otherwise permit a plea when the Court, counsel and the Defendant all misunderstood the essential jury trial rights Piper was waiving.

The South Dakota Supreme Court's remedy of a remand to a procedural position after the plea will always be inadequate. It is baffling to conclude that, even though the previous misadvisements rendered Piper's previous decision unconstitutional, the South Dakota Supreme Court still refuses to allow Piper to rethink his decision with the assistance of correct trial advice.

This Court has overturned statutes based on the fundamental principle that a valid waiver cannot be coerced. In United States v. Jackson, 390 U.S. 570 (1968), the Court was faced with a federal kidnapping statute which provided for the possibility of a death sentence, but only if the defendant exercised his right to a jury trial. The Court invalidated that portion of the statute. "The inevitable effect of [the law] is, of course, to discourage assertion of the Fifth Amendment right to plead not guilty and to deter exercise of the Sixth Amendment right to demand a

jury trial." Id. at 581. "Whatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights. . . . The question is not whether the chilling effect is 'incidental' rather than intentional; the question is whether that effect is unnecessary and therefore excessive." Id. at 582.

Those cases dealt with statutory schemes, but the identical evil is present here. The plea colloquy's misadvisements "needlessly chill[ed] the exercise of basic constitutional rights", because they informed Piper -- wrongly -- that his chances of a life sentence were worse with a jury, and that the only way to avoid a jury sentencing was by pleading guilty to the criminal charges. This transformed the required "free and deliberate choice" into one colored by "intimidation, coercion or deception" (Burbine, supra). Piper was offered a choice, but with a judicial thumb on the scale. A state court cannot restrict a defendant's exercise of a fundamental constitutional right without good reason. This Court has long adhered to this principle, applying it to a wide variety of state restrictions on a wide variety of constitutional trial rights. See Holmes v. South Carolina, 547 U.S. 319, 321, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) (collecting precedent). The misadvice given to Piper "discourage[d] assertion of the Fifth Amendment right to plead not guilty and ... deter[red] exercise of the Sixth Amendment right to demand a jury trial". Jackson, 390 U.S. at 581. Piper's decision to plead guilty cannot be considered a voluntary waiver of his actual jury-trial right.

The reality of this case is that Piper was deprived of his Sixth Amendment right to a jury trial

because he was not told that it existed (a jury trial on guilt, which did not carry mandatory jury sentencing) and because the tainted jury sentencing he was advised of could only be avoided by pleading guilty to the criminal charges. The right to a jury trial is a "constitutional protection of surpassing importance". Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2358, 147 L.Ed.2d 435 (2000). This is unlike an advising regarding the elements of the offense only and impeachment evidence. See Bradshaw v. Strumpf, 545 U.S. 175, 182-183, 125 U.S. 2398, 2405-06, 162 L.Ed.2d 143, 153-54 (2005); and United States v. Ruiz, 536 U.S. 622, 628-29, 153 L.Ed.2d 586, 595, 108 S.Ct. 2389, 2455 (1988).

This right was insisted upon by the Framers not just for the protection of the accused, but for an independent and equally fundamental purpose: to restrict the power of the judiciary, by reserving that power to the people. See Jones v. United States, 526 U.S. 227, 244-48, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999).

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

Blakely v. Washington, 542 U.S. 296, 305-06, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

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

To uphold this guilty plea is to trivialize and dilute this Constitutional right of "surpassing importance". A capital defendant, more than others, is entitled to accurate advice before making the crucial decision whether to plead guilty. Courts are to exercise "the utmost of caution", giving a "painstaking explanation" of rights and consequences. State v. Sewell, 69 S.D. 494, 12 N.W.2dd 198, 199 (1943). Here, the advice given to Piper was wrong in two important respects, and it took Piper II to be decided before Piper could be given the accurate advice he needed before making a knowingly and voluntary waiver of his jury trial and jury sentencing. He must be afforded that opportunity.

