OCTOBER TERM, 2026

CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

Briley Piper,
Petitioner,

v.

Attorney General for the State of South Dakota;
Tabatha Benting, Warden, South Dakota State Penitentiary,
Respondents;
United States of America,
Intervenor.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

CAPITAL CASE

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Dated: November 13, 2026

Index to Appendix

Appendix A – Panel Order of the United States Court of Appeals for the Eighth Circuit Denying Petition for Rehearing and Rehearing En Banc (June 18, 2026) A1

Appendix B – Panel Order of the United States Court of Appeals for the Eighth Circuit Affirming Denial of the Application for Relief from the United States District Court (May 4, 2026).....A2

Appendix C – Opinion and Order of the United States District Court of South Dakota Denying Motion to Amend Judgment and Granting in Part Motion for Certificate of Appealability (July 16, 2025) A22

Appendix D – Opinion and Order of the United States District Court of South Dakota Granting Respondents' Motion for Summary Judgment (March 21, 2025).....A38

Appendix E – Opinion and Order of the United States District Court of South Dakota on Exhaustion and Procedural Default Issues and Granting Partial Summary Judgment to Respondents (March 29, 2024).....A109

Appendix F – Opinion of the Supreme Court of South Dakota, (Dec. 11, 2019) A229

Appendix G – Opinion of the Supreme Court of South Dakota, (Jan. 8, 2014).....A250

Appendix H – Opinion of the Supreme Court of South Dakota (July 29, 2009).....A264

Appendix I – Opinion of the Supreme Court of South Dakota (Jan. 4, 2006).....A274

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 25-2617

Briley Piper

Appellant

v.

Attorney General for the State of South Dakota and Joseph Roemmich, Warden, South Dakota State Penitentiary

Appellees

United States of America

Intervenor

Appeal from U.S. District Court for the District of South Dakota - Western
(5:20-cv-05074-RAL)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

June 18, 2026

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Susan E. Bindler

Appellate Case: 25-2617 Page: 1 Date Filed: 06/18/2026 Entry ID: 5652490

United States Court of Appeals
For the Eighth Circuit

No. 25-2617

Briley Piper

Plaintiff - Appellant

v.

Attorney General for the State of South Dakota; Joseph Roemmich, Warden, South Dakota State Penitentiary

Defendants - Appellees

United States of America

Intervenor

Appeal from United States District Court
for the District of South Dakota - Western

Submitted: March 18, 2026
Filed: May 4, 2026

Before SHEPHERD, ERICKSON, and GRASZ, Circuit Judges.

ERICKSON, Circuit Judge.

In March 2000, Briley Piper, and two others, brutally beat and killed Chester Allan Poage at a remote location in Lawrence County, South Dakota. In January

Appellate Case: 25-2617 Page: 1 Date Filed: 05/04/2026 Entry ID: 5635735

2001, shortly before his capital murder trial was scheduled to begin, Piper pled guilty to five crimes, including first-degree felony murder. The circuit court subsequently imposed a death sentence.[1] Several years later, when reviewing Piper's application for habeas relief, the South Dakota Supreme Court concluded Piper did not validly waive his right to have a jury determine his sentence, vacated Piper's death sentence, and remanded for resentencing by a jury.[2] On remand, the jury found the State had proven three aggravating statutory factors[3] beyond a reasonable doubt and unanimously recommended a sentence of death. The South Dakota Supreme Court affirmed Piper's sentence. State v. Piper, 842 N.W.2d 338, 345-47 (S.D. 2014) (Piper III). Piper filed a second application for a writ of habeas corpus, claiming, among other issues, that his guilty pleas were not voluntary and intelligent. The South Dakota Supreme Court affirmed the circuit court's decision denying habeas relief. Piper v. Young, 936 N.W.2d 793, 816 (S.D. 2019) (Piper IV).

Piper commenced this federal habeas corpus case, seeking to overturn both his capital murder conviction and death sentence. The district court[4] denied all

[1]After three days of evidence, the state circuit court sentenced Piper to death for first-degree murder, life imprisonment for kidnapping, and consecutive maximum sentences for robbery, burglary, and grand theft. Piper's sentence was affirmed on direct appeal. State v. Piper, 709 N.W.2d 783, 797-99 (S.D. 2006) (Piper I).

[2]Piper v. Weber, 771 N.W.2d 352, 360 (S.D. 2009) (Piper II).

[3]The jury found the existence of the same three aggravating factors that the state circuit court had previously found. Piper III, 842 N.W.2d at 345-47. Those factors were: (1) committing the offense for personal benefit or to receive money or other thing of monetary value; (2) committing the offense for the purpose of "avoiding, interfering with, or preventing a lawful arrest;" and (3) committing an "outrageously or wantonly vile, horrible, or inhuman" offense that involves "torture, depravity of mind, or an aggravated battery to the victim." See S.D. Codified Laws § 23A-27A-1(3), (6), & (9).

[4]The Honorable Roberto A. Lange, Chief Judge, United States District Court for the District of South Dakota.

Appellate Case: 25-2617 Page: 2 Date Filed: 05/04/2026 Entry ID: 5635735

thirteen claims and granted a certificate of appealability on four claims. This Court granted Piper's unopposed request to expand the certificate of appealability to include two more claims. Because Piper has failed to show that he is entitled to relief on any of the six claims before us, we affirm.

I. BACKGROUND

Briley Piper has been on death row in South Dakota for 20 years. The precise details of the murder of Poage that lead to his death sentence are mostly immaterial to the issues before us. A complete factual summation of the extended and brutal nature of the murder can be found in Piper I, 709 N.W.2d at 790-91. A month after Piper left Poage to die and drove away in Poage's car, a woman discovered Poage's remains, clad in a sleeveless t-shirt, socks, and shoes, in a creek. Id. An autopsy revealed numerous head injuries and stab wounds. Id. at 792. The cause of Poage's death was determined to be stab wounds and blunt force injury to the head. Id. A complete procedural progression of this case through its successive stages of litigation in state court was articulated by the court in Piper IV, 936 N.W.2d at 793. In short, Piper's case has been before the South Dakota Supreme Court four times—twice on direct appeal and twice on habeas review.

Having exhausted his avenues for relief in state court, Piper filed this federal habeas case. The district court resolved Piper's claims in two separate orders. The first order addressed issues relating to exhaustion and procedural default and disposed of several claims. The second order granted summary judgment in favor of the State on the remaining claims and dismissed Piper's habeas petition. Of the thirteen claims Piper alleged in the district court, six are before us on review:

1. The constitutionality of 28 U.S.C. § 2254(d) after the Supreme Court's decision in Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024);

2. South Dakota's *res judicata* doctrine as applied to Piper's challenge to his guilty pleas;

3. The district court's denial of Piper's request for an evidentiary hearing to show Piper was not "at fault" for resentencing trial counsel's failure to investigate/present mitigating evidence on fetal alcohol spectrum disorder and state habeas counsel's failure to raise the issue;

4. The adequacy of trial counsel's impeachment of witness Thomas Curtis;

5. Trial counsel's purported failure to investigate and rebut the State's assertion that Sister Gabriella Crowley violated prison rules during her interactions with Piper; and

6. The district court's denial of relief due to cumulative prejudice.

After careful review, we conclude Piper has not demonstrated he is entitled to relief on any of his claims.

II. DISCUSSION

When reviewing the denial of a habeas petition, we review the district court's findings of fact for clear error and its conclusions of law *de novo*. Garrett v. Payne, 154 F.4th 599, 601 (8th Cir. 2025). We review *de novo* a district court's finding of procedural default. Marcyniuk v. Payne, 39 F.4th 988, 995 (8th Cir. 2022). Our review of the denial of an evidentiary hearing is under the deferential abuse of discretion standard. Id.

To prevail in a federal habeas proceeding, a petitioner must show a constitutional error that had a "substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 622 (1983) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). A federal court's authority to grant a writ of habeas corpus on state convictions is narrow. See 28 U.S.C. § 2254(d). It is not enough for a federal court to conclude that, in its independent judgment, it would have applied federal law differently from the state court; "the state court's application must have been objectively unreasonable."

Strong v. Roper, 737 F.3d 506, 510 (8th Cir. 2013) (quoting Rousan v. Roper, 436 F.3d 951, 956 (8th Cir. 2006)).

1. The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and the Supreme Court's decision in Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024).

Although not the first issue raised by Piper, we begin with his challenge to the constitutionality of the deference federal courts are required to give state court rulings. Section 2254(d) of AEDPA requires a state prisoner to show the state court's adjudication of a claim either:

> **(1)** resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> **(2)** resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

Piper argues the Supreme Court's decision in Loper Bright renders this provision in AEDPA unconstitutional. He contends federal courts are obligated to exercise independent judgment when deciding whether a petitioner is entitled to habeas corpus relief. Every court to address this claim disagrees with this view and has concluded Loper Bright has limited applicability and does not implicate federal habeas practice. See, e.g., Sanders v. Plappert, 168 F.4th 837, 848-49 (6th Cir. 2026); Bates v. Sec'y, Fla. Dep't of Corrs., No. 25-12588, 2025 WL 2305211, at *1 (11th Cir. Aug. 1, 2025) (per curiam) (unpublished), cert. denied, Bates v. Dixon, 146 S. Ct. 65 (2025); Ellis v. Jeffreys, 8:23CV315, 2026 WL 123276, at *10 n.8 (D. Neb. Jan. 9, 2026) (unpublished); Gay v. Payne, Civil No. 6:23-cv-06011, 2025 WL 2737222, *3 (W.D. Ark. Sept. 25, 2025) (unpublished); Green v. Streeter, Case No. 5:24-cv-1501-MHH-GMB, 2025 WL 3721690, at *1 (N.D. Ala. Sept. 23, 2025)

(unpublished); Walden v. Thornell, 799 F. Supp. 3d 920, 925-27 (D. Ariz. 2025); Davis v. Guerrero, 798 F. Supp. 3d 633, 667-68 (N.D. Tex. 2025); Creech v. Valley, Case No. 1:24-cv-00485-GMS, 2025 WL 3718636, at *15-16 (D. Idaho Aug. 5, 2025) (unpublished).

Piper has offered no convincing basis on which to decree AEDPA deference unconstitutional or find that Loper Bright silently overruled other Supreme Court cases interpreting and applying § 2254(d)(1). Notably, seven months after Loper Bright was decided, the Supreme Court reiterated a state prisoner's narrow grounds for habeas relief in federal court, as set forth in § 2254(d). See Andrew v. White, 604 U.S. 86, 92 (2025) (per curiam). We join the other courts that have concluded Loper Bright did not render AEDPA deference unconstitutional.

When reviewing a state prisoner's federal habeas petition, "[a] state court's findings are entitled to a presumption of correctness, and the petitioner has the burden of rebutting the presumption by clear and convincing evidence." Strong, 737 F.3d at 510 (citing 28 U.S.C. § 2254(e)(1)).

2. South Dakota's application of *res judicata* to Piper's due process challenge to his 2001 guilty pleas.

In his first appeal and in his first habeas application, Piper did not challenge the validity of his guilty pleas. The record shows that given the overwhelming evidence of guilt, the reprehensible conduct involved in the murder, and undisclosed aggravating evidence unknown to law enforcement or the prosecution, Piper's objective was not to undo his convictions but seek reversal of the death sentence and conversion to life in prison without the possibility of parole. While the South Dakota Supreme Court vacated Piper's death sentence, it did not give him the full relief he was seeking. Rather than convert his sentence to life without parole, the South Dakota Supreme Court remanded Piper's case for resentencing by a jury, where Piper again faced the prospect of being sentenced to death.

Only after failing to obtain the full relief he wanted did Piper move for the first time to withdraw his guilty pleas. The circuit court, finding no manifest injustice, denied Piper's motion on the merits. See S.D. Codified Laws § 23A-27-11 (permitting a court to allow a defendant to withdraw his plea "to correct manifest injustice"). On appeal, the South Dakota Supreme Court concluded the circuit court lacked jurisdiction to consider the motion because its remand order only authorized the circuit court to conduct a jury resentencing. Piper III, 842 N.W. at 344.

While his second habeas application was pending in the state circuit court, Piper moved a second time to withdraw his guilty pleas. The state circuit court denied his motion for lack of jurisdiction. In his second habeas application, Piper claimed he waived his right to a jury trial and pled guilty believing this was the only way to be sentenced by the court. Piper did not ask for a jury to determine his guilt, nor did he claim actual innocence. He contended that once his death sentence was vacated by the South Dakota Supreme Court, he became an "unsentenced" defendant and, under S.D. Codified Law § 23A-27-11, he was entitled as a matter of right to withdraw his guilty pleas. Piper asserted that the court's refusal to allow him to withdraw his guilty pleas was unexpected. The state circuit court denied relief, noting the claim might be barred under principles of claim preclusion but also concluding Piper's guilty pleas were voluntarily and intelligently made.

On appeal, in Piper IV, the South Dakota Supreme Court determined that Piper's claim was "twice procedurally defaulted" because he failed to raise it on direct appeal and failed to raise it during his initial habeas case. 936 N.W.2d at 805. The Court explained, "Piper's opportunity to challenge his guilty pleas was surely presented in Piper II, and if he intended to pursue it at all, he should have advanced the argument then rather than through the piecemeal method he now suggests." Id. at 806. The Court expressly rejected Piper's theory that S.D. Codified Law § 23A-27-11 allows him to choose when to mount a challenge to his guilty pleas, reasoning nothing in the statutory text displaces other restricting limitations, such as basic rules of claim preclusion or procedural default in post-conviction cases. Id.

Turning to Piper's federal habeas petition where he raises this claim again, "a federal court will not entertain a procedurally defaulted constitutional claim in a petition for habeas corpus absent a showing of cause and prejudice to excuse the default." Marcyniuk, 39 F.4th at 995 (quoting Cagle v. Norris 474 F.3d 1090, 1099 (8th Cir. 2007)). Piper argued to the district court that federal review is available because the state court applied *res judicata* to his claim in a novel and unforeseeable way. The district court rejected Piper's argument, finding the South Dakota Supreme Court consistently applies *res judicata* to bar habeas claims that were or could have been raised on direct appeal. Because the claim was defaulted, the district court declined to address the merits of Piper's claim.

This Court has previously determined that South Dakota's *res judicata* rule "is an independent and adequate state ground that bars federal habeas relief." Rhines v. Young, 899 F.3d 482, 490-91 (8th Cir. 2018). Further, longstanding South Dakota habeas precedent has applied *res judicata* to bar claims that could have been raised on direct appeal. See Ramos v. Weber, 616 N.W.2d 88, 91-92 (S.D. 2000) (noting in a habeas proceeding *res judicata* precludes consideration of a constitutional issue that could have been raised in an earlier proceeding); Moeller v. Weber, 689 N.W.2d 1, 6 (S.D. 2004) ("Habeas corpus petitions are subject to the doctrines of *res judicata* and collateral estoppel."); Loop v. Class, 554 N.W.2d 189, 193 (S.D. 1996) (reiterating the rule that when a defendant takes a direct appeal, "he cannot thereafter, in a post-conviction proceeding, raise any matter of which he was aware at the time of the direct appeal but did not raise"). Piper has not shown the district court erred when it held South Dakota's application of *res judicata* in habeas proceedings was firmly established when Piper contested his court-imposed death sentence. Piper procedurally defaulted his due process claim related to his guilty pleas when he chose not to raise his claim on direct appeal.

To circumvent the *res judicata* bar, Piper relies on Haase v. Weber, 693 N.W.2d 668 (S.D. 2005), to show South Dakota has inconsistently applied the doctrine in habeas cases. Haase is an outlier for a couple reasons. First, unlike in this case where Piper has had multiple reviews of his claims, Haase's three habeas

applications were denied without a judge ever reviewing any of his grounds for relief. Id. at 669. Even so, only three of the five justices found fundamental fairness permitted him to get around "the procedural purgatory" Haase found himself in. The two dissenting justices asserted the court's decision violated South Dakota's habeas statutes. Id. at 670-75. Second, the South Dakota Supreme Court made plain the case presented "a unique and troubling situation" and was decided "under the unique facts of this case." Id. at 669-70. It has proven so unique that, in the 20 years it has been in existence, no other South Dakota court has relied on Haase to circumvent application of the doctrine of *res judicata*. A single case presenting "unique and troubling facts" does not demonstrate that South Dakota has been inconsistent in its application of *res judicata*.

The record shows Piper made a strategic decision to contest only his sentence and not the validity of his guilty pleas when he filed his brief with the South Dakota Supreme Court in May 2003 and also when he filed his first application for habeas relief in the state circuit court in August 2006. Because South Dakota's *res judicata* doctrine is independent of federal law and, at that time of Piper's filings, the doctrine was firmly established, regularly followed, and readily ascertainable, Piper procedurally defaulted his constitutional claim relating to his guilty pleas.

Piper has not shown cause to excuse his default. His counsel's belief that South Dakota law would allow Piper to withdraw his guilty pleas if he was successful in getting his sentence vacated does not establish cause. See Marcyniuk, 39 F.4th at 995 ("In Coleman, the Supreme Court clearly stated that '[a]ttorney ignorance or inadvertence is not 'cause' because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must 'bear the risk of attorney error'" (quoting Coleman v. Thompson, 510 U.S. 722, 753 (1991)).

3. Piper's request for an evidentiary hearing to show he was not "at fault" for resentencing trial counsel's failure to investigate/ present mitigating evidence on fetal alcohol spectrum disorder and the ineffectiveness of state habeas counsel for failing to raise the issue.

Piper seeks to develop evidence showing he was not "at fault" for all prior counsel's failure to discover that his mother drank alcohol while she was pregnant with him, that she abused alcohol during his childhood, that she was physically abusive, and that he suffers from brain damage consistent with fetal alcohol spectrum disorder ("FASD"). Piper contends his state habeas counsel's conduct in failing to discover trial counsel's deficiencies was grossly negligent, constitutes extraordinary misconduct, and amounts to breach of the duty of loyalty.

The United States Supreme Court has made plain that, unless a prisoner can satisfy the "stringent requirements" of 28 U.S.C. § 2254(e)(2), a federal court may not conduct an evidentiary hearing or otherwise consider evidence beyond the state court record on a claim based on ineffective assistance of state post-conviction counsel. Shinn v. Ramirez, 596 U.S. 366, 382 (2022). Section 2254(e)(2)(A) requires the prisoner to show: (a) the existence of "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable;" or (b) "a factual predicate that could not have been previously discovered through the exercise of due diligence." In addition, a prisoner must show that "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2254(e)(2)(B).

Piper contends the district court abused its discretion when it denied an evidentiary hearing because the Supreme Court's decision in Shinn does not foreclose a hearing to determine whether a habeas petitioner was "at fault" for failing to develop the state court record. We need not reach that issue because the record

belies Piper's allegations of attorney negligence, misconduct, or "extreme departure from the minimum standards of professional conduct."

The district court methodically reviewed resentencing counsel's time entries and found trial counsel almost immediately began investigating Piper's mental health conditions and contacted potential mitigation experts and witnesses. The billing records show counsel consulted with at least one psychologist and explored potential psychiatric issues. Of significance, a note in September 2009 states: "Research FASD/ADHD/sociopathy." A November 2009 entry identifies "FASD/other mental health research." Another entry 12 days later states: "FASD (fetal alcohol) work-up." Piper has not challenged the district court's findings related to counsel's investigation of his mental health condition. In short, the records confirm counsel had frequent contact with Piper's family, sent a health questionnaire to Piper's mother, retained a capital mitigation specialist, received approval to have a psychologist appointed to the defense team, and hired a forensic neuropsychiatrist. Neither the psychologist nor the pediatrician mentioned FASD in their evaluation reports when Piper was 13 years old; neither retained trial mitigation psychologist nor neuropsychiatrist testified as to any suspicion of FASD; none of the psychiatrists whom the state called perceived Piper to have FASD; and counsel's mitigation investigation, which explored FASD, did not show signs of FASD.

Given the uncontroverted records, Piper faces an uphill battle trying to prove counsel conducted an inadequate mental health investigation or failed to appreciate the value of mitigating psychological evidence. The reality is the evidence in the record simply does not support Piper's claim that counsel failed to "notice red flags" indicating he suffered from a mental impairment, such as FASD. There was virtually no indication of the existence of FASD, let alone "red flags." The records show Piper's counsel hired experts and specialists to investigate whether Piper suffered from any mental condition, including FASD, but came up empty. Piper cultivates a statement from his mom in 1994, when Piper was 13 years old, indicating she consumed "some" alcohol while pregnant into a diagnosis or apparent case of FASD. The entirety of the statement transcribed by the doctor as part Piper's mom's request

for a second opinion as to potential explanations for Piper's impulsive behavior: "Mrs. Piper reports that she was anemic throughout her pregnancy. She smoked one pack of cigarettes per day and consumed some alcohol." Notably, after the doctor completed his evaluation, nowhere in the doctor's report, or anywhere else in the record, is there a mention of prenatal alcohol exposure or FASD as possible explanations for Piper's behavior.

Piper has proffered no credible basis showing there were "red flags" in the record that should have put all prior counsel on notice that he may suffer from FASD. "Reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." Rhines, 899 F.3d at 492 (quoting Rompilla v. Beard, 545 U.S. 374, 383 2005)). Based on the absence of evidence, Piper has presented no colorable claim that all prior counsel missed signs that he may suffer from FASD, let alone a basis warranting an evidentiary hearing. The district court did not abuse its discretion when it denied Piper's request for an evidentiary hearing.

4. Trial counsel's impeachment of witness Thomas Curtis.

Piper met Thomas Curtis in 2000 while they were in custody together at the Lawrence County Jail. Curtis testified in person at each of Piper's trials. At the time of Piper's resentencing trial, Curtis was in custody in Utah. The State had Curtis brought back to South Dakota to testify via an interstate subpoena. Curtis testified about statements Piper made to him about his role in Poage's murder, which corroborated other evidence presented by the State. He also told the jury that Piper had concocted a plan to escape, a plan that included killing prison guards in the process. In addition, Curtis testified about Piper's lack of remorse as to his actions, both past and future.

Curtis appeared at the resentencing trial clad in a jail uniform. He told the jury that he was incarcerated on eight counts of distribution of cocaine. After trial was over, counsel discovered Curtis had been convicted of, and was awaiting sentencing on, four counts of giving a minor female cocaine and four counts of

raping her. Piper contends his counsel's failure to discover the truth about Curtis's criminal history and inform the jury that Curtis was awaiting sentencing on four rape convictions prejudiced him. Piper contends if jurors would have known the truth, a reasonable juror could have concluded that if Curtis was willing to lie about his criminal history to cover his own misdeeds, he would be willing to lie about Piper as well.

The South Dakota Supreme Court disposed of Piper's claim on Strickland's[5] prejudice prong, concluding Piper had failed to show a more thorough investigation of Curtis's criminal history would have "yielded meaningful impeachment information." Piper IV, 936 N.W. 2d at 815. Under AEDPA, deference must be given to a state court's adjudication of both the law and facts. See 28 U.S.C. § 2254(d). Pointing to defense counsel's admissions that Curtis's rape convictions would have constituted very important impeachment evidence and counsel's opinion that advising the jury of those convictions might have affected the jury's verdict, Piper asserts the South Dakota Supreme Court's decision was based on an unreasonable determination of fact and was an unreasonable application of Strickland.

The district court found that deciding the appropriate standard of review applicable to Piper's claim was complicated because it was difficult to decipher from the records whether the South Dakota Supreme Court treated Curtis's rape convictions as part of the record or not. In the district court's view, resolving the standard of review issue was unnecessary because, even under *de novo* review, Piper's claim failed. The district court reasoned that impeaching Curtis with his rape convictions would not have made a different outcome reasonably probable because:

[5]The familiar two-pronged standard set out in Strickland v. Washington, 466 U.S. 668 (1984), requires a petitioner alleging ineffective assistance of counsel to show: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defense. Because both prongs must be satisfied, a court may decide a claim by addressing either prong. Ford v. United States, 917 F.3d 1015, 1021 (8th Cir. 2019).

(1) other witnesses provided similar testimony making Curtis's testimony cumulative; (2) counsel effectively called into question Curtis's credibility so the impact of the rape convictions would have been "marginal;" and (3) Curtis's rape convictions would not have overcome the "gruesome facts" of Poage's murder that caused the jury to unanimously recommend a death sentence.

Piper's arguments on appeal do not show error in the district court's findings or analysis. Piper overlooks defense counsel's efforts that raised questions about Curtis's credibility, even without the rape convictions. When asked by defense counsel how many felonies he had been convicted of over the years, Curtis responded: "Approximately two that I have been convicted of. I have been accused of many more but I have been convicted of I think two." Turning to the reason for his current incarceration, Curtis acknowledged that a jury convicted him on eight charges of felony possession with intent to distribute cocaine and was awaiting sentencing. When asked how much cocaine was involved, Curtis testified, "I did not have any cocaine, I was accused of having cocaine." Curtis agreed with counsel's characterization of his situation as "taking a false rap." Curtis confirmed his position a second time, telling the jury that he had been falsely convicted on all eight distribution charges. Even without the rape convictions, Piper's counsel undermined Curtis's credibility.

More importantly, Piper incorrectly assumes that if the jurors knew about Curtis's rape convictions, they would have disregarded all of Curtis's "damaging" testimony, including Piper's escape plans and lack of remorse. Curtis was not the only witness to testify about these potentially aggravating factors for the jury to evaluate. Piper has not contested the district court's finding that at least two other witnesses echoed Curtis's testimony indicating Piper demonstrated a lack of remorse for murdering Poage. With regard to Piper's plans to escape from custody, Kenneth Tingley's testimony from Piper's first trial was read to the jury because Tingley was unavailable for the resentencing trial. Tingley, who was in custody with Piper in the Lawrence County Jail, testified that Piper offered him money to kill a female guard so he could escape from custody. Tingley explained that Piper discussed the escape

plans with fellow inmates Tobe Givens and "Tom." Givens testified at Piper's first trial that Piper offered him, Tingley, and Curtis money to "take out" two prison guards and help Piper escape. When the State expressed difficulty locating Givens for trial, it sought permission to read Givens's prior testimony into the record. The circuit judge denied the request on the ground that Givens's testimony was cumulative to Curtis's and Tingley's testimony.

To get around the cumulative aspect of Curtis's testimony, Piper asks us to treat Curtis's testimony as more significant because he testified in person. The circuit judge, however, instructed the jury to give the same consideration to Tingley's testimony as it would for testimony from live witnesses. Piper's request to assign more weight to Curtis's testimony is without factual or legal support.

Lastly, Piper argues Curtis's testimony was significant because this was not "a slam-dunk case for the death penalty." Piper highlights that another jury sentenced co-defendant Darrell Hoadley to life imprisonment. The district court found that although Curtis's testimony about Piper's escape plans and lack of remorse hurt Piper's case, "it paled in comparison to the gruesome facts of Poage's murder." While there has been extensive finger pointing as to who was the worst perpetrator that participated in Poage's murder, the state circuit court, who heard and saw all the evidence the first time, identified Piper as the leader of the three men involved in Poage's murder. Piper I, 709 N.W.2d at 802. On review, the South Dakota Supreme Court added to that assessment: "That Piper is a vicious schemer and leader is further evidenced by his actions since his imprisonment, including escape plots as well as schemes to murder prison guards and his co-defendant [Elijah] Page, whom he suspected of cooperating with the police against him." Id. There is nothing in the record to suggest that this assessment of Piper was different during his resentencing trial.

In comparison, the South Dakota Supreme Court determined that "after extensive review of the record," Hoadley was "a follower," Hoadley's degree of criminal involvement was not equal to Piper's, Hoadley did not joke or taunt Poage

during the attack, and Hoadley was never mentioned as the instigator of the murder. Id. at 815-16. Prison officers, who worked with Piper, Page, and Hoadley, testified that Piper has a leadership personality and described the other two men as "followers." Piper III, 842 N.W. at 350-51. In addition to the "genuine and substantial difference between the actions of Piper and Hoadley," Hoadley showed remorse for his actions while Piper "showed a complete lack of remorse." Piper I, 709 N.W.2d at 816.

Piper is unable to refute the district court's determination that the most damaging evidence causing the jury to unanimously recommend a death sentence was the "horrendous facts" of the murder—which lasted four hours and involved torture and taunting as Poage begged for his life—and Piper's more extensive level of involvement and culpability. On this well-developed record, impeaching Curtis with his convictions for rape would not have caused a reasonable juror to reach a different sentencing decision. Even applying *de novo* review, a more favorable standard to Piper, he cannot show prejudice for his counsel's failure to discover and impeach Curtis with his rape convictions.

5. Trial counsel's purported failure to investigate and rebut the State's assertion that Sister Gabriella Crowley violated prison rules during her interactions with Piper.

Piper acknowledges there was little question that the State would be able to prove the existence of one or more statutory aggravating factors. The defense strategy was to show Piper was capable of change and Piper had, in fact, changed. Sister Gabriella Crowley, a nun who had visited Piper in jail over a three-year period prior to his resentencing trial, testified about Piper's efforts to change and his transformation. She explained how Piper was studying to become a Catholic and she served as his godmother at his 2008 baptism. Sister Crowley told the jury that during her visits with Piper, she and Piper discussed spiritual matters, talked about his family, and conferred about his studies. According to Piper, on cross-examination, the State undermined the impact and effectiveness of Sister Crowley's testimony when it suggested Piper manipulated and used Sister Crowley to violate

prison rules. Piper now claims there was no violation of any prison rules and his counsel's failure to discover this fact was deficient and prejudiced him.

While in jail, Sister Crowley wrote a letter on Piper's behalf to a female inmate. When the prosector asked Sister Crowley if she knew that she was violating prison rules by writing the letter, she explained that she did not think so at the time but, looking back, she believed she may have broken prison rules. When asked if she thought Piper had "manipulated your friendship," Sister Crowley replied that she did not view "it that way." Because the prosecutor suggested to the jury that Piper had manipulated Sister Crowley, Piper contends the State "eviscerated" his mitigating evidence and turned it into "an aggravating twist."

During the trial, a correctional officer testified that inmates are prohibited from communicating with each other through third parties. The letter written by Sister Crowley was introduced as evidence, but an official prison policy, if there was one, was never presented to the jury. In the letter, Sister Crowley explained that she was writing on Piper's behalf because inmates could not write to each other. During the state habeas proceedings, defense counsel testified that after the trial his paralegal spoke with the warden and the warden told her there was no prison policy prohibiting inmate-to-inmate communications via third parties. The South Dakota Supreme Court rejected Piper's ineffective assistance of counsel claim on the merits, reasoning whether the letter actually violated prison policy remained "unsettled" and Piper had not shown that his counsel acted unreasonably or that the alleged error prejudiced the outcome. Piper IV, 936 N.W. at 816.

