No. 19-1338

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

The first question concerning the constitutionality of Piper's guilty plea is not actually presented here because the South Dakota Supreme Court denied relief on the claim on the adequate and independent state law ground of *res judicata*. Even on its merits, the question does not warrant review because the South Dakota Supreme Court's ruling is not in conflict with another state court of last resort, a United States appellate court, or settled precedent of this Court.

The second question concerning the alleged inconsistency of the prosecutor's arguments is not actually presented here because the South Dakota Supreme Court denied relief on the claim on the adequate and independent state law ground of *res judicata*. Even on its merits, the question does not warrant review because the South Dakota Supreme Court's ruling is not in conflict with another state court of last resort, a United States appellate court, or settled precedent of this Court.

The third question concerning the alleged ineffectiveness of Piper's counsel does not warrant review because the South Dakota Supreme Court's ruling is not in conflict with another state court of last resort, a United States appellate court, or settled precedent of this Court.

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STATEMENT OF THE CASE AND FACTS

Briley Wayne Piper and two fellow druggies committed a murder so torturous and terrifying it makes *A Clockwork Orange* seem like a bedtime story. In a bid for leniency, Piper pled guilty to first-degree murder and asked to be sentenced by the court. The court sentenced Piper to death. Piper succeeded in overturning the court's death sentence in his first state *habeas corpus* proceeding. At his resentencing, the jury was no less mortified and resentenced Piper to death. Having twice failed at attacks upon his capital sentence, Piper now seeks relief from his underlying plea of guilty and, incidentally, his deserved death sentence.

A. The Murder

A detailed account of the murder is found in appellee's brief in the record below. The abbreviated and sanitized version is this: on the icy cold night of March 13, 2000, in Spearfish, South Dakota, Piper, Elijah Page and Darrell Hoadley, lured Allan Poage to Page's house with the intent to incapacitate, kill and rob him. Piper instigated the scheme and was the group's ringleader.

At Page's house, Page pulled a gun on Poage and ordered him to lay on the floor. When Page asked why they were doing this to him, Piper kicked Poage in the face so hard he broke a tooth out down to a jagged stump and knocked Poage unconscious. While unconscious, they bound Poage's hands behind his back with speaker wire. When he awoke, they continued to beat him. They forced a rancid mixture of crushed pills, hydrochloric acid and stale beer down Poage's throat in an attempt to poison him to death.

When that did not work, the trio stood around and openly discussed how best to kill Poage while he helplessly sat there and listened. They discussed throwing him down an abandoned mineshaft. They sharpened a dull knife while Poage watched but they vetoed the idea of cutting his throat right there because it would create too much blood. They settled on an idea to take Poage out to a remote wilderness area and kill him by still-undetermined means.

Piper drove the group to a trailhead parking lot several miles outside of Spearfish. The ground was covered in knee-deep snow. The air temperature was 26 degrees and the wind chill even lower. They had Poage strip naked except for a tank-top shirt and shoes. They cranked up the stereo in Poage's car to party while they murdered him.

They led Poage to the shore of the creek where they beat him some more. They forced him to lay in the icy snow and in the frigid creek hoping he would die of hypothermia but Poage did not die.

They kicked Poage ceaselessly with full football kicks and laughed as Poage lay there wailing in pain, pleading for his life, trying to comprehend why this horror was happening to him. They mocked his suffering. They kicked Poage's head so relentlessly and forcibly that they amputated his ears and scalped a 4 x 6-inch patch of skin from Poage's skull. They pummeled his face and body with stones. Still, Poage did not die.

Piper stood on Poage's neck while Page tried to drown him in the creek. They aborted that effort because they were getting themselves too wet. Piper

broke a branch from a tree and tried to bludgeon Poage to death with it. When Poage did not die, Piper asked Hoadley for his pocket knife.

Piper pounded the knife through Poage's skull, inflicting a mortal but not immediately fatal wound to Poage's brain. Page stabbed him in the throat. Hoadley stabbed Poage's ear socket. Poage screamed in pain and terror. Page kicked Poage for disobeying his order to stop screaming. The group laughed and beat Poage some more as Poage wailed in agony.

After four hours of ceaseless physical torment, Poage died when Page dropped bowling ball-sized rocks on his head. They left his naked, mutilated body face down in the creek, drove back to Poage's house and stole his possessions and car. The group embarked on a road trip through Wyoming, Missouri and Texas funded by proceeds from the sale of Poage's belongings and money robbed from his bank account.

Once back in Spearfish, Piper openly bragged about killing Poage, describing with pathological pride how he did it to anyone who would listen and telling his audience how he had always wanted the experience of killing a person. Piper was eventually arrested and freely confessed, as did Page and Hoadley, supplying disturbing details of the murder and Poage's incomprehensible suffering.

B. The Guilty Plea And Court Sentencing

On the eve of his trial on charges of capital murder, kidnapping, robbery, burglary and grand theft, Piper surprised the trial judge and prosecutor by announcing at a routine pretrial hearing that he intended to plead guilty to all

charges. HCT07 I at 32/10-20, Respondent's Appendix 00005; PETITIONER'S APPENDIX C at 2. Piper hoped to catch the prosecutor unprepared, deprive the prosecutor of "an opportunity to pick and choose which strategy to use," and possibly to bait the court into "just sentenc[ing Piper] to life right then and there." HCT07 I at 77/4, 139/4-11, Respondent's Appendix 00005; PETITIONER'S APPENDIX C at 2-3.

When the trial judge asked Piper if he understood that a plea of guilty to murder in his case was "punishable by either life imprisonment without parole or punishable by death by lethal injection," Piper responded "Yes." PETITIONER'S APPENDIX C at 11. Piper informed the court that he and his attorneys had started discussing the possibility of entering a guilty plea "[a]bout a month ago" and that he had "had all the time [he] needed to think about" the consequences of his plea. PETITIONER'S APPENDIX C at 13.

There is no dispute that the trial judge provided appropriate *Boykin* advisements with respect to the consequences of Piper's waiver of a guilt phase jury trial. PETITIONER'S APPENDIX C at 9-12; HCT07 I at 28/13, 155/1, Respondent's Appendix 00005. With respect to sentencing, the trial judge advised Piper that:

> [Y]ou not only have a jury trial right as to the charge itself as to the issue of guilt or innocence, but you have a right to a jury to 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. And even if the jury found that one or more aggravating circumstances existed, I think it is still within their province to sentence you to life imprisonment . . . . You are proposing that I hold the

> sentencing hearing rather than the jury hold the sentencing hearing. What you need to understand is that if you have a jury instead of a judge, all 12 jurors must agree on the penalty . . . . What is significant about what you're doing here today is that if you waive your right to have the jury do the sentencing, you are trading 12 lay people for one judge to make that call.