This advising was inadequate in 2001, 2009, and 2020. Time does not heal a faulty waiver's wounds.

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

The South Dakota Supreme Court incorrectly held that res judicata bars Piper's claim and the motion to withdraw his guilty pleas. Piper IV, ¶25. The South Dakota Supreme Court wrote that Piper's due process claim challenging his guilty pleas was twice procedurally defaulted, as Piper failed to raise the issue in his direct appeal (Piper I) and "overlooked" the claim during his initial habeas in Piper II. Making the claim at that time, however, would have required the attorneys to claim the plea was

unknowing and unintelligent prior to the Supreme Court ruling that it was so. Further, any choice by Piper before Piper II would have been uninformed, and therefore not voluntary.

"The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." North Carolina v. Alford, 400 U.S. 25, 31, 27 L.Ed.2d 162, 91 S.Ct. 160 (1970). See Parke v. Raley, 506 U.S. 20, 29, 113 S.Ct. 517, 523, 121 L.Ed.2d 391, 403 (1992). It was not until after the Piper II decision, however, that Piper could finally be advised about what the alternative courses of action were available to him. Any decision before Piper II would have been uninformed.

The primary issue in 2009 before the South Dakota Supreme Court in Piper II, was whether the plea was defective, not what must be done as the remedy. The remedy was barely discussed, but only chosen because life in prison under the 2001 statutory scheme was the only other sentencing option for a jury during a death penalty trial. Piper III, at ¶20. But this was not the only option for a remedy by the South Dakota Supreme Court, as no statute restricts the Supreme Court available remedies after finding a Constitutional violation.

Since his habeas proceeding vigorously challenged the professional competence of his previous attorneys' appellate work, it was obvious that Piper would receive new counsel. Applying any issue preclusion doctrine today would be to "interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." Strickland v.

Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The importance of independent counsel, and how it might affect Piper's choice of pleading versus going to trial, has been recognized by this Court:

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

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

Res judicata supports the policy of relieving parties of the cost and vexation of multiple lawsuits and conserving judicial resources. Allen v. McCurry, 449 U.S. 90, 66 L.Ed.2d 308, 201 S.Ct. 411 (1980). Applying res judicata in this case has provided the opposite result as litigation since the inadequate remand has focused on this issue. See Montana v. United States, 400 U.S. 147, 59 L.ED.2d 210, 99 S.Ct.970 (1979) (stating the concept of collateral estoppel cannot apply in a subsequent federal action when the party against whom the decision was made

did not have a full and fair opportunity to litigate the issue). A claim, dismissed for lack of jurisdiction, did not have a decision "on the merits". Johnson v. Williams, 568 U.S. 289, 308-309, 133 S.Ct. 1088, 185 L.ED.2d 105 (2013) (presumption of adjudication disappears when a claim is dismissed because of a want of jurisdiction).

For Piper's plea decision to be knowing and intelligently made, it could have only been made after Piper II, upon proper reliance of Piper II and the judicial determination of whether the advisement was proper. The decision should not have been made at that point because no attorney would have known the correct advice to give Piper. It was only after the appellate decision and after returning to criminal court that Piper finally had complete judicial correction of the pre-plea misadvise. It was only at that point (when correct advice is finally furnished) that a criminal defendant's plea decision is to be made. Any decision made prior to this point would have resulted in judicial guessing about how the South Dakota Supreme Court would rule.

Calling Piper's plea a strategic choice is not a substitute for a valid waiver because Piper was not informed. "A defendant can hardly be said to make a strategic decision to waive his jury trial right if he is not aware of the nature of the right or the consequences of the waiver." United States v. Martin, 704 F.2d 267, 273 n. 5 (6th Cir. 1983). In other words, the question of a knowing and intelligent waiver of a fundamental constitutional right comes first. It cannot be dispensed with merely by claiming that the waiver (here, the plea) is the product of a defendant's choice. That choice must first be fully

informed and knowing before it may be made.