In the district court, Piper argued the South Dakota Supreme Court made an unreasonable finding of fact when it found it was "still unsettled" whether Sister Crowley's letter violated prison policy. Piper acknowledged that the paralegal's affidavit setting forth what the warden told her was not made part of the state habeas record. Based on the lack of supporting evidence, the district court found it was reasonable for the South Dakota Supreme Court to find the dispute over whether Sister Crowley's letter violated prison policy "unsettled." With that finding, it then

flowed naturally for the South Dakota Supreme Court to conclude Piper's claim (his counsel acted deficiently when he failed to refute the State's suggestion that Piper manipulated Sister Crowley) was based only on speculation. Even if Piper's counsel had established the letter did not violate prison policy, the district court concluded the South Dakota Supreme Court's decision finding no prejudice was reasonable because the aggravating evidence was so "weighty."

On appeal, Piper argues there was evidence in the record establishing there was no prison policy prohibiting inmate-to-inmate communications and refers to defense counsel's testimony on cross-examination about what his paralegal told him she learned from speaking to the warden after trial. But "the existence of some contrary evidence in the record does not suffice to show that the state court's factual determination was unreasonable." Cole v. Roper, 783 F.3d 707, 711 (8th Cir. 2015). Piper also contends the district court's acceptance of the state court's finding of no prejudice unreasonably assumes every juror would reject the mitigating value of Piper's religious awakening and efforts to change.

Piper places an inordinate amount of weight on the merits of whether Sister Crowley violated prison policy and the impact that issue had on the jury. The undisputed record shows Sister Crowley understood she was writing the letter because Piper was not allowed to communicate with another inmate. Piper himself recognized during a state habeas hearing that he understood the prison restricted inmate-to-inmate communications, stating "clearly inmates writing to one another is a violation [and] is not allowed." At the time Piper asked Sister Crowley to assist him in communicating with the female inmate, both he and Sister Crowley believed the conduct was prohibited. Establishing definitively whether a prison policy was violated would have had little to no influence on the jurors, as Sister Crowley denied the suggestion that Piper was using his friendship with her to manipulate her.

Further, Sister Crowley was not Piper's only witness. She was only a part of his case. Piper's arguments ignore the extensive mitigating evidence that was before the jury and unrefuted, including Piper's difficult upbringing, his parents' failure to

provide him the help he needed, his youth at the time of the offense, the effects of group dynamics, his history of drug abuse, psychological conditions that may lessen culpability, as well as other positive changes and things Piper had done while incarcerated. In the end, the jury found the aggravating circumstances outweighed Piper's mitigating factors.

Piper has failed to show the prosecutor's suggestion that Piper manipulated Sister Crowley had a substantial and injurious effect or influence on the jury's sentencing decision. A writ of habeas corpus "is designed to guard against extreme malfunctions in the state criminal justice systems; it is not a substitute for ordinary error correction through appeal." Bookwalter v. Vandergriff, 73 F.4th 622, 624 (2023) (cleaned up). Because Piper has failed to demonstrate that, without the suggestion of manipulation, there is a reasonable probability that a juror would have voted for life imprisonment rather than capital punishment, he is not entitled to habeas relief.

6. The denial of relief due to cumulative prejudice.

Finally, Piper contends he is entitled to habeas relief due to the cumulative prejudice of the constitutional violations in his case. Piper has not met his burden of showing error entitling him to relief, let alone cumulative errors. Further, this Court has held that "habeas relief will not be granted based on the cumulative effect of attorney errors." McLaughlin v. Precythe, 9 F.4th 819, 830-31 (8th Cir. 2021) (cleaned up); see also Wainwright v. Lockhart, 80 F.3d 1226, 1233 (8th Cir. 1996) ("Errors that are not unconstitutional individually cannot be added together to create a constitutional violation. Neither cumulative effect of trial errors nor cumulative effect of attorney errors are grounds for habeas relief."). Piper's claim for habeas relief based on cumulative prejudice is unavailable in this Court.

III. CONCLUSION

We affirm the district court's denial of Piper's application for relief under 28 U.S.C. § 2254.

Appellate Case: 25-2617 Page: 20 Date Filed: 05/04/2026 Entry ID: 5635735

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

BRILEY PIPER, Petitioner, vs. MARTY JACKLEY, ATTORNEY GENERAL OF THE STATE OF SOUTH DAKOTA, JOSEPH ROEMMICH, WARDEN, SOUTH DAKOTA STATE PENITENTIARY; Respondents.	5:20-CV-05074-RAL OPINION AND ORDER DENYING MOTION TO AMEND JUDGMENT AND GRANTING IN PART MOTION FOR CERTIFICATE OF APPEALABILITY

Petitioner Briley Piper is a state death row inmate who has brought this case to challenge his conviction and sentence. This Court denied Piper's motion for neuropsychological testing, Doc. 108, and ultimately granted summary judgment on all the claims raised in his amended petition, Docs. 122, 145. The facts of Piper's crime and the background for his claims are set forth in this Court's lengthy prior opinions. See Docs. 108, 122, 145. Piper now moves to amend the judgment, Doc. 146, and for a certificate of appealability (COA) on certain claims, Doc. 147. This Court denies the motion to amend the judgment but grants in part the motion for a COA.

I. Motion to Amend Judgment

A. Rule 59(e) Standard

Motions to amend a judgment under Rule 59(e) of the Federal Rules of Civil Procedure "serve the limited function of correcting manifest errors of law or fact or to present newly

discovered evidence."[1] United States v. Metro. St. Louis Sewer Dist., 440 F.3d 930, 933 (8th Cir. 2006) (cleaned up and citation omitted). They are not a means to reargue issues on which the court already ruled, Nordgen v. Hennepin Cnty., 96 F.4th 1072, 1077 (8th Cir. 2024), and may not "be used to introduce new evidence, tender new legal theories, or raise arguments which could have been offered or raised prior to entry of judgment." Metro St. Louis Sewer, 440 F.3d at 933 (cleaned up and citation omitted).

B. Claim IX: Tom Curtis

Tom Curtis was an inmate housed with Piper at the Lawrence County Jail before Piper's first trial. Doc. 145 at 17–19, 63–69. Curtis testified about Piper's plan to kill two jail guards so that he could escape, and recounted various statements Piper had made about murdering Chester Allan Poage. Id. Claim IX addressed the shortcoming in disclosure and use in cross-examination of Curtis's criminal history. Piper alleged in Claims IX.A–IX.D that the State violated his due process rights by (1) failing to disclose that Curtis was awaiting sentencing on rape convictions in Utah when he testified at Piper's resentencing trial in July 2011, and (2) failing to correct Curtis's omission of the rape convictions when describing his criminal history to the jury. Doc. 67 at 128–35; see Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that the State violates due process when it suppresses evidence favorable to the defense and material to the defendant's guilt or punishment); Napue v. Illinois, 360 U.S. 264, 265, 269 (1959) (holding that the State violated due process when it failed to correct testimony it knew to be false). Claim IX.E alleged that trial counsel were ineffective by failing to discover and use for impeachment Curtis's recent rape

[1]This Court dismissed all Piper's remaining claims on March 21, 2025, Doc. 145, but opted to wait until the parties briefed the COA to enter a judgment. Although Piper filed his Rule 59(e) motion while the parties were briefing the COA, this Court has now entered final judgment and a ruling on Piper's motion is appropriate.

convictions. Doc. 67 at 135–37; Doc. 131 at 42–51. This Court granted summary judgment on Claims IX.A–IX.D because they were procedurally defaulted and Piper could not show cause for the default. Doc. 122 at 97–106. It granted summary judgment on Claim IX.E because Piper failed to show prejudice under Strickland v. Washington, 466 U.S. 668 (1984). Doc. 145 at 61–69.

Piper now argues that this Court committed a manifest error of law by rejecting Claim IX.E because it failed to "apply completely" the materiality standard in Napue and Giglio v. United States, 405 U.S. 150 (1972). Doc. 146 at 3. Claim IX.E alleged ineffective assistance, so this Court analyzed whether Piper had shown a reasonable probability that raising in cross-examination or otherwise Curtis's rape convictions would have caused at least one juror to weigh the aggravating and mitigating circumstances differently and vote for life. Doc. 145 at 61–69. This is the standard the Supreme Court applies to ineffective assistance of counsel claims, Strickland, 466 U.S. at 695; Andrus v. Texas, 590 U.S. 806, 822 (2020) (per curiam), and it is the same standard Piper applied in his brief, Doc. 131 at 46, 49–50. Piper's real complaint seems to be that, under the Supreme Court's recent decision in Glossip v. Oklahoma, 145 S. Ct. 612 (2025), this Court should have assigned more significance to Curtis's rape convictions and his omission of them when describing his criminal history to the jury. Doc. 146 at 4–5. This Court's prior opinion distinguished Glossip and explained at length why Piper could not show a reasonable probability that trial counsel's use of the rape convictions would have caused at least one juror to vote for life. Doc. 145 at 64–69. Piper's rehash of the arguments he made in his brief and at the hearing does not show manifest error.

Piper also argues that this Court should reconsider its holding that he has not shown cause to excuse the procedural default of the Brady and Napue arguments he raised in Claims IX.A–

IX.D. Piper argued in prior briefing that the State's failure to disclose Curtis's updated criminal history provided cause to excuse default of the Brady and Napue claims. Doc. 67 at 136; Doc. 86 at 47. According to Piper, this Court rejected that argument because "Piper had not provided any authority suggesting that the State knew, or should have known, that Curtis was lying about his Utah convictions." Doc. 146 at 5. Piper claims this holding was wrong because Glossip shows that he need not provide direct evidence that the prosecution knew Curtis's testimony was false.

Piper's argument mischaracterizes this Court's holding and does not warrant relief under Rule 59(e). As this Court explained in its prior opinion, a prosecutor's suppression of evidence may sometimes constitute cause to excuse procedural default of a Brady or Napue claim. See Banks v. Dretke, 540 U.S. 668, 691–92 (2004); Dansby v. Payne, 47 F.4th 647, 657, 659–60 (8th Cir. 2022). This rule, however, only applies when the suppression of evidence "is the reason for the petitioner's default." Dansby, 47 F.4th at 659. "A petitioner has not shown cause if he had evidentiary support for his claim before his default, or if the evidence was reasonably available through other means." Id. (cleaned up and citations omitted). Although this Court noted that Piper "has not cited any evidence that the State knew of Curtis's rape convictions," Doc. 122 at 101, that was not the only reason to not find cause for Piper's procedural default. Rather, this Court explained that Piper could not demonstrate cause because Curtis's rape convictions were reasonably available to him and the State's alleged suppression of the convictions was not the reason for Piper's default. Doc. 122 at 100–06. Piper's current motion does not even mention that reasoning, let alone explain why it is wrong.

C. Claim XI

Claim XI alleged that Piper's guilty pleas were not knowing, voluntary, and intelligent because the state trial judge incorrectly told him that all twelve jurors would need to agree before

he could receive a life sentence and that pleading guilty would require him to be sentenced by the court rather than a jury. Doc. 67 at 146. The Supreme Court of South Dakota rejected this claim when Piper raised it in his state habeas case, Doc. 2-1 at 90–100, finding that res judicata applied because Piper failed to raise the claim when appealing his initial death sentence and in his first habeas proceeding, and that the claim would fail on the merits "[e]ven if we were inclined to review" it, Piper v. Young, 936 N.W.2d 793, 803–07 (S.D. 2019).

As relevant here, Piper argued in prior briefing that this res judicata ruling did not bar Claim XI because it depended on federal law. See Lee v. Kemna, 534 U.S. 362, 375 (2002) (explaining that a state procedural ruling will bar federal review if the rule is "*independent* of the federal question and *adequate* to support the judgment" (cleaned up and citation omitted)). He claimed that the Supreme Court of South Dakota's decision in Haase v. Weber, 693 N.W.2d 668 (S.D. 2005), created a "fundamental-fairness exception to the application of res judicata," Doc. 104 at 4, that South Dakota courts equate fundamental fairness with due process, and that the Supreme Court of South Dakota's rejection of his fundamental fairness argument "was, in essence, a constitutional due process ruling," Doc. 67 at 160–61. This Court disagreed, finding that Haase did not create a fundamental-fairness exception requiring South Dakota courts to review the underlying claim to determine whether it would be fundamentally unfair, under federal due process principles, to apply res judicata and that the Supreme Court of South Dakota's rejection of Piper's fundamental fairness argument had nothing to do with the federal merits of his guilty plea claim. Doc. 122 at 44–46, 116–18. As this Court explained, Piper cited no case suggesting that the Supreme Court of South Dakota's rejection of his fundamental fairness argument—made without reference to the merits of his claim or federal due process principles—somehow made the res judicata ruling dependent on federal law. Doc. 122 at 117.

Piper now argues that this Court's decision was manifestly erroneous, largely repeating his prior argument about Haase and that the Supreme Court of South Dakota's decision on fundamental fairness was interwoven with federal law. These arguments fail for the reasons explained in this Court's prior decision. Doc. 122 at 44–46, 116–18. Piper also claims that the res judicata ruling depended on federal law because he argued to the Supreme Court of South Dakota that state appellate counsel's ineffectiveness made it fundamentally unfair under Haase to apply res judicata. But this argument doesn't justify relief either. First, Piper could have raised this argument in a prior round of briefing but did not. See Nordgren, 96 F.4th at 1077 (explaining that Rule 59(e) cannot be used to "raise arguments that could have been made prior to the issuance of judgment"). Second, Piper has not cited any South Dakota case that requires courts to consider the merits of the underlying claim or determine whether federal law was violated when applying res judicata to habeas claims, and nothing in the Supreme Court of South Dakota's opinion in Piper, 936 N.W.2d 793, suggests that it did so. This Court correctly concluded that the res judicata ruling was independent of federal law.[2] See Murden v. Artuz, 497 F.3d 178, 193 (2d. Cir. 2007) ("Where a state court explicitly relies on a state procedural bar and does not rest its application of the bar on its consideration of the merits, the ruling is independent of federal constitutional law.").

Piper also claims that this Court can review Claim XI under Cone v. Bell, 556 U.S. 449 (2009). The Supreme Court in Cone held that a state court's refusal to "review the merits of a petitioner's claim on the ground that it has done so already" does not bar federal habeas review. Id. at 466. Cone does not apply here. The Supreme Court of South Dakota held that claim

[2]Piper argues that the Supreme Court of South Dakota's application of res judicata to his Brady and Napue claims lacked independence for the same reasons the res judicata ruling on Claim XI lacked independence. That argument fails for the reasons discussed above.

preclusion barred Piper's guilty plea claim because he had failed to raise it in prior proceedings, not because the court had previously reviewed the claim. Piper, 936 N.W.2d at 803–07.

D. Claim I

Claim I of Piper's amended petition alleged that his trial attorneys Robert Van Norman and Michael Stonefield were ineffective by failing to conduct a timely and adequate background investigation and failing to investigate and present cognitive functioning evidence. Doc. 67 ¶¶ 44–126. A state judge appointed Van Norman and Stonefield to represent Piper in August 2009 and his trial occurred in July 2011. Piper argued in his petition that the "foundational defect" in his attorneys' representation was their "late start," and that they "squandered the first year and one-half" after being appointed "before they began their background investigation." Doc. 67 at 22.

But the record did not bear this argument out. This Court detailed the efforts of Van Norman and Stonefield previously, explaining that they began investigating Piper's background in August 2009 and continued developing his mitigation case thereafter. Doc. 122 at 3–7, 56–57, 62–66. This Court previously observed:

> compensation vouchers Van Norman and Stonefield submitted show that they began investigating Piper's mitigation case almost immediately, including speaking with Piper's prior attorneys, researching potential mitigation specialists, gathering records, and wading through the voluminous files from Piper's prior case and the cases of Page and Hoadley. Doc. 121-4 at 458–473.

Doc. 122 at 3 (footnotes omitted). Piper now argues that this sentence was manifestly erroneous because his attorneys did not "meaningfully" begin "to investigate mitigation almost immediately." Doc. 146 at 10. He contends that the compensation vouchers this Court relied on actually show that his attorneys did very little mitigation work between August and October 2009.

Piper comes nowhere close to showing manifest error. Whatever amount of mitigation work Piper's attorneys did between August and October 2009, the evidence this Court cited—both

in support of the sentence Piper complains of and throughout its prior opinion—disproves Piper's argument that his attorneys waited 18 months to begin investigating his background. See Doc. 122 at 3–7, 56–57, 62–66. The question raised by Claim I was whether Piper had a substantial claim of ineffective assistance under Martinez v. Ryan, 566 U.S. 1 (2012), and the evidence showed that he did not. See Doc. 122 at 54–66.

Piper also argues that this Court's finding was manifestly erroneous given the record as a whole and what counsel failed to do. He argues that his attorneys should have retained a mitigation specialist and mental health experts earlier and they squandered much of the time they had to prepare for his trial. Piper made these same arguments in earlier briefing and they fail for the reasons explained in this Court's prior opinion. See Doc. 122 at 62–66.

II. Certificate of Appealability

A prisoner needs a COA to appeal a final order denying a § 2254 petition. 28 U.S.C. § 2253(c). A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." § 2253(c)(2). A COA is claim specific, meaning that each claim individually must meet the substantial showing standard. See § 2253(c)(3) ("The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2)."). To meet this standard, the petitioner must show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 336 (2003) (cleaned up and citation omitted).

This standard looks slightly different depending on whether a claim was dismissed based on procedural default or on the merits. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). When

the district court finds that a claim is procedurally defaulted, the petitioner must show that reasonable jurists could debate both the validity of the constitutional claim and the procedural ruling. Id. When the court rejects a constitutional claim on the merits, the "petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Id. And when the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) applies, the question becomes whether the district court's application of AEDPA's deferential standards to the petitioner's claim was debatable. Becker v. Sec'y Pa. Dep't of Corrs., 28 F.4th 459, 462 (3d Cir. 2022) (holding that AEDPA's "deferential standard also governs our decision whether to issue a COA to a habeas petitioner seeking to appeal a district court's order to which § 2254's deferential standard applies"). At least three federal circuits have concluded that a death sentence impacts whether to issue a COA. Harper v. Lumpkin, 64 F.4th 684, 690 (5th Cir. 2023) (per curiam) ("In a capital case, any doubts as to whether a COA should issue must be resolved in the petitioner's favor." (cleaned up and citation omitted)); Porter v. Gramley, 112 F.3d 1308, 1312 (7th Cir. 1997) ("[I]n a capital case, the nature of the penalty is a proper consideration in determining whether to issue a certificate but the severity of the penalty does not in itself suffice to warrant the automatic issuing of a certificate." (quoting Barefoot v. Estelle, 463 U.S. 880, 893 (1983))); Williams v. Woodford, 384 F.3d 567, 583 (9th Cir. 2004) ("Although not dispositive, in a capital case, the nature of the penalty is a proper consideration in determining whether to issue a certificate of appealability." (cleaned up and citation omitted)); see also 16AA Catherine T. Struve, Federal Practice and Procedure § 3968.1 (5th ed. May 2025 update) ("When performing the COA analysis, it is proper to take into account the fact that the petitioner is under a sentence of death."). With these standards in mind, this Court turns to Piper's arguments.[3]

[3]Respondents do not oppose Piper's motion for a COA on any of his claims. Doc. 148.

A. Claim I and an evidentiary hearing on whether Piper was at fault for failing to develop the record

Piper submitted evidence that was not part of the state court record in support of Claim I. He filed affidavits from experts, family members, and others and moved for an order allowing his experts to test him in prison for brain damage and Fetal Alcohol Spectrum Disorder (FASD). AEDPA, however, strictly limits a federal habeas court's authority to consider new evidence the prisoner neglected to offer in state court. See 28 U.S.C. § 2254(e)(2). If the prisoner "has failed to develop the factual basis of a claim in State court proceedings," § 2254(e)(2) bars federal courts from holding "an evidentiary hearing on the claim"—or, indeed, even considering extra-record evidence submitted to support the claim—unless the prisoner can satisfy some narrow exceptions not applicable here. 28 U.S.C. § 2254(e)(2)(A)(i), (ii); Shinn v. Ramirez, 596 U.S. 366, 383–90 (2022); Holland v. Jackson, 542 U.S. 649, 653 (2004) (per curiam). These strict limits in § 2254(e)(2) apply only when a prisoner is "at fault" for failing to develop the factual basis of a claim, meaning that he "bears responsibility for the failure." Shinn, 596 U.S. at 382 (cleaned up and citation omitted).

This Court denied Piper's motion for testing because it deemed him "at fault" under precedent applying § 2254(e)(2) for his state habeas counsel's alleged failure to develop the evidentiary record. Doc. 108 at 29–45. This Court also denied Piper's request for a hearing to determine whether state habeas counsel's "failures constituted such gross or extreme misconduct that it severed the attorney-client relationship" and relieved Piper of responsibility for counsel's alleged failure to develop the record. Doc. 108 at 40. Since Piper was at fault for state habeas counsel's failures, this Court held that it could not consider the evidence submitted in support of Claim I either on the merits of that claim or when assessing cause and prejudice under Martinez. Doc. 122 at 51–54. Considering the state court record only, this Court granted summary judgment

on Claim I because Piper had not shown a "substantial" claim of ineffective assistance necessary to avoid procedural default under Martinez. Doc. 122 at 54–66.

Piper now seeks a COA on whether this Court should have granted an evidentiary hearing to allow him to show that he was not at fault for failing to develop the state court record. He also seeks a COA on Claim I, arguing that a hearing would have allowed him to show that he was not at fault and that this Court could then have considered the evidence he failed to present in state court. This additional evidence, Piper argues, shows that Claim I meets the standard for a COA.

This Court grants Piper a COA on Claim I and on whether Piper was entitled to a hearing to show that he was not at fault for failing to develop the record in state court. Claim I alleged that Piper's records contained many red flags suggesting that he may have brain damage and FASD but that Van Norman and Stonefield failed to pursue and develop this evidence. Brain damage can be an important mitigating factor in a capital case, see Porter v. McCollum, 558 U.S. 30, 36 (2009) (per curiam); Rompilla v. Beard, 545 U.S. 374, 392–93 (2005), and Claim I and its related motion for testing was the most briefed issue before this Court. This Court's decision on Claim I and the requests for testing and hearings depended in large part on the Supreme Court's 2022 opinion in Shinn. See Doc. 108 at 29–42; Doc. 122 at 48–54. Because this is a death penalty case and the law on what types of hearings are available after Shinn is still developing, a COA is appropriate.

B. Res Judicata

This Court previously held that, as a general matter, South Dakota's res judicata rule was adequate and independent and thus barred review of several of Piper's claims. Doc. 122 at 38–46. This Court also rejected Piper's argument that the Supreme Court of South Dakota's application of res judicata to his guilty plea claim (Claim XI) depended on federal law and was too novel to

bar federal review. Id. at 108–18. Piper now seeks a COA on whether South Dakota's application of the res judicata rule is adequate and independent in general, on whether res judicata was adequate and independent as applied to Claim XI, and on the merits of Claim XI.

Piper is entitled to a COA on these issues given their importance and his sentence of death. The Supreme Court of South Dakota's opinion in Piper's habeas case gave the most attention to Piper's guilty plea claim and whether res judicata barred it. Piper, 936 N.W.2d at 803–09. The Supreme Court of South Dakota's decision in Haase arguably creates a bit of a wrinkle in its habeas jurisprudence, and the Eighth Circuit has never ruled on the independence and adequacy of South Dakota's res judicata rule in the circumstances here.

C. Constitutional challenge to AEDPA

This Court previously rejected Piper's argument that the Supreme Court's decision in Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024), renders AEDPA unconstitutional as violative of Article III of the Constitution. The only federal appellate court to have ruled on this issue is the Sixth Circuit, which held that Loper Bright did not "impliedly overturn[] AEDPA deference." Miles v. Floyd, No. 24-1096, 2025 WL 902800, at *3 (6th Cir. Mar. 25, 2025). Piper now seeks a COA on this issue. Although this Court does not believe that Loper Bright made AEDPA unconstitutional, its effect on AEDPA is still being litigated and at least one district court has granted a COA on the issue. Doc. 143-3. Given these circumstances, reasonable jurists could find that Piper's challenge to AEDPA is "adequate to deserve encouragement to proceed further." Miller-El, 537 U.S. at 336 (cleaned up and citation omitted).

D. Tom Curtis

As stated above, Piper alleged in Claims IX.A–IX.D that the State violated his due process rights by (1) failing to disclose that Curtis was awaiting sentencing on rape convictions in Utah

when he testified at Piper's resentencing trial in July 2011, and (2) failing to correct Curtis's omission of the rape convictions when describing his criminal history to the jury. Claim IX.E alleged that trial counsel were ineffective by failing to discover and use for impeachment Curtis's recent rape convictions. Doc. 67 at 135–37; Doc. 131 at 42–51. Piper seeks a COA on this Court's holdings that he could not show cause to avoid the procedural default of his Brady and Napue claims and that he failed to establish prejudice on his ineffective assistance claim.

A COA on Claim IX is appropriate. This Court's grant of summary judgment on Claims IX.A–IX.D involved detailed factual findings and the "thorny" question of whether claims involving the nondisclosure of Curtis's rape convictions could have been raised on direct appeal. Doc. 122 at 100–06. Reasonable jurists could disagree on this Court's procedural ruling as well as on the validity of Piper's Brady and Napue claims. This Court resolved Claim IX.E on de novo review because of uncertainty over whether the Supreme Court of South Dakota viewed Curtis's rape convictions as part of the state court record. Doc. 145 at 61–69. Reasonable jurists could debate this Court's grant of summary judgment on Claim IX.E, especially given the Supreme Court's recent decision in Glossip.

D. Sister Crowley

Claim V alleged that Van Norman and Stonefield were ineffective when the prosecution cross-examined Sister Gabrielle Crowley about writing a letter to a female inmate at Piper's urging. Piper argued that Sister Crowley's letter did not violate prison policy and that trial counsel should have objected to the cross-examination, asked for an offer of proof that such a policy existed, and requested a recess to research the issue themselves. Doc. 67 at 93; Doc. 131 at 35–36. Piper included an affidavit from a paralegal about the prison's policy with his federal habeas petition but never presented that affidavit to the Supreme Court of South Dakota. Doc. 145 at 53.

This Court granted summary judgment on Claim V, concluding that the Supreme Court of South Dakota's rejection of the claim was a reasonable determination of the facts and law under AEDPA on the record before it. Doc. 145 at 51–56. This Court also found that Claim V would fail under AEDPA even if Piper's attorneys could have shown that the letter did not violate prison policy. Id.

Piper has not met the standard for a COA on Claim V. Reasonable jurists could not debate that the Supreme Court of South Dakota's rejection of Claim V was reasonable under AEDPA. Although Piper argues that state habeas counsel was ineffective by not presenting evidence to support Claim V, he has not explained how this Court could consider the paralegal's affidavit when the Supreme Court South Dakota decided Claim V on the merits. See Cullen v. Pinholster, 563 U.S. 170, 185 (2011) ("If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court."); Vandross v. Stirling, 986 F.3d 442, 450–51 (4th Cir. 2021) (holding that ineffective assistance of postconviction counsel did not allow federal court to review new evidence submitted in support of a claim that the state court had adjudicated on the merits).

E. Cumulative Error

Claim XIII alleged that Piper is entitled to habeas relief because of the cumulative prejudice of the constitutional violations in his case. He argued that he raised this claim in his reply brief in Piper, 936 N.W.2d 793, but says that the Supreme Court of South Dakota never addressed it.[4] Doc.

[4] Piper previously asked this Court to find that he properly exhausted this claim by raising it in his reply brief before the Supreme Court of South Dakota. As this Court recognized, however, the Supreme Court of South Dakota does not consider arguments raised for the first time in a reply brief, Mach v. Connors, 979 N.W.2d 161, 173 (S.D. 2022); State v. Roedder, 923 N.W.2d 537, 545 (S.D. 2019), and courts have held that a petitioner procedurally defaults a claim raised for the first time in a reply brief when the state court's rules deem arguments raised in that manner waived, see Atwater v. Crosby, 451 F.3d 799, 810 (11th Cir. 2006).

67 at 168. This Court granted summary judgment on Claim XIII because the Eighth Circuit has held that neither the cumulative effect of trial errors nor the cumulative effect of attorney errors are grounds for habeas relief. Wainwright v. Lockhart, 80 F.3d 1226, 1233 (8th Cir. 1996); see also id. ("Errors that are not unconstitutional individually cannot be added together to create a constitutional violation."); Middelton v. Roper, 455 F.3d 838, 851 (8th Cir. 2006) ("We repeatedly have recognized a habeas petitioner cannot build a showing of prejudice on a series of errors, none of which would by itself meet the prejudice test." (cleaned up and citation omitted)). Piper now seeks a COA on Claim XIII, arguing that reasonable jurists could debate the Eighth Circuit's refusal to entertain cumulative error analysis. This Court denies a COA on Claim XIII because reasonable jurists could not debate that Eighth Circuit precedent forecloses the claim. See Hamilton v. Sec'y Fla. Dep't of Corrs., 793 F.3d 1261, 1266 (11th Cir. 2015) (per curiam) ("[N]o COA should issue where the claim is foreclosed by binding circuit precedent because reasonable jurists will follow controlling law." (cleaned up and citation omitted)).

III. Conclusion

For the reasons explained above, it is

ORDERED that Piper's Motion to Alter or Amend Judgment, Doc. 146, is denied. It is further

ORDERED that Piper's Motion for Certificate of Appealability, Doc. 147, is granted as to the following claims and issues:

(1) Claim I and whether this Court should have held an evidentiary hearing on whether Piper was at fault for failing to develop the record in state court.

(2) Claim XI, whether South Dakota's application of the res judicata rule is adequate and independent in general, and whether res judicata was adequate and independent as applied to Claim XI.

(3) Constitutional challenge under Loper Bright to AEDPA.

(4) Claim IX involving Tom Curtis.

It is further

ORDERED that Piper's Motion for Certificate of Appealability, Doc. 147, is otherwise denied.

DATED this 16th day of July, 2025.

BY THE COURT:

ROBERTO A. LANGE
CHIEF JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

BRILEY PIPER, Petitioner, vs. MARTY JACKLEY, ATTORNEY GENERAL OF THE STATE OF SOUTH DAKOTA, AMBER PIRRAGLIA, INTERIM WARDEN, SOUTH DAKOTA STATE PENITENTIARY; Respondents.	5:20-CV-05074-RAL OPINION AND ORDER GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT

State prisoners challenging their conviction and sentence in federal court must meet a high standard. The Antiterrorism and Effective Death Penalty Act, commonly known as AEDPA, bars relief on a claim adjudicated on the merits in state court unless the state court's decision (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)–(2). Petitioner Briley Piper, a state death row inmate, has been challenging his conviction and sentence in this Court since 2020. This Court has already granted summary judgment on claims that Piper procedurally defaulted, Doc. 122, and Respondents, South Dakota Attorney General Marty Jackley and Interim Warden Amber Pirraglia, now move for summary judgment on Piper's remaining claims, Doc. 126. This Court grants Respondents' motion for the reasons explained below.