PETITIONER'S APPENDIX C at 16-18. This advice would later be found deficient with regard to Piper's waiver of a 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.

Before the change of plea hearing, Piper's counsel had explicitly informed him that "if one [juror] was against [death] . . . that death would not be imposed." HCT07I at 108/10-20, 109/10. Thus, Piper' decision to plead guilty was driven not by the court's advisement but his own strategic aims: (1) to appear remorseful and accepting of responsibility to the sentencing judge and (2) to secure sentencing by the trial judge rather than a jury. Piper tailored his process demands accordingly.

1. The Strategic Aim Of Pleading Early

Piper wanted "to demonstrate remorse" (even though he had none)[1] and acceptance of responsibility by "being the first [of the three co-defendants] to come forward and plead guilty." AMENDED MOTION TO WITHDRAW at ¶ 4.A,

[1] When not addressing the sentencing judge, Piper told a penitentiary psychologist that "guilt is an emotion he does not feel." SENTENCING IX at 1598/18, 1599/19, Respondent's Appendix 00147. Piper has "said he had no regret or sense of responsibility for the crime, only irritation with the court and the system." SENTENCING IX at 1659/19, Respondent's Appendix 00147. Piper's only "regret is the fact that [he] allowed [himself] to get caught." SENTENCING IV at 725/10, Respondent's Appendix 00131.

Respondent's Appendix at 00116; HCT07 I at 68/4, 69/23, 124/1, Respondent's Appendix at 00005. Hence, Piper told the trial judge that "[t]he reason why [he] wanted to come and change [his] plea . . . is [he] want[ed] to take responsibility for what [he] did." PETITIONER'S APPENDIX C at 29. Piper hoped the judge might give greater consideration to Piper's age, background, prompt acceptance of responsibility and expression of remorse. HCT07 I at 64/6, 65-66, 68/1-9, 69, 94/13-25, 112/9, 124/1, Respondent's Appendix 00005; HCT07 II at 42/23, Respondent's Appendix 00054.

2. The Strategic Aim Of Court Sentencing

To "assure . . . that he would be sentenced by the trial judge, rather than by a jury," Piper's counsel interpreted SDCL 23A-27A-6 literally and out of context in order to argue that the statute *required* a court sentencing for any defendant who waived a jury trial as to guilt. AMENDED MOTION TO WITHDRAW at ¶ 4.A, Respondent's Appendix at 00116; HCT07 I at 99/14-25, Respondent's Appendix 00005; SDCL EXCERPTS, Respondent's Appendix at 00128.

SDCL 23A-27A-6 does not actually require a defendant to plead guilty to obtain a court sentencing or preclude a jury sentencing of a defendant who pleads guilty. The statute simply describes the procedure for *how* a court will conduct a capital sentencing *when* a court, rather than a jury, is called upon to do so. SDCL EXCERPTS, Respondent's Appendix at 00128. But Piper and his counsel "wanted the judge to sentence him" so badly they "didn't care" if their interpretation of

SDCL 23A-27A-6 was correct or not. HCT07 I at 94/13, Respondent's Appendix 00005.

Piper's reason for wanting a court sentencing had nothing to do with the judge's jury unanimity advice. Rather, "the facts were very bad" for Piper. HCT07 I at 63/9, Respondent's Appendix 00005. Just the acts that Piper himself admitted to – torture and laughter – presented a "terrible, terrible" fact pattern that made the question of guilt an "empty one" in Piper's counsel's estimation. HCT07 I at 63/14-17, 64/18, Respondent's Appendix 00005. The evidence of Piper's guilt was so "overwhelming" that Piper was "never" going to "win the murder case." HCT07 I at 63/17, 67/24-68/1, Respondent's Appendix 00005; HCT07 II at 35/8, 41/19, Respondent's Appendix 00054. His counsel were concerned that jurors hearing Piper deny killing Poage would "decide he was lying about all of this and becom[e] angry" and "be more likely to put him to death." HCT07 I at 63/18-22, Respondent's Appendix 00005.

Though his counsel had explicitly informed him that "if one [juror] was against [death] . . . that death would not be imposed," Piper did not see "comfort in [those] numbers." HCT07 I at 108/10-20, 109/10, Respondent's Appendix at 00005; HCT07 II at 29/13-31/4, Respondent's Appendix at 00054; HCT16 at 203/10, Respondent's Appendix at 00116. Piper feared that the "very graphic, very bloody, very horrific" imagery of an earless, mutilated victim with his skull split open left naked to decompose in a creek "could hurt him badly with 12 people." HCT07 I at 69/5-70/8, 99/17-25, 117/13, 123/3, 129/22, Respondent's Appendix

00005; HCT07 II at 43/18, 45/9, Respondent's Appendix 00054. Counsel's understandable 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 [who was] . . . no stranger to violent crimes. My concern was that the effect of the violence of this case would not be well received by a jury.

HCT07 II at 43/8, Respondent's Appendix 00054. Despite knowing that one lone juror could hang a death sentence, "the last thing [Piper or his counsel] wanted was a jury to decide the death penalty issue because [they] didn't feel that [a jury] would be able to view things in a measured, calm way that [they] thought a judge would be able to do." HCT07 I at 64/10, 94/18, 117/13, 129/23, Respondent's Appendix 00005.

Thus, the record reflects that Piper had decided to plead guilty for strategic reasons *before* the pretrial hearing and *before* the trial judge gave him any misadvice concerning jury sentencing unanimity in the hope that a dispassionate judge who was "no stranger to violent crimes" would be "more receptive" to the leniency he sought. HCT07 I at 117/13, 123/23, Respondent's Appendix 00005; HCT07 II at 43/18, Respondent's Appendix 00054.

Piper's hopes did not come to fruition. After hearing the evidence in the case, the trial court sentenced Piper to death.

C. *Ring v. Arizona*

While Piper's direct appeal of his sentence was pending, this Court decided *Ring v. Arizona,* 536 U.S. 584 (2001). *Ring* ruled that "a capital sentencing

scheme would be unconstitutional if it prevented a defendant who pleaded guilty from having aggravating circumstances found by a jury." *Ring,* 536 U.S. at 609. In other words, SDCL 23A-27A-6 as interpreted by Piper's counsel would have been unconstitutional. Though the case was fully briefed, the South Dakota Supreme Court ordered Piper and the state to re-brief the case in light of *Ring*. HCT07 at 13/20-14/24, 37/16, 38/6, Respondent's Appendix 00005.