To affirm the trial court, this Court would have to decide that Piper should be forever shackled to the choice that he made in 2001, made after erroneous legal advice from his attorneys and from the plea-taking judge -- advice which the South Dakota Supreme Court has held to have rendered his earlier choice unconstitutional. The misadvice as to penalty-jury unanimity told him that his chances of obtaining a life sentence were greater with a judge than with a jury, when just the opposite is true. Further, Piper was also told that the only way he could obtain a judge sentencing was to plead guilty to the criminal charges. In light of this, application of the res judicata doctrine to prohibit Piper's claim is erroneous. The South Dakota Supreme Court must be reversed.

II. WHETHER FEDERAL DUE PROCESS REQUIRES REVERSAL WHEN NOT ALL MITIGATION EVIDENCE, SPECIFICALLY INCONSISTENT ADMISSIONS BY THE STATE, WAS PRESENTED TO THE JURY.

United States Supreme Court decisions indicate that the failure to allow a capital defendant to present mitigation evidence may constitute reversible error. Roper v. Simmons, 543 U.S. 551, 568, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (finding the Constitution requires that a capital defendant be given "wide latitude" to present mitigating evidence); Williams v. Taylor, 529 U.S. 362, 393, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (noting a capital defendant's "undisputed" and "constitutionally protected right . . .

to provide the jury with . . . mitigating evidence"); Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) (concluding the improper exclusion of mitigation evidence at capital sentencing hearing was reversible error); Eddings v. Oklahoma, 455 U.S. 104, 110-116 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) (vacating a death sentence because it was imposed without the type of individualized consideration of mitigating factors . . . required by the Eighth and Fourteenth Amendments in capital cases); Lockett v. Ohio, 438 U.S. 586, 604-05, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (finding the sentence must be allowed to consider any mitigating evidence). Further, South Dakota statutes mandate mitigation evidence be presented in a death penalty case. SDCL 23A-27A-2 requires that "(4) All evidence concerning any mitigating circumstances" be considered. SDCL 23A-27A-1 provides "the judge shall consider . . . any mitigating circumstances."

Confidence in the outcome of the proceeding is undermined by the jury's inability to consider mitigation evidence. Parkus v. Delo, 33 F.3d 933, 940 (8th Cir. 1994); See Thompson v. Calderon, 120 F.3d 1047, 1059 (9th Cir. 1997) (it is well established that when no new significant evidence comes to light a prosecutor cannot, in order to convict two defendants at separate trials, offer inconsistent theories and facts regarding the same crime).

In Bradshaw v. Strumpf, the United States Supreme Court reviewed how the defendant's "principal role in the offense was material to (a) sentencing determination". 545 U.S. 175, 187-88 (2005). In Bradshaw, this Court vacated a portion of the judgment relating to the prosecutorial

inconsistency claim and remanded the case for additional proceedings. Id. This Court determined that the prosecutor's use of allegedly inconsistent theories may have had an impact on Strumpf's sentence. Id.

In Piper's case, the Lawrence County prosecutor constantly portrayed Piper as the "leader" of this group. Piper, Re-Sentencing, 1806. Any evidence to the contrary, such as that someone else committed the first act of aggression, is relevant to diminish Piper's culpability.

In Elijah Page's case, the Lawrence County prosecutor portrayed Page as the "leader" of this group:

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

Page Sentencing, 947. (Emphasis added). Appendix D.

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

Piper, Re-Sentencing, 1807. (Emphasis added).

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

For the statements to be admitted, the Eighth Circuit has required "an inconsistency must exist at the core of the prosecutor's case against the defendants for the same crime" in order to prevent a due process violation. Smith v. Groose, 205 F.3d 1045, 1047 (8th Cir. 2000) (finding a due process violation when the prosecutor manipulated evidence by using different and conflicting statements from same cooperating witness); See United States v.