I. Facts

A. Background and Procedural History

In April 2000, Chester Allan Poage's partially clothed body was found in a remote location in Lawrence County, South Dakota. Piper v. Young (Piper IV), 936 N.W.2d 793, 799 (S.D. 2019); State v. Piper (Piper I), 709 N.W.2d 783, 792 (S.D. 2006). Law enforcement identified Piper, Elijah Page, and Darrell Hoadley as suspects in Poage's murder and a related burglary at Poage's house. Piper IV, 936 N.W.2d at 799. The State of South Dakota (State) charged the three men with first-degree murder, kidnapping, first-degree robbery, first-degree burglary, and grand theft. Id. Attorneys Patrick Duffy and Timothy Rensch were appointed to represent Piper. Doc. 67 ¶ 3. In early 2001, Piper pleaded guilty to all five crimes, including the first-degree felony murder of Poage. Piper IV, 936 N.W.2d at 799 & n.1. A state court judge sentenced Piper to death after a three-day sentencing hearing. Id. at 800. The Supreme Court of South Dakota affirmed Piper's death sentence on direct review in 2006. Piper I, 709 N.W.2d 783.

Piper, represented by attorneys Steve Miller and Steven Binger, then filed a habeas petition in state court. Piper IV, 936 N.W.2d at 801–02; Doc. 67 at ¶ 6. The Supreme Court of South Dakota granted Piper habeas relief in 2009, finding that Piper did not validly waive his right to have a jury decide whether to impose the death penalty because the state trial judge had not made clear that Piper would receive a life sentence if even one juror voted against the death penalty. Piper v. Weber (Piper II), 771 N.W.2d 352, 358–60 (S.D. 2009). The Court remanded Piper's case for resentencing by a jury. Id. at 360.

In August 2009, a state court judge appointed attorneys Robert Van Norman and Michael Stonefield to represent Piper in the resentencing proceeding. Doc. 67 at ¶¶ 7, 50; Doc. 2 at 288. Both men were experienced criminal defense attorneys: Van Norman, the Federal Public Defender

for South Dakota from 1999 to 2003, had handled seven death penalty cases; Stonefield, a long-time state public defender, had worked on two death penalty cases. Doc. 90-11 at 7–8, 92, 115. The compensation vouchers Van Norman and Stonefield submitted show that they began investigating Piper's mitigation case almost immediately, including speaking with Piper's prior attorneys, researching potential mitigation specialists, gathering records, and wading through the voluminous files from Piper's prior case and the cases of Page[1] and Hoadley.[2] Doc. 121-4 at 458–473.

One of the records collected—and the one most relevant to Claim I of Piper's petition—was a February 1994 report prepared by Lyn Clark, M.D., when Piper was 13. Doc. 2 at 233–43; Doc. 66-1 at 5. Piper's mother Linda had Dr. Clark evaluate Piper because she was concerned about his impulsive behavior and wanted a second opinion. Doc. 2 at 233; Doc. 66-5 at 80–81. The "Medical History" section of Dr. Clark's report noted that Linda recalled smoking one pack of cigarettes per day while pregnant with Piper and consuming "some alcohol."[3] Doc. 2 at 235. Dr. Clark noted that Piper was born four to six weeks prematurely, developed mild neonatal jaundice, and suffered from vomiting for the first month of his life. Doc. 2 at 235; Doc. 66-1 at 5. She gave Piper a neurodevelopmental examination called the Pediatric Examination of Educational Readiness in Middle Childhood. Doc. 2 at 237. Dr. Clark concluded that attention deficit disorder (ADD)[4] was a "primary concern" for Piper but believed that ADD was "not the total explanation

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[1]Page pleaded guilty, received a death sentence, and has been executed. Piper IV, 936 N.W.2d at 800 n.5.

[2]Hoadley had a jury trial and received a life sentence. Piper IV, 936 N.W.2d at 800 n.5.

[3]Dr. Clark's full statement on Linda's drinking was as follows: "Mrs. Piper reports that she was anemic throughout her pregnancy. She smoked one pack of cigarettes per day and consumed some alcohol." Doc. 2 at 235.

[4]"The term 'ADD' refers to 'attention deficit disorder,' while 'ADHD' refers to 'attention-deficit/hyperactivity disorder.' ADD is an older term used for what is now known as the inattentive type of ADHD. The term ADHD is now commonly used to describe both inattentive and

for [his] behavioral difficulties." Doc. 2 at 241. In Dr. Clark's view, the "extent of" Piper's aggression and the "seriousness" of his conduct were "not necessarily typical of students with primary" ADD. Id. Dr. Clark's report did not mention prenatal alcohol exposure or fetal alcohol spectrum disorders (FASD)[5] as a possible explanation for Piper's behavior. Doc. 2 at 233–43.

The compensation vouchers reflect that by September 2009, Van Norman was already researching cognitive or mental health conditions Piper potentially had and communicating with mitigation witnesses. Doc. 121-4 at 463–64, 466, 468. Van Norman and Stonefield moved to withdraw Piper's guilty pleas in October 2009, arguing among other things that he was never informed that he did not have to plead guilty to receive a court sentencing. Doc. 2 at 288, 339–49, 367–79. They filed several supplements to the motion and deposed a law enforcement officer about whether evidence had been withheld in Piper's earlier case. Doc. 2 at 381–88.

Compensation vouchers from Fall 2009 to Winter 2011 show continued work on Piper's mitigation case. Van Norman and Stonefield gathered more records, tracked down and interviewed witnesses across the country, researched mitigation specialists and potential expert witnesses, met with psychologist Dewey Ertz, and investigated Piper's potential psychiatric issues. Doc. 121-4 at 470–73; Doc. 121-5 at 301–03; Doc. 121-10 at 327–29, 335–36, 342–43, 350–52, 358, 369–71, 373–74, 381–82, 385–87, 392–93, 395–98, 406, 409, 412, 417–19, 423–24, 428–32, 439, 445–47. They had frequent contact with Piper's family and sent a health questionnaire to his mother Linda. Doc. 121-4 at 473; Doc. 121-5 at 302; Doc. 121-10 at 329, 350, 358, 369–71, 373–

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hyperactive types." Munday v. Lees-McRae Coll., 20-cv-00105, 2022 WL 17252598, at *2 n.2 (W.D.N.C. Nov. 28, 2022).

[5]FASD "is an umbrella term used to describe the spectrum of birth defects and neurologic impacts caused by maternal alcohol consumption during pregnancy." Doc. 62-3 at 2. It "affects the ability to make decisions, communicate, and control emotions." Anderson v. Kelley, 938 F.3d 949, 963 (8th Cir. 2019) (Kobes, J., concurring in part and dissenting in part).

75, 381–82, 385, 395, 397, 408–09, 412, 417–18, 421–24, 430–32, 447. Van Norman also hired a jury consultant using his own money. Doc. 90-11 at 17; Doc. 121-10 at 369, 428, 495.

Judge Jerome A. Eckrich III denied Piper's motion to withdraw his guilty pleas in November 2010, over a year after it was filed. Doc. 2 at 388. In December 2010, Piper unsuccessfully petitioned the Supreme Court of South Dakota for permission to appeal Judge Eckrich's denial. Doc. 2 at 292, 414–29; Doc. 90-11 at 126–27. Judge Eckrich entered a scheduling order in early January 2011 setting Piper's sentencing trial for July 5, 2011. Doc. 121-5 at 456. Van Norman and Stonefield filed myriad motions in mid-January 2011, successfully moving to change the venue of the trial and to have appointed to the defense team Dr. Ertz, capital mitigation specialist Jeannette Sheldon, and an investigator. Doc. 121-5 at 461, 509, 523, 592; Doc. 121-8 at 379–85, 389–90.

Sheldon's role would be to investigate Piper's life history, flag issues that could warrant further evaluation, and prepare a narrative for her testimony in court. Doc. 88-1 at 6–14, 16–18, 21–22. She had over 200 hours of training in mitigation work and 70 hours of one-on-one training with forensic psychologists and psychiatrists. Doc. 90-6 at 219. An affidavit Sheldon submitted to the state court noted her 12 "years[']] experience in assisting counsel in capital case proceedings, in determining the scope of investigation necessary for preparation and presentation of mitigation and other mental health claims, in conducting those investigations and in providing mental health experts the kind of materials they routinely rely upon in their professions in order to offer reliable expert opinions." Doc. 121-6 at 40. Stonefield explained at a motion hearing that Sheldon had said that while the average number of hours necessary to do a "complete mitigation investigation" was over 1,000, she could do a "competent" job in Piper's case in 150 to 200 hours. Doc. 88-1 at 9–10. According to Stonefield, Sheldon did not need as much time as she would in a typical case

because the defense team had already done some investigation and compiled documents and because there was less than typical life history to review given that Piper was just 19 years old when the murder occurred. Doc. 88-1 at 10–12; Doc. 66-1 at 5; see also Doc. 121-9 at 379 (affidavit from Sheldon explaining that she would need less time than in an average death penalty case because of "the age of the defendant and the amount of documentary evidence already compiled by the defense team"). At the same motions hearing, Stonefield explained that Dr. Ertz would review Piper's records for mitigation evidence. Doc. 88-1 at 20–23. Stonefield said that, like the psychologists in the Hoadley and Page trials, Dr. Ertz would testify about the mitigating factors of youth, drug use, and the group dynamic involved in the killing. Doc. 88-1 at 21–23. Judge Eckrich initially capped Sheldon's fees at $10,000 and Dr. Ertz's fees at $4,000. Doc. 2 at 430. He later granted an additional $5,000 for Sheldon's work. Doc. 2 at 432. In March 2011, Piper's parents gave his lawyers $10,000 to hire forensic neuropsychiatrist Hal Wortzel. Doc. 2 at 249–53; Doc. 90-8 at 76.

Sheldon began reviewing Piper's school, psychological, and court records in February 2011. Doc. 90-6 at 225; Doc. 121-9 at 377; Doc. 121-10 at 471. She prepared a 57-page social history for Piper that involved nearly 200 hours of work. Doc. 90-7 at 59; Doc. 66-1. As relevant here, the social history cited to Dr. Clark's evaluation and noted that Linda "smoke[d] one pack of cigarettes a day and consume[d] alcohol" while pregnant with Piper. Doc. 66-1 at 5. Sheldon also discussed a diagnostic evaluation performed by psychologist Michael Rose on Piper in January 1994. Doc. 66-1 at 32–35; Doc. 66-6. Dr. Rose's diagnostic impression of Piper was that he had conduct disorder of an undifferentiated type. Doc. 66-1 at 34; Doc. 66-6 at 7. Dr. Rose's report mentioned nothing about FASD. Doc. 66-6.

Compensation vouchers from early 2011 leading up to the July trial show that Van Norman and Stonefield continued to develop Piper's mitigation case. They gathered and reviewed records, worked with Sheldon on the social history, interviewed more witnesses, and consulted with and provided documents to Dr. Ertz and Dr. Wortzel. Doc. 121-10 at 286–94, 301–02, 304, 456–59, 461, 477–81, 484, 488–97.

Dr. Ertz met with Piper twice before the trial for a total of about five hours and interviewed him "extensive[ly]" about his background and the murder. Doc. 90-7 at 183–85, 190. He also reviewed many documents, including Sheldon's social history, the evaluations from Dr. Clark and Dr. Rose, and evidence about Hoadley and Page. Doc. 90-7 at 188–89, 201. He did not evaluate Piper, perform any tests, or write a report, however. Doc. 90-8 at 26, 32, 40. He testified at trial that "[t]here didn't seem to be a lot of purpose to evaluate Briley Piper psychologically 11 years after the murder." 90-8 at 26.

Dr. Wortzel met with Piper for about four hours and reviewed his school and psychological records as well the social history Sheldon prepared. Doc. 90-8 at 81, 85, 104. Dr. Wortzel did not prepare a written report (nor had Van Norman and Stonefield requested one) or administer any test to Piper. Doc. 90-8 at 104–05, 133–36.

B. Resentencing Trial

1. Voir Dire

Judge Eckrich sent an eight-page questionnaire to the potential jurors in late May 2011. Doc. 121-9 at 191–204. Although the questionnaire was shorter than the one Piper had proposed, Doc. 121-8 at 506–27, it did include questions about whether the potential jurors or someone close to them had ever been the victim of a crime, what the jurors knew about Piper's case, how they would respond to certain mitigating evidence, and their thoughts on the death penalty, Doc. 121-9

at 195–201. Among other things, the questionnaire asked whether the potential jurors felt "that the death penalty is used too often or too seldom," whether they believed in an "eye for an eye," and whether they believed that the "State should impose a death penalty on everyone who, for any reason, intentionally kills another person." Id. at 200.

Voir dire began on July 5 and lasted more than seven court days. Doc. 89; Doc. 89-13. Piper had moved for 10 additional peremptory strikes beyond the 20 already guaranteed by statute, Doc. 121-5 at 535–36; SDCL § 23A-20-20, but Judge Eckrich concluded that one extra peremptory strike for both sides was sufficient, Doc. 121-8 at 448–49. Judge Eckrich split voir dire into sessions involving 15 potential jurors at a time. Doc. 88-2 at 3. Counsel for both sides would examine the jurors individually and exercise any challenges for cause while the remaining jurors were sequestered. These sessions would continue until there was a panel of 57 potential jurors, after which the parties would exercise their peremptory strikes. Doc. 89 at 34–35.

As relevant to Piper's petition, the third potential juror undergoing voir dire was Lisa Sagdalen. Doc. 89 at 73. Sagdalen had written in her juror questionnaire that her best friend was a deputy with the Pennington County Sheriff's Office, that she had read all the newspaper articles about the case, and that she had formed an opinion about the case: that Piper had chosen to plead guilty and "need[ed] to accept" the judge's decision. Doc. 2-2 at 160–62. She also indicated, however, that she did not believe the death penalty was appropriate in every case involving an intentional killing and that she would want to hear all the circumstances surrounding a killing before deciding whether to impose a death sentence. Doc. 2-2 at 163.

Van Norman's voir dire of Sagdalen focused first on her knowledge about the case. Doc. 89 at 75. Sagdalen confirmed that she knew "quite a bit" about Piper's case, that she had "read all the newspaper articles," and that she had discussed the case "a lot" with her friends in the

Pennington County Sheriff's Office. Id. She also confirmed that she had already formed an opinion:

> **Van Norman**: I take it from what you're saying, and please correct me if I'm wrong, that you believe that the death sentence that was imposed by that Judge some years ago should stand.
> **Sagdalen**: I do.
> **Van Norman**: Okay. And that's a firmly held belief, I take it.
> **Sagdalen**: Yes. That's how I believe, I mean.
> **Van Norman**: No, that's fine. I take it then for me to have you sitting in that jury box, on behalf of my client from his perspective - - well, let's put it this way: if you were seated - - seated in his position with a juror with your feelings would you think it would be fair, from your perspective?
> **Sagdalen**: I don't know, I - - I know that I would try and do my best to be as fair as possible sitting there.
> **Van Norman**: Right.
> **Sagdalen**: I don't know. I don't know.
> **Van Norman**: Could you envision being a juror giving your opinions and actually imposing a life sentence on Briley as opposed to a death sentence?
> **Sagdalen**: I would do my best to take what was said in the courtroom and use that instead of what I previously read and heard and such.

Id. at 77–78. Sagdalen was ambivalent when questioned further about whether she could put her opinion aside, saying she "d[id]n't know" whether she could do so and that she could not say that "yes, I could throw everything aside." Id. at 78. Van Norman challenged Sagdalen for cause after she agreed again that she already had "a pretty firm opinion as to how the case should come out." Id. at 79.

The prosecutor, John Fitzgerald, examined Sagdalen next. Sagdalen testified that although she had formed an opinion about the case and could not guarantee she could set aside everything she had read, she "might" change her opinion if she learned something new during trial. Id. at 80. Fitzgerald said he would "defer to the Court" and did not make any argument on Piper's challenge of Sagdalen. Id. at 81.

Judge Eckrich then took a turn speaking with Sagdalen. He used the famous example of President Truman holding a newspaper wrongly declaring that Thomas Dewey had won the 1948 presidential election to illustrate why jurors must decide cases on the evidence presented in court rather than on what they read in the media. Id. Judge Eckrich then asked for an "honest answer" on whether Sagdalen could be fair to both sides and decide the case based only on the evidence presented in court. Id. at 82. Sagdalen said she believed she could, and Judge Eckrich followed up by asking "so despite what you read about what the prior Court did or any sentence, you could give Mr. Piper a fair shake and start from square one and . . . listen to the evidence, and make your decision based on the evidence as instructed and apply it to the law as given to you?" Id. at 83. Sagdalen said "Yes," and Judge Eckrich denied the challenge for cause. Id.

Van Norman resumed speaking with Sagdalen, explaining that Judge Eckrich just wanted the jurors to follow the law and that there were no right or wrong answers to the questions being posed. Id. Sagdalen confirmed that her best friend was a deputy with the Pennington County Sheriff's Office and said she relied on the deputy's opinions "[v]ery highly" because they had known each other for over 30 years. Id. at 83–84. She explained, however, that although she had probably spoken with the deputy about Piper's case in the last year or two, she could not recall a specific conversation about it. Id. at 84–85. Van Norman then asked Sagdalen about her comment in the juror questionnaire that she did not agree that "those convicted and sentenced should have years and years of appeals to continue on 'death row' wasting taxpayer dollars." Id. at 85. Sagdalen testified that this comment was a "general" one and not specific to Piper's case. Id. at 86–87. Van Norman then returned to Sagdalen's comment about Piper needing to accept his sentence:

> **Van Norman**: Okay, yeah. And what I was doing was taking you back to your earlier answer that, "Mr. Piper needs to accept the Judge's decision as that was his choice."
> **Sagdalen**: Uh-huh.
> **Van Norman**: And isn't that really what you're saying, that Mr. Piper should just shut up and sit down and accept the death sentence?
> **Sagdalen**: I guess in a sense. What my thought was on that was he chose to plead guilty, he knew that the Judge had the opportunity of two choices, and that when he pled guilty he accepted that - -
> **Van Norman**: Yeah.
> ....
> **Van Norman**: What concerns me about that isn't that you have an opinion, it's - - what concerns me, what worries me is whether you can set that aside. And let me put it this way, and I talked about it earlier: I don't want to start out with an extra burden. And correct me if I'm wrong, you really do have strong opinions about this case, don't you.
> **Sagdalen**: I have an opinion.
> **Van Norman**: Yes, and you said that you did have an opinion, I appreciate that, and it's what we just recited there, right?
> **Sagdalen**: Yes, but I guess after what the Judge had said I am - - I don't know, I guess I feel I'm intelligent enough or social enough that I can take what is given to me and what I need to do.
> **Van Norman**: Do you - - can you sit here and visualize yourself being on the jury, first of all, and visualize yourself coming back into this court and saying, "No, I want life without parole for Mr. Piper?"
> **Sagdalen**: If that's presented I can with what I hear.

Id. at 87–88. Sagdalen then agreed that she could meaningfully consider mitigating evidence. Id. at 89–91, 94–96. Van Norman renewed his challenge for cause to Sagdalen, but Judge Eckrich denied it. Id. at 97.

Dennis Anthony was the fifth potential juror questioned during voir dire. Anthony had expressed concern in his juror questionnaire about the costs of imprisoning someone for life and had commented that the appeals process lasts too long in death penalty cases. Doc. 2-2 at 150–51. He also checked "Yes" when asked "Do you believe the State should impose a death penalty on everyone who, for any reason, intentionally kills another person?" Id. at 151. Van Norman

questioned Anthony on all these topics, particularly on whether he would be an automatic vote for the death penalty. Doc. 89 at 126–42. Although Anthony initially seemed to affirm his response in the questionnaire that everyone who intentionally kills should get the death penalty, he went on to explain that he would want to hear the evidence before voting for a death sentence and that he could envision imposing a life sentence on someone in Piper's situation. Id. at 133–42. Van Norman passed Anthony for cause. Id. at 142.

Dan Carlin, the last potential juror relevant to Piper's petition, underwent voir dire a few days later. Carlin disclosed in his juror questionnaire that his niece had been murdered and that he was unhappy with the perpetrator's sentence. Doc. 2-2 at 133. He believed in an "eye for an eye" and that people who kill should be willing to forfeit their own lives. Doc. 2-2 at 135. Carlin initially told Stonefield that, given his experience with his niece, he would "[p]robably not" want himself on the jury were he in Piper's shoes. Doc. 89-6 at 83. Stonefield then challenged Carlin for cause, id. at 83, but Judge Eckrich denied the challenge after questioning by Fitzgerald, id. at 85. Under further questioning from Stonefield, Carlin testified that he did not think the death penalty would be appropriate in every murder case. Id. at 91. When Carlin said that mitigatory evidence of Piper's troubled childhood would not matter to him, however, Stonefield renewed the challenge for cause. Id. at 94–95. Fitzgerald then questioned Carlin and objected to the challenge after Carlin agreed that he would follow the instructions and would consider both mitigating and aggravating evidence before reaching a verdict. Id. at 96–99. Judge Eckrich spoke with Carlin next, asking Carlin how he solves problems in his job as a mechanic and whether he could follow the instructions and consider mitigatory evidence of a troubled childhood despite his personal opinions. Id. at 99–105. Carlin agreed that he could, and Judge Eckrich denied the challenge for cause. Id. at 104–05. Judge Eckrich made a record once Carlin left the courtroom, reciting the

standard for juror bias in capital cases and explaining that, after listening to the whole voir dire and considering the juror questionnaire, he did not believe that Carlin's views would substantially impair his duty to be impartial. Id. at 108–09. Piper's attorneys used peremptory strikes on Sagdalen and Carlin, but Anthony ended up on the jury. Piper IV, 936 N.W.2d at 812.

2. Final Pretrial Conference and Opening Statements

The trial began on July 18, 2011. Doc. 90 at 13. Judge Eckrich held a final pretrial hearing that morning in chambers. Id. at 18–19. One of the issues discussed was Piper's sexual orientation. Id. at 24–25. Piper had filed a motion in limine in January 2011 seeking to prohibit any evidence or argument that he was bisexual or had sexual relationships with other men. Doc. 121-5 at 551–53. He claimed that the State had presented evidence of this nature in his first trial and cited to the testimony of a man named Russell Olson in support.[6] Id. Judge Eckrich entered a terse order in mid-June 2011 granting Piper's motion under the "[s]ame circumstances and ruling as Motion in Limine #6."[7] Doc. 121-9 at 316. Fitzgerald sought reconsideration of this ruling at the pretrial hearing, arguing that Piper's sexual orientation tied in with evidence that Piper had forced Poage to strip naked and asked Poage to perform fellatio on him, Hoadley, and Page. Doc. 90 at 24. Judge Eckrich said he would "stand by [his] prior ruling excluding it." Id. at 25.

The final pretrial conference also included a discussion on whether prison privileges would be admissible. Id. at 28–29. Stonefield asked that the State be prohibited from mentioning the privileges available to inmates serving life sentences. Id. at 29. Judge Eckrich questioned the

[6]Russell Olson testified in the first trial that he had sexual relations with Piper. Doc. 121-2 at 525.
[7]Judge Eckrich's ruling on motion in limine six stated that the State had agreed to that motion during a January 28, 2011 hearing. Doc. 121-9 at 316. This Court read the transcript from that hearing, however, and did not see where the State agreed to Piper's motion to exclude evidence that he was bisexual or had sexual relationships with men. See Doc. 88-1. Rather, the transcript reflects that Judge Eckrich said he would defer ruling on Piper's motions in limine. Doc. 88-1 at 64–65.

relevance of particular privileges like cable television or subscriptions for reading materials and directed Fitzgerald to "stay away from any kind of specifics" in his opening statement. Id. at 30–34.

In opening statements, Fitzgerald said the evidence would show that Piper had told a fellow inmate at the Lawrence County Jail that he, Page, and Hoadley had made Poage strip because they wanted him to give them "blow jobs." Id. at 96–97. Van Norman objected, and the transcript reflects that the parties had an off-the-record discussion. Id. at 97. Fitzgerald resumed his opening statement, saying that Piper had told inmate Tom Curtis that the purpose of having Poage disrobe was because the trio wanted Poage to give them oral sex. Id. Piper's counsel did not object this time. Id. Fitzgerald proceeded to tell the jury that Piper had said that Poage was forced to disrobe because Page "got some sort of a pleasure from watching men strip" and that Page threatened to "'have Russell come down here and rape [Poage's] ass.'" Id. at 104. According to Fitzgerald, Piper found Page's threat amusing. Id.

3. Trial

For Piper to be eligible for the death penalty, the State needed to prove at least one of the aggravating factors listed in SDCL § 23A-27A-1. Piper I, 709 N.W.2d at 797; Doc. 90-10 at 6. If the jury found one of these factors beyond a reasonable doubt, it would then consider any mitigating circumstances[8] and whether Piper should be sentenced to death or life without parole. Doc. 90-10 at 9, 19–20; SDCL § 23A-27A-1. The State argued that three aggravating factors existed in Piper's case: (1) the killing was "outrageously or wantonly vile, horrible, or inhuman in

[8]The jury instructions in Piper's case defined a mitigating circumstance as "one which, while not constituting a justification or excuse for the crime, should in fairness and mercy be considered as reducing the degree of moral culpability or blame of the defendant, or otherwise offering a basis for not imposing the death penalty." Doc. 90-10 at 19.

that it involved torture, depravity of mind, or an aggravated battery;" (2) Piper had killed Poage for money or profit; and (3) Piper had killed Poage to avoid detection. Doc. 90 at 80–81.

The State presented extensive evidence on all three factors. The State's witnesses testified that Piper, Page, and Hoadley developed a plan to rob Poage while playing video games at his house on the evening of March 12, 2000. Doc. 90-3 at 64–65; Doc. 90-4 at 9–12; State v. Piper (Piper III), 842 N.W.2d 338, 345 (S.D. 2014). The three men lured Poage away from his home to a house where they had been staying. Doc. 90-3 at 65; Doc. 90-4 at 14. Inside, Page pulled a .22 caliber pistol he had stolen from Poage's home and ordered Poage to the floor. Doc. 90-3 at 65; Doc. 90-4 at 14–15; Piper III, 842 N.W.2d at 346. As Poage lay on his stomach, asking why his supposed friends were doing this, Piper kicked him in the face, knocking him unconscious. Doc. 90-3 at 26, 64–65; Doc. 90-4 at 16–17; Doc. 95 at 5–6; Piper III, 842 N.W.2d at 346. Poage's hands and feet were bound, and he was propped upright in a chair. Doc. 90-3 at 65; Doc. 90-4 at 19–22; Doc. 90-6 at 16; Piper III, 842 N.W.2d at 346. Poage, upon regaining consciousness, could overhear Piper, Page, and Hoadley discuss ways to kill him, including slitting his throat or drowning him. Doc. 90-3 at 27, 65; Doc. 90-4 at 22–23, 29–30. Piper stood on a four-way tire iron across Poage's ankles while Page and Hoadley forced Poage to drink a mixture of beer and hydrochloric acid. Doc. 90-4 at 25–28; Doc. 90-6 at 17; Doc. 90-8 at 114; Piper III, 842 N.W.2d at 346, 350. The acid hurt Poage's stomach but did not kill him. Doc. 90-4 at 26.

Piper, Page, and Hoadley decided that it would be best to kill Poage elsewhere. Doc. 90-3 at 65; 90-4 at 32–33. They put Poage in his Chevrolet Blazer and drove to a remote, wooded area in the Black Hills called Higgins Gulch. Doc. 90 at 179; Doc. 90-3 at 65; Doc. 90-4 at 31. Once there, Piper and Page forced Poage out into a foot of snow, in the below-freezing night, and made him strip to nothing but a tank-top shirt and his socks and shoes. Doc. 90 at 189–91; Doc. 90-4 at

35–36. The three then tried burying Poage in the snow, Doc. 90-4 at 53; 90-8 at 55, 123; 90-6 at 19, and drowning him in a nearby creek, Doc. 90-1 at 124; Doc. 90-4 at 47; 90-6 at 22, but Poage remained alive, Piper III, 842 N.W.2d at 346. Piper would later admit that he kicked Poage multiple times in the head and body with combat boots while out at Higgins Gulch. Doc. 90 at 127–34, 151–53, 167–68; Doc. 90-3 at 66; Doc. 90-8 at 55–56, 121; Doc. 95 at 32, 35–36, 52; Piper III, 842 N.W.2d at 346, 350.

Poage tried to escape sometime during the attack, but according to Hoadley, Piper told Page to bring him back. Doc. 90-4 at 43; Piper III, 842 N.W.2d at 346. The three then each stabbed Poage once with a buck knife. Doc. 90-4 at 46–49, 118–19; Doc. 90-7 at 194; Doc. 90-8 at 121, 125. According to Hoadley, Piper went first, stabbing Poage in the side of the head. Doc. 90-4 at 46–47, 118–19; Doc. 90-5 at 43. Poage's stab wounds were potentially lethal, but he did not die immediately. Doc. 90 at 147; Doc. 90-4 at 125. Instead, Poage asked to get in the Blazer so that he could bleed to death where it was warm. Doc. 90-1 at 127; Doc. 90-3 at 29; Doc. 90-4 at 54, 124; Piper III, 842 N.W.2d at 346, 350. The three told Poage that they would grant his request if he washed the blood off his body in the creek first. Doc. 90-4 at 54–56, 124. Poage complied but was still not allowed in the vehicle. Doc. 90-1 at 127; Doc. 90-4 at 54–56, 124. Piper retreated to the Blazer after which Page and Hoadley dropped heavy rocks on Poage's head to complete the murder. Doc. 90-3 at 66–67; Doc. 90-4 at 57–58; Piper III, 842 N.W.2d at 346. The three left Poage's body in the creek and drove back to Spearfish where they looted Poage's home. Doc. 90-4 at 57–59; Doc. 90-3 at 33, 67; Doc. 95 at 18; Piper III, 842 N.W.2d at 345. They eventually pawned some of Poage's possessions and used his ATM card to steal cash from his bank account. Doc. 90-4 at 61, 68; Doc. 90-6 at 89; Doc. 95 at 24, 95–96; Piper III, 842 N.W.2d at 345.

All told, the kidnapping and murder of Poage lasted about four hours. Doc. 90-4 at 44–45, 122; Doc. 95 at 49. The State presented evidence at trial that Poage had begged for his life throughout the ordeal and that Piper taunted Poage as he was brutalized. Doc. 90-1 at 126, 175; Doc. 90-3 at 26–27, 30; Doc. 90-4 at 33, 48, 51; Doc. 90-6 at 20; Doc. 95 at 40, 70; Doc. 90-8 at 122; Piper III, 842 N.W.2d at 347, 350. Hoadley admitted that he and his codefendants killed Poage to eliminate him as a witness, Doc. 90-4 at 51, and the State offered other testimony that Piper had said that "things had gotten so bad that they had to" kill Poage, Doc. 90-1 at 176. At least two witnesses testified that in the months just before the murder, Piper had said that he wanted to know what it was like to kill someone. Doc. 90-1 at 128; Doc. 90-5 at 168. Other witnesses who were housed with Piper in the Lawrence County Jail before his first trial testified that Piper had offered them money to kill two guards so that he could escape. Doc. 90-3 at 13, 15–16, 19–23; Doc. 90-6 at 12, 23–25. One of these witnesses was Tom Curtis.