D. The First Direct Appeal (*Piper I*)

The holding in *Ring* and subsequent re-briefing offered Piper the opportunity to challenge his guilty plea. Piper could have argued on direct appeal (as he does now) that the combination of his counsel's interpretation of SDCL 23A-27A-6 and the trial court's sentencing misadvice coerced him to plead guilty in order to secure a court sentencing. Piper did not do so.

The only issue Piper raised on direct appeal was a challenge to SDCL 23A-27A-6, on the ground that it unconstitutionally deprived him of a jury sentencing (even though a jury sentencing had been the "last thing" Piper had actually wanted until the trial judge proved to be not as "receptive" to leniency as Piper had hoped). HCT07 I at 49/8-19-50/14, 52/7, 99/15-25, Respondent's Appendix 00005. Because Piper's motives and incentives to plead guilty had nothing to do with the trial judge's sentencing advisement, "the only objective of th[e] appeal was reversal of the death sentence" and "no attempt was made . . . to reverse the plea of guilty." HCT07 I at 124/12-125/3, Respondent's Appendix 00005.

Piper's conviction and sentence were affirmed on direct appeal in a decision now commonly referred to as *Piper I*. *State v. Piper,* 2006 SD 1, 709 N.W.2d 783 (*Piper I*). *Piper I* held that Piper's counsel's literal and out-of-context interpretation of SDCL 23A-27A-6 was incorrect. According to *Piper I*, South Dakota's capital sentencing scheme as a whole permitted a capital defendant to plead guilty to a court but be sentenced by a jury (or be tried by a jury and sentenced by the court). SDCL EXCERPTS, Respondent's Appendix at 00128. Because the trial judge had offered Piper an opportunity to be sentenced by a jury even after he pled, the *Piper I* court found that no *Ring* violation had occurred. *Piper I* at 2006 SD 1 at ¶ 47, 709 N.W.2d at 803. Moreover, SDCL 23A-27A-6 had not "prevented" Piper from obtaining a jury sentencing because his reasons for electing a court sentencing were unrelated to the statute. *Ring,* 536 U.S. at 609.

E. The First State *Habeas Corpus* (*Piper II*)

Both *Ring* and *Piper I* informed Piper that court sentencing was not dependent on, nor a jury sentencing foreclosed by, pleading guilty, and that his counsel's (strategically) literal interpretation of SDCL 23A-27A-6 was incorrect. Yet, Piper's initial state *habeas corpus* petition again did not challenge his plea of guilty as being the product of any coercive effect of SDCL 23A-27A-6 or tainted by any misconception concerning jury unanimity. HCT07 I at 124/25, Respondent's Appendix 00005. Instead, Piper's counsel expressly waived any claim "alleging ineffective assistance of counsel when it c[ame] to the issue of pleading guilty."

HCT07 II at 10/14, 45/9, Respondent's Appendix 00054. Again, this was for strategic reasons.

In their argument and testimony during the *habeas corpus* hearing, Piper's counsel discussed the strategic considerations driving Piper's decision to not challenge his guilty plea. HCT07 I at 51/17, Respondent's Appendix 00005; HCT16 at 202/11, 203/10, Respondent's Appendix 00096. For one, Piper's *habeas corpus* counsel felt he "certainly would have lost" a plea challenge because Piper's trial counsel's pre-*Ring* interpretation of SDCL 23A-27A-6 as requiring him to waive a jury trial to secure a court sentencing "was not so unreasonable that [Piper] would have won." HCT16 at 204/4-23, Respondent's Appendix 00096.

For another, Piper desperately wanted to preserve attorney/client privilege as it related to his decision to enter his plea in order to prevent disclosure of certain damaging information discovered by his trial counsel but not known to law enforcement or the prosecution. HCT07 I at 7/23, 20/7, 96/13, 124/23, Respondent's Appendix 00005; HCT07 II at 10/14, 19-28, Respondent's Appendix at 00054; HCT16 at 197/12, Respondent's Appendix 00096. His trial counsel described this undisclosed aggravating evidence as a "neutron bomb" that could have destroyed any prospect for leniency. HCT07 II at 19/22, Respondent's Appendix at 00054. Claiming ineffective plea advisements by his trial counsel would have waived the privilege protecting this damaging information, which could have made further inflammatory aggravating evidence available to the prosecution at Piper's hoped-for resentencing. HCT07 II at 10/8-14, 11/1, 18/21,

19/16-21, 20/1-21/13, Respondent's Appendix 00054; HCT07 I at 60/15, 75/12, Respondent's Appendix 00005.

Consequently, Piper's *habeas corpus* counsel carefully limited his waiver of attorney/client privilege to his appellate counsel, and objected vigorously to any lines of questioning that broached or could have waived the privilege surrounding Piper's decision to plead guilty. HCT07 I at 24/10, 62/18, 75/12, Respondent's Appendix 00005; HCT07 II at 19/21, 20/2, 26/1, 26/24, Respondent's Appendix 00054. In so doing, Piper's counsel succeeded in preventing disclosure of this damaging information, whatever it was. Thus, the question before the court in Piper's initial state *habeas corpus* was strictly the voluntariness and intelligence of Piper's waiver of his jury sentencing but not the voluntariness or intelligence of the guilty plea itself. *Piper v. Weber,* 2009 SD 66, 771 N.W.2d 352 (*Piper II*).

The *Piper II* court ruled that Piper's waiver of his jury sentencing proceeding had not been voluntary and intelligent because the trial court's advisements that "the jury would have to be unanimous" and that "all 12 jurors must agree on the penalty" did not adequately explain that unanimity pertained only to a death sentence and that "one juror has the potential to save a defendant's life." PETITIONER'S APPENDIX C at 16-18; *Piper II,* 2009 SD 66 at ¶ 19, 771 N.W.2d at 359. *Piper II* remanded the case for resentencing. *Piper II,* 2009 SD 66 at ¶ 20, 771 N.W.2d at 360.

F. The Jury Resentencing

On remand, Piper moved to withdraw his guilty plea as involuntarily and unintelligently entered. For the first time, Piper claimed, as he does now, that he had been induced to plead guilty to secure a court sentencing because of the trial court's unanimity misadvice. No record evidence supports Piper's claim.