Higgs, 353 F.3d 281, 326 (4th Cir. 2003) (noting how a due process violation can occur with the use of inherently factually contradictory theories). Further, the prosecutor in the current case adopted and believed the arguments he made against Elijah Page to be true and this was in the scope of his relationship as the county prosecutor. As a result, the statements made by the prosecutor in prosecuting Elijah Page qualify as an admission on behalf of Lawrence County. See Giglio v. U.S., 405 U.S. 150, 154, 92 S.Ct.763, 31 L.Ed.2d 104, (1972) (the prosecutor's office is an entity and as such it is the spokesman for the Government); U.S. v. Bakshinian, 65 F.Supp2d 1104, 1106 (C.D. Cal 1999) (prosecutor's statement is admission by party-opponent).

Every crime has a timeline, something that should not change based on which defendant is on trial. The person who started this murder scheme did not change during the decade between trials, but in Piper's resentencing the prosecutor's characterization of what occurred did, and the two characterizations are incompatible.

The Government strived to paint both Page and Piper as the one who did the first act; the one who without these actions, this murder would not have occurred. Admitting the prosecutor's statements are relevant to the relative culpability of Page and Piper which would have provided the factfinder a basis to conclude that, if Page was the one who started this, then Piper was less culpable of the offense and deserving of a life sentence instead of the death penalty. As a result, the statement made by the prosecutor is proper mitigation evidence.

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

III. WHETHER PIPER WAS AFFORDED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL ADMITTED AGGRAVATING FACTORS WITHOUT HIS CONSENT, AND FAILED TO INVESTIGATE WITNESSES, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

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

> In a long line of cases that includes Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed 158 (1932), Johnson v. Zerbst, 304 U.S. 458 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), and Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the

> fundamental right to a fair trial. The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause:
>
> Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled. Adams v. United States ex rel. McCann, 317 U.S. 269, 275, 276, 63 S.Ct. 236, 87 L.Ed. 268 (1942); see Powell v. Alabama, supra, 287 U.S. at 68-69.

Id.

The question is whether counsel's representation "amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. 86, 94 131 S.Ct. 770, 788, 178 L.Ed.2d 624 (2011) (quoting Strickland, 466 U.S. at 690).

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

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

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

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

A defense attorney's role is to subject the evidence to the adversarial system, and not to call witnesses who can bolster the Government's case. The Eighth Circuit Court of Appeals has discussed how calling a witness who could become a witness for the prosecution makes little sense. In Walls v. Bowersox, 151 F.3d 827, 834 (8th Cir. 1998), counsel did not call family members who were unwilling to testify in mitigation in the capital case. The Court noted that "it makes little sense to force unwilling family to testify in mitigation" as the simplest questions would have been more damning evidence

than anything presented by the prosecution. Id. As a result, defense counsel should not call a witness who will harm the client's case.

Further, this Court recently held that it is structural error for an attorney to admit his client's guilt without his client's authority to do so. McCoy v. Louisiana, 138 S.Ct. 1500, 584 U.S. ____, 200 L.Ed. 2d 821, (2017). A client's autonomy supersedes an attorney's strategy with the Court noting that:

> "With individual liberty – and, in capital cases, life – at stake, it is the defendant's prerogative, not counsel's, to decide on the objective of the defense: to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt."

Id.

During the mitigation phase of this trial, the defense called two expert doctors, one a psychologist and the other a neuropsychiatrist, to admit that Piper committed three aggravating factors within SDCL 23A-27A-1, removing the state from their burden of proof. Piper, Re-Sentencing, 1572-1573, 1641, 1647, 1655. The doctors essentially also relayed Piper's own admissions, without any record of whether Piper was aware he was essentially waiving his argument that he did not commit any aggravating factors.