Curtis met Piper at the Lawrence County Jail in 2000 and testified at Piper's first trial. Doc. 121-2 at 574, 577–78; Doc. 90-3 at 15–16. He was in custody in Utah during Piper's second trial, but the State had him returned to South Dakota via an interstate subpoena to testify. Doc. 90-3 at 15–16. A few days before Curtis took the stand, Piper made an oral motion to prohibit Curtis from testifying as he did in the first trial that Piper had disclosed that "[t]hey made [Poage] strip down, said that he was going to perform oral sex on them." Doc. 121-2 at 585; Doc. 90-1 at 2–3, 111, 187–88, 192–93. Judge Eckrich declined to exclude this testimony, finding it different from the sort of sexual orientation evidence he thought Piper had been seeking to prohibit:

> Okay. Now, that -- we had a brief discussion yesterday because it came up in the opening a little bit. I don't -- to be honest with you, I don't see that as a sexual orientation reference. It's a -- might be an aggression reference, it might be an assault reference, but it's -- I suppose it's to -- it's to sexual orientation as rape is to sex. There isn't really a connection. I don't regard it that way.

> "They" said "he" "perform oral sex on them." To that extent, if that's the -- if that was going to be the -- if that's the objectionable material based on sort of a constitutional sexual orientation argument I would deny it.

90-1 at 193. Judge Eckrich later reaffirmed his ruling on Curtis's testimony, saying that references to oral sex out at Higgins Gulch were admissible and "part of the res gestae." Doc. 90-3 at 8–9.

Curtis thus testified about the oral sex reference at Piper's trial. He explained that Piper had said that he and his accomplices forced Poage to disrobe out at Higgins Gulch because they planned to make him give them "blow job[s]." Id. at 27–28. Curtis said that he did not know, however, whether the three men actually made Poage fellate them. Id. at 28. Van Norman objected to Curtis's testimony, but Judge Eckrich overruled the objection. Id. at 27.

Although Curtis also testified about several other topics, the one most relevant here is his criminal history. Clad in jail garb, Curtis testified on direct that he was imprisoned in Utah and was awaiting sentencing on some recent felony convictions. Id. at 11–12. Van Norman revisited Curtis's criminal history on cross:

> **Van Norman**: Okay. How many felonies have you been convicted of over the years?
> **Curtis**: How many have I been convicted of?
> **Van Norman**: Yeah.
> **Curtis**: Approximately two that I have been convicted of. I have been accused of many more but I have been convicted of I think two.
> **Van Norman**: Okay.
> **Curtis**: A burglary and a theft.
> **Van Norman**: A burglary and a theft?
> **Curtis**: Yes.
> **Van Norman**: Okay, and what have you been convicted of that you're incarcerated for now?
> **Curtis**: For possession with intent to distribute.
> **Van Norman**: What?
> **Curtis**: Cocaine.
> **Van Norman**: And that would be another conviction - -
> **Curtis**: Yeah.
> **Van Norman**: - - right? How much time are you facing?
> **Curtis**: I have no idea yet and I won't know until I go to court.

Van Norman: I thought you said you were just awaiting sentencing.
Curtis: I am awaiting sentencing.
Van Norman: You have an attorney, don't you?
Curtis: But it carries - - it carries a five-to-life and I don't know what the Judge is going to do on that.
. . . .
Van Norman: Okay. And [your lawyer] has explained to you what you might get, right?
Curtis: No, he has not yet. I - - when you're - - when you get your papers you know what it is. There is first, second and third degree felonies, mine was a first degree felony, which is a five-to-life.
Van Norman: That's the highest rated felony?
Curtis: Yes.
Van Norman: How much cocaine?
Curtis: I did not have any cocaine, I was accused of having cocaine.
Van Norman: Okay, so you're taking a false rap here, right, with regard to the cocaine?
Curtis: Yes, I am.
Van Norman: You have explained that to your attorney?
Curtis: My attorney is aware of that, yes.
Van Norman: And you have actually gone to court and pled guilty in front of a Judge even though it's a false charge.
Curtis: No, I did not go to court and plead guilty to it, I was found facility [sic, likely "guilty" mistranscribed].
Van Norman: Oh, you went to trial?
Curtis: Yes.
Van Norman: I'm sorry.
Curtis: That's okay.
Van Norman: Yeah. And how many charges were you found guilty of?
Curtis: There was eight charges.
Van Norman: Eight?
Curtis: Eight distributors.
Van Norman: And you were charged - - charged with eight distributions, right?
Curtis: Yeah.
Van Norman: And you were found guilty of eight distributions?
Curtis: Okay.
Van Norman: And all eight of the incidents are false.
Curtis: Yes, it is.

Doc. 90-3 at 36–39. Curtis did not testify to nor was he asked about convictions for sexual assault.

Trouble arose during the State's case in chief when Fitzgerald asked Brad Woodward, a unit manager at the Penitentiary, whether inmates were allowed to have television. Doc. 90-2 at

104, 121–22. Woodward responded "Yes," and Van Norman immediately objected. Id. at 121. Judge Eckrich sustained the objection and called a recess. Id. Van Norman then moved for a mistrial, arguing that Fitzgerald had violated Judge Eckrich's "direct order in chambers" prohibiting evidence of "television and other privileges" available to prisoners. Id. at 121–22. Judge Eckrich admonished Fitzgerald for "stepp[ing] over the line" but denied Piper's motion, finding that the brief reference to inmates having television did not justify a mistrial. Id. at 122. Judge Eckrich prohibited Fitzgerald from making any further reference to privileges in prison.[9] Id.

The State also offered testimony from psychiatrists Ulises Pesce and Ronald Franks and counselor Robert Fredrickson. Dr. Pesce saw Piper over ten times between 2001 and 2004 while working at the South Dakota State Penitentiary in Sioux Falls. Doc. 90-2 at 57. He prescribed Piper medication and assessed him as having antisocial personality disorder. Doc. 90-2 at 65–66, 69, 83. Dr. Pesce testified that conduct disorder is basically the child version of antisocial personality disorder, and that a childhood diagnosis of the former often precedes an adult diagnosis of the latter. Id. at 76, 96–98. He explained that violence, manipulation, deceitfulness, and a lack of empathy were all associated with antisocial personality disorder. Doc. 90-2 at 78. When asked about ADHD, Dr. Pesce said that the condition is linked to trouble in school and agitation, but that it does not cause violence. Id. at 72–73. He described Piper as feeling that his death sentence was a "terrible crime" the State committed against him.[10] Id. at 61.

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[9]Neither party cites to where Judge Eckrich's order on prison privileges appears in the record. Doc. 75 at 12; Doc. 67 at 94–97. Van Norman's reference to a "direct order in chambers" appears to refer to the pretrial hearing Judge Eckrich held in chambers. Doc. 90 at 18–19.

[10]There were no objections to Dr. Pesce saying that Piper had received a death sentence in his prior trial. Doc. 90-2 at 61. That fact seemed to be part of the trial from voir dire and throughout. See, e.g., Doc. 89 at 60. The final instructions said that the jury could not consider Piper's prior death sentence. Doc. 121-10 at 194.

On cross-examination, Dr. Pesce conceded that he had only seen Piper for eight hours total and that ADHD can have very significant effects on a person's life. Id. at 80, 85. He also agreed that the brain's frontal lobes are not fully mature when a person is 20 years old, that development of the frontal lobes is directly related to impulse control and an appreciation for consequences, and that ADHD can exacerbate problems associated with underdeveloped frontal lobes. Id. at 86–87. Dr. Pesce likewise acknowledged that ADHD and antisocial personality disorder would "directly" affect a 20-year-old's ability to make good choices. Id. at 99.

Dr. Franks never met with Piper but did review his social history and psychological records from the penitentiary. Doc. 90-3 at 79, 86. He testified that ADHD makes it difficult to focus but that children with ADHD are no more likely to be violent than children without ADHD. Id. at 76–79. Dr. Franks told the jury that children with conduct disorder can still control their behavior, id. at 85–86, and identified instances in Piper's social history where he had behaved well, id. at 79–80. He testified that an enabling home environment—such as when a parent refuses to consistently punish misbehavior and hold a child accountable—can worsen conduct disorder, id. at 84–85, 101, and that Dr. Rose had diagnosed Piper with conduct disorder when he was 13 or 14, id. at 130.

According to Dr. Franks, Piper's social history and penitentiary records did not reveal any evidence that Piper had a brain disease or neurological damage. Doc. 90-3 at 87. "[I]n fact," Dr. Franks explained, "[Piper] had a very thorough neurological assessment when he was in the seventh grade and they did not find evidence of neurological deficit" or damage. Id. at 87; see also id. at 91 (stating that Dr. Clark's evaluation did not show any evidence of neurological deficits). Dr. Franks also testified that he saw little connection between frontal lobe development and the type of violence done to Poage, id. at 95, and that people with antisocial personality disorder can control their impulses but are sometimes unwilling to do so, id. at 98–99. On cross-

examination, Dr. Franks acknowledged that at least two authorities had recommended that Piper receive residential treatment but that such treatment never occurred. Id. at 104–05, 119.

Penitentiary counselor Robert Fredrickson saw Piper regularly between June 2008 and March 2009 while doing rounds in Piper's housing area. Doc. 90-5 at 96–97, 101, 103, 111, 121. He testified that there were times Piper exhibited antisocial traits like a lack of remorse, superficial charm, and little concern for something unless it involved himself. Id. at 103–04. He also recalled one interaction where Piper had displayed "strong traits of narcissism," id. at 106, and testified that Piper is "quite intelligent," id. at 107. Fredrickson admitted on cross-examination that Piper had never been rude or combative with him and that Piper taking college courses in prison was a positive sign. Id. at 110–11, 113.

Piper's defense focused largely on presenting mitigatory evidence. Testimony from Linda and Sheldon sought to humanize Piper, highlight his ADHD and learning disability, and explain his difficult upbringing. Doc. 90-6 at 129–207, 218–51; Doc. 90-7 at 2–121. Prison counselor Justin Falon testified about Piper's drive to educate himself by taking college correspondence courses and about his positive overall impression of Piper. Doc. 90-7 at 121–77.

A prison chaplain and a nun, Sister Gabrielle Crowley, also testified on Piper's behalf. Doc. 90-8 at 149–89. Sister Crowley testified that she met Piper about three and a half years before trial when she started giving him Spanish lessons over the phone. Id. at 151. Piper was studying to become a Catholic, Sister Crowley explained, and she served as his godmother when he was baptized in April 2008. Id. at 152. She began regular in-person visits with Piper thereafter, during which they would discuss spiritual matters, Piper's family, his close relationship with his nieces, his studies, and his desire to please his parents with good grades. Id. at 154–57. Sister Crowley testified that she had a "very deep relationship" with Piper given their "spiritual connection," and

that she felt like "family to him, like I belong to their family." Id. at 157. Fitzgerald's cross-examination of Sister Crowley focused on a letter she had written to a female inmate at Piper's request. Sister Crowley agreed with Fitzgerald that prison policy prohibited inmates from writing each other and that her letter violated this policy. Id. at 158–60. Fitzgerald closed his cross-examination by asking whether Piper had "manipulated your friendship" to get Sister Crowley to do something he could not. Id. at 160–61. Sister Crowley replied that she did not view "it that way" when she wrote the letter because she did not recall that doing so was against prison policy. Id. at 161.

Dr. Ertz testified about Piper's extensive pre-incarceration abuse of marijuana and LSD, and the negative effects these drugs have on a person's reasoning and mental health. Doc. 90-7 at 195–98. He agreed with Piper's ADHD diagnosis but questioned Dr. Rose's conclusion that Piper had conduct disorder. Id. at 199–203, 205. Among other things, Dr. Ertz believed that Dr. Rose erred by using an adult version of a test when evaluating the then 13-year-old Piper. Id. at 202. In Dr. Ertz's view, Piper's inattention and struggle to conform to societal norms was evidence of his ADHD. Id. at 205. He explained that impulsivity and failure to conform to societal norms are symptoms of both antisocial personality disorder and ADHD, and that Piper's impulsivity made it more likely that he would unthinkingly engage in antisocial behavior. Id. at 205–08; Doc. 90-8 at 3–4. Dr. Ertz told the jury that youth, substance abuse, group dynamics, and upbringing all affect a person's ability to exercise free will. Doc. 90-8 at 6, 8. He explained that the brain's frontal lobes—the area responsible for reasoning and executive function—are not fully developed until age 25, id. at 7, and that the harsh physical punishment Piper received during his youth only worsened his ADHD and prevented him from learning prosocial behavior, id. at 9–10.

Dr. Wortzel testified that youth, substance abuse, upbringing, ADHD, and group dynamics were all mitigating factors in Piper's case. Id. at 85, 97. He explained that 19-year-olds are more impulsive because their brains haven't finished maturing and that Piper's heavy LSD use in the months before Poage's murder would have compounded this impulsivity. Id. at 87–90. He said that home environment is critical to a person's development, id. at 93, and that Piper's environment was "far from ideal," id. at 91. In particular, Dr. Wortzel explained that the arbitrary beatings Piper received would not have taught him right from wrong and that Piper's parents erred by blaming others for his behavior and refusing to get him the help he needed. Id. at 91–94. Dr. Wortzel believed that Poage's murder resulted from group dynamics, with Piper, Hoadley, and Page feeding off one another and behaving in ways they would not have if they had been alone. Id. at 99–100.

Dr. Wortzel agreed on cross-examination that the three defendants stole Poage's property and murdered him to eliminate a witness against them. Id. at 120, 128. The State asked Dr. Wortzel whether he had done a brain scan of Piper and whether there was any evidence that Piper had brain damage. Id. at 135. Dr. Wortzel replied that while Piper's ADHD and antisocial tendencies had "neurological underpinnings," he was not saying that Piper had brain damage. Id. He also testified that he had not recommended a brain scan or similar test for Piper because they were "experimental in nature at this point in time and not intended for single subject use." Id. at 136.

Attorneys Van Norman and Stonefield focused on the mitigatory evidence in closing arguments, urging the jury to impose a sentence of life without parole rather than death. Doc. 90-10 at 58–94. Stonefield argued that the crime resulted from group dynamics and was not something Piper would have done by himself, that Piper had cooperated with law enforcement and

accepted responsibility by pleading guilty, and that Piper had been sitting in the Blazer when Hoadley and Page did the most damage to Poage. Id. at 66–67, 72–73. He contended that it would be wrong to sentence Piper to death when Hoadley—who played a significant role in Poage's murder, showed little remorse on the witness stand, and engaged in other concerning conduct like threatening his pregnant girlfriend's life and holding a knife to another girl's throat—only received a life sentence. Id. at 73–74. Van Norman's mitigation arguments focused more on Piper's upbringing and mental health. He argued that Piper "wasn't wired correctly to start with," having been born with a learning disability and ADHD. Id. at 84–85. He emphasized Linda's refusal to get Piper the therapeutic help he so clearly needed, id. at 90, as well as her penchant for corporal punishment, id. at 89.

The jury found all three aggravating factors alleged by the State and sentenced Piper to death. Doc. 2 at 333–34. Judge Eckrich entered judgment in early August 2011 and appointed attorney Steve Miller as appellate counsel. Id. at 304–05, 337; Doc. 67 ¶ 7. Piper appealed to the Supreme Court of South Dakota, arguing that Judge Eckrich erred by denying his motion to withdraw his guilty pleas and that his sentence was disproportionate to the life sentence Hoadley received.[11] Doc. 2-1 at 7–42. The Supreme Court of South Dakota affirmed in early 2014, holding that Piper's sentence was lawful and that his motions to withdraw his guilty pleas were beyond the scope of the court's limited 2009 remand. Piper III, 842 N.W.2d at 344–51.

C. State Habeas Case

Piper filed a pro se state habeas petition in mid-March 2014. Doc. 2 at 313; Doc. 2-1 at 44–48. He claimed that the State had presented false testimony and withheld material evidence,

[11]When Piper appealed his initial sentence, two justices on the Supreme Court of South Dakota agreed that his death sentence was grossly disproportionate to Hoadley's life sentence. Piper I, 709 N.W.2d at 822 (Sabers, J., dissenting).

that his 2001 guilty pleas were not knowing and intelligent, and that he received ineffective assistance of counsel. Doc. 2-1 at 44–48. Judge Randall Macy appointed attorney Matthew Kinney to represent Piper. Kinney secured an order staying Piper's execution and began work on the case. Doc. 103 at 62, 68–71, 73–74. An evidentiary hearing was set for mid-July 2015. Id. at 99. In June 2015, Kinney moved to postpone the hearing so that he could have more time to review "the voluminous amounts of documents and discovery in this matter." Id. at 102. At a hearing on the motion, Kinney explained that he planned to move to withdraw Piper's guilty pleas in the criminal case so that this issue would be exhausted for any federal habeas action Piper might bring. Id. at 530–31. He added that he was "on schedule," that he and Kim de Hueck, an attorney at his firm, had "spent some good time on this," and that de Hueck had "seen Mr. Piper at least on two or three occasions for long periods of time in the South Dakota State Pen." Id. at 532. Judge Macy granted the continuance and moved the evidentiary hearing to October 2015. Id. at 118.

Kinney moved for another continuance in September 2015. The motion explained that Judge Eckrich had yet to rule on Piper's motion to withdraw his guilty pleas and that Piper wanted to exhaust this issue before Judge Macy ruled on his habeas petition. Doc. 103 at 122–24. Judge Macy granted the motion and set a status conference for January 2016. Id. at 131. In the meantime, Judge Eckrich held a hearing on Piper's motion to withdraw his guilty pleas and both parties submitted briefs on the issue. Id. at 557–58. Piper and the State agreed to continue the habeas hearing until Judge Eckrich ruled on Piper's motion. Id. at 558–59. Judge Eckrich denied Piper's motion in February 2016. Id. at 564–65. Piper filed an immediate appeal, but the Supreme Court of South Dakota dismissed it for a lack of jurisdiction. Piper IV, 936 N.W.2d at 803. With the effort to withdraw the guilty pleas concluded, Judge Macy set the evidentiary hearing for July 2016. Doc. 103 at 134, 564. Kinney prepared a writ of habeas corpus ad testificandum directing

that Piper be brought to Lawrence County before the hearing so that he could meet with his attorneys. Id. at 143–44. Kinney also subpoenaed Van Norman and Stonefield. Id. at 138–41.

At the evidentiary hearing, Kinney presented testimony from Van Norman, Stonefield, and Steve Miller. He questioned Van Norman and Stonefield about the motion to withdraw Piper's guilty pleas, voir dire and jury selection, preparation for and cross of certain witnesses, supposedly inconsistent arguments the State made about the leadership roles of Piper and Page during Poage's murder, and which issues they believed Miller should have raised on appeal. Doc. 90-11 at 7–36, 44–82, 114–60. Kinney questioned Miller on his advice to Piper that it would be premature to challenge his guilty pleas during his initial state habeas case, the motion to withdraw Piper's guilty pleas, and Miller's decision on which arguments to raise in Piper's appeal. Id. at 196–221. Miller testified that although he could not "specifically recall" discussing with trial counsel whether he should appeal Judge Eckrich's denials of Piper's challenges for cause to potential jurors, he had read the entire record and concluded that he had no issue that was "even arguably close" to as strong as the claim that Judge Eckrich erred by denying Piper's motion to withdraw his guilty pleas.[12] Id. at 218. Kinney did not ask anyone about Piper possibly having brain damage or FASD and did not offer any evidence beyond the testimony of Piper's three previous lawyers.

Piper himself was also allowed to question his former attorneys. When Piper asked how long Sheldon had requested to prepare her report, Van Norman admitted that she had been rushed:

> I remember we jammed her up, and there were two reasons I think that that happened. One is that we waited quite a while for a couple of rulings by Judge Eckrich which were pretty important. One could have been dispositive of the case, and that was on the motion to withdraw your guilty plea. And then there was – there

[12]Miller testified that he had only raised the disproportionate-sentence argument because the Supreme Court of South Dakota was already going to review the issue as part of the automatic appeal in every death penalty case in South Dakota, and Miller felt like he "had" to raise it. Doc. 90-11 at 212–13, 218.

> were several other pending decisions that took until February or March to get decided, of the same year we went to trial. We had started at that point looking for a mitigation specialist and even the very experienced ones we talked to, they were too expensive or unavailable because they wanted at least a year lead time to properly do their work. And there's a national organization of mitigation specialists, and I understood what their standards were.
>
> So we ended up finding Ms. Sheldon, and then pushing her very hard to try to do what she could do. There were a couple of things about her that were a little odd. She wouldn't fly, she lived in Tuscan [sic] so she'd need to drive or take a bus or a train to get different places, and we were balancing schedules for her to even see you at the penitentiary to do very essential things.

Id. at 40–41. Van Norman acknowledged that, if Sheldon had needed more time to complete her work and he and Stonefield had not requested a continuance, he had not "protect[ed] that aspect of [Piper's] case." Id. at 42–43.

Judge Macy ordered the parties to file proposed findings of fact and conclusions of law after they received the transcript of the habeas hearing. Id. at 228–29; Doc. 103 at 145. Kinney and the State filed their proposed findings of fact and conclusions of law in early October 2016. Doc. 103 at 410–59. Piper's proposed findings of fact and conclusions of law raised these grounds for relief:

> (1) that his 2001 guilty pleas were not knowing and intelligent;
>
> (2) that Duffy, Rensch, and Piper's initial state habeas counsel (Miller) were ineffective in advising him about his guilty pleas and right to a jury trial;
>
> (3) that Van Norman and Stonefield were ineffective during voir dire in handling potential jurors Sagdalen and Carlin, failing to thoroughly investigate State witnesses from the Penitentiary, failing to adequately investigate Tom Curtis, and failing to respond appropriately when Sister Crowley was questioned about the alleged prison policy.
>
> (4) that Miller was ineffective in his role as appellate counsel after the jury verdict by failing to appeal Judge Eckrich's denial of the motions to strike Sagdalen and Carlin as well as the denial of

> Piper's motion for a mistrial after Fitzgerald asked whether inmates were allowed to have television.

Doc. 85-1 at 30–31; Doc. 2-1 at 183–85. Some of these grounds for relief overlapped with Piper's pro se habeas petition while others were new. Kinney did not claim that Van Norman and Stonefield were ineffective by failing to adequately investigate and present life history and cognitive functioning evidence. The State filed a rebuttal brief, but Kinney did not. Doc. 103 at 460–65.

Judge Macy denied Piper's habeas petition on January 13, 2017, finding that Piper's guilty pleas were knowing and intelligent and that his attorneys had not performed ineffectively or prejudiced him. Doc. 2-1 at 180–204. Judge Macy entered an order on February 13, 2017, appointing Kinney to represent Piper on appeal of his habeas case. Doc. 103 at 504. Piper wrote to the Supreme Court of South Dakota asking that a new attorney be appointed for his appeal. Id. at 835–36. The court remanded Piper's request to the trial court and Judge Macy entered an order appointing Ryan Kolbeck as substitute counsel for Piper. Id. at 834, 843–44, 847. Kolbeck obtained an amended certificate of probable cause from the trial court and appealed to the Supreme Court of South Dakota. Id. at 953–54, 962–63. Piper raised the following claims on appeal:

1. That his guilty pleas were not knowing and intelligent;

2. That the State made inconsistent arguments during the separate proceedings for Page and Piper and that the State's inconsistent arguments should have been admitted at Piper's resentencing trial;

3. That the trial judge violated his right to due process by failing to strike potential jurors Sagdalen and Carlin for cause;

4. That counsel was ineffective by (a) presenting testimony from Dr. Wortzel and Dr. Ertz essentially admitting that Piper had committed the alleged aggravating factors; (b) providing incorrect legal advice about his guilty pleas; (c) failing to object when the trial court rehabilitated potential jurors Sagdalen and

> Carlin; (d) failing to adequately investigate the State's witnesses from the Penitentiary; (e) failing to adequately investigate State witness Tom Curtis; (f) failing to appropriately respond to the State's assertion that Sister Crowley violated prison policy;
>
> 5. That the State violated his right to due process by failing to provide an updated criminal history report for Curtis; and
>
> 6. That Miller was ineffective as appellate counsel by failing to appeal Judge Eckrich's denial of Piper's motion for a mistrial and Judge Eckrich's refusal to strike Sagdalen and Carlin for cause.

Doc. 2-1 at 72–148. The Supreme Court of South Dakota affirmed the denial of Piper's habeas petition in late 2019, concluding that res judicata barred some claims and that others failed on the merits. Piper IV, 936 N.W.2d 793.

D. Federal Habeas Case

Piper filed his federal habeas petition in December 2020, Doc. 1, and his amended federal habeas petition in August 2022, Doc. 67. He raised these claims:

> Claim I: Van Norman and Stonefield were ineffective by failing to adequately investigate and present life history and cognitive functioning evidence.
>
> Claim II: [This claim was withdrawn.]
>
> Claim III: Judge Eckrich improperly denied Piper's motion to strike juror Lisa Sagdalen for cause and both trial and appellate counsel were ineffective in handling the Sagdalen issues.
>
> Claim IV: Van Norman and Stonefield were ineffective during voir dire in handling potential juror Dan Carlin and juror Dennis Anthony.
>
> Claim V: Van Norman and Stonefield were ineffective in preparing for and handling Sister Crowley's cross examination.
>
> Claim VI: Miller was ineffective by failing to appeal Judge Eckrich's denial of a motion for a mistrial after the State elicited testimony about whether inmates were allowed television in prison.

> Claim VII: Fitzerald violated Piper's rights by introducing evidence of lewd behavior at Higgins Gulch and Van Norman and Stonefield were ineffective in responding to Fitzgerald's actions.
>
> Claim VIII: Van Norman and Stonefield were ineffective by failing to move for a mistrial based on Fitzgerald's cumulative prosecutorial misconduct.
>
> Claim IX: The State violated Piper's due process rights by failing to disclose Tom Curtis's criminal history and Van Norman and Stonefield were ineffective by failing to adequately investigate Curtis's background.
>
> Claim X: Judge Eckrich violated Piper's rights under the Due Process Clause and Eighth Amendment by refusing to admit allegedly inconsistent arguments Fitzgerald made in Poage's trial.
>
> Claim XI: Piper's guilty pleas were not knowing, voluntary, and intelligent.
>
> Claim XII: Piper had a statutory right to withdraw his guilty pleas under South Dakota law and the State violated due process by arbitrarily denying him this right.
>
> Claim XIII: Piper was prejudiced because of the cumulative effect of the errors in his case.

Doc. 67.

Piper filed a motion for testing to support Claim I, asking that four experts be allowed to visit him in prison to evaluate him for brain damage and FASD now. Doc. 60. He argued that the results of these tests would help him both to succeed on the merits of Claim I and to demonstrate cause and prejudice to excuse his procedural default of this claim. Doc. 62 at 3–4. This Court issued a decision in June 2023 finding that 28 U.S.C. § 2254(e)(2) and the Supreme Court's decision in Shinn v. Ramirez, 596 U.S. 366 (2022), barred Piper's motion for testing. Doc. 108.

This Court structured the deadlines in this case so that it could decide whether Piper's claims were exhausted or procedurally defaulted before ruling on whether Piper was entitled to any relief on his claims. Docs. 54, 84. In March 2024, this Court issued an opinion granting

Respondents summary judgment on Claims I, III.B, III.C, IV.B, VII, VIII, IX.A–D, X, XI, and XII. Doc. 122. This Court found that Piper had procedurally defaulted these claims and had failed to show the necessary cause and prejudice to avoid that default. Id. Respondents now move for summary judgment on the remaining exhausted claims in Piper's petition: III.D, III.E, IV.A, V, VI, IX.E, and XIII. Doc. 126.

II. Governing Law

Piper's remaining claims allege ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984). Respondents argues that AEDPA governs all these claims, and Piper responds that AEDPA doesn't apply because it's unconstitutional. To limit repetition, this Court first describes the standards under AEDPA and Strickland and addresses Piper's constitutional argument.

A. AEDPA's Standards

AEDPA makes succeeding on a federal habeas petition difficult, even when prisoners follow all of a state's procedural rules and properly exhaust their claims in state court. Section 2254(d) bars federal courts from granting relief on any claim "that was adjudicated on the merits in State court" unless the state court's decision (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)–(2). This "difficult to meet and highly deferential standard for evaluating state-court rulings" requires "that state-court decisions be given the benefit of the doubt." Cullen v. Pinholster, 563 U.S. 170, 181 (2011) (cleaned up and citations omitted).

A state court decision is contrary to federal law under AEDPA "if it (1) contradicts a rule set forth in the Supreme Court's cases or (2) confronts a set of materially indistinguishable facts and arrives at a different result." Dansby v. Payne, 47 F.4th 647, 655 (8th Cir. 2022) (cleaned up and citation omitted). And a "decision unreasonably applies federal law if the state court correctly identifies the governing legal standard but either unreasonably applies it to the facts of the particular case or unreasonably extends or refuses to extend the legal standard to a new context." Id. at 656 (cleaned up and citation omitted). Prisoners claiming an unreasonable application of federal law "must show that a state court's adjudication was not only wrong, but also objectively unreasonable, such that fairminded jurists could not disagree about the proper resolution." Id. (citation omitted). This Court evaluates "the reasonableness of the state court's ultimate conclusion, not necessarily the reasoning used to justify the decision." Zornes v. Bolin, 37 F.4th 1411, 1415 (8th Cir. 2022); see also Springs v. Payne, 95 F.4th 596, 600–01 (8th Cir. 2024) (citing Zornes and Wilson v. Sellers, 584 U.S. 122 (2018)).[13] AEDPA also demands that a state court's factual determinations "shall be presumed to be correct," and gives the petitioner the "burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

B. Ineffective Assistance Under Strickland

[13]One habeas treatise reads the Supreme Court's decision in Wilson, 584 U.S. 122, as saying that federal courts cannot consider theories that could have supported the state court's decision unless the state court's decision was unexplained. Brian R. Means, Federal Habeas Manual § 3:70 (June 2024 update). That is, federal habeas courts are stuck with the state court's justifications when the state court issues a reasoned decision. Id. Piper does not argue that this Court is so limited, and this Court must follow Eighth Circuit precedent in any event. See Zornes, 37 F.4th at 1415; Springs, 95 F.4th at 600–01.

Strickland requires a petitioner claiming ineffective assistance to show both that counsel's performance was constitutionally deficient and that he was prejudiced by this deficiency. Strickland, 466 U.S. at 687. To demonstrate deficient performance, Piper must show that counsel's "representation fell below an objective standard of reasonableness" given "all the circumstances." Id. at 688. This standard is "highly deferential," and courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. Piper has the burden of showing that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." Id. at 687.