As detailed above, the record reflects that Piper arrived at his decision to plead guilty and elect a court sentencing approximately a month before the trial court's unanimity misadvice, knowing that one juror could hang a death sentence, and that the unanimity misadvice had no bearing on his reasons for doing so. Piper's counsel interpreted SDCL 23A-27A-6 as requiring a court to sentence in cases of guilty pleas as part of a strategy to *force* the trial court to conduct the sentencing hearing. HCT07 I at 107/20-21, 129/18-24, 130/8, Respondent's Appendix 00005; HCT07 II at 45/9, Respondent's Appendix 00054. Piper and his counsel "didn't care" if their interpretation of SDCL 23A-27A-6 was correct or not; they badly "wanted the judge to sentence him" so they interpreted the statute in the way that best suited this strategy. HCT07 I at 94/13, Respondent's Appendix 00005. Admitting the possibility that the statute might allow split sentencing would not have guaranteed Piper the desired court sentencing. In order to "assure . . . that he would be sentenced by the trial judge, rather than by a jury," Piper's original trial counsel interpreted SDCL 23A-27A-6 to *require* the court to sentence Piper if he pled guilty. AMENDED MOTION TO WITHDRAW at 6, ¶ 4.A, Respondent's Appendix 00116.

The trial court addressed Piper's motion to withdraw his guilty plea on the merits and denied it. The jury sentenced Piper to death. Piper appealed.

G. The Second Direct Appeal (*Piper III*)

In the decision now commonly referred to as *Piper III,* the court ruled that the trial court had been correct in denying Piper's motion to withdraw his guilty plea but for the wrong reason. *State v. Piper,* 2014 SD 2, ¶ 13, 842 N.W.2d 338, 344 (*Piper III*). *Piper III* ruled that the resentencing court lacked jurisdiction to entertain Piper's motion to withdraw because it was "beyond the scope of [the] remand in *Piper II.*" *Piper,* 2014 SD 2, ¶ 13, 842 N.W.2d 338, 344.

H. The Second State *Habeas Corpus* (*Piper IV*)

Piper's second state *habeas corpus* renewed his challenge to his guilty plea, now framed as a due process violation. In *Piper v. Young,* 2019 SD 65, 936 N.W.2d 793 (*Piper IV*), from which Piper now seeks this Court's review, the court denied Piper relief from his guilty plea on procedural and substantive grounds.

Procedurally, the *Piper IV* court ruled that Piper had doubly defaulted any challenge to his guilty plea by failing to challenge the plea either on direct appeal in *Piper I* or in his first state *habeas corpus* in *Piper II. Piper IV,* 2019 SD 65 at ¶ 25, 936 N.W.2d at 805. If the judge's unanimity misadvice or SDCL 23A-27A-6 had exerted any "coercive" force on Piper's decision to plead guilty, the *Piper IV* court ruled he could have challenged the statute on due process grounds in *Piper I. Piper IV,* 2019 SD 65 at ¶¶ 25-28, 33, 936 N.W.2d at 805, 806. And since *Piper I* had informed Piper that he could split his plea and sentencing forums, he could

have challenged his plea in *Piper II* on ineffectiveness and/or due process grounds. *Piper IV,* 2019 SD 65 at ¶¶ 29-30, 33, 936 N.W.2d at 805, 806. Having twice elected (for strategic reasons) to not avail himself of opportunities to challenge his guilty plea, the *Piper IV* court ruled that the claim was barred by *res judicata.*

Substantively, the *Piper IV* court ruled that Piper entered his guilty plea voluntarily and intelligently. Piper proffered "no evidence of any threats, coercion or broken promises" that impugned the voluntariness of his plea. *Piper IV,* 2019 SD 65 at ¶ 39, 936 N.W.2d at 808. And even assuming Piper elected to plead guilty because of his attorneys' (strategically) erroneous interpretation of SDCL 23A-27A-6, this fact did not impugn the intelligence of the plea. As noted by the *Piper IV* court, a guilty plea "does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise." *Piper IV,* 2019 SD 65 at ¶ 40, 936 N.W.2d at 808, citing *Brady v. United States,* 397 U.S. 742, 757 (1970). Rather, the "historical facts associated with his pleas" reflected that Piper's reasons for pleading guilty – the certainty of being convicted, concern that fighting the "empty question" of his guilt would undermine his claims of remorse and acceptance of responsibility, the calculus that "a seasoned trial judge" who was "no stranger to violence" might be more lenient than a jury – were unrelated to any alleged misadvice of either his counsel or the trial court judge. *Piper IV,* 2019 SD 65 at ¶¶ 39, 43, 936 N.W.2d at 808, 809. The failure of Piper's strategies to come to fruition "d[id] not impugn the truth or reliability of his plea." *Piper IV,* 2019 SD 65 at ¶¶ 43, 936 N.W.2d at 809, citing *Brady,* 397 U.S. at 757.

SUMMARY OF ARGUMENT

All of Piper's claims fail to meet the criteria for review set by U.S.S.Ct. Rule 10.[2] Also, this Court does not review decisions that rest on an adequate and independent state law ground. Here, *Piper IV* disposed of Piper's challenges to his guilty plea and the exclusion of evidence of allegedly inconsistent prosecutorial arguments at his sentencing on the state law ground of *res judicata.* Thus, review of these claims on the merits would only result in an advisory ruling.

Even if not barred by *res judicata,* no review of these claims is warranted. Piper's plea was valid because, per this Court's settled precedent, defective plea advisements do not impugn the voluntariness and intelligence of a guilty plea if the record demonstrates that they had no influence on a defendant's decision to plead guilty. With regard to his remaining arguments, Piper has failed to demonstrate any actual inconsistency in the prosecutor's arguments or objectively unreasonable performance by his counsel, or any adverse impact on the outcome of his sentencing as a result.

ARGUMENT

A. Piper's Challenge To His Guilty Plea Does Not Warrant Review Or Relief

Piper's challenge to his guilty plea does not warrant review or relief for two reasons: (1) the *Piper IV* court's decision rests on the adequate and independent

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[2] Respondent assumes that his jurisdictional objection, voiced in an e-mail to Court staff dated March 13, 2020, has, by the filing of the petition, been overruled. JURISDICTIONAL OBJECTION, Respondent's Appendix at 00001. If this assumption is incorrect, respondent renews his defense that Piper failed to perfect this Court's jurisdiction by failing to timely file a petition naming the appropriate responding party per U.S.S.Ct. Rules 13.1 and 13.2.

state law ground of *res judicata* and (2) Piper entered his guilty plea voluntarily and intelligently according to standards established in this Court's precedent.

1. Review Is Not Warranted Because The *Piper IV* Decision Rests On An Adequate And Independent State Law Ground

"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," *Harris v. Reed,* 489 U.S. 255, 260 (1989). This rule is grounded in "the independence of state courts" and this Court's "jurisdictional concern . . . that [it] not render an advisory opinion." *Michigan v. Long,* 463 U.S. 1032, 1040 (1983). This Court has ruled that *res judicata* is "itself . . . sufficient to sustain [a] judgment against reversal in this Court" provided that "the party to be affected . . . has litigated or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction." *Postal Telegraph Cable Co. v. City of Newport, Ky.*, 247 U.S. 464, 476 (1918).