In this case, the trial strategy of calling two expert witnesses to testify regarding the existence of three aggravating factors cannot be considered reasonable. Prejudice is apparent as there are few witnesses who could have done a better job

summarizing the state's evidence than these two defense experts who used Piper's own statements to do so. Defense counsel, and the defense experts, did not advocate on behalf of Piper but rather made the Lawrence County State's Attorney's role easier. This was not reasonable trial strategy, nor was it done with Piper's consent.

Next, due to the near ten year time period between the two sentencings, all updated criminal history should have been disclosed to the defense pursuant to the right to confront one's accusers and impeach their testimony, guaranteed under the Sixth Amendment to the United States Constitution. Davis v. Alaska, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) (cross-examiner allowed to impeach and discredit the witness); State v. Wiegers, 373 N.W.2d 1, 10 (S.D. 1985) (holding that defendants are constitutionally entitled to impeach the prosecution's key witness by showing that those pivotal witnesses are biased); See SDCL 19-19-607 (any party may attack a witness's credibility); SDCL 19-19-608 (witness's character for truthfulness or untruthfulness); SDCL 19-19-609 (impeachment by evidence of a criminal conviction).

Instead, Tom Curtis testified as a jail informant and provided incriminating testimony about Piper seeking to kill guards in an attempt to escape. Piper, Re-Sentencing, 607-654. The defense team did not obtain an updated criminal history of Mr. Curtis, which would have revealed a pending felony rape case, among additional criminal history. This failure to adequately prepare to cross-examine Curtis resulted in damaging aggravation testimony without any ability to impeach Curtis on his criminal record. See

Thompson v. Calderon, 120 F.3d 1045, 1054 (9th Cir. 1997) (defense counsel's failure to investigate and impeach informant severely prejudiced defendant).

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

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

Id. at 1346-47.

The Sixth Circuit Court of Appeals, in the case of Higgins v. Renico, 470 F.3d 624, 633 (6th Cir. 2006) stated:

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

> challenge to the credibility of the prosecution's only eyewitness").

Id.

Giglio v. United States is akin to this case. In Giglio, a key witness testified that he was not getting any promises by the Government. 405 U.S. at 151 (1972). This was untrue. Id. The prosecutor trying the case was unaware of the agreement and therefore did not correct the false testimony. Id. at 153. The Court nevertheless held that the failure to correct the false testimony violated the defendant's rights, strengthening due process protection with a clear rule expanding the ways in which the defendant could satisfy the knowledge requirement. Anne Bowen Poulin, *Convictions Based on Lies: Defining Due Process Protection,* 116 PENN ST. L. REV. 331, 339 (2011).

Finally, the defense did call as a mitigation witness Sister Bagrielle Crowley. Sister Crowley offered spiritual guidance with Piper's conversion to Catholicism and is Piper's godmother. Sr. Crowley testified about her in-person conversations with Piper, including the development of his spiritual life and common interests of reading, education and music. Piper, Re-Sentencing, 1676 – 1689. The state was able to impeach Sr. Crowley, by inferring that Piper had "conned" a "true angel" into doing something in violation of prison policy. Piper, Re-Sentencing, 1806.

The defense made no attempt to follow up with questions to the Catholic nun as to *how* she came to believe that she had violated a prison policy. There was no investigation to determine whether the

prosecution was telling the truth when the prosecution claimed she violated prison policy.

In conclusion, trial counsel failed to subject the evidence to adversarial testing by admitting aggravating factors without Piper's consent. Next, trial counsel failed to investigate Tom Curtis's criminal history, while letting the State discredit a key witness, Sister Crowley, without any basis for the accusation. The combination of these errors shows that Piper received ineffective assistance of counsel.

CONCLUSION

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

Respectfully submitted this 10th day of March, 2020.

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APPENDIX

Appendix A:
(South Dakota Supreme Court Opinion)
Appendix B
(Judgment of Conviction and Sentence)
Appendix C:
(Plea Hearing Transcript)
Appendix D:
(Elijah Page Partial Sentencing Transcript