To establish prejudice, Piper must show a "reasonable probability" that, but for his attorneys' deficient performance, the outcome of his trial would have been different. Id. at 694. Since Piper is challenging his capital sentencing trial, "the question is whether there is a reasonable probability that, absent [counsel's] errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Id. at 695; see also Andrus v. Texas, 590 U.S. 806, 822 (2020) (per curiam) (explaining that, in a state where the law required a unanimous jury recommendation for a death sentence, the petitioner had to show a reasonable probability "that at least one juror would have struck a different balance" (citation omitted)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. "That requires a substantial, not just conceivable, likelihood of a different result." Cullen, 563 U.S. at 189 (cleaned up and citation omitted). Petitioners must meet both Strickland prongs to succeed on an ineffectiveness claim, and courts can begin (and perhaps end) with either prong. Williams v. Norris, 576 F.3d 850, 858 (8th Cir. 2009).

These same Strickland standards apply to Piper's claims of ineffective assistance of appellate counsel. See United States v. Brown, 528 F.3d 1030, 1032–33 (8th Cir. 2008). "Because

one of appellate counsel's important duties is to focus on those arguments that are most likely to succeed, counsel will not be held to be ineffective for failure to raise every conceivable issue." Link v. Luebbers, 469 F.3d 1197, 1205 (8th Cir. 2006). "[A]bsent contrary evidence, [courts] assume that appellate counsel's failure to raise a claim was an exercise of sound appellate strategy." Brown, 528 F.3d at 1033 (cleaned up and citation omitted).

Federal habeas courts reviewing a state court's application of Strickland must layer deference upon deference, taking "a highly deferential look at counsel's performance" under Strickland "through the deferential lens of § 2254(d)." Cullen, 563 U.S. at 190 (cleaned up and citation omitted).

C. Piper's Constitutional Challenge to AEDPA

Piper argues AEDPA's standards don't apply because the Supreme Court's decision in Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024), renders AEDPA unconstitutional as violative of Article III of the Constitution. Article III made the Federal Judiciary an independent branch of government with the "'province and duty to say what the law is' in particular cases and controversies." Bank Markazi v. Peterson, 578 U.S. 212, 225 (2016) (cleaned up) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)). Piper claims that AEDPA violates Article III and the Supremacy Clause because it prohibits federal courts from making independent judgments about whether a petitioner's state court conviction is unconstitutional. Every federal appellate court to have considered these arguments before Loper Bright has rejected it.

First, these courts have held that while § 2254(d)(1) limits relief to habeas petitioners, it does not prohibit federal judges from interpreting the law independently. Cobb v. Thaler, 682 F.3d 364, 374 (5th Cir. 2012); Evans v. Thompson, 518 F.3d 1, 11 (1st Cir. 2008) ("There is a world of difference between telling a court how to decide a case given a certain set of facts and limiting the

availability of relief *after* a judge independently determines the existence of a right and the reach of Supreme Court precedent."); Crater v. Galaza, 491 F.3d 1119, 1128 (9th Cir. 2007) ("Section 2254(d)(1) does not restrict the federal courts' power to interpret the law, but only sets standards for what state court errors of law require federal habeas relief."); Green v. French, 143 F.3d 865, 874–75 (4th Cir. 1998), abrogated on other grounds by Williams v. Taylor, 529 U.S. 362 (2000); Lindh v. Murphy, 96 F.3d 856, 870 (7th Cir. 1996) (en banc) ("Federal courts acting within their jurisdiction are always entitled to interpret the law independently. Section 2254(d)(1) as we read it does no more than regulate relief."), reversed on other grounds, 521 U.S. 320 (1997); see also Evans, 518 F.3d at 8 n.3 (rejecting argument that AEDPA violates the Supremacy Clause). As these courts of appeals recognized, AEDPA is hardly the only rule limiting relief for constitutional violations. Cobb, 682 F.3d at 375; Evans, 518 F.3d at 8–9; Lindh, 96 F.3d at 870–72. Qualified immunity, for instance, can bar an award of damages even if a state official violated the Constitution. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The Supreme Court's retroactivity decision in Teague v. Lane, 489 U.S. 288, 310 (1989), can likewise prohibit federal habeas courts from granting relief on new rules of constitutional law. Evans, 518 F.3d at 9. And the Court's rule in Stone v. Powell, 428 U.S. 465 (1976), can prohibit federal habeas relief for state prisoners convicted with evidence seized unconstitutionally. Cobb, 682 F.3d at 375. If the limits in Teague and Stone are constitutional, the courts of appeals reasoned, then so too are the limits on relief in § 2254(d)(1). Lindh, 96 F.3d at 871–72; Cobb, 682 F.3d at 375; Green, 143 F.3d at 875.

Second, these courts of appeals reasoned that Congress has the authority to limit lower federal courts' power to grant habeas relief to state prisoners. Cobb, 682 F.3d at 375–77; Evans, 518 F.3d at 8–10; Crater, 491 F.3d at 1127–29; Lindh, 96 F.3d at 871–74. Reviewing Supreme Court precedent and the history of habeas corpus, these courts rejected the idea that once Congress

gives lower courts jurisdiction to hear certain cases, "it must not limit the discretion of judges to resolve those cases however they see fit." Evans, 518 F.3d at 8; see also Cobb, 682 F.3d at 375 (describing how the Supreme Court "has long permitted Congress to extend habeas jurisdiction to federal courts without authorizing them to reconsider the legal determinations of criminal courts"); Crater, 491 F.3d at 1127–29; Lindh, 96 F.3d at 872 ("Regulating relief is a far cry from limiting the interpretive powers of the courts, however, and Congress has ample power to adjust the circumstances under which the remedy of the writ of habeas corpus is deployed."); id. at 873–74 ("We would have to cast history to the winds to say that [§ 2254(d)(1)], which respects fully-litigated judgments unless the state court has gone seriously wrong, transgresses constitutional limitations.").

Piper argues that Loper Bright vitiates the persuasive value of these cases. The Supreme Court in Loper Bright overruled the holding in Chevron v. U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), that federal courts must defer to "permissible" agency interpretations of certain statutes. The Court began with Article III and how federal courts had traditionally treated agencies' legal interpretations. Article III, the Court explained, gives the Federal Judiciary the power to "say what the law is" free from influence by the political branches. Loper Bright, 603 U.S. at 385 (citation omitted). Consistent with this understanding that legal questions are for the judiciary to decide, federal courts had historically given "due respect" to agency interpretations of federal statutes without allowing those interpretations to "supersede" their own judgment. Id. at 385–86. The Court in Loper Bright reasoned that Congress had incorporated this understanding into the Administrative Procedures Act (APA), explaining that § 706 of the APA "codifies for agency cases the unremarkable, yet elemental proposition . . . that courts decide legal questions by applying their own judgment." 603 U.S. at 391–92; see also 5

U.S.C. § 706 (stating that courts reviewing agency action "shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action"). The Court held that the deference required by Chevron "cannot not be squared" with the APA's command that a reviewing court "decide *all* relevant questions of law." Loper Bright, 603 U.S. at 396, 398.

Loper Bright does not undermine the well-reasoned opinions from the courts of appeals that AEDPA is constitutional. First, Loper Bright in no way suggests that Article III requires lower federal courts to discount state court decisions on constitutional issues and review those decisions de novo. Indeed, although the Loper Bright majority opinion discussed Article III, it stopped short of saying deference to agency interpretations violated the Constitution and said nothing about state court decisions. Second, Loper Bright involved administrative law and the judicially-created Chevron doctrine, not habeas corpus and the congressionally-enacted limits in AEDPA. Loper Bright did not discuss the significant comity and finality issues raised by habeas corpus and provides no support for Piper's argument that Congress lacks the authority to limit lower federal courts' power to grant habeas relief to state prisoners. See Felker v. Turpin, 518 U.S. 651, 664 (1996) ("[J]udgments about the proper scope of [habeas corpus] are normally for Congress to make." (cleaned up and citation omitted)); Teague, 489 U.S. at 308 ("[I]nterests of comity and finality must . . . be considered in determining the proper scope of habeas review."); Burt v. Titlow, 571 U.S. 12, 19 (2013) ("AEDPA recognizes a foundational principle of our federal system: State courts are adequate forums for the vindication of federal rights."); Woods v. Donald, 575 U.S. 312, 316 (2015) (per curiam) (explaining that AEDPA's standards "serve[] important interests of federalism and comity."). Third, Loper Bright does not undermine the rights/remedies distinction drawn by the courts of appeals considering AEDPA and their conclusion that AEDPA limits

habeas relief but not the judiciary's ability to independently interpret the law. Fourth, the only court to have ruled on the argument that Loper Bright renders AEPDA unconstitutional has disagreed with Piper. Smith v. Thornell, No. CV-12-00318, 2025 WL 563453, at *6 (D. Ariz. Feb. 20, 2025) ("The Court has no basis on which to decree the AEDPA unconstitutional or find that Loper Bright silently overruled cases . . . which have interpreted and applied § 2254(d)(1)."). Loper Bright does not render AEDPA unconstitutional, and thus Piper must satisfy AEDPA's standards to secure relief.

III. Analysis of Claims

A. Claims III & IV

Claims III and IV of Piper's petition overlap, so this Court analyzes them together. Claim III involves potential juror Lisa Sagdalen. Doc. 67 at 67–80. Piper alleged that Judge Eckrich improperly denied his motion to strike Sagdalen for cause (Claim III.B), that this denial caused prejudice by forcing him to waste a peremptory strike on Sagdalen rather than using it on biased Juror Anthony (Claim III.C), that counsel were ineffective by not objecting to Judge Eckrich's questioning of Sagdalen (Claim III.D), and that Miller was ineffective by failing to argue on direct appeal that Judge Eckrich erred by denying the motion to strike Sagdalen for cause (Claim III.E).

This Court granted Respondents summary judgment on Claims III.B and III.C, holding that these claims were procedurally defaulted and barred by res judicata. Doc. 122 at 68–73. In rejecting Piper's attempts to avoid procedural default, this Court concluded that it could not consider Piper's argument that Juror Anthony's presence on the jury prejudiced him because Piper had not fairly presented that argument to the Supreme Court of South Dakota. Id. at 71–73.

Claim IV also involved voir dire. Claim IV.A alleged that Piper's attorneys were ineffective by not objecting to Judge Eckrich's questioning of potential juror Dan Carlin. Piper

asserted that Judge Eckrich would have struck Carlin for cause if counsel had only objected to the Judge's questions, that this would have saved Piper a peremptory strike, and that he could have used that strike on biased Juror Anthony. Doc. 67 at 86. Claim IV.B alleged that trial counsel performed ineffectively by not challenging Juror Anthony for cause or not requesting an additional peremptory strike to use on him. Doc. 67 at 87. This Court granted Respondents summary judgment on Claim IV.B because Piper failed to exhaust it in state court and could not overcome his procedural default. Doc. 122 at 81.

Respondents now move for summary judgment on Claims III.D, III.E, and IV.A, arguing that the Supreme Court of South Dakota's rejection of these claims was not contrary to or an unreasonable application of federal law. Piper disagrees and argues that this Court should consider the Juror Anthony evidence when analyzing Claims III.D, III.E, and IV.A.

1. Juror Anthony Evidence

As Piper recognizes, the Juror Anthony evidence is "essential" to Claims III.D, III.E, and IV.A. Doc. 131 at 20. "[A] juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Adams v. Texas, 448 U.S. 38, 45 (1980). And "[s]o long as the jury that sits is impartial," a defendant's loss of a peremptory strike to fix a court's erroneous failure to dismiss a juror for cause does not violate the Constitution. Ross v. Oklahoma, 487 U.S. 81, 88 (1988). In other words, a prisoner complaining about the loss of a peremptory strike cannot establish a constitutional violation without showing that a juror who heard the case was biased. Ramsey v. Bowersox, 149 F.3d 749, 758 (8th Cir. 1998). Since Piper relies on Anthony's presence on the jury to establish Strickland prejudice, Doc. 131 at 20, 26–27, juror bias is likewise critical to his ineffective assistance of counsel claim, see Sanders v Norris,

529 F.3d 787, 790–94 (8th Cir. 2008) (holding that the petitioner's ineffective assistance claim failed for lack of prejudice because he had not shown that the juror was partial); Krutilek v. Kenney, 125 F. App'x 93, 95 (8th Cir. 2005) (unpublished) (per curiam) ("[B]ecause the jurors were not biased, Krutilek cannot show his attorney's failure [during voir dire] prejudiced him."); Singleton v. Lockhart, 871 F.2d 1395, 1400 (8th Cir. 1989) (holding that petitioner could not show prejudice on his claim that counsel was ineffective during voir dire where there was no evidence that juror in question was biased); Ybarra v. McDaniel, 656 F.3d 984, 1001 (9th Cir. 2011) ("Ybarra has not made the required showing of prejudice under Strickland, because he has not shown that any juror who harbored an actual bias was seated on the jury as a result of counsel's failure to voir dire on the insanity defense.").

Piper argues that this Court erred by holding that he failed to properly exhaust the Juror Anthony aspect of his claims. A prisoner has not properly exhausted a claim unless he "fairly presented" it to the state court. Picard v. Connor, 404 U.S. 270, 275–76 (1971). A "fair presentation," in turn, requires that the prisoner "present the same facts and legal theories to the state court that he later presents to the federal courts." Morris v. Norris, 83 F.3d 268, 270 (8th Cir. 1996) (citation omitted). Although the federal claim "cannot contain significant additional facts[,] . . . closely related claims containing an arguable factual commonality may be reviewed." Ward v. Norris, 577 F.3d 925, 935 (8th Cir. 2009) (citation omitted).

This Court's Juror Anthony ruling was correct. Piper argued in state court that the denial of counsel's motion to strike Sagdalen and Carlin for cause violated his right to a fair trial, that counsel was ineffective by not objecting to Judge Eckrich's questioning of Sagdalen and Carlin, and that Miller was ineffective by not appealing the denial of the motions to strike Sagdalen and Carlin for cause. Doc. 2-1 at 122–27. But while Piper argued generally that these alleged errors

prejudiced him, he never claimed that Anthony or any other juror who heard his case was impermissibly biased. See Doc. 2-1 at 119–27; Piper's Reply Brief, 2018 WL 10152750, at *16–18. Rather, he argued that unlike the federal rule, South Dakota law did not require him to show that a member of the jury was biased to succeed on a fair trial claim. Piper's Reply Brief, 2018 WL 10152750, at *16–18. The Supreme Court of South Dakota disagreed, explaining that the loss of a peremptory challenge does not violate the Constitution absent a showing of juror bias. Piper IV, 936 N.W.2d at 812–13. Piper did not make this showing, so the court held that he could neither establish prejudice under Strickland for his voir dire claims nor succeed on his free-standing fair trial claim. Id. Since Piper's voir dire claims lacked merit, the court held that Miller was not ineffective for failing to raise them on direct appeal. Id. at 814 n.19. Claims III.D, III.E., and IV.A now rely on Anthony's supposed bias to establish prejudice. Doc. 131 at 20, 26–30. That is, these claims seek to supply the missing element of prejudice for Piper's voir dire claims and address one of the very reasons the Supreme Court of South Dakota rejected them. As this Court explained in its prior opinion, the Juror Anthony aspect of Claims III.D, III.E, and IV.A is simply too different from the claims Piper raised in state court to be considered fairly presented. Doc. 122 at 72.

Piper disagrees; he claims that the Eighth Circuit's focus in applying the fair presentation requirement has been on whether the petitioner adequately identified the constitutional basis for the claim in state court and then raised that same basis in federal court. Doc. 131 at 21. In Piper's view, raising the same general constitutional error in state and federal court is enough to fairly present a claim. Id. at 23. None of the cases Piper cites supports this interpretation of Eighth Circuit jurisprudence, however, and only one—Anderson v. Groose, 106 F.3d 242 (8th Cir. 1997)—even deserves mention. The question in Anderson was whether the petitioner's "one

vague reference" to ineffective assistance—he argued in state court that the trial judge denied him the effective assistance of counsel by precluding testimony from a belatedly-noticed alibi witness—was enough to fairly present his claim that trial counsel had been ineffective by failing to adequately pursue alibi witnesses. Id. at 245. "Giving [the petitioner] the benefit of the doubt," the Eighth Circuit concluded that "there may be an arguable factual commonality between" the petitioner's ineffective assistance claim in state court and his ineffective assistance claim in federal court. Id. (cleaned up). The Eighth Circuit then considered the claim but found it meritless. Id.

The decision in Anderson to give the petitioner "the benefit of the doubt" does not mean that Piper fairly presented the Juror Anthony aspect of his voir dire claims in state court. The Eighth Circuit requires a prisoner to "present *both* the *factual and legal* premises of his claims to the state court" to exhaust the claims properly. Dansby v. Hobbs, 766 F.3d 809, 823 (8th Cir. 2014) (cleaned up and citation omitted); see also Fairchild v. Workman, 579 F.3d 1134, 1149 (10th Cir. 2009) ("A claim is more than a mere theory on which a court could grant relief; a claim must have a factual basis, and an adjudication of that claim requires an evaluation of that factual basis." (citation omitted)). A prisoner has not properly exhausted a claim when either new facts or new arguments make it significantly different from the claim asserted in state court. See Nash v. Russell, 807 F.3d 892, 898 (8th Cir. 2015) (holding that the petitioner did not fairly present his claim where he made a facial challenge to a state evidentiary rule in state court and then an as-applied challenge in his federal habeas petition); Ward, 577 F.3d at 935–36 (finding that the petitioner was trying to "broaden impermissibly his ineffective assistance of counsel claim" when he argued in state court that counsel should have sought recusal of the trial judge after the judge exhibited bias by refusing to allow the prosecutor and defense attorney the same opportunity to approach the bench but then tried to offer additional factual bases showing the trial judge's alleged

bias in his federal habeas appeal); Williams, 576 F.3d at 865 (holding that the petitioner did not fairly present his claims that the state had inappropriately struck two specific African American jurors where the petitioner's direct appeal challenged "the State's use of peremptory strikes generally, but not the strikes" of the two jurors specifically); Wooten v. Norris, 578 F.3d 767, 777–78 (8th Cir. 2009) (concluding claim that trial counsel was ineffective in the penalty phase by failing to assert mental infirmities to rebut the state's arguments about a death-qualifying aggravator was procedurally defaulted because while the petitioner had argued in state court that trial counsel was generally ineffective for failing to present additional mitigation evidence, he did not identify what the mitigation evidence was or how it would have impacted the trial).

Here, the Juror Anthony aspect of Claims III.D, III.E, and IV.A alters the claims so much that the Supreme Court of South Dakota's decision no longer even addresses the substance of the claims. For the exhaustion requirement to have any meaning, Piper cannot use his federal habeas petition to supply the missing element of a claim raised in state court and to address the very reason the Supreme Court of South Dakota rejected the claim. See Picard, 404 U.S. at 276 (explaining that the exhaustion requirement "would serve no purpose if it could be satisfied by raising one claim in the state courts and another in the federal courts"). Because Piper did not fairly present the Juror Anthony aspect of Claims III.D, III.E, and IV.A to the Supreme Court of South Dakota, this Court cannot consider that aspect when ruling on the claims.[14]

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[14]This Court's prior opinion also found Piper did not have a substantial claim under Martinez v. Ryan, 566 U.S. 1 (2012), that Juror Anthony was impermissibly biased in favor of the death penalty. Doc. 122 at 75–80. Piper now argues that this Court applied the wrong standard in making that finding. That is not correct. This Court's analysis of the Juror Anthony issue began by explaining that the "standard for excusing jurors for cause in a capital case is whether their views would prevent or substantially impair the performance of their duties as a juror in accordance with their instructions and their oath." Doc. 122 at 75 (cleaned up) (quoting Morgan v. Illinois, 504 U.S. 719, 728 (1992)). This is the correct standard and the same standard Piper cites in his brief. Doc. 131 at 15. A few pages after citing the correct standard, this Court wrote that Juror

2. Adjudication on the Merits

Piper argues that de novo review applies to Claims III.D and IV.A because the Supreme Court of South Dakota misconstrued the claims and never actually decided them. Piper is correct that § 2254(d) only applies to claims that state courts have "adjudicated on the merits," 28 U.S.C. § 2254(d), and that review is de novo absent such an adjudication, Porter v. McCollum, 558 U.S. 30, 39 (2009) (per curiam). But he overlooks the presumption that applies to state court decisions. Federal courts "presume that a state court has adjudicated a federal claim on the merits if the defendant presented the claim to the state court and the court denied relief." Dansby, 47 F.4th at 655 (citing Harrington v. Richter, 562 U.S. 86, 99 (2011)). "This presumption applies even when the state court's opinion does not expressly address the claim." Id. (citing Johnson v. Williams, 568 U.S. 289, 300–01 (2013)). Though "strong," this presumption "can in some limited circumstances be rebutted." Johnson, 568 U.S. at 301. De novo review applies, for instance, when "the evidence leads very clearly to the conclusion that a federal claim was inadvertently overlooked in state court."[15] Johnson, 568 U.S. at 303.

Anthony's "voir dire as a whole shows that he was not a juror whose views on capital punishment would have prevented him from following the law and the judge's instructions." Doc. 122 at 79. This is not, as Piper argues, a sign that this Court failed to consider whether Juror Anthony's views substantially impaired his ability to follow the law and the judge's instructions. Instead, it was merely a shorthand way of referring to the standard this Court quoted at the start of its analysis.

[15]Piper cites to several out-of-circuit cases to support his argument for de novo review of Claims III.D and IV.A. See, e.g., Campbell v. Bradshaw, 674 F.3d 578, 596 (6th Cir. 2012) (conducting de novo review because state court did not "reach the core" of the petitioner's argument); Chadwick v. Janecka, 312 F.3d 597, 606 (3d Cir. 2002) ("[I]f an examination of the opinions of the state courts shows that they misunderstood the nature of a properly exhausted claim and thus failed to adjudicate that claim on the merits, the deferential standards of review in AEDPA do not apply."). Since the Supreme Court issued Johnson, 568 U.S. 289, however, at least one of these courts of appeals has questioned the reasoning in the case on which Piper relies. See Smith v. Cook, 956 F.3d 377, 387 (6th Cir. 2020) (explaining that the approach in Campbell, 674 F.3d 578, "is hard to reconcile with Johnson's healthy presumption of merits adjudication").

But a state court opinion need not be perfect to constitute an adjudication on the merits. In Worthington v. Roper, 631 F.3d 487 (8th Cir. 2011), for example, the Eighth Circuit rejected an argument that the state court failed to adjudicate a portion of the petitioner's claim because it did not "adequately scrutinize his allegation that counsel performed ineffectively at the penalty phase by failing to supply experts with comprehensive background information." Id. at 496. Although the state court apparently failed to fully analyze this allegation about not supplying the experts with background information, it still discussed counsel's performance and determined that the ineffective assistance claim "as a whole lacked merit." Id. at 497. Since AEDPA does not require that a state court's decision be "well-articulated or even . . . correct," the Eighth Circuit found that the state court's decision "plainly" sufficed as an adjudication on the merits. Id. Other federal courts of appeals have treated the adjudication-on-the-merits requirement the same way. See Smith v. Cook, 956 F.3d 377, 386 (6th Cir. 2020) ("We have held that Johnson's presumption prevails when a state court imperfectly discusses, rather than omits, a petitioner's federal claim."); Lee v. Comm'r, Ala. Dep't of Corrs., 726 F.3d 1172, 1211 (11th Cir. 2013) (rejecting the petitioner's argument that a state court's decision is not entitled to deference unless the "opinion on its face 'shows its work' by explicitly mentioning 'all relevant circumstances' argued by" the petitioner); Jenkins v. Bergeron, 824 F.3d 148, 152 (1st Cir. 2016) (applying AEDPA deference even though the state court "did not explicitly discuss one subsidiary argument" that the petitioner made to support his claim).

Piper now asserts that the Supreme Court of South Dakota did not adjudicate Claims III.D and IV.A on the merits. Piper argued in state court that the denial of counsel's motions to strike Sagdalen and Carlin for cause violated his right to a fair trial and that counsel had been ineffective by not objecting to Judge Eckrich's questioning of Sagdalen and Carlin. Doc. 2-1 at 122–27. The

Supreme Court of South Dakota concluded that res judicata barred the free-standing fair trial claim and that the claim didn't fare any better when "viewed through the lens of the Strickland analysis." Piper IV, 936 N.W.2d at 812. The court addressed Strickland's deficient performance prong first:

> As to the first prong of Strickland, Piper has not demonstrated his attorneys' efforts fell below a standard of reasonableness. Indeed, Piper's counsel challenged the two potential jurors he identifies—Sagdalen and Carlin—for cause, citing concerns about what he describes as an inclination to impose the death penalty. When the court denied the cause challenges, Piper's attorneys exercised peremptory strikes to ensure that the two jurors did not become part of the jury that considered Piper's sentence.

Id. The court addressed Strickland's prejudice prong next, holding that Piper could not establish prejudice because he failed to show that any of the jurors were impermissibly biased. Id. at 812–13. Piper argues here that the Supreme Court of South Dakota's analysis shows that it misconstrued his claim as being that trial counsel was ineffective for failing to object at all to Sagdalen and Carlin.

Piper has not rebutted the presumption that the Supreme Court of South Dakota adjudicated Claims III.D and IV.A on the merits. Like the state court in Worthington, the Supreme Court of South Dakota discussed trial counsels' performance and found that the ineffective assistance claim as a whole lacked merit. Worthington, 631 F.3d at 496–97; Piper IV, 936 N.W.2d at 812–13. And while the Supreme Court of South Dakota's analysis of the performance prong focused on the appropriate actions trial counsel took rather than on what the petitioner alleged counsel failed to do, so did the state court in Worthington. Worthington, 631 F.3d at 496–97; Piper IV, 936 N.W.2d at 812. The Supreme Court of South Dakota's analysis can be understood as concluding that trial counsel took reasonable steps to deal with Sagdalen and Carlin and that their performance did not become deficient merely by failing to object to Judge Eckrich's voir dire. Indeed, it is not surprising that the court did not specifically discuss Piper's assertion that counsel should have

objected to Judge Eckrich's questioning of Sagdalen and Carlin; this is not a strong argument given the sort of questions Judge Eckrich asked, and Piper did not cite a single case where a court found deficient performance by failing to object to the trial judge's voir dire. The Supreme Court of South Dakota's decision not to articulate each step of its reasoning does not show that it overlooked Piper's claim.

3. Claims III.D and IV.A

The Supreme Court of South Dakota correctly stated the Strickland standard, and there is no contrary Supreme Court decision with materially indistinguishable facts, so the Supreme Court of South Dakota's decision was not contrary to clearly established law. Piper argues, however, that the Supreme Court of South Dakota unreasonably applied Strickland when deciding Claims III.D and IV.A and based its decision on an unreasonable determination of facts given the evidence presented. See § 2254(d)(1), (2). These arguments largely repeat Piper's assertion that the Supreme Court of South Dakota failed to adjudicate his claims on the merits.

Piper argues first that the Supreme Court of South Dakota based its prejudice ruling on an unreasonable determination of fact because it "ignored entirely the portion of the record reflecting the trial court's interference with voir dire." Doc. 131 at 28. Piper does not cite any authority to support this argument; there are, however, some cases finding an unreasonable factual determination when the state court ignored evidence that was "highly probative and central to petitioner's claim" and "sufficient to support petitioner's claim when considered in the context of the full record." Taylor v. Maddox, 366 F.3d 992, 1001 (9th Cir. 2004), overruled on other grounds by Murray v. Schriro, 745 F.3d 984 (9th Cir. 2014). That is not what happened here, though. As just stated, Piper's argument that counsel should have objected to Judge Eckrich's questioning of Sagdalen and Carlin after Piper challenged them for cause is weak. After all, trial judges have

"wide discretion" when conducting voir dire in "areas of inquiry that might tend to show juror bias," Mu'Min v. Virginia, 500 U.S. 415, 427 (1991), as well as a "duty to investigate colorable claims of juror bias when they arise," Fylling v. Royal Caribbean Cruises, Ltd., 91 F.4th 1371, 1375–76 (11th Cir. 2024). Piper has never cited any cases suggesting that Judge Eckrich's questions were inappropriate or that trial counsel performs deficiently by failing to object to the sort of questions Judge Eckrich asked. See generally Miller v. Province, 509 F. App'x 744, 747–48 (10th Cir. 2013) (denying certificate of appealability on claim that trial judge asked inappropriate questions during voir dire). The Supreme Court of South Dakota could reasonably have determined that Piper's failure-to-object argument did not warrant discussion, especially when counsel challenged Sagdalen and Carlin for cause and then used peremptory strikes to keep them off the jury.

Piper argues next that the Supreme Court of South Dakota applied Strickland unreasonably by failing to consider "whether, *in light of all the circumstances*, the identified acts or omissions were outside the wide range of professionally competent assistance." Doc. 131 at 28 (quoting Strickland, 466 U.S. at 690). This argument fails too, as state courts are not required to mention every weak argument or piece of evidence to reasonably apply Strickland. See Crockett v. Clark, 35 F.4th 231, 244 (4th Cir. 2022) (explaining that "a state court need not refer to each piece of a petitioner's evidence" for a decision under Strickland to be reasonable).

Turning to Strickland's second prong, Piper argues that the Supreme Court of South Dakota's failure to mention the Juror Anthony evidence means that its prejudice analysis was based on an unreasonable determination of fact and unreasonably applied Strickland. This Court cannot consider the Juror Anthony aspect of Piper's claims, however, because Piper never fairly presented it to the Supreme Court of South Dakota. Nor did the Supreme Court of South Dakota

have any reason to discuss Juror Anthony in its analysis. The State's brief on appeal pointed out that the loss of a peremptory strike to fix an erroneous failure to dismiss a juror for cause does not violate the Constitution. State's Brief, 2018 WL 10152749, at *55–56. Piper responded by arguing that the rule in South Dakota was different and that he did not have to show that a member of the jury was biased. Piper's Reply Brief, 2018 WL 10152750, at *16–18. He did not argue that Juror Anthony or any other juror was impartial.

The Supreme Court of South Dakota did not unreasonably apply Strickland by rejecting the forms of Claims III.D and IV.A that Piper raised in state court. Indeed, it was more than reasonable for the court to conclude that Piper had not shown prejudice under Strickland because he failed to offer any evidence that the jurors who heard his case were biased. See Sanders, 529 F.3d at 790–94 (holding that the petitioner's ineffective assistance claim failed for lack of prejudice because he had not shown that the juror was partial); Krutilek, 125 F. App'x at 95 ("[B]ecause the jurors were not biased, Krutilek cannot show his attorney's failure [during voir dire] prejudiced him."); Singelton, 871 F.2d at 1400 (holding that petitioner could not show prejudice on his claim that counsel was ineffective during voir dire where there was no evidence that juror in question was biased); Ybarra, 656 F.3d at 1001 ("Ybarra has not made the required showing of prejudice under Strickland, because he has not shown that any juror who harbored an actual bias was seated on the jury as a result of counsel's failure to voir dire on the insanity defense."). Respondents are entitled to summary judgment on Claims III.D. and IV.A.