There is no doubt that, as explained in *Piper IV,* Piper had opportunities to challenge his plea on direct appeal in *Piper I* or in his first state *habeas corpus* in *Piper II* but elected against bringing such challenges for strategic reasons. *Piper IV,* 2019 SD 65 at ¶ 25, 936 N.W.2d at 805. In an analysis conducted wholly independent of any federal constitutional ruling, the *Piper IV* court explained how this double default barred review of Piper's plea challenge. *Piper IV,* 2019 SD 65 at ¶¶ 22-34, 936 N.W.2d at 804-807. Thus, it is "clear from the opinion itself that

the [*Piper IV*] court relied upon [the] adequate and independent state law ground" of *res judicata. Long,* 463 U.S. at 1042.

The *Piper IV* court's *res judicata* determination is not in any way dependent on its alternative ruling on the merits of Piper's plea challenge. Consequently, this Court's review of the voluntariness and intelligence of Piper's guilty plea would be futile and merely advisory because "the same judgment would be rendered by the state court after [this Court] corrected its views of federal laws." *Long,* 463 U.S. at 1040.

2. Neither Review Nor Relief Are Warranted Because The *Piper IV* Decision Conforms To This Court's Settled Precedent

Piper's plea challenge does not warrant review or relief. It rests on the false premise that he believed, based on the plea court's flawed sentencing advice and his counsel's interpretation of SDCL 23A-27A-6, that "his chances of a life sentence were worse with a jury, and the only way to avoid a jury sentencing was by pleading guilty to the criminal charges." PETITION at 15. The record is crystal clear that Piper's choices were dictated by his strategies, not the trial court's sentencing advisements or his counsel's statutory interpretation. This court's decisions in *Brady, Dominguez Benitez* and *Halliday* are equally clear that Piper's claim of "confusion" concerning his plea options need not be given credence when the record "show[s] that at the time [Piper] changed his plea he in fact did understand" that "if one [juror] was against [death] . . . that death would not be imposed." *Halliday v. United States,* 394 U.S. 831, 835 (1969); HCT07I at 108/10-20, 109/10.

a. *Brady v. United States*

When Brady entered a plea of guilty to kidnapping in 1959, 18 U.S.C. § 1201(a) permitted a death sentence only upon a jury's recommendation. Per 18 U.S.C. § 1201(a), defendants who pled guilty, or who waived a jury trial, could avoid a death sentence. The trial judge was unwilling to try the case without a jury, exposing Brady to a possible death sentence. *Brady,* 397 U.S. at 743. Despite this, Brady still did not plead guilty. Only after learning that his co-defendant had confessed to authorities and would testify against him did Brady plead guilty. *Brady,* 397 U.S. at 743.

Nine years later, this court ruled 18 U.S.C. § 1201(a) unconstitutional as an undue burden on a defendant's right to a jury trial. Brady then challenged his plea in *habeas corpus* on the grounds that the combination of the judge's unwillingness to hold a court trial and the operation of 18 U.S.C. § 1201(a) had coerced his guilty plea. The *habeas corpus* court denied relief because Brady had "pleaded guilty 'by reason of other matters and not by reason of the statute' or because of any acts of the trial judge." *Brady,* 397 U.S. at 745.

This Court affirmed, noting that neither the trial court's refusal to hold a court trial, his counsel's failure to advise him of 18 U.S.C. § 1201(a)'s potential unconstitutionality, nor 18 U.S.C. § 1201(a) itself had "triggered Brady's guilty plea." *Brady,* 397 U.S. at 749. Rather, "all the relevant circumstances surrounding" Brady's plea revealed that Brady only chose to plead guilty "once his confederate had pleaded guilty and became available to testify" against him. *Brady,* 397 U.S. at 756. Brady's plea was "not subject to later attack" simply

because "the maximum penalty then assumed applicable ha[d] been held inapplicable in subsequent judicial decisions." *Brady,* 397 U.S. at 757.

b. *United States v. Dominguez Benitez*

In light of the conclusive evidence against him, Carlos Dominguez Benitez never wanted to face trial on charges of conspiracy to possess methamphetamine and possession of more than 1,000 grams of methamphetamine. *United States v. Dominguez Benitez,* 542 U.S. 74, 77 (2004). Instead, Dominguez Benitez pled guilty in the (mistaken) belief that he would qualify for a downward sentencing adjustment under the guidelines. At the plea hearing, the trial court failed to advise Dominguez Benitez that he could not withdraw his plea if his (and his counsel's and the government's) assumptions about his eligibility for a downward adjustment were incorrect. *Dominguez Benitez,* 542 U.S. at 78. However, Dominguez Benitez's plea agreement did inform him that he could not withdraw his plea if the government was unable to deliver a downward reduction.

As it turned out, Dominguez Benitez was ineligible for the downward adjustment because his criminal history was more extensive than what his counsel and the government had been aware of. He sought to withdraw his plea claiming that he did not properly understand the operation of the downward adjustment provision. The sentencing court denied the motion because "in light of the 'lengthy change of plea proceedings' it was difficult to accept" Dominguez Benitez's claim that he "never had any knowledge" of his downward adjustment being dependent on a cleaner criminal record than he actually had. *Dominguez Benitez,* 542 U.S. at 79.

On appeal, Dominguez Benitez claimed for the first time that his plea had been improperly induced by the plea court's failure to advise him that he could not withdraw his plea if he did not qualify for a downward adjustment. Applying plain error review, this Court ruled that the trial court's failure to instruct Dominguez Benitez that he could not withdraw his plea did not render his plea involuntary or unintelligent. Well before the omitted warning, Dominguez Benitez had made clear to the court and his counsel "that he did not intend to go to trial." *Dominguez Benitez,* 542 U.S. at 84. This Court found nothing to "suggest a causal link between [Dominguez Benitez's alleged] confusion" and the plea court's omitted warning. *Dominguez Benitez,* 542 U.S. at 85. In the absence of evidence that "the warning could have had an effect on Dominguez Benitez's assessment of his strategic position," his plea was neither involuntary nor unintelligently entered. *Dominguez Benitez,* 542 U.S. at 85.

c. Halliday v. United States

Because the evidence coming into his trial was so damning, Russell Halliday stopped the proceedings midstream and pled guilty to kidnapping and other charges. *Halliday v. United States,* 262 F.Supp. 325, 326 (D.Ct.Mass. 1967). In accordance with then-existing procedure, the trial court did not conduct an inquiry into its voluntariness on the record. The court imposed a lengthy sentence. Halliday petitioned in *habeas corpus* to have his sentence vacated because his plea had not been voluntarily and intelligently entered.