4. Claim III.E

Piper alleges in Claim III.E that Miller was ineffective by failing to argue on direct appeal that Judge Eckrich erred by denying the motion to strike Sagdalen for cause. He argues that de novo review should apply because it is "unclear" whether the Supreme Court of South Dakota

adjudicated Claim III.E on the merits. Doc. 131 at 29. According to Piper, the court did not address Miller "at all in the juror claims." Id. Not so. The Supreme Court of South Dakota noted Miller's testimony that he did not raise the juror selection arguments "because of their relative weakness," found that the juror selection arguments "lack[ed] merit," and concluded that Piper's ineffective assistance of appellate counsel claim was thus "similarly unsupported." Piper IV, 936 N.W.2d at 814 n.19. This constitutes an adjudication on the merits and triggers § 2254(d).

Piper argues alternatively that the Supreme Court of South Dakota's failure to consider the Juror Anthony evidence means that it unreasonably applied Strickland and based its decision on an unreasonable determination of the facts. This argument fails for reasons already explained. This Court cannot consider the Juror Anthony aspect of Claim III.E and the Supreme Court of South Dakota had no cause to address it. Since Piper failed to raise any evidence or argument that the seated jury was biased, the Supreme Court of South Dakota's holding that Claim III.E lacked merit was consistent with Ross, 487 U.S. 81, and was a reasonable application of Strickland. Respondents are entitled to summary judgment on Claim III.E.

B. Claim V: Sister Crowley

Claim V alleges that Van Norman and Stonefield were ineffective when Fitzgerald cross-examined Sister Crowly about writing a letter to a female inmate at Piper's urging. Piper argues that Sister Crowley's letter did not violate prison policy and that trial counsel should have objected to the cross-examination, asked for an offer of proof that such a policy existed, and requested a recess to research the issue themselves. Doc. 67 at 93; Doc. 131 at 35–36.

The State's evidence on prison policy came from corrections officer Keith Ditmanson, who testified at trial that inmates are prohibited from communicating with each other through third parties. Doc. 90-5 at 142; Doc. 133 ¶ 16; Doc. 135 ¶ 16. When Fitzgerald cross-examined Sister

Crowley, she agreed with him that prison policy prohibited inmates from writing each other. Doc. 90-8 at 158–60. She also agreed that, looking back, the letter she wrote violated prison policy, although this had not occurred to her at the time. Id. at 159–61. The letter was received into evidence, and Sister Crowley acknowledged that it included an explanation that she was writing on Piper's behalf because inmates could not write each other. Id. at 160–61; Doc. 133 ¶ 18; Doc. 135 ¶ 18. Stonefield's brief redirect of Sister Crowley did not address the letter or prison policy. Doc. 90-8 at 161–62.

The prison's policy and Sister Crowley's cross-examination came up again at Piper's state habeas hearing. Stonefield testified that he handled Sister Crowley's cross-examination "really badly" and that he would act differently in hindsight. Doc. 90-11 at 146–47, 160. Van Norman testified that his paralegal had asked the warden after Piper's trial whether prison policy prohibited inmate-to-inmate communication through third parties, that she had drafted an affidavit about this discussion, and that the affidavit said "the warden was very concerned about the exchange that had taken place" between Fitzgerald and Sister Crowley. Id. at 77–78. Judge Macy sustained a hearsay objection to Van Norman's description of the affidavit. Id. at 78. On cross-examination, Van Norman testified that although he did not speak with the warden, the warden had told his paralegal that there was no policy prohibiting inmate-to-inmate communications via third parties. Id. at 86.

On appeal in his state habeas case, Piper argued that trial counsel responded ineffectively when the State asserted that Sister Crowley violated prison policy. Doc. 2-1 at 139–141. His appellate brief stated that because the prison's policy was never introduced at trial, "it is still unclear as to whether this letter was, in fact, in violation of any prison policy." Id. at 140. The brief added that "habeas trial counsel did not determine whether this prison policy existed or not,

and at this time, there is no policy in the record." Id. at 141. The Supreme Court of South Dakota rejected Piper's claim on the merits:

> Whether the letter actually violated policy is still unsettled, despite the fact that Sister Crowley acknowledged she had violated the policy. Under the circumstances, Piper has failed to prove his counsel acted unreasonably. Further, Piper fails to show how the alleged error prejudiced the outcome of his resentencing.

Piper IV, 936 N.W.2d at 816.

Piper now argues that the Supreme Court of South Dakota unreasonably applied both Strickland prongs and made an unreasonable finding of fact by concluding it was "still unsettled" whether Sister Crowley's letter violated prison policy. Doc. 131 at 37–38. The reasonableness of the Supreme Court of South Dakota's factual finding depends on the "evidence presented in the State Court proceeding." 28 U.S.C. § 2254(d)(2); see also Shoop v. Twyford, 596 U.S. 811, 819 (2022) (explaining that review under § 2254(d)(2) "is expressly limited to the evidence presented in the State court proceeding" (cleaned up and citation omitted)). This Court noted in a previous opinion that it is "unclear whether [Piper] made the [paralegal's] affidavit part of the record in his state habeas case." Doc. 122 at 82 n.24. Although Piper included the affidavit in the appendix of his federal habeas case, Doc. 2-2 at 177–78, his appellate brief in his state habeas case suggested that the affidavit was not presented in the state court proceeding, see Doc. 2-1 at 140 (stating that it was "unclear" whether the letter violated prison policy); id. at 141 (stating that "habeas trial counsel did not determine whether this prison policy existed or not, and at this time, there is no policy in the record"). Piper agreed at the February 28, 2025 hearing in this case that the affidavit was not part of the state habeas record.

The Supreme Court of South Dakota reasonably found it "unsettled" whether Sister Crowley's letter violated prison policy. The question under § 2254(d)(2)'s "unreasonable

determination of the facts" clause "is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." Donelson v. Steele, 16 F.4th 559, 568 (8th Cir. 2021) (quoting Schriro v. Landrigan, 550 U.S. 465, 473 (2007)). A state court's factual determination is not unreasonable simply "because [the federal court] would have reached a different conclusion in the first instance," Brumfield v. Cain, 576 U.S. 305, 313–14 (2015) (citation omitted), or because there is "some contrary evidence in the record," Ervin v. Bowersox, 892 F.3d 979, 985 (8th Cir. 2018) (citation omitted). Instead, federal courts may "supersede the [state court's] determination only if reasonable minds reviewing the record would not disagree about the finding in question." Donelson, 16 F.4th at 568 (cleaned up and citation omitted). The evidence before the Supreme Court of South Dakota could easily lead reasonable minds to agree that it was unsettled whether Sister Crowley's letter violated prison policy. The paralegal's affidavit was not part of "the evidence presented in the State court proceeding." § 2254(d)(2). What the Supreme Court of South Dakota had before it, then, was Ditmanson's testimony that prisoner-to-prisoner communication via third parties violated prison policy, Sister Crowley's acknowledgment that her letter violated the policy, Piper's statement in his habeas brief that it was "unclear" whether the letter violated the policy, and Van Norman's testimony at the state habeas hearing. Although Piper argues that Van Norman's testimony established that no policy existed, Judge Macy sustained a hearsay objection to Van Norman's description of the affidavit. Whatever the force of Van Norman's testimony, it is not nearly enough to render the Supreme Court of South Dakota's factual finding unreasonable.

Piper has also failed to show that the Supreme Court of South Dakota unreasonably applied Strickland's prejudice prong. Piper argues that his attorneys' alleged failure to respond

appropriately to Sister Crowley's cross-examination prejudiced him because while her testimony was key to showing that he was a changed man, the jury was left with the impression that he had manipulated her. Piper is correct that the prosecution portrayed him as manipulative; Fitzgerald asked Sister Crowley whether Piper had manipulated her into doing something he could not, Doc. 90-8 at 160–61, and then pointed to Piper's "conn[ing]" of Sister Crowley as an example of him being a "master at manipulation." Doc. 90-10 at 52. On the record before the Supreme Court of South Dakota, however, it was "unsettled" whether the letter violated prison policy. Piper's argument to that court about the potential benefits of an appropriate response from his attorneys—showing that there was no manipulation because the letter did not violate prison policy—thus relied on speculation. It was not objectively unreasonable for the Supreme Court of South Dakota to find that this speculation did not create a reasonable probability that at least one juror would have reached a different result. See Piper v. South Dakota, 5:20-CV-05074, 2024 WL 1348502, at *28 (D.S.D. Mar. 29, 2024) (collecting cases and explaining that courts "routinely hold that speculation is not enough to show a reasonable probability that the results of a petitioner's trial would have been different"); Hill v. Sec'y, Fla. Dep't of Corrs., 578 F. App'x 805, 809 (11th Cir. 2014) (per curiam) ("Because Hill has not shown what the phone records would have demonstrated, she has not proved a reasonable probability that presenting the phone records would have changed the outcome of the proceeding."); see also Williams, 576 F.3d at 859–63 (reversing district court decision that state court had unreasonably applied Strickland's prejudice prong where the state court had found no prejudice because the petitioner had failed to show what mitigating evidence could have been presented and the district court's prejudice ruling depended on evidence not offered in state court).

The Supreme Court of South Dakota's decision would be reasonable even assuming that Piper's attorneys could have shown that the letter did not violate prison policy. True, the jury heard mitigating evidence about Piper's difficult upbringing, his parents' failure to secure the help he needed, and the positive things he had done since being imprisoned. See, e.g., Doc. 90-6 at 135–206, 236–251; Doc. 90-7 at 2–59, 127–48; Doc. 90-8 at 149–58, 168–78. The jury also heard testimony and argument that Piper should be held less culpable because of the group's dynamics and Piper's youth, ADHD, and drug abuse. Doc. 90-7 at 195–98, 205–08; Doc. 90-8 at 3–10, 14–22, 85–101; Doc. 90-10 at 58–94. But the aggravating evidence was weighty. Witnesses testified that Piper had said he wanted to know what it was like to kill someone. Doc. 90-1 at 128–29, 148–49; Doc. 90-5 at 168. Along with Page and Hoadley, Piper tortured, taunted, and humiliated their supposed friend Poage for nearly four hours before killing him. That murder allowed the trio to get away for a while with robbery. The jury also heard evidence that Piper had offered fellow inmates money to kill prison guards so he could escape, that he lacked remorse for murdering Poage and even had laughed about it, and that he had antisocial personality disorder. Doc. 90-1 at 123–29, 173–74; Doc. 90-2 at 69–70; Doc. 90-3 at 18–23, 26, 30; Doc. 90-6 at 13, 23–25. Considering the entire record, a fairminded jurist could conclude that the State's evidence was so strong that Sister Crowley's testimony, free from implication that Piper had manipulated her, would not have created a reasonable probability of at least one juror voting against death.

C. Claim VI: Ineffective Assistance by Appellate Counsel Miller

Claim VI alleges Miller was ineffective by failing to appeal the denial of Piper's motion for a mistrial made after the State elicited testimony that inmates are allowed television. Doc. 67 at 94–97; Doc. 131 at 38–42. Piper argues that Fitzgerald's question violated Judge Eckrich's

pretrial order and that there is a reasonable probability that the mistrial issue would have succeeded on appeal.

The order Piper relies on was an oral one issued during the final pretrial conference. Stonefield argued during the conference that the court should bar the State from mentioning the privileges available to inmates serving life without parole. Doc. 90 at 28–29. He relied on a South Carolina case, State v. Burkhart, 640 S.E.2d 450, 487–89 (S.C. 2007), holding that evidence of prison privileges in a death penalty case was not relevant under state law. Doc. 90 at 29. Fitzgerald replied that some discussion of prison life was necessary to show that Piper was not a model prisoner, having received 75 disciplinary write ups while in the Penitentiary. Id. at 30. He gave the example of Piper communicating with other inmates despite being in solitary confinement for much of the day. Id. Judge Eckrich agreed that certain evidence about Piper's conditions of confinement could be admissible but doubted the relevance of particular privileges like cable television or subscriptions for reading materials. Id. at 30–31. As Judge Eckrich understood it, the State would only offer evidence of prison privileges if relevant to showing that Piper violated prison rules. Id. at 30–33. Judge Eckrich said that he would reread Burkhart and directed Fitzgerald to "stay away from any kind of specifics" for "the moment." Id. at 33–34.

Judge Eckrich did not mention the prison privilege issue again until Fitzgerald asked Woodward whether inmates are allowed to have television. Doc. 90-2 at 121–22. Judge Eckrich sustained an objection to the question, told Fitzgerald that he had "stepped over the line there," and ruled that prison privileges were irrelevant under Burkhart.[16] Id. at 121–22. He denied Piper's motion for a mistrial, though, finding that the single reference to television was not "irretrievable"

[16]Just a few moments later, however, Judge Eckrich said that he "actually had [the prison privileges issue] as a pending motion," although he knew he "did discuss it some, just to be clear." Doc. 90-2 at 122–23.

and was unlikely to have "sunk very deep" with the jury. Id. at 122, 126. Miller did not appeal this ruling. Piper claimed that the failure to do so constituted ineffective assistance, but the Supreme Court of South Dakota disagreed. It held that Miller made a reasonable "strategic decision" not to appeal the issue based on its "relative strength" and that Piper had failed to show prejudice. Piper IV, 936 N.W.2d at 816.

Piper now argues that the Supreme Court of South Dakota unreasonably applied both Strickland prongs and made an unreasonable determination of fact when it characterized Miller as having testified that "he made a strategic decision not to appeal the [mistrial] issue based upon his assessment of its relative strength." Piper IV, 936 N.W.2d at 816. None of these arguments are convincing. First, the Supreme Court of South Dakota did not unreasonably determine the facts. Piper argues that the court got it wrong because Miller did not recall the mistrial motion when asked at the habeas hearing whether he should have appealed it. Doc. 90-11 at 220. Shortly before that, however, Miller testified that he limited the appeal to Judge Eckrich's denial of Piper's motion to withdraw his guilty plea because he had reviewed the entire record and found no issue "that was even arguably close" to as strong as that claim. Doc. 90-11 at 218; Doc. 133 ¶¶ 27–28; Doc. 135 ¶¶ 27–28; see also Doc. 90-11 at 219; Doc. 133 ¶ 26; Doc. 135 ¶ 26. A reasonable jurist could interpret Miller's testimony as showing that he made a strategic decision not to appeal the mistrial issue, despite his inability to recall the issue nearly four years later at the habeas hearing. See Donelson, 16 F.4th at 568 (explaining that federal courts may "supersede the [state court's] determination only if reasonable minds reviewing the record would not disagree about the finding in question" (cleaned up and citation omitted)).

Second, Piper has not shown that the Supreme Court of South Dakota unreasonably applied Strickland's performance prong. "Effective appellate counsel should not raise every nonfrivolous

argument on appeal, but rather only those arguments most likely to succeed." Davila v. Davis, 582 U.S. 521, 533 (2017). Miller's decision not to raise the mistrial issue was "not deficient performance unless that claim was plainly stronger than those actually presented to the appellate court." Id.; see also Deck v. Jennings, 978 F.3d 578, 584 (8th Cir. 2020) (same). Fairminded jurists could find that the mistrial claim was not plainly stronger than the guilty plea claim Miller raised. After all, courts in South Dakota will not grant a mistrial unless the conduct "in all probability[] produced some effect upon the jury's verdict and is harmful to the substantial rights of the defendant." State v. Ortiz-Martinez, 995 N.W.2d 239, 244–45 (S.D. 2023) (cleaned up and citation omitted); see also State v. Mitchell, 491 N.W.2d 438, 441 (S.D. 1992) (applying this same standard for a motion for a mistrial based on prosecutorial misconduct). This standard requires that the moving party establish "actual prejudice," Ortiz-Martinez, 995 N.W.2d at 245, a showing that would have been very difficult for Piper. Indeed, the television reference occurred just once during a ten-day trial, Judge Eckrich sustained an objection to it,[17] and the jury heard a mountain of properly admitted evidence establishing the aggravating factors and horrendous circumstances of Poage's murder. These circumstances make it unlikely that a brief reference to television in prison influenced the jury's verdict or caused it to reach a decision on an improper basis. Beyond that, the Supreme Court of South Dakota has suggested that the circumstances of prison life can be relevant in a death penalty case. See State v. Rhines, 548 N.W.2d 415, 453–54 (S.D. 1996). The petitioner in Rhines argued that the jury's question about whether prison conditions "might allow 'distraction from his punishment'" and whether he would be eligible for work release showed that the jury considered irrelevant or unfairly prejudicial matters. Id. The court rejected

[17]Judge Eckrich instructed the jurors at the beginning of trial that they must ignore any question to which he sustained an objection and should not try to guess what the answer might have been. Doc. 90 at 82.

this argument, explaining that "[p]rison life was an appropriate topic for discussion when weighing the alternatives of life imprisonment and the death penalty." Id. at 454; see also State v. Holden, 488 S.E.2d 514, 528 (N.C. 1997) (approving argument that the defendant would enjoy various privileges if the jury sentenced him to life in prison rather than death). This Court certainly does not read Rhines as allowing prosecutors to make a sentence of life in prison sound cushy, but there does not appear to be any prohibition per se in South Dakota on evidence about prison conditions that apply to a person serving a life sentence. Considering all the circumstances, the mistrial issue had a very low chance of succeeding. And while the guilty plea claim ultimately failed, it was a unique, thorny issue that had at least a chance of being resolved in Piper's favor. Fairminded jurists could disagree on the relative strength of the claims and the reasonableness of Miller's approach.

Third, the Supreme Court of South Dakota reasonably resolved Strickland's prejudice prong. This prong required Piper to show a reasonable probability that he would have won his appeal had Miller raised the mistrial claim. Carter v. Bowersox, 265 F.3d 705, 713–14 (8th Cir. 2001). Fairminded jurists could agree that Piper failed to make this showing given that television was referenced just once during the ten-day trial, Judge Eckrich sustained an objection to the question, the jury heard overwhelming evidence on the aggravating factors and the brutality of Poage's murder, and there does not appear to be any prohibition per se in South Dakota on evidence about prison conditions in death penalty cases. See State v. Dillon, 788 N.W.2d 360, 369 (S.D. 2010) (finding no abuse of discretion where trial court denied a mistrial motion after the prosecution's expert testified that the majority of people claiming to have been sexually abused are telling the truth); State v. Anderson, 546 N.W.2d 395, 401 (S.D. 1996) (holding that trial court did not abuse its discretion by denying a motion for mistrial after a witness testified that the

defendant was on parole; although a pretrial order precluded mention of the defendant's parole status, the evidence of guilt was overwhelming).

D. Claim IX: Investigation of Tom Curtis's Criminal History

Claim IX.E alleges that Van Norman and Stonefield were ineffective by failing to discover and use for impeachment Curtis's recent rape convictions. Doc. 67 at 135–37; Doc. 131 at 42–51.[18] Curtis testified at Piper's resentencing trial that a jury had convicted him (wrongly, according to Curtis) of eight cocaine distribution charges. Doc. 90-3 at 36–39. At the state habeas hearing, however, Van Norman testified that his paralegal had checked Curtis's record after Piper's resentencing trial and discovered that Curtis had been convicted of several rape charges concurrent with his cocaine distribution charges.[19] Doc. 90-11 at 50, 52, 101; see also Doc. 133 ¶ 37; Doc. 135 ¶ 37. Van Norman testified that Fitzgerald had provided a criminal history for Curtis at some point before Piper's resentencing but that this history did not include the Utah convictions. Doc. 90-11 at 49, 101. Van Norman acknowledged that he could have received the criminal history before Curtis's convictions for rape and cocaine distribution occurred and that he did not request an updated criminal history for Curtis right before trial. Id. at 49–50, 54, 94.

On appeal of Piper's habeas case, Kolbeck argued that the State had violated Piper's due process rights by not providing an updated criminal history that included Curtis's rape convictions and by permitting Curtis to lie under oath about his Utah convictions. Doc. 2-1 at 135–39. He

[18]Piper alleged in Claims IX.A–IX.D that the State violated his due process rights by (1) failing to disclose that Curtis was awaiting sentencing on rape convictions in Utah when he testified at Piper's resentencing trial in July 2011, and (2) failing to correct Curtis's omission of the rape convictions when describing his criminal history to the jury. Doc. 67 at 128–35. This Court granted summary judgment on those claims because they were procedurally defaulted, and Piper could not show cause for the default. Doc. 122 at 97–106.

[19]A 2013 opinion from the Utah Court of Appeals, over two years after Piper's resentencing trial, shows that a jury convicted Curtis of four counts of giving a minor female victim cocaine and four counts of raping her. State v. Curtis, 317 P.3d 968, 971–72 (Utah Ct. App. 2013).

also asserted that trial counsel was ineffective by failing to adequately investigate Curtis's criminal background. Id. Although Kolbeck's appellate brief cited Van Norman's testimony about the rape convictions, it appears that Piper's state habeas attorneys never offered a judgment or other document establishing that Curtis had, in fact, been convicted of rape in Utah. The State's appellate brief argued that Piper had not identified impeaching convictions that trial counsel had failed to discover, and that Piper was simply speculating that Curtis had convictions in Utah "beyond those that were known by his counsel and used as impeachment." State's Appeal Brief, 2018 WL 10152749, at *67–69 (July 10, 2018).

The Supreme Court of South Dakota rejected Piper's ineffective assistance claim, finding no prejudice because Piper had failed to show that an investigation of Curtis would have "yielded meaningful impeachment information." Piper IV, 936 N.W.2d at 815. Although the court noted that Curtis was awaiting sentencing in Utah "on felony charges" when he testified at Piper's resentencing trial, it did not specify what those "felony charges" were. Id. Respondents argued in an earlier round of briefing in this Court that Piper failed to offer evidence of Curtis's rape conviction in his state habeas case and that he could not do so now. Doc. 75 at 14–15; Doc. 97 at 31. Respondents now seem to accept that Curtis's rape convictions were part of the record before the Supreme Court of South Dakota, however. They argue that the court reasonably found the rape convictions would not have created a reasonable probability of a different result. Doc. 127 at 11–13; Doc. 134 at 9–12. Piper disagrees, pointing to the Supreme Court of South Dakota's holding that he could not show prejudice because his claim lacked "a predicate showing that the investigation would have yielded meaningful impeachment information." Piper IV, 936 N.W.2d at 815. He argues that this constitutes an unreasonable determination of fact and an unreasonable application of Strickland because the state court record shows that an appropriate investigation

would have revealed the meaningful impeachment evidence of Curtis's rape convictions. Doc. 131 at 49–50.

Determining whether the Supreme Court of South Dakota treated Curtis's rape convictions as part of the record is difficult; although Piper discussed the convictions in his brief, the State responded that he had failed to offer evidence of the convictions, and the court never mentioned the rape convictions in its opinion. State's Appeal Brief, 2018 WL 10152749, at *67 n.7 (July 10, 2018) ("Piper has presented no evidence to establish that the state suppressed Curtis' updated criminal records, or that updated records contained impeachment material. Piper's counsel . . . produced no documentation that Curtis had been convicted of a rape charge." (cleaned up)). Not knowing how or whether Curtis's rape convictions factored into the Supreme Court of South Dakota's decision also complicates analyzing whether AEDPA should apply. See Cooper v. Sec'y, Dep't of Corrs., 646 F.3d 1328, 1353 (11th Cir. 2011) (explaining that AEDPA deference does not apply when a state court unreasonably determines the facts relevant to a claim). But federal courts need not decide whether AEPDA deference applies when the petitioner's claim would fail even under de novo review. Berghuis v. Thompkins, 560 U.S. 370, 390 (2010). That is the situation here.

Piper argues that Curtis's testimony about the escape plan and Piper's lack of remorse was devastating[20] because it suggested he posed a danger in the future and was incapable of reform. Piper contends there is a reasonable probability that at least one juror would have discounted

[20]Curtis also testified to things Piper had told him about Poage's murder, including that Piper had said they were going to make Poage perform oral sex, that Piper had said the murder was his idea, that Piper thought Poage begging for his life was funny, that Piper and Hoadley stood on Poage's back and head when trying to drown him in the creek, and that Piper had said he participated in throwing rocks at Poage's head. Doc. 90-3 at 25–32.

Curtis's testimony and voted for life had counsel only impeached Curtis with the rape convictions and shown that he had lied about them. Doc. 131 at 48–49.

This Court disagrees. To start, Piper's argument assumes the jury would have disregarded the escape plan and his supposed remorselessness had counsel undermined Curtis's credibility with the rape convictions. But Curtis wasn't the only witness to testify about these issues. Kenneth Tingley, who was housed with Piper in the Lawrence County Jail before his first trial, testified that Piper had offered him money to kill a female guard so Piper could escape. Doc. 90-6 at 12, 24–25. According to Tingley, Piper discussed the escape plan with fellow inmates Tobe Givens[21] and "Tom." Id. at 24.[22] Tingley did not know inmate Tom's last name, but he was presumably referring to Tom Curtis. Id. Curtis likewise testified that Piper tried to enlist Tingley and Givens in his escape plan. Doc. 90-3 at 19–20, 46. And at least two other witnesses echoed Curtis's testimony that Piper lacked remorse for murdering Poage. Doc. 90-1 at 123–29, 145; Doc. 90-6 at 13. Given the ample evidence corroborating Curtis's testimony, the rape convictions would probably not have caused even one juror to discount the prison escape plan and Piper's supposed

[21]Tobe Givens, a prisoner with Piper at the Lawrence County Jail, testified about the plan at Piper's first trial. Doc. 121-2 at 617–628. Givens said that Piper offered him, Tingley, and Curtis money to "take out" two prison guards and help Piper escape. Id. at 619–20. He also testified about Piper seeming to have no remorse when recounting the brutal details of Poage's murder. Id. at 627. Reporting difficulty locating Givens to testify at Piper's resentencing trial, the State sought to read his testimony from the first trial into the record. Doc. 90-5 at 11–16. Judge Eckrich excluded Givens's testimony as cumulative to Curtis's and Tingley's testimony. Doc. 90-5 at 15–16; Doc. 90-6 at 2–3.

[22]Tingley was unavailable at Piper's resentencing trial, so the State read his testimony from Piper's first trial into evidence. Doc. 90-6 at 10. Piper now argues that Curtis's testimony was more important than Tingley's because Curtis testified in person. Doc. 138 at 11. But Judge Eckrich instructed the jury to consider Tingley's testimony just as it considered testimony by live witnesses. Doc. 90-6 at 10; Doc. 121-10 at 200. And Tingley's testimony did not somehow become less corroborative just because it was read into evidence. See Strickland, 466 U.S. at 695 ("The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision.").

lack of remorse. See United States v. Orr, 636 F.3d 944, 953 (8th Cir. 2011) ("[I]t is very difficult to show the trial outcome would have been different had specific [impeaching] questions been asked on cross examination, particularly where other trial testimony repeatedly corroborated the challenged testimony." (cleaned up and citation omitted)); United States v. Delana, 404 F. App'x 318, 322–23 (10th Cir. 2010) (unpublished) (holding that the defendant was not prejudiced by counsel's failure to impeach witness given "the substantial amount of evidence that otherwise corroborated [the witness's] testimony").

Next, Piper's argument ignores that Van Norman damaged Curtis's credibility even without the rape convictions. Van Norman elicited testimony from Curtis that he was a convicted burglar and thief who had spent multiple years in prison. Doc. 90-3 at 35–36. Incredibly, Curtis told Van Norman that he was completely innocent of his eight recent convictions for distributing cocaine. Id. at 37–39. Jurors could easily have inferred from this that Curtis would lie under oath. And while Piper is correct that knowing that four of these eight convictions were for rape and that Curtis had lied about them would have undermined Curtis's credibility to an even greater extent, the additional benefit would have been somewhat marginal considering the damage Van Norman did to Curtis's credibility and the other evidence corroborating the gist of Curtis's testimony. See Lowery v. Anderson, 225 F.3d 833, 843–44 (7th Cir. 2000) (holding that the defendant was not prejudiced by his lawyer's failure to impeach a witness with additional evidence where the witness's credibility had already been undermined and his testimony was corroborated by other witnesses).

Still another problem with Piper's argument is the significance it assigns to Curtis's testimony about the escape and Piper's lack of remorse. Although this testimony hurt Piper's case, it paled in comparison to the gruesome facts of Poage's murder. Again, near the start of this

brutality, a combat-boot clad Piper kicked the defenseless Poage in the face so hard that he knocked him unconscious. Piper and his accomplices then forced Poage to drink hydrochloric acid mixed with beer and discussed in Poage's presence various ways of killing him. They drove Poage to a remote location where they made him strip in the below-freezing night and tried burying him in the snow and drowning him in an icy creek. This didn't kill Poage, so Piper stabbed him in the head with a knife and kicked him with his combat boots. Piper stood by while Page and Hoadley similarly stabbed and beat Poage. Poage pleaded for mercy throughout the attack, but Piper and his accomplices ignored and taunted him. It was these horrendous facts that damaged Piper's case the most, not Curtis's testimony about Piper's escape plan and lack of remorse.

As yet another argument, Piper points to Kyles v. Whitley, a case where the Supreme Court found that the cumulative effect of evidence suppressed by the state raised a reasonable probability that its disclosure would have led to a different result. 514 U.S. 419, 441–54 (1995). Piper argues that Kyles shows that a lack of impeachment evidence can be prejudicial even when the prosecution introduces corroborating evidence. See id. at 445 ("[T]he effective impeachment of one eyewitness can call for a new trial even though the attack does not extend directly to others . . . ."). Though that may be true, the critical question is still whether Piper has shown a reasonable probability that, but for Van Norman's failure to impeach Curtis with the rape convictions, at least one juror would have voted for life. Piper has not made this showing, for the reasons already explained.[23]

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[23]Piper's case is also far different from Kyles. The "heart" and "essence" of the prosecution's case in Kyles was testimony from four eyewitnesses identifying the petitioner as the killer. Id. at 430, 441. Yet the prosecution never disclosed statements by the two most important eyewitnesses that would have "resulted in a markedly weaker case for the prosecution and a markedly stronger one for the defense." Id. at 441. The prosecution also failed to disclose statements from an informer that would have allowed the defense "to attack not only the probative value of crucial physical evidence and the circumstances in which it was found, but the thoroughness and even the good

Piper also cites to the Supreme Court's very recent decision in Glossip v. Oklahoma, 145 S. Ct. 612 (2025). Petitioner Glossip was convicted of paying Justin Sneed to murder Glossip's boss and received a death sentence. Id. at 618–19. As the star witness at trial, Sneed testified that Glossip had promised him thousands of dollars to commit the murder. Id. at 618. Sneed told the jury that jail personnel had given him lithium when he asked for medication for a cold and that he didn't know why this happened because he had never seen a psychiatrist. Id. at 620. The prosecution argued that Sneed "had no propensity to violence except at Glossip's direction." Id. at 621. After Glossip's conviction, the state released eight boxes of previously undisclosed documents, including:

- pretrial notes from the head prosecutor showing that Sneed had told the prosecutor that a doctor prescribed him lithium;
- medical records the prosecution had showing that the lithium was to treat Sneed's undisclosed bipolar disorder;
- pretrial letters from Sneed to his attorney asking about recanting his testimony; and
- a letter suggesting that the state had violated a sequestration order by speaking to Sneed about his testimony.

Id. at 618, 621–23.

The Supreme Court held that Glossip was entitled to a new trial under Napue v. Illinois, 360 U.S. 264 (1959),[24] because the state had failed to correct Sneed's false testimony and this failure was "material," meaning there was a "reasonable likelihood" that it "could have affected the judgment of the jury." Glossip, 145 S. Ct. at 626–28, 631 (cleaned up and citation omitted). "Evidence can be material," the Court explained, "even if it goes only to the credibility of the

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faith of the investigation, as well." Id. at 445. The net effect of this and other suppressed evidence created a reasonable probability that disclosure would have led to a different result. Id. at 441–54. Curtis's rape convictions have nowhere near the significance of the suppressed evidence in Kyles.

[24]Napue held that prosecutors have a constitutional duty to correct testimony they know is false. Glossip, 145 S. Ct. at 626.

witness." Id. at 628 (cleaned up and citation omitted). Since Sneed's testimony was "the only direct evidence of Glossip's guilt of capital murder," his credibility was material and indeed determinative of Glossip's case. Id. Correcting Sneed's false testimony, the Court found, would have significantly damaged his credibility by showing the jury that he "was willing to lie to them under oath." Id. This correction would also have undermined the prosecution's theory that Sneed was harmless without Glossip, as bipolar disorder can "trigger impulsive violence" when combined with Sneed's acknowledged methamphetamine use. Id.

Piper argues that Glossip draws a qualitative distinction between general evidence of untrustworthiness and evidence that the witness lied to the jury under oath. He contends that, like the Supreme Court in Glossip, this Court should find the evidence of lying under oath material even though there was other impeaching evidence. But Glossip is too dissimilar to help Piper. Most significantly, the prosecution's case in Glossip "rested centrally on Sneed's credibility." Id. at 629. In fact, there was no other evidence showing Glossip arranged the murder, and "the jury could convict Glossip *only* if it believed Sneed." Id. at 628 (emphasis added). Not so here. Curtis's testimony helped the State but was hardly central to its case for death. Testimony from Tingley included that Piper planned to kill a guard to escape, and testimony from Tingley and others would have allowed the jury to find that Piper lacked remorse even if the jury completely discounted Curtis's testimony. Beyond that, Curtis's testimony that he was innocent of all eight convictions for distributing cocaine already showed the jury that he would lie under oath; raising that four of those were actually rape convictions thus would not have had the same effect as the prosecutor correcting the false testimony in Glossip.

Piper finally argues that the case for death was no "slam dunk" because another jury sentenced Hoadley to life and two justices of the Supreme Court of South Dakota agreed in Piper

I, that Piper's sentence was disproportionate to Hoadley's sentence. The Supreme Court of South Dakota has explained at length why Piper is more culpable than Hoadley. Piper I, 709 N.W.2d at 815–18; Piper III, 842 N.W.2d at 348–49. And Piper's argument again overstates the significance of Curtis's testimony and the impact the rape convictions would have had.

Considering the evidence corroborating Curtis's testimony, the somewhat marginal benefit of impeaching Curtis with the rape convictions, and the horrendous nature of Poage's murder, Piper has not shown a reasonable probability that raising in cross-examination or otherwise Curtis's rape convictions would have caused at least one juror to weigh the aggravating and mitigating circumstances differently and vote for life. Respondents are entitled to summary judgment on Claim IX.E.

E. Claim XIII: Cumulative Prejudice

Claim XIII alleges that Piper is entitled to habeas relief because of the cumulative prejudice of the constitutional violations in his case. He argues that he raised this claim in his reply brief in Piper IV but says that the Supreme Court of South Dakota never addressed it. Doc. 67 at 168. Respondents did not move for summary judgment on Claim XIII in the last round of briefing because they did not realize it was a free-standing claim. Doc. 122 at 119–20. Respondents now move for summary judgment on the claim and summary judgment is appropriate. As Piper recognizes, the Eighth Circuit has held that neither the cumulative effect of trial errors nor the cumulative effect of attorney errors is a ground for habeas relief. Wainwright v. Lockhart, 80 F.3d 1226, 1233 (8th Cir. 1996); see also id. ("Errors that are not unconstitutional individually cannot be added together to create a constitutional violation."); Middelton v. Roper, 455 F.3d 838, 851 (8th Cir. 2006) ("We repeatedly have recognized a habeas petitioner cannot build a showing of

prejudice on a series of errors, none of which would by itself meet the prejudice test." (cleaned up and citation omitted)). Respondents are entitled to summary judgment on Claim XIII.[25]

IV. Conclusion

For the reasons stated above, it is

ORDERED that Respondents' Motion for Summary Judgment on Exhausted Claims, Doc. 126, is granted. It is further

ORDERED that Piper's Amended Petition for Writ of Habeas Corpus, Doc. 67, is dismissed. It is further

ORDERED that Piper's motion for a certificate of appealability and accompanying brief is due on May 1, 2025. This Court is familiar with the standard for certificate of appealability issuance in death penalty case appeals. Counsel may reference prior briefing or decisions of this Court in lieu of arguing about the substantiality of certain claims. The brief shall not exceed 20 pages. It is further

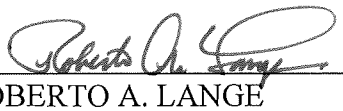
ORDERED that Respondents' reply brief is due on May 22, 2025, and shall not exceed 20 pages. It is finally

ORDERED that any reply brief from Piper is due by June 9, 2025.

DATED this 21st day of March, 2025.

[25]Piper asks this Court to find that he properly exhausted this claim by raising it in his reply brief before the Supreme Court of South Dakota. The Supreme Court of South Dakota does not consider arguments raised for the first time in a reply brief, Mach v. Connors, 979 N.W.2d 161, 173 (S.D. 2022); State v. Roedder, 923 N.W.2d 537, 545 (S.D. 2019), however, and courts have held that a petitioner procedurally defaults a claim raised for the first time in a reply brief when the state court's rules deem arguments raised in that manner waived, see Atwater v. Crosby, 451 F.3d 799, 810 (11th Cir. 2006).

BY THE COURT:



ROBERTO A. LANGE
CHIEF JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

BRILEY PIPER, Petitioner, vs. THE ATTORNEY GENERAL OF THE STATE OF SOUTH DAKOTA, THERESA BITTINGER, WARDEN, SOUTH DAKOTA STATE PENITENTIARY; Respondents.	5:20-CV-05074-RAL OPINION AND ORDER ON EXHAUSTION AND PROCEDURAL DEFAULT ISSUES AND GRANTING PARTIAL SUMMARY JUDGMENT TO RESPONDENTS

Petitioner Briley Piper, a state death row inmate, challenges his conviction and death sentence on multiple grounds. Doc. 67. Federal courts generally may not consider a state petitioner's habeas claims unless the petitioner has (1) presented or "exhausted" those claims in state court; and (2) done so in accordance with state procedural rules so as to avoid a "procedural default." Shinn v. Ramirez, 596 U.S. 366, 371 (2022). This Court structured the deadlines in this case so that it could decide whether Piper's claims were exhausted or procedurally defaulted before ruling on whether Piper is entitled to any relief on his claims. Docs. 54, 84. Consistent with this Court's order, Piper filed an amended federal habeas petition setting forth all his claims and identifying whether each claim was exhausted or unexhausted. Doc. 67. Piper argued that any procedural defaults should be excused because the state court applied a rule that was not adequate and independent or because there was cause and prejudice to overcome the default. Id. Respondents, Warden Theresa Bittinger and the South Dakota Attorney General, have now filed

four motions for summary judgment, Docs. 69, 72, 74, 77, arguing that none of Piper's procedural defaults can be excused, that res judicata is an adequate and independent rule barring review of some of Piper's claims, and that summary judgment is appropriate on the merits of other claims. This opinion and order addresses only exhaustion and procedural default.

I. Facts

A. Background and Procedural History

In April 2000, Chester Allan Poage's partially clothed body was found in a remote location in Lawrence County, South Dakota. Piper v. Young (Piper IV), 936 N.W.2d 793, 799 (S.D. 2019); State v. Piper (Piper I), 709 N.W.2d 783, 792 (S.D. 2006). Law enforcement identified Piper, Elijah Page, and Darrell Hoadley as suspects in Poage's murder and a related burglary at Poage's house. Piper IV, 936 N.W.2d at 799. The State of South Dakota (State) charged the three men with first-degree murder, kidnapping, first-degree robbery, first-degree burglary, and grand theft. Id. Attorneys Patrick Duffy and Timothy Rensch were appointed to represent Piper. Doc. 67 ¶ 3. In early 2001, Piper pleaded guilty to all five crimes, including the first-degree felony murder of Poage. Piper IV, 936 N.W.2d at 799 & n.1. A state court judge sentenced Piper to death after a three-day sentencing hearing. Id. at 800. The Supreme Court of South Dakota affirmed Piper's death sentence on direct review in 2006. Piper I, 709 N.W.2d 783.

Piper, represented by attorneys Steve Miller and Steven Binger, then filed a habeas petition in state court. Piper IV, 936 N.W.2d at 801–02; Doc. 67 at ¶ 6. The Supreme Court of South Dakota granted Piper habeas relief in 2009, finding that Piper did not validly waive his right to have a jury decide whether to impose the death penalty because the state trial judge had not made clear that Piper would receive a life sentence if even one juror voted against the death penalty.

Piper v. Weber (Piper II), 771 N.W.2d 352, 358–60 (S.D. 2009). The Court remanded Piper's case for resentencing by a jury. Id. at 360.

In August 2009, a state court judge appointed attorneys Robert Van Norman and Michael Stonefield to represent Piper in the resentencing proceeding. Doc. 67 at ¶¶ 7, 50; Doc. 2 at 288. Both men were experienced criminal defense attorneys: Van Norman, the Federal Public Defender for South Dakota from 1999 to 2003, had handled seven death penalty cases; Stonefield, a long-time state public defender, had worked on two death penalty cases. Doc. 90-11 at 7–8, 92, 115. The compensation vouchers Van Norman and Stonefield submitted show that they began investigating Piper's mitigation case almost immediately, including speaking with Piper's prior attorneys, researching potential mitigation specialists, gathering records, and wading through the voluminous files from Piper's prior case and the cases of Page[1] and Hoadley.[2] Doc. 121-4 at 458–473.

One of the records collected—and the one most relevant to Claim I of Piper's petition—was a February 1994 report prepared by Lyn Clark, M.D., when Piper was 13. Doc. 2 at 233–43; Doc. 66-1 at 5. Piper's mother Linda had Dr. Clark evaluate Piper because she was concerned about his impulsive behavior and wanted a second opinion. Doc. 2 at 233; Doc. 66-5 at 80–81. The "Medical History" section of Dr. Clark's report noted that Linda recalled smoking one pack of cigarettes per day while pregnant with Piper and consuming "some alcohol."[3] Doc. 2 at 235. Dr. Clark noted that Piper was born four to six weeks prematurely, developed mild neonatal

[1]Page pleaded guilty, received a death sentence, and has been executed. Piper IV, 936 N.W.2d at 800 n.5.
[2]Hoadley had a jury trial and received a life sentence. Piper IV, 936 N.W.2d at 800 n.5.
[3]Dr. Clark's full statement on Linda's drinking was as follows: "Mrs. Piper reports that she was anemic throughout her pregnancy. She smoked one pack of cigarettes per day and consumed some alcohol." Doc. 2 at 235.

jaundice, and suffered from vomiting for the first month of his life. Doc. 2 at 235; Doc. 66-1 at 5. She gave Piper a neurodevelopmental examination called the Pediatric Examination of Educational Readiness in Middle Childhood. Doc. 2 at 237. Dr. Clark concluded that attention deficit disorder (ADD)[4] was a "primary concern" for Piper but believed that ADD was "not the total explanation for [his] behavioral difficulties." Doc. 2 at 241. In Dr. Clark's view, the "extent of" Piper's aggression and the "seriousness" of his conduct were "not necessarily typical of students with primary" ADD. Id. Dr. Clark's report did not mention prenatal alcohol exposure or fetal alcohol spectrum disorders (FASD)[5] as a possible explanation for Piper's behavior. Doc. 2 at 233–43.

The compensation vouchers reflect that by September 2009, Van Norman was already researching mental conditions Piper potentially had and communicating with mitigation witnesses. Doc. 121-4 at 463–64, 466, 468. Van Norman and Stonefield moved to withdraw Piper's guilty pleas in October 2009, arguing among other things that he was never informed that he did not have to plead guilty to receive a court sentencing. Doc. 2 at 288, 339–49, 367–79. They filed several supplements to the motion and deposed a law enforcement officer about whether evidence had been withheld in Piper's earlier case. Doc. 2 at 381–88.

Compensation vouchers from Fall 2009 to Winter 2011 show continued work on Piper's mitigation case. Van Norman and Stonefield gathered more records, tracked down and interviewed witnesses across the country, researched mitigation specialists and potential expert

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[4]"The term 'ADD' refers to 'attention deficit disorder,' while 'ADHD' refers to 'attention-deficit/hyperactivity disorder.' ADD is an older term used for what is now known as the inattentive type of ADHD. The term ADHD is now commonly used to describe both inattentive and hyperactive types." Munday v. Lees-McRae Coll., 20-cv-00105, 2022 WL 17252598, at *2 n.2 (W.D.N.C. Nov. 28, 2022).

[5]FASD "is an umbrella term used to describe the spectrum of birth defects and neurologic impacts caused by maternal alcohol consumption during pregnancy." Doc. 62-3 at 2. It "affects the ability to make decisions, communicate, and control emotions." Anderson v. Kelley, 938 F.3d 949, 963 (8th Cir. 2019) (Kobes, J., concurring in part and dissenting in part).

witnesses, met with psychologist Dewey Ertz, and investigated Piper's potential psychiatric issues. Doc. 121-4 at 470–73; Doc. 121-5 at 301–03; Doc. 121-10 at 327–29, 335–36, 342–43, 350–52, 358, 369–71, 373–74, 381–82, 385–87, 392–93, 395–98, 406, 409, 412, 417–19, 423–24, 428–32, 439, 445–47. They had frequent contact with Piper's family and sent a health questionnaire to his mother Linda. Doc. 121-4 at 473; Doc. 121-5 at 302; Doc. 121-10 at 329, 350, 358, 369–71, 373–75, 381–82, 385, 395, 397, 408–09, 412, 417–18, 421–24, 430–32, 447. Van Norman also hired a jury consultant using his own money. Doc. 90-11 at 17; Doc. 121-10 at 369, 428, 495.

Judge Jerome A. Eckrich III denied Piper's motion to withdraw his guilty pleas in November 2010, over a year after it was filed. Doc. 2 at 388. In December 2010, Piper unsuccessfully petitioned the Supreme Court of South Dakota for permission to appeal Judge Eckrich's denial. Doc. 2 at 292, 414–29; Doc. 90-11 at 126–27. Judge Eckrich entered a scheduling order in early January 2011 setting Piper's sentencing trial for July 5, 2011. Doc. 121-5 at 456. Van Norman and Stonefield filed myriad motions in mid-January 2011, successfully moving to change the venue of the trial and to have appointed to the defense team Dr. Ertz, capital mitigation specialist Jeannette Sheldon, and an investigator. Doc. 121-5 at 461, 509, 523, 592; Doc. 121-8 at 379–85, 389–90.

Sheldon's role would be to investigate Piper's life history, flag issues that could warrant further evaluation, and prepare a narrative for her testimony in court. Doc. 88-1 at 6–14, 16–18, 21–22. She had over 200 hours of training in mitigation work and 70 hours of one-on-one training with forensic psychologists and psychiatrists. Doc. 90-6 at 219. An affidavit Sheldon submitted to the state court noted her 12 "years['] experience in assisting counsel in capital case proceedings, in determining the scope of investigation necessary for preparation and presentation of mitigation and other mental health claims, in conducting those investigations and in providing mental health

experts the kind of materials they routinely rely upon in their professions in order to offer reliable expert opinions." Doc. 121-6 at 40. Stonefield explained at a motion hearing that Sheldon had said that while the average number of hours necessary to do a "complete mitigation investigation" was over 1,000, she could do a "competent" job in Piper's case in 150 to 200 hours. Doc. 88-1 at 9–10. According to Stonefield, Sheldon did not need as much time as she would in a typical case because the defense team had already done some investigation and compiled documents and because there was less than typical life history to review given that Piper was just 19 years old when the murder occurred. Doc. 88-1 at 10–12; Doc. 66-1 at 5; see also Doc. 121-9 at 379 (affidavit from Sheldon explaining that she would need less time than in an average death penalty case because of "the age of the defendant and the amount of documentary evidence already compiled by the defense team"). At the same motions hearing, Stonefield explained that Dr. Ertz would review Piper's records for mitigation evidence. Doc. 88-1 at 20–23. Stonefield said that, like the psychologists in the Hoadley and Page trials, Dr. Ertz would testify about the mitigating factors of youth, drug use, and the group dynamic involved in the killing. Doc. 88-1 at 21–23. Judge Eckrich initially capped Sheldon's fees at $10,000 and Dr. Ertz's fees at $4,000. Doc. 2 at 430. He later granted an additional $5,000 for Sheldon's work. Doc. 2 at 432. In March 2011, Piper's parents gave his lawyers $10,000 to hire forensic neuropsychiatrist Hal Wortzel. Doc. 2 at 249–53; Doc. 90-8 at 76.

Sheldon began reviewing Piper's school, psychological, and court records in February 2011. Doc. 90-6 at 225; Doc. 121-9 at 377; Doc. 121-10 at 471. She prepared a 57-page social history for Piper that involved nearly 200 hours of work. Doc. 90-7 at 59; Doc. 66-1. As relevant here, the social history cited to Dr. Clark's evaluation and noted that Linda "smoke[d] one pack of cigarettes a day and consume[d] alcohol" while pregnant with Piper. Doc. 66-1 at 5. Sheldon also

discussed a diagnostic evaluation performed by psychologist Michael Rose on Piper in January 1994. Doc. 66-1 at 32–35; Doc. 66-6. Dr. Rose's diagnostic impression of Piper was that he had conduct disorder of an undifferentiated type. Doc. 66-1 at 34; Doc. 66-6 at 7. Dr. Rose's report mentioned nothing about FASD. Doc. 66-6.

Compensation vouchers from early 2011 leading up to the July trial show that Van Norman and Stonefield continued to develop Piper's mitigation case. They gathered and reviewed records, worked with Sheldon on the social history, interviewed more witnesses, and consulted with and provided documents to Dr. Ertz and Dr. Wortzel. Doc. 121-10 at 286–94, 301–02, 304, 456–59, 461, 477–81, 484, 488–97.

Dr. Ertz met with Piper twice before the trial for a total of about five hours and interviewed him "extensive[ly]" about his background and the murder. Doc. 90-7 at 183–85, 190. He also reviewed many documents, including Sheldon's social history, the evaluations from Dr. Clark and Dr. Rose, and evidence about Hoadley and Page. Doc. 90-7 at 188–89, 201. He did not evaluate Piper, perform any tests, or write a report, however. Doc. 90-8 at 26, 32, 40. He testified at trial that "[t]here didn't seem to be a lot of purpose to evaluate Briley Piper psychologically 11 years after the murder." 90-8 at 26.

Dr. Wortzel met with Piper for about four hours and reviewed his school and psychological records as well the social history Sheldon prepared. Doc. 90-8 at 81, 85, 104. Dr. Wortzel did not prepare a written report (nor had Van Norman and Stonefield requested one) or administer any test to Piper. Doc. 90-8 at 104–05, 133–36.

B. Resentencing Trial

1. Voir Dire

Judge Eckrich sent an eight-page questionnaire to the potential jurors in late May 2011. Doc. 121-9 at 191–204. Although the questionnaire was shorter than the one Piper had proposed, Doc. 121-8 at 506–27, it did include questions about whether the potential jurors or someone close to them had ever been the victim of a crime, what the jurors knew about Piper's case, how they would respond to certain mitigating evidence, and their thoughts on the death penalty, Doc. 121-9 at 195–201. Among other things, the questionnaire asked whether the potential jurors felt "that the death penalty is used too often or too seldom," whether they believed in an "eye for an eye," and whether they believed that the "State should impose a death penalty on everyone who, for any reason, intentionally kills another person." Id. at 200.

Voir dire began on July 5 and lasted more than seven court days. Doc. 89; Doc. 89-13. Piper had moved for 10 additional peremptory strikes beyond the 20 already guaranteed by statute, Doc. 121-5 at 535–36; SDCL § 23A-20-20, but Judge Eckrich concluded that one extra peremptory strike for both sides was sufficient, Doc. 121-8 at 448–49. Judge Eckrich split voir dire into sessions involving 15 potential jurors at a time. Doc. 88-2 at 3. Counsel for both sides would examine the jurors individually and exercise any challenges for cause while the remaining jurors were sequestered. These sessions would continue until there was a panel of 57 potential jurors, after which the parties would exercise their peremptory strikes. Doc. 89 at 34–35.

As relevant to Piper's petition, the third potential juror voir dired was Lisa Sagdalen. Doc. 89 at 73. Sagdalen had written in her juror questionnaire that her best friend was a deputy with the Pennington County Sheriff's Office, that she had read all the newspaper articles about the case, and that she had formed an opinion about the case: that Piper had chosen to plead guilty and "need[ed] to accept" the judge's decision. Doc. 2-2 at 160–62. She also indicated, however, that she did not believe the death penalty was appropriate in every case involving an intentional killing

and that she would want to hear all the circumstances surrounding a killing before deciding whether to impose a death sentence. Doc. 2-2 at 163.

Van Norman's voir dire of Sagdalen focused first on her knowledge about the case. Doc. 89 at 75. Sagdalen confirmed that she knew "quite a bit" about Piper's case, that she had "read all the newspaper articles," and that she had discussed the case "a lot" with her friends in the Pennington County Sheriff's Office. Id. She also confirmed that she had already formed an opinion:

> **Van Norman**: I take it from what you're saying, and please correct me if I'm wrong, that you believe that the death sentence that was imposed by that Judge some years ago should stand.
> **Sagdalen**: I do.
> **Van Norman**: Okay. And that's a firmly held belief, I take it.
> **Sagdalen**: Yes. That's how I believe, I mean.
> **Van Norman**: No, that's fine. I take it then for me to have you sitting in that jury box, on behalf of my client from his perspective - - well, let's put it this way: if you were seated - - seated in his position with a juror with your feelings would you think it would be fair, from your perspective?
> **Sagdalen**: I don't know, I - - I know that I would try and do my best to be as fair as possible sitting there.
> **Van Norman**: Right.
> **Sagdalen**: I don't know. I don't know.
> **Van Norman**: Could you envision being a juror giving your opinions and actually imposing a life sentence on Briley as opposed to a death sentence?
> **Sagdalen**: I would do my best to take what was said in the courtroom and use that instead of what I previously read and heard and such.

Id. at 77–78. Sagdalen was ambivalent when questioned further about whether she could put her opinion aside, saying she "d[id]n't know" whether she could do so and that she could not say that "yes, I could throw everything aside." Id. at 78. Van Norman challenged Sagdalen for cause after she agreed again that she already had "a pretty firm opinion as to how the case should come out." Id. at 79.

The prosecutor, John Fitzgerald, examined Sagdalen next. Sagdalen testified that although she had formed an opinion about the case and could not guarantee she could set aside everything she had read, she "might" change her opinion if she learned something new during trial. Id. at 80. Fitzgerald said he would "defer to the Court" and did not make any argument on Piper's challenge of Sagdalen. Id. at 81.

Judge Eckrich then took a turn speaking with Sagdalen. He used the famous example of President Truman holding a newspaper wrongly declaring that Thomas Dewey had won the 1948 presidential election to illustrate why jurors must decide cases on the evidence presented in court rather than on what they read in the media. Id. Judge Eckrich then asked for an "honest answer" on whether Sagdalen could be fair to both sides and decide the case based only on the evidence presented in court. Id. at 82. Sagdalen said she believed she could, and Judge Eckrich followed up by asking "so despite what you read about what the prior Court did or any sentence, you could give Mr. Piper a fair shake and start from square one and . . . listen to the evidence, and make your decision based on the evidence as instructed and apply it to the law as given to you?" Id. at 83. Sagdalen said "Yes," and Judge Eckrich denied the challenge for cause. Id.

Van Norman resumed speaking with Sagdalen, explaining that Judge Eckrich just wanted the jurors to follow the law and that there were no right or wrong answers to the questions being posed. Id. Sagdalen confirmed that her best friend was a deputy with the Pennington County Sheriff's Office and said she relied on the deputy's opinions "[v]ery highly" because they had known each other for over 30 years. Id. at 83–84. She explained, however, that although she had probably spoken with the deputy about Piper's case in the last year or two, she could not recall a specific conversation about it. Id. at 84–85. Van Norman then asked Sagdalen about her comment in the juror questionnaire that she did not agree that "those convicted and sentenced should have

years and years of appeals to continue on 'death row' wasting taxpayer dollars." Id. at 85. Sagdalen testified that this comment was a "general" one and not specific to Piper's case. Id. at 86–87. Van Norman then returned to Sagdalen's comment about Piper needing to accept his sentence:

> **Van Norman**: Okay, yeah. And what I was doing was taking you back to your earlier answer that, "Mr. Piper needs to accept the Judge's decision as that was his choice."
> **Sagdalen**: Uh-huh.
> **Van Norman**: And isn't that really what you're saying, that Mr. Piper should just shut up and sit down and accept the death sentence?
> **Sagdalen**: I guess in a sense. What my thought was on that was he chose to plead guilty, he knew that the Judge had the opportunity of two choices, and that when he pled guilty he accepted that - -
> **Van Norman**: Yeah.
> ....
> **Van Norman**: What concerns me about that isn't that you have an opinion, it's - - what concerns me, what worries me is whether you can set that aside. And let me put it this way, and I talked about it earlier: I don't want to start out with an extra burden. And correct me if I'm wrong, you really do have strong opinions about this case, don't you.
> **Sagdalen**: I have an opinion.
> **Van Norman**: Yes, and you said that you did have an opinion, I appreciate that, and it's what we just recited there, right?
> **Sagdalen**: Yes, but I guess after what the Judge had said I am - - I don't know, I guess I feel I'm intelligent enough or social enough that I can take what is given to me and what I need to do.
> **Van Norman**: Do you - - can you sit here and visualize yourself being on the jury, first of all, and visualize yourself coming back into this court and saying, "No, I want life without parole for Mr. Piper?"
> **Sagdalen**: If that's presented I can with what I hear.

Id. at 87–88. Sagdalen then agreed that she could meaningfully consider mitigating evidence. Id. at 89–91, 94–96. Van Norman renewed his challenge for cause to Sagdalen, but Judge Eckrich denied it. Id. at 97.

Dennis Anthony was the fifth potential juror voir dired. Anthony had expressed concern in his juror questionnaire about the costs of imprisoning someone for life and had commented that the appeals process lasts too long in death penalty cases. Doc. 2-2 at 150–51. He also checked "Yes" when asked "Do you believe the State should impose a death penalty on everyone who, for any reason, intentionally kills another person?" Id. at 151. Van Norman questioned Anthony on all these topics, particularly on whether he would be an automatic vote for the death penalty. Doc. 89 at 126–42. Although Anthony initially seemed to affirm his response in the questionnaire that everyone who intentionally kills should get the death penalty, he went on to explain that he would want to hear the evidence before voting for a death sentence and that he could envision imposing a life sentence on someone in Piper's situation. Id. at 133–42. Van Norman passed Anthony for cause. Id. at 142.

Dan Carlin, the last potential juror relevant to Piper's petition, underwent voir dire a few days later. Carlin disclosed in his juror questionnaire that his niece had been murdered and that he was unhappy with the perpetrator's sentence. Doc. 2-2 at 133. He believed in an "eye for an eye" and that people who kill should be willing to forfeit their own lives. Doc. 2-2 at 135. Carlin initially told Stonefield that, given his experience with his niece, he would "[p]robably not" want himself on the jury were he in Piper's shoes. Doc. 89-6 at 83. Stonefield then challenged Carlin for cause, id. at 83, but Judge Eckrich denied the challenge after questioning by Fitzgerald, id. at 85. Under further questioning from Stonefield, Carlin testified that he did not think the death penalty would be appropriate in every murder case. Id. at 91. When Carlin said that mitigatory evidence of Piper's troubled childhood would not matter to him, however, Stonefield renewed the challenge for cause. Id. at 94–95. Fitzgerald then questioned Carlin and objected to the challenge after Carlin agreed that he would follow the instructions and would consider both mitigating and

aggravating evidence before reaching a verdict. Id. at 96–99. Judge Eckrich spoke with Carlin next, asking Carlin how he solves problems in his job as a mechanic and whether he could follow the instructions and consider mitigatory evidence of a troubled childhood despite his personal opinions. Id. at 99–105. Carlin agreed that he could, and Judge Eckrich denied the challenge for cause. Id. at 104–05. Judge Eckrich made a record once Carlin left the courtroom, reciting the standard for juror bias in capital cases and explaining that, after listening to the whole voir dire and considering the juror questionnaire, he did not believe that Carlin's views would substantially impair his duty to be impartial. Id. at 108–09. Piper's attorneys used peremptory strikes on Sagdalen and Carlin, but Anthony ended up on the jury. Piper IV, 936 N.W.2d at 812.

2. Final Pretrial Conference and Opening Statements

The trial began on July 18, 2011. Doc. 90 at 13. Judge Eckrich held a final pretrial hearing that morning in chambers. Id. at 18–19. One of the issues discussed was Piper's sexual orientation. Id. at 24–25. Piper had filed a motion in limine in January 2011 seeking to prohibit any evidence or argument that he was bisexual or had sexual relationships with other men. Doc. 121-5 at 551–53. He claimed that the State had presented evidence of this nature in his first trial and cited to the testimony of a man named Russell Olson in support.[6] Id. Judge Eckrich entered a terse order in mid-June 2011 granting Piper's motion under the "[s]ame circumstances and ruling as Motion in Limine #6."[7] Doc. 121-9 at 316. Fitzgerald sought reconsideration of this ruling at the pretrial hearing, arguing that Piper's sexual orientation tied in with evidence that Piper had forced Poage

[6]Russell Olson testified in the first trial that he had sexual relations with Piper. Doc. 121-2 at 525.
[7]Judge Eckrich's ruling on motion in limine six stated that the State had agreed to that motion during a January 28, 2011 hearing. Doc. 121-9 at 316. This Court read the transcript from that hearing, however, and did not see where the State agreed to Piper's motion to exclude evidence that he was bisexual or had sexual relationships with men. See Doc. 88-1. Rather, the transcript reflects that Judge Eckrich said he would defer ruling on Piper's motions in limine. Doc. 88-1 at 64–65.

to strip naked and asked Poage to perform fellatio on him, Hoadley, and Page. Doc. 90 at 24. Judge Eckrich said he would "stand by [his] prior ruling excluding it." Id. at 25.

The final pretrial conference also included a discussion on whether prison privileges would be admissible. Id. at 28–29. Stonefield asked that the State be prohibited from mentioning the privileges available to inmates serving life sentences. Id. at 29. Judge Eckrich questioned the relevance of particular privileges like cable television or reading subscriptions and directed Fitzgerald to "stay away from any kind of specifics" in his opening statement. Id. at 30–34.