Based on the testimony of Halliday and his lawyer at the *habeas corpus* proceedings, the district court ruled that it could not "give any credence to

Halliday's testimony that he never received any explanation of the charges against him, never discussed possible defenses, or never was informed of the possible maximum sentences" or "accept his statement that he was completely confused, did not understand the charges and the proceedings and pleaded guilty only because counsel urged him to do so." *Halliday,* 262 F.Supp. at 326. This Court upheld Halliday's plea, citing the district court's finding of "ample evidence" in the *habeas corpus* record that Halliday had "entered his plea voluntarily with an understanding of the nature of the charges against him." *Halliday,* 394 U.S. at 832.

d. Neither Review Nor Relief Are Warranted Per *Brady, Dominguez Benitez* And *Halliday*

Brady, Dominguez Benitez and *Halliday* uniformly provide that a defendant's claim of "confusion" when entering his plea need not be given credence if evidence or testimony in the record shows that the defendant in fact did understand his rights and the consequences of his plea. Like *Brady, Dominguez Benitez* and *Halliday,* the *Piper IV* court found that Piper's faux "confusion" concerning his plea and sentencing options did not square with the "historical facts associated with his plea." *Piper IV,* 2019 SD 65 at § 43, 936 N.W.2d at 809.

The "historical facts associated with [Piper's] plea" reflect that his counsel had explained to him that "in order for [the jury] to sentence him to death they would have to have a unanimous decision in that regard," and that if the defense "hung one of the 12, the sentence would be life." Piper knew that "if one [juror] was against [death] . . . that death would not be imposed" and "life without parole"

would be imposed instead. HCT07 I at 108/10-20, 109/10, 144/15, Respondent's Appendix 00005; HCT07 II at 30/16-19, Respondent's Appendix 00054. Piper's counsel deemed him a "highly intelligent" individual who "understood" that one hung juror would equate to a sentence of "life without parole." HCT07 II at 30/8-22, 31/4-22, Respondent's Appendix 00054. Thus, Piper's current claim that his decision to plead guilty was influenced by some misconception that a guilt phase jury trial came with the "price tag" of a sentencing jury that would have to unanimously agree to impose a life sentence is bereft of any factual basis in the record.

The "historical facts associated with [Piper's] plea" also reflect that neither the plea court's flawed advice concerning the sentencing procedure nor his attorneys' interpretation of SDCL 23A-27A-6 had any influence on Piper's decision to plead guilty. Piper appeared at a routine pretrial motion hearing determined to plead guilty *before* the court rendered flawed advice concerning the sentencing procedure. As in *Dominguez Benitez,* Piper had made it clear, and his counsel confirmed, "that he did not intend to go to trial." *Dominguez Benitez,* 542 U.S. at 84. Thus, as in *Brady* and *Dominguez Benitez,* Piper's plea was not "triggered" by the trial court's plea advisements; there is no "causal link" between Piper's plea and the plea court's sentencing advisement. *Brady,* 397 U.S. at 749; *Dominguez Benitez,* 542 U.S. at 85.

As in *Brady* and *Dominguez Benitez,* Piper was motivated to plead guilty "by reason of other matters," namely "the overall strength of the government's

case," and "not . . . because of any acts of the trial judge." *Brady,* 397 U.S. at 745; *Dominguez Benitez,* 542 U.S. at 85. Like *Brady,* "faced with a strong case against him and recognizing that his chances for acquittal were slight, [Piper] preferred to plead guilty" believing "that the judge w[ould] very probably be more lenient than the jury." *Brady,* 397 U.S. at 749, 751, 756. Piper's "decision to plead guilty [wa]s heavily influenced by [his] appraisal of the prosecution's case against him and by the apparent likelihood of securing leniency should [his] guilty plea be offered and accepted." *Brady,* 397 U.S. at 756.

The record is similarly bereft of any historical facts reflecting that Piper's counsel's strategic misinterpretation of SDCL 23A-27A-6 rendered his plea involuntary or unintelligent. Piper "underst[ood] what was taking place in his case" and "the choices that he was making and [the] potential consequences of his choices." HCT07 I at 75/20-76/2, Respondent's Appendix 00005. While it is true that Piper's counsel took the (strategically erroneous) position that pleading guilty foreclosed a jury sentencing, there is "ample evidence" that Piper did not elect a court sentencing out of any misconception that a jury would have to unanimously agree to impose a life sentence. *Halliday,* 394 U.S. at 832. Piper elected a court sentencing simply because he expected the court to view the gruesome evidence of the murder more dispassionately than 12 lay jurors.

Per *Brady,* the fact that *Ring* proved Piper's counsel's advice concerning the operation of SDCL 23A-27A-6 to be erroneous is of no consequence to the voluntariness and intelligence of his plea. *Brady,* 397 U.S. at 757 (defendant's

plea not made "vulnerable because later decisions indicate that the plea rested on a faulty premise"). Piper's own *habeas corpus* counsel testified that his trial counsel's pre-*Ring* interpretation of SDCL 23A-27A-6 "was not . . .unreasonable." HCT16 at 204/4-23, Respondent's Appendix 00096. But even if Piper's counsel's interpretation had been unreasonable, *Ring* was decided while Piper's direct appeal was pending and he was afforded an opportunity to re-brief his appeal in light of *Ring,* at which time he could have raised a due process and/or ineffective assistance of counsel challenge to his plea. Piper also did not raise (for strategic reasons) either a due process or ineffective assistance challenge to his plea in his first state *habeas corpus*. HCT07 II at 10/14, 19-28, Respondent's Appendix 00054.

Unlike in *Brady,* the error of Piper's counsel's strategic misinterpretation of SDCL 23A-27A-6 was known to Piper at points in his case when he could have timely challenged his plea. But Piper did not do so. Consequently, as observed by the *Piper IV* court, one is hard pressed to comprehend "what is fundamentally unfair" with holding Piper to his plea "given the opportunities he has had to litigate the claims he now asserts." *Piper IV,* 2019 SD 65 at ¶ 33, 936 N.W.2d at 806.

The record demonstrates that Piper was afforded the precise procedure he originally wanted, to plead guilty and be sentenced by the court. When that strategy did not yield the desired result, he claimed (in *Piper II*) that he had wanted to plead guilty but be sentenced by a jury. When that strategy still did not

yield the desired result, he claimed (in *Piper III*) that – all evidence to the contrary – he had actually wanted a jury trial on the "empty question" of his guilt. Only after his sentencing strategies failed did Piper seek to challenge his underlying plea. But by the time Piper raised this claim for the first time, his conviction was final. *United States v. Timmreck,* 441 U.S. 780, 784 (1979)("the concern with finality served by the limitations on collateral attack has special force with respect to convictions based on guilty pleas").

Piper's false premise that he believed a jury would have to unanimously vote for a life sentence is belied by the historical facts associated with his plea. "[A]ll of the relevant circumstances surrounding" Piper's plea fail to demonstrate "that he was actually unaware of [the correct sentencing procedures] or that, if he had been properly advised by the trial judge, he would not have pleaded guilty." *Brady,* 397 U.S. at 748; *Timmreck,* 441 U.S. at 784. For his own strategic reasons, jury sentencing was never Piper's goal. He stood to gain nothing by going to trial on the "empty question" of guilt or innocence, while he stood to lose everything if he did. Feigning remorse to a dispassionate sentencing judge was the only card that Piper had left to play; pleading guilty was indispensable to this strategy. Per *Brady, Dominguez Benitez* and *Halliday,* Piper has failed to demonstrate that his plea was anything but a voluntary and intelligent choice. Piper's disappointed expectations are not grounds to overturn his plea on collateral review. *Timmreck,* 441 U.S. at 784.

B. Piper's Inconsistent Prosecutorial Argument Claim Does Not Warrant Review Or Relief

Piper claims that he was denied the right to present the "mitigating" evidence of an alleged inconsistency in the prosecutor's arguments in Piper's and Page's sentencings characterizing both as the "leader" and initial aggressor. This claim does not warrant review or relief for three reasons: (1) the *Piper IV* court's decision rests on the adequate and independent state law ground of *res judicata,* (2) it does not meet any of the criteria for review of U.S.S.Ct. Rule 10 and (3) there was no actual inconsistency in the prosecutor's arguments.

1. Review Is Not Warranted Because The *Piper IV* Court's Rejection Of This Claim Rests On An Adequate And Independent State Law Ground

Piper is complaining about an evidentiary ruling by the resentencing court. Piper could have appealed this ruling in the direct appeal of his resentencing (*Piper III*). He did not. *Piper IV,* 2019 SD 65 at ¶ 45, 936 N.W.2d at 809.

Piper's appellate counsel did not challenge the exclusion of the inconsistent argument evidence because he chose to appeal only the strongest issue, which was the denial of Piper's motion to withdraw his plea. HCT16 at 179/16, 217/9-15, 218/15-24, 219/17, Respondent's Appendix 00096. This "process of winnowing out weaker claims on appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith v. Murray*, 477 U.S. 527, 536 (1986).

Having decided for strategic reasons to jettison his inconsistent prosecutorial argument claim from his direct appeal, the *Piper IV* court found that

it was barred by *res judicata.* Because the *Piper IV* court's rejection of the claim rests on an independent and adequate state law ground, no review is warranted. *Long,* 463 U.S. at 1040.

2. Review Is Not Warranted Because Piper's Claim Does Not Meet The Criteria Of U.S.S.Ct. Rule 10

The *Piper IV* decision is not in conflict with any federal circuit court, another state high court or this Court's settled precedent. Doubtless, in certain circumstances a prosecutor's inconsistent arguments can serve as impeachment or mitigating evidence. *Bradshaw v. Strumpf,* 125 S.Ct. 2398 (2005). But *Piper IV* did not rule, contrary to *Bradshaw,* that a prosecutor's inconsistent arguments concerning the relative roles of co-defendants in a crime is never potentially mitigating evidence. It simply ruled that, given that "both Piper and Page exhibited leadership roles, and each had significant culpability in torturing, beating and killing Poage," the court could not "accept that the prosecutor's arguments were, in fact, inconsistent." *Piper IV,* 2019 SD 65 at ¶ 46, 936 N.W.2d at 810.

3. Neither Review Nor Relief Are Warranted Because The Prosecutor's Arguments Were Not Actually Inconsistent

While the prosecutor certainly argued that participation in the initial acts of aggression was a consideration for imposing the death sentence in both the Page and Piper cases, he did not argue that *only* the initial aggressor deserved a death sentence. The prosecutor argued consistently in the Page and Piper proceedings that both had participated in torturing and murdering Poage. PAGE SENTENCING at 930-32, Respondent's Appendix 00178. The prosecutor

consistently represented that Page, backed by Piper, set the events in motion by pointing a gun at Poage and ordering him to the floor and that Piper inflicted the first physical injury by "kick[ing] Chester Allan Poage in the head with his combat boots." PAGE SENTENCING at 929-30, 946, Respondent's Appendix 00178; PIPER SENTENCING XI at 1794/10, 1807/ 21, Respondent's Appendix 00175. The prosecutor sought death for both Piper and Page on the grounds of multiple aggravating factors (murder for pecuniary gain, torture, elimination of a witness) which existed wholly apart from who committed the first act of aggression. SDCL 23A-27A-1(3), (6) and (9). There is no "clear incompatibility" between the prosecutor's Page and Piper arguments. 21 Am.Jur.2d Proof of Facts 101, § 2.

As in any case, "relevance marks the outer limit of admissibility for purported mitigating evidence" in a death penalty case. *Williams v. Norris,* 612 F.3d 941, 948 (8th Cir. 2010). According to *Tennard v. Dretke,* 124 S.Ct. 2562, 2570 (2004), "the meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding than in any other context . . . . Relevant evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value." *Lockett v. Ohio,* 98 S.Ct. 2954, 2965 n. 2 (1978). Given the lack of any genuine inconsistency, the mitigation value of Piper's "impeachment" evidence was nil.

Under the particular facts of this case, there was no error in excluding Piper's "impeachment" evidence because: (1) it was not grounded in a genuine

"inconsistency," (2) it did not rebut any statutory aggravator, (3) it would have entailed a mini-trial on whether the evidence in the Page case was inconsistent with the evidence in the Piper case, (4) which would have invited further evidence and argument emphasizing Piper's role in planning and initiating the murder, and (5) its mitigating value was vastly outweighed by the aggravating evidence. Thus, exclusion of Piper's "impeachment" evidence for mitigation purposes was harmless because it was not reasonably likely to have secured him a life sentence. *Williams,* 612 F.3d at 948 (exclusion of mitigating evidence harmless if it likely had no effect on the sentence in light of the evidence as a whole); *Skipper v. South Carolina,* 106 S.Ct. 1669, 1673 (1986).

C. Piper's Claims Of Ineffective Assistance Of Counsel Do Not Warrant Review Or Relief

Piper raises various claims of ineffective assistance of counsel. These claims do not warrant review or relief for two reasons: (1) they do not meet the criteria for review of U.S.S.Ct. Rule 10 and (2) they do not meet *Strickland* standards of ineffectiveness.

1. Review Is Not Warranted Because Piper's Ineffectiveness Claims Do Not Meet The Criteria Of U.S.S.Ct. Rule 10

The *Piper IV* decision rejecting Piper's ineffectiveness claims is not in conflict with any federal circuit court, another state high court or this Court's settled precedent. To the extent Piper argues a conflict with this Court's decision in *McCoy v. Louisiana,* 138 S.Ct. 1500 (2018), the facts that Piper had confessed to the aggravating factors and never objected to his counsel's strategy readily distinguish *Piper IV* from *McCoy*.

2. Neither Review Nor Relief Are Warranted Because Piper's Claims Do Not Satisfy The *Strickland* Standard Of Ineffectiveness

Because his ineffective assistance of counsel claims do not pose a U.S.S.Ct. Rule 10 conflict, Piper is asking this court to conduct a review for simple factual or legal error. Per *Strickland v. Washington,* 466 U.S. 668, 694 (1984), Piper needs to show (1) that his counsel's performance was objectively unreasonable and (2) that, but for his counsel's deficient performance, the outcome of his sentencing would have been different. Piper's ineffectiveness claims do not meet this standard.

a. No Ineffectiveness In Expert Preparation

Piper called a neuropsychiatrist and psychologist to provide indispensable mitigation testimony. SENTENCING IX at 1531/16, 1537/10, 1548-49, 1571/11, 1613/5, 1614/8-1, 1615/4, 1622/12-25, 1623/1-9, 1626/25, 1627/8, Respondent's Appendix 00147; SENTENCING VIII at 1513-14, 1515/10, 1521/6-13, Respondent's Appendix 00138. Piper's counsel knew that the aggravating facts "weren't particularly contested" in light of Piper's confession to killing Poage to steal his belongings, to torturous acts, to wanting a thrill kill and to killing Poage so as not to leave a witness to the planned theft. HCT16 at 108/18-111/9, Repondent's Appendix 00096; CONFESSION at 73/5 (eliminating a witness), 9/19, 16/10, 30/10 (pecuniary gain), 12/5, 46/16, 46/19, 47/1, 58/12, 59/5 (torture), Respondent's Appendix 00184.

Piper's counsel also knew that the credibility of the doctors' mitigation testimony depended on them speaking "knowledgeably" about the case. HCT16 111/2, Respondent's Appendix 00096. The harm of proffering unknowledgeable experts certainly outweighed any harm that resulted from openly acknowledging aggravating facts already in evidence from Piper's confession. CONFESSION at 73/5, 9/19, 16/10, 30/10, 12/5, 46/16, 46/19, 47/1, 58/12, 59/5, Respondent's Appendix at 00184. Piper's counsel's reasoned strategic calculations concerning how to best present mitigating evidence are "virtually unchallengeable" in *habeas corpus* proceedings. *Strickland,* 466 U.S. at 690.

b. No Due Process Error Or Ineffective Assistance Of Counsel In Connection With The Testimony Of Tom Curtis

In regard to witness Tom Curtis, Piper argues that his counsel were ineffective in failing to procure Curtis' updated criminal history regarding alleged offenses in the state of Utah. Curtis was Piper's cellmate while Piper was awaiting trial. Curtis testified that Piper had tried to enlist him in an escape plot to kill two guards on a trip to the jail library and take their keys. SENTENCING IV at 615/20, Respondent's Appendix 00131; SENTENCING VII at 1076/19, 1087/8-1088/24, Respondent's Appendix 00138; HCT16 at 45/21, Respondent's Appendix 00096.

Piper's ineffectiveness (or due process) claim is deficient because he has not demonstrated that any impeaching evidence even exists. Piper merely speculates that Curtis had convictions in Utah beyond the ones already known by his counsel and used as impeachment. HCT16 at 50/22, 51/23, 52/23, 101/24, Respondent's

Appendix 00096. Curtis testified that he received nothing but his previously-disclosed South Dakota plea deal, and "[n]othing whatsoever" from Utah, in consideration for his resentencing testimony. SENTENCING IV at 609/15-611/6, 635/2-5, Respondent's Appendix at 00131; HCT16 at 102/21, Respondent's Appendix 00096. Because Piper has not identified what useful evidence would have been found, or how the outcome of his resentencing probably would have been different if only his counsel had dug deeper, he has failed to make the requisite showings of deficient performance and prejudice necessary to obtain *Strickland* relief. *Strickland*, 466 U.S. at 697.

c. No Ineffective Assistance Of Counsel In Connection With The Testimony Of Sister Gabrielle Crowley

Piper called Sister Gabrielle Crowley to testify to Piper's alleged intellectual and spiritual growth while in prison. SENTENCING IX at 1676-1685, Respondent's Appendix 00147. The mitigating impact of this testimony was blunted on cross-examination when Crowley admitted that Piper had manipulated her into writing and delivering a letter to a female inmate in another facility in violation of a penitentiary policy against "prisoner-to-prisoner communication." HCT16 at 145/14, 165/18, Respondent's Appendix 00096. Piper complains that his counsel were ineffective for not attempting to rehabilitate Sister Crowley's testimony by questioning whether her facilitation of a prisoner-to-prisoner communication actually violated penitentiary rules. SENTENCING IX 1686/2-17, 1687/7-16, 1688/6-9, Respondent's Appendix 00147.

But Sister Crowley testified that, as a result of training that she attended at the penitentiary in order to volunteer as a spiritual counselor to inmates, she learned of restrictions against prisoner-to-prisoner communications. SENTENCING IX at 1685/19-1686/7, Respondent's Appendix 00147. Her letter to the female inmate explained that she was writing on Piper's behalf because he was not allowed to communicate with another inmate. SENTENCING IX at 1688/9, Respondent's Appendix 00147; SENTENCING VI at 1008/8-12, Respondent's Appendix 00136. Also, Piper himself, when permitted to ask questions of a witness at his resentencing, admitted that "clearly inmates writing to one another is a violation and is not allowed." HCT16 at 165/18, Respondent's Appendix 00096. No sparring with the prosecution over the language of a prison policy would have altered the outcome of Piper's sentencing.

CONCLUSION

Piper's petition for a writ of *certiorari* should be denied.

Dated this 27th day of July 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing brief was served on Ryan Kolbeck at ryan@kolbecklaw.com.

Dated this 27th day of July 2020.

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