In opening statements, Fitzgerald said the evidence would show that Piper had told a fellow inmate at the Lawrence County Jail that he, Page, and Hoadley had made Poage strip because they wanted him to give them "blow jobs." Id. at 96–97. Van Norman objected, and the transcript reflects that the parties had an off-the-record discussion. Id. at 97. Fitzgerald resumed his opening statement, saying that Piper had told inmate Tom Curtis that the purpose of having Poage disrobe was because the trio wanted Poage to give them oral sex. Id. Piper's counsel did not object this time. Id. Fitzgerald proceeded to tell the jury that Piper had said that Poage was forced to disrobe because Page "got some sort of a pleasure from watching men strip" and that Page threatened to "'have Russell come down here and rape [Poage's] ass.'" Id. at 104. According to Fitzgerald, Piper found Page's threat amusing. Id.

3. Trial

For Piper to be eligible for the death penalty, the State needed to prove at least one of the aggravating factors listed in SDCL § 23A-27A-1. Piper I, 709 N.W.2d at 797; Doc. 90-10 at 6. If the jury found one of these factors beyond a reasonable doubt, it would then consider any

mitigating circumstances[8] and whether Piper should be sentenced to death or life without parole. Doc. 90-10 at 9, 19–20; SDCL § 23A-27A-1. The State argued that three aggravating factors existed in Piper's case: (1) the killing was "outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery;" (2) Piper had killed Poage for money or profit; and (3) Piper had killed Poage to avoid detection. Doc. 90 at 80–81.

The State presented extensive evidence on all three factors. The State's witnesses testified that Piper, Page, and Hoadley developed a plan to rob Poage while playing video games at his house on the evening of March 12, 2000. Doc. 90-3 at 64–65; Doc. 90-4 at 9–12; State v. Piper (Piper III), 842 N.W.2d 338, 345 (S.D. 2014). The three men lured Poage away from his home to a house where they had been staying. Doc. 90-3 at 65; Doc. 90-4 at 14. Inside, Page pulled a .22 caliber pistol he had stolen from Poage's home and ordered Poage to the floor. Doc. 90-3 at 65; Doc. 90-4 at 14–15; Piper III, 842 N.W.2d at 346. As Poage lay on his stomach, asking why his supposed friends were doing this, Piper kicked him in the face, knocking him unconscious. Doc. 90-3 at 26, 64–65; Doc. 90-4 at 16–17; Doc. 95 at 5–6; Piper III, 842 N.W.2d at 346. Poage's hands and feet were bound, and he was propped upright in a chair. Doc. 90-3 at 65; Doc. 90-4 at 19–22; Doc. 90-6 at 16; Piper III, 842 N.W.2d at 346. Poage, upon regaining consciousness, could overhear Piper, Page, and Hoadley discuss ways to kill him, including slitting his throat or drowning him. Doc. 90-3 at 27, 65; Doc. 90-4 at 22–23, 29–30. Piper stood on a four-way tire iron across Poage's ankles while Page and Hoadley forced Poage to drink a mixture of beer and

[8]The jury instructions in Piper's case defined a mitigating circumstance as "one which, while not constituting a justification or excuse for the crime, should in fairness and mercy be considered as reducing the degree of moral culpability or blame of the defendant, or otherwise offering a basis for not imposing the death penalty." Doc. 90-10 at 19.

hydrochloric acid. Doc. 90-4 at 25–28; Doc. 90-6 at 17; Doc. 90-8 at 114; Piper III, 842 N.W.2d at 346, 350. The acid hurt Poage's stomach but did not kill him. Doc. 90-4 at 26.

Piper, Page, and Hoadley decided that it would be best to kill Poage elsewhere. Doc. 90-3 at 65; 90-4 at 32–33. They put Poage in his Chevrolet Blazer and drove to a remote, wooded area in the Black Hills called Higgins Gulch. Doc. 90 at 179; Doc. 90-3 at 65; Doc. 90-4 at 31. Once there, Piper and Page forced Poage out into a foot of snow, in the below-freezing night, and made him strip to nothing but a tank-top shirt and his socks and shoes. Doc. 90 at 189–91; Doc. 90-4 at 35–36. The three then tried burying Poage in the snow, Doc. 90-4 at 53; 90-8 at 55, 123; 90-6 at 19, and drowning him in a nearby creek, Doc. 90-1 at 124; Doc. 90-4 at 47; 90-6 at 22, but Poage remained alive, Piper III, 842 N.W.2d at 346. Piper would later admit that he kicked Poage multiple times in the head and body with combat boots while out at Higgins Gulch. Doc. 90 at 127–34, 151–53, 167–68; Doc. 90-3 at 66; Doc. 90-8 at 55–56, 121; Doc. 95 at 32, 35–36, 52; Piper III, 842 N.W.2d at 346, 350.

Poage tried to escape sometime during the attack, but according to Hoadley, Piper told Page to bring him back. Doc. 90-4 at 43; Piper III, 842 N.W.2d at 346. The three then each stabbed Poage once with a buck knife. Doc. 90-4 at 46–49, 118–19; Doc. 90-7 at 194; Doc. 90-8 at 121, 125. According to Hoadley, Piper went first, stabbing Poage in the side of the head. Doc. 90-4 at 46–47, 118–19; Doc. 90-5 at 43. Poage's stab wounds were potentially lethal, but he did not die immediately. Doc. 90 at 147; Doc. 90-4 at 125. Instead, Poage asked to get in the Blazer so that he could bleed to death where it was warm. Doc. 90-1 at 127; Doc. 90-3 at 29; Doc. 90-4 at 54, 124; Piper III, 842 N.W.2d at 346, 350. The three told Poage that they would grant his request if he washed the blood off his body in the creek first. Doc. 90-4 at 54–56, 124. Poage complied but was still not allowed in the vehicle. Doc. 90-1 at 127; Doc. 90-4 at 54–56, 124.

Piper retreated to the Blazer after which Page and Hoadley dropped heavy rocks on Poage's head to complete the murder. Doc. 90-3 at 66–67; Doc. 90-4 at 57–58; Piper III, 842 N.W.2d at 346. The three left Poage's body in the creek and drove back to Spearfish where they looted Poage's home. Doc. 90-4 at 57–59; Doc. 90-3 at 33, 67; Doc. 95 at 18; Piper III, 842 N.W.2d at 345. They eventually pawned some of Poage's possessions and used his ATM card to steal cash from his bank account. Doc. 90-4 at 61, 68; Doc. 90-6 at 89; Doc. 95 at 24, 95–96; Piper III, 842 N.W.2d at 345.

All told, the kidnapping and murder of Poage lasted about four hours. Doc. 90-4 at 44–45, 122; Doc. 95 at 49. The State presented evidence at trial that Poage had begged for his life throughout the ordeal and that Piper taunted Poage as he was brutalized. Doc. 90-1 at 126, 175; Doc. 90-3 at 26–27, 30; Doc. 90-4 at 33, 48, 51; Doc. 90-6 at 20; Doc. 95 at 40, 70; Doc. 90-8 at 122; Piper III, 842 N.W.2d at 347, 350. Hoadley admitted that he and his codefendants killed Poage to eliminate him as a witness, Doc. 90-4 at 51, and the State offered other testimony that Piper had said that "things had gotten so bad that they had to" kill Poage, Doc. 90-1 at 176. At least two witnesses testified that in the months just before the murder, Piper had said that he wanted to know what it was like to kill someone. Doc. 90-1 at 128; Doc. 90-5 at 168. Other witnesses who were housed with Piper in the Lawrence County Jail before his first trial testified that Piper had offered them money to kill two guards so that he could escape. Doc. 90-3 at 13, 15–16, 19–23; Doc. 90-6 at 12, 23–25. One of these witnesses was Tom Curtis.

Curtis met Piper at the Lawrence County Jail in 2000 and testified at Piper's first trial. Doc. 121-2 at 574, 577–78; Doc. 90-3 at 15–16. He was in custody in Utah during Piper's second trial, but the State had him returned to South Dakota via an interstate subpoena to testify. Doc. 90-3 at 15–16. A few days before Curtis took the stand, Piper made an oral motion to prohibit

Curtis from testifying as he did in the first trial that Piper had disclosed that "[t]hey made [Poage] strip down, said that he was going to perform oral sex on them." Doc. 121-2 at 585; Doc. 90-1 at 2–3, 111, 187–88, 192–93. Judge Eckrich declined to exclude this testimony, finding it different from the sort of sexual orientation evidence he thought Piper had been seeking to prohibit:

> Okay. Now, that -- we had a brief discussion yesterday because it came up in the opening a little bit. I don't -- to be honest with you, I don't see that as a sexual orientation reference. It's a -- might be an aggression reference, it might be an assault reference, but it's -- I suppose it's to -- it's to sexual orientation as rape is to sex. There isn't really a connection. I don't regard it that way. "They" said "he" "perform oral sex on them." To that extent, if that's the -- if that was going to be the -- if that's the objectionable material based on sort of a constitutional sexual orientation argument I would deny it.

90-1 at 193. Judge Eckrich later reaffirmed his ruling on Curtis's testimony, saying that references to oral sex out at Higgins Gulch were admissible and "part of the res gestae." Doc. 90-3 at 8–9.

Curtis thus testified about the oral sex reference at Piper's trial. He explained that Piper had said that he and his accomplices forced Poage to disrobe out at Higgins Gulch because they planned to make him give them "blow job[s]." Id. at 27–28. Curtis said that he did not know, however, whether the three men actually made Poage fellate them. Id. at 28. Van Norman objected to Curtis's testimony, but Judge Eckrich overruled him. Id. at 27.

Although Curtis also testified about several other topics, the one most relevant here is his criminal history. Clad in jail garb, Curtis testified on direct that he was imprisoned in Utah and was awaiting sentencing on some recent felony convictions. Id. at 11–12. Van Norman revisited Curtis's criminal history on cross:

> **Van Norman**: Okay. How many felonies have you been convicted of over the years?
> **Curtis**: How many have I been convicted of?
> **Van Norman**: Yeah.

Curtis: Approximately two that I have been convicted of. I have been accused of many more but I have been convicted of I think two.
Van Norman: Okay.
Curtis: A burglary and a theft.
Van Norman: A burglary and a theft?
Curtis: Yes.
Van Norman: Okay, and what have you been convicted of that you're incarcerated for now?
Curtis: For possession with intent to distribute.
Van Norman: What?
Curtis: Cocaine.
Van Norman: And that would be another conviction - -
Curtis: Yeah.
Van Norman: - - right? How much time are you facing?
Curtis: I have no idea yet and I won't know until I go to court.
Van Norman: I thought you said you were just awaiting sentencing.
Curtis: I am awaiting sentencing.
Van Norman: You have an attorney, don't you?
Curtis: But it carries - - it carries a five-to-life and I don't know what the Judge is going to do on that.
. . . .
Van Norman: Okay. And [your lawyer] has explained to you what you might get, right?
Curtis: No, he has not yet. I - - when you're - - when you get your papers you know what it is. There is first, second and third degree felonies, mine was a first degree felony, which is a five-to-life.
Van Norman: That's the highest rated felony?
Curtis: Yes.
Van Norman: How much cocaine?
Curtis: I did not have any cocaine, I was accused of having cocaine.
Van Norman: Okay, so you're taking a false rap here, right, with regard to the cocaine?
Curtis: Yes, I am.
Van Norman: You have explained that to your attorney?
Curtis: My attorney is aware of that, yes.
Van Norman: And you have actually gone to court and pled guilty in front of a Judge even though it's a false charge.
Curtis: No, I did not go to court and plead guilty to it, I was found facility [sic].
Van Norman: Oh, you went to trial?
Curtis: Yes.
Van Norman: I'm sorry.
Curtis: That's okay.
Van Norman: Yeah. And how many charges were you found guilty of?
Curtis: There was eight charges.

Van Norman: Eight?
Curtis: Eight distributors.
Van Norman: And you were charged - - charged with eight distributions, right?
Curtis: Yeah.
Van Norman: And you were found guilty of eight distributions?
Curtis: Okay.
Van Norman: And all eight of the incidents are false.
Curtis: Yes, it is.

Doc. 90-3 at 36–39. Curtis did not testify to nor was he asked about convictions for sexual assault.

Trouble arose during the State's case in chief when Fitzgerald asked Brad Woodward, a unit manager at the Penitentiary, whether inmates were allowed to have television. Doc. 90-2 at 104, 121–22. Woodward responded "Yes," and Van Norman immediately objected. Id. at 121. Judge Eckrich sustained the objection and called a recess. Id. Van Norman then moved for a mistrial, arguing that Fitzgerald had violated Judge Eckrich's "direct order in chambers" prohibiting evidence of "television and other privileges" available to prisoners. Id. at 121–22. Judge Eckrich admonished Fitzgerald for "stepp[ing] over the line" but denied Piper's motion, finding that the brief reference to inmates having television did not justify a mistrial. Id. at 122. Judge Eckrich prohibited Fitzgerald from making any further reference to privileges in prison.[9] Id.

The State also offered testimony from psychiatrists Ulises Pesce and Ronald Franks and counselor Robert Fredrickson. Dr. Pesce saw Piper over ten times between 2001 and 2004 while working at the South Dakota State Penitentiary in Sioux Falls. Doc. 90-2 at 57. He prescribed Piper medication and assessed him as having antisocial personality disorder. Doc. 90-2 at 65–66, 69, 83. Dr. Pesce testified that conduct disorder is basically the child version of antisocial

[9]Neither party cites to where Judge Eckrich's order on prison privileges appears in the record. Doc. 75 at 12; Doc. 67 at 94–97. Van Norman's reference to a "direct order in chambers" appears to refer to the pretrial hearing Judge Eckrich held in chambers. Doc. 90 at 18–19.

personality disorder, and that a childhood diagnosis of the former often precedes an adult diagnosis of the latter. Id. at 76, 96–98. He explained that violence, manipulation, deceitfulness, and a lack of empathy were all associated with antisocial personality disorder. Doc. 90-2 at 78. When asked about ADHD, Dr. Pesce said that the condition is linked to trouble in school and agitation, but that it does not cause violence. Id. at 72–73. He described Piper as feeling that his death sentence was a "terrible crime" the State committed against him. Id. at 61.

On cross-examination, Dr. Pesce conceded that he had only seen Piper for eight hours total and that ADHD can have very significant effects on a person's life. Id. at 80, 85. He also agreed that the brain's frontal lobes are not fully mature when a person is 20 years old, that development of the frontal lobes is directly related to impulse control and an appreciation for consequences, and that ADHD can exacerbate problems associated with underdeveloped frontal lobes. Id. at 86–87. Dr. Pesce likewise acknowledged that ADHD and antisocial personality disorder would "directly" affect a 20-year-old's ability to make good choices. Id. at 99.

Dr. Franks never met with Piper but did review his social history and psychological records from the penitentiary. Doc. 90-3 at 79, 86. He testified that ADHD makes it difficult to focus but that children with ADHD are no more likely to be violent than children without ADHD. Id. at 76–79. Dr. Franks told the jury that children with conduct disorder can still control their behavior, id. at 85–86, and identified instances in Piper's social history where he had behaved well, id. at 79–80. He testified that an enabling home environment—such as when a parent refuses to consistently punish misbehavior and hold a child accountable—can worsen conduct disorder, id. at 84–85, 101, and that Dr. Rose had diagnosed Piper with conduct disorder when he was 13 or 14, id. at 130.

According to Dr. Franks, Piper's social history and penitentiary records did not reveal any evidence that Piper had a brain disease or neurological damage. Doc. 90-3 at 87. "[I]n fact," Dr.

Franks explained, "[Piper] had a very thorough neurological assessment when he was in the seventh grade and they did not find evidence of neurological deficit" or damage. Id. at 87; see also id. at 91 (stating that Dr. Clark's evaluation did not show any evidence of neurological deficits). Dr. Franks also testified that he saw little connection between frontal lobe development and the type of violence done to Poage, id. at 95, and that people with antisocial personality disorder can control their impulses but are sometimes unwilling to do so, id. at 98–99. On cross, Dr. Franks acknowledged that at least two authorities had recommended that Piper receive residential treatment but that such treatment never occurred. Id. at 104–05, 119.

Penitentiary counselor Robert Fredrickson saw Piper regularly between June 2008 and March 2009 while doing rounds in Piper's housing area. Doc. 90-5 at 96–97, 101, 103, 111, 121. He testified that there were times Piper exhibited antisocial traits like a lack of remorse, superficial charm, and little concern for something unless it involved himself. Id. at 103–04. He also recalled one interaction where Piper had displayed "strong traits of narcissism," id. at 106, and testified that Piper is "quite intelligent," id. at 107. Fredrickson admitted on cross-examination that Piper had never been rude or combative with him and that Piper taking college courses in prison was a positive sign. Id. at 110–11, 113.

Piper's defense focused largely on presenting mitigatory evidence. Testimony from Linda and Sheldon sought to humanize Piper, highlight his ADHD and learning disability, and explain his difficult upbringing. Doc. 90-6 at 129–207, 218–51; Doc. 90-7 at 2–121. Prison counselor Justin Falon testified about Piper's drive to educate himself by taking college correspondence courses and about his positive overall impression of Piper. Doc. 90-7 at 121–77.

A prison chaplain and a nun, Sister Gabrielle Crowley, also testified on Piper's behalf. Doc. 90-8 at 149–89. Sister Crowley testified that she met Piper about three and a half years before

trial when she started giving him Spanish lessons over the phone. Id. at 151. Piper was studying to become a Catholic, Sister Crowley explained, and she served as his godmother when he was baptized in April 2008. Id. at 152. She began regular in-person visits with Piper thereafter, during which they would discuss spiritual matters, Piper's family, his close relationship with his nieces, his studies, and his desire to please his parents with good grades. Id. at 154–57. Sister Crowley testified that she had a "very deep relationship" with Piper given their "spiritual connection," and that she felt like "family to him, like I belong to their family." Id. at 157. Fitzgerald's cross-examination of Sister Crowley focused on a letter she had written to a female inmate at Piper's request. Sister Crowley agreed with Fitzgerald that prison policy prohibited inmates from writing each other and that her letter violated this policy. Id. at 158–60. Fitzgerald closed his cross-examination by asking whether Piper had "manipulated your friendship" to get Sister Crowley to do something he could not. Id. at 160–61. Sister Crowley replied that she did not view "it that way" when she wrote the letter because she did not recall that doing so was against prison policy. Id. at 161.

Dr. Ertz testified about Piper's extensive pre-incarceration abuse of marijuana and LSD, and the negative effects these drugs have on a person's reasoning and mental health. Doc. 90-7 at 195–98. He agreed with Piper's ADHD diagnosis but questioned Dr. Rose's conclusion that Piper had conduct disorder. Id. at 199–203, 205. Among other things, Dr. Ertz believed that Dr. Rose erred by using an adult version of a test when evaluating the then 13-year-old Piper. Id. at 202. In Dr. Ertz's view, Piper's inattention and struggle to conform to societal norms was evidence of his ADHD. Id. at 205. He explained that impulsivity and failure to conform to societal norms are symptoms of both antisocial personality disorder and ADHD, and that Piper's impulsivity made it more likely that he would unthinkingly engage in antisocial behavior. Id. at 205–08; Doc. 90-8 at

3–4. Dr. Ertz told the jury that youth, substance abuse, group dynamics, and upbringing all affect a person's ability to exercise free will. Doc. 90-8 at 6, 8. He explained that the brain's frontal lobes—the area responsible for reasoning and executive function—are not fully developed until age 25, id. at 7, and that the harsh physical punishment Piper received during his youth only worsened his ADHD and prevented him from learning prosocial behavior, id. at 9–10.

Dr. Wortzel testified that youth, substance abuse, upbringing, ADHD, and group dynamics were all mitigating factors in Piper's case. Id. at 85, 97. He explained that 19-year-olds are more impulsive because their brains haven't finished maturing and that Piper's heavy LSD use in the months before Poage's murder would have compounded this impulsivity. Id. at 87–90. He said that home environment is critical to a person's development, id. at 93, and that Piper's environment was "far from ideal," id. at 91. In particular, Dr. Wortzel explained that the arbitrary beatings Piper received would not have taught him right from wrong and that Piper's parents erred by blaming others for his behavior and refusing to get him the help he needed. Id. at 91–94. Dr. Wortzel believed that Poage's murder resulted from group dynamics, with Piper, Hoadley, and Page feeding off one another and behaving in ways they would not have if they had been alone. Id. at 99–100.

Dr. Wortzel agreed on cross-examination that the three defendants stole Poage's property and murdered him to eliminate a witness against them. Id. at 120, 128. The State asked Dr. Wortzel whether he had done a brain scan of Piper and whether there was any evidence that Piper had brain damage. Id. at 135. Dr. Wortzel replied that while Piper's ADHD and antisocial tendencies had "neurological underpinnings," he was not saying that Piper had brain damage. Id. He also testified that he had not recommended a brain scan or similar test for Piper because they

were "experimental in nature at this point in time and not intended for single subject use." Id. at 136.

Attorneys Van Norman and Stonefield focused on the mitigatory evidence in closing arguments, urging the jury to impose a sentence of life without parole rather than death. Doc. 90-10 at 58–94. Stonefield argued that the crime resulted from group dynamics and was not something Piper would have done by himself, that Piper had cooperated with law enforcement and accepted responsibility by pleading guilty, and that Piper had been sitting in the Blazer when Hoadley and Page did the most damage to Poage. Id. at 66–67, 72–73. He contended that it would be wrong to sentence Piper to death when Hoadley—who played a significant role in Poage's murder, showed little remorse on the witness stand, and engaged in other concerning conduct like threatening his pregnant girlfriend's life and holding a knife to another girl's throat—only received a life sentence. Id. at 73–74. Van Norman's mitigation arguments focused more on Piper's upbringing and mental health. He argued that Piper "wasn't wired correctly to start with," having been born with a learning disability and ADHD. Id. at 84–85. He emphasized Linda's refusal to get Piper the therapeutic help he so clearly needed, id. at 90, as well as her penchant for corporal punishment, id. at 89.

The jury found all three aggravating factors alleged by the State and sentenced Piper to death. Doc. 2 at 333–34. Judge Eckrich entered judgment in early August 2011 and appointed attorney Steve Miller as appellate counsel. Id. at 304–05, 337; Doc. 67 ¶ 7. Piper appealed to the Supreme Court of South Dakota, arguing that Judge Eckrich erred by denying his motion to withdraw his guilty pleas and that his sentence was disproportionate to the life sentence Hoadley

received.[10] Doc. 2-1 at 7–42. The Supreme Court of South Dakota affirmed in early 2014, holding that Piper's sentence was lawful and that his motions to withdraw his guilty pleas were beyond the scope of the court's limited 2009 remand. Piper III, 842 N.W.2d at 344–51.

C. State Habeas Case

Piper filed a pro se state habeas petition in mid-March 2014. Doc. 2 at 313; Doc. 2-1 at 44–48. He claimed that the State had presented false testimony and withheld material evidence, that his 2001 guilty pleas were not knowing and intelligent, and that he received ineffective assistance of counsel. Doc. 2-1 at 44–48. Judge Randall Macy appointed attorney Matthew Kinney to represent Piper. Kinney secured an order staying Piper's execution and began work on the case. Doc. 103 at 62, 68–71, 73–74. An evidentiary hearing was set for mid-July 2015. Id. at 99. In June 2015, Kinney moved to postpone the hearing so that he could have more time to review "the voluminous amounts of documents and discovery in this matter." Id. at 102. At a hearing on the motion, Kinney explained that he planned to move to withdraw Piper's guilty pleas in the criminal case so that this issue would be exhausted for any federal habeas action Piper might bring. Id. at 530–31. He added that he was "on schedule," that he and Kim de Hueck, an attorney at his firm, had "spent some good time on this," and that de Hueck had "seen Mr. Piper at least on two or three occasions for long periods of time in the South Dakota State Pen." Id. at 532. Judge Macy granted the continuance and moved the evidentiary hearing to October 2015. Id. at 118.

Kinney moved for another continuance in September 2015. The motion explained that Judge Eckrich had yet to rule on Piper's motion to withdraw his guilty pleas and that Piper wanted to exhaust this issue before Judge Macy ruled on his habeas petition. Doc. 103 at 122–24. Judge

[10]When Piper appealed his initial sentence, two justices on the Supreme Court of South Dakota agreed that his death sentence was grossly disproportionate to Hoadley's life sentence. Piper I, 709 N.W.2d at 822 (Sabers, J., dissenting).

Macy granted the motion and set a status conference for January 2016. Id. at 131. In the meantime, Judge Eckrich held a hearing on Piper's motion to withdraw his guilty pleas and both parties submitted briefs on the issue. Id. at 557–58. Piper and the State agreed to continue the habeas hearing until Judge Eckrich ruled on Piper's motion. Id. at 558–59. Judge Eckrich denied Piper's motion in February 2016. Id. at 564–65. Piper filed an immediate appeal, but the Supreme Court of South Dakota dismissed it for a lack of jurisdiction. Piper IV, 936 N.W.2d at 803. With the effort to withdraw the guilty pleas concluded, Judge Macy set the evidentiary hearing for July 2016. Doc. 103 at 134, 564. Kinney prepared a writ of habeas corpus ad testificandum directing that Piper be brought to Lawrence County before the hearing so that he could meet with his attorneys. Id. at 143–44. He also subpoenaed Van Norman and Stonefield. Id. at 138–41.

At the evidentiary hearing, Kinney presented testimony from Van Norman, Stonefield, and Steve Miller. He questioned Van Norman and Stonefield about the motion to withdraw Piper's guilty pleas, voir dire and jury selection, preparation for and cross of certain witnesses, supposedly inconsistent arguments the State made about the leadership roles of Piper and Page during Poage's murder, and which issues they believed Miller should have raised on appeal. Doc. 90-11 at 7–36, 44–82, 114–60. Kinney questioned Miller on his advice to Piper that it would be premature to challenge his guilty pleas during his initial state habeas case, the motion to withdraw Piper's guilty pleas, and Miller's decision on which arguments to raise in Piper's appeal. Id. at 196–221. Miller testified that although he could not "specifically recall" discussing with trial counsel whether he should appeal Judge Eckrich's denials of Piper's challenges for cause to potential jurors, he had read the entire record and concluded that there he had no issue that was "even arguably close" to as strong as the claim that Judge Eckrich erred by denying Piper's motion to withdraw his guilty

pleas.[11] Id. at 218. Kinney did not ask anyone about Piper possibly having brain damage or FASD and did not offer any evidence beyond the testimony of Piper's three previous lawyers.

Piper himself was also allowed to question his former attorneys. When Piper asked how long Sheldon had requested to prepare her report, Van Norman admitted that she had been rushed:

> I remember we jammed her up, and there were two reasons I think that that happened. One is that we waited quite a while for a couple of rulings by Judge Eckrich which were pretty important. One could have been dispositive of the case, and that was on the motion to withdraw your guilty plea. And then there was – there were several other pending decisions that took until February or March to get decided, of the same year we went to trial. We had started at that point looking for a mitigation specialist and even the very experienced ones we talked to, they were too expensive or unavailable because they wanted at least a year lead time to properly do their work. And there's a national organization of mitigation specialists, and I understood what their standards were.
>
> So we ended up finding Ms. Sheldon, and then pushing her very hard to try to do what she could do. There were a couple of things about her that were a little odd. She wouldn't fly, she lived in Tuscan [sic] so she'd need to drive or take a bus or a train to get different places, and we were balancing schedules for her to even see you at the penitentiary to do very essential things.

Id. at 40–41. Van Norman acknowledged that, if Sheldon had needed more time to complete her work and he and Stonefield had not requested a continuance, he had not "protect[ed] that aspect of [Piper's] case." Id. at 42–43.

Judge Macy ordered the parties to file proposed findings of fact and conclusions of law after they received the transcript of the habeas hearing. Id. at 228–29; Doc. 103 at 145. Kinney and the State filed their proposed findings of fact and conclusions of law in early October 2016.

[11]Miller testified that he had only raised the disproportionate-sentence argument because the Supreme Court of South Dakota was already going to review the issue as part of the automatic appeal in every death penalty case in South Dakota, and Miller felt like he "had" to raise it. Doc. 90-11 at 212–13, 218.

Doc. 103 at 410–59. Piper's proposed findings of fact and conclusions of law raised these grounds for relief:

> (1) that his 2001 guilty pleas were not knowing and intelligent;
>
> (2) that Duffy, Rensch, and Piper's initial state habeas counsel (Miller) were ineffective in advising him about his guilty pleas and right to a jury trial;
>
> (3) that Van Norman and Stonefield were ineffective during voir dire in handling potential jurors Sagdalen and Carlin, failing to thoroughly investigate State witnesses from the Penitentiary, failing to adequately investigate Tom Curtis, and failing to respond appropriately when Sister Crowley was questioned about the alleged prison policy.
>
> (4) that Miller was ineffective in his role as appellate counsel after the jury verdict by failing to appeal Judge Eckrich's denial of the motions to strike Sagdalen and Carlin as well as the denial of Piper's motion for a mistrial after Fitzgerald asked whether inmates were allowed to have television.

Doc. 85-1 at 30–31; Doc. 2-1 at 183–85. Some of these grounds for relief overlapped with Piper's pro se habeas petition while others were new. Kinney did not claim that Van Norman and Stonefield were ineffective by failing to adequately investigate and present life history and cognitive functioning evidence. The State filed a rebuttal brief, but Kinney did not. Doc. 103 at 460–65.

Judge Macy denied Piper's habeas petition on January 13, 2017, finding that Piper's guilty pleas were knowing and intelligent and that his attorneys had not performed ineffectively or prejudiced him. Doc. 2-1 at 180–204. Judge Macy entered an order on February 13, 2017, appointing Kinney to represent Piper on appeal of his habeas case. Doc. 103 at 504. Piper wrote to the Supreme Court of South Dakota asking that a new attorney be appointed for his appeal. Id. at 835–36. The court remanded Piper's request to the trial court and Judge Macy entered an order appointing Ryan Kolbeck as substitute counsel for Piper. Id. at 834, 843–44, 847. Kolbeck

obtained an amended certificate of probable cause from the trial court and appealed to the Supreme Court of South Dakota. Id. at 953–54, 962–63. Piper raised the following claims on appeal:

1. That his guilty pleas were not knowing and intelligent;

2. That the State made inconsistent arguments during the separate proceedings for Page and Piper and that the State's inconsistent arguments should have been admitted at Piper's resentencing trial;

3. That the trial judge violated his right to due process by failing to strike potential jurors Sagdalen and Carlin for cause;

4. That counsel was ineffective by (a) presenting testimony from Dr. Wortzel and Dr. Ertz essentially admitting that Piper had committed the alleged aggravating factors; (b) providing incorrect legal advice about his guilty pleas; (c) failing to object when the trial court rehabilitated potential jurors Sagdalen and Carlin; (d) failing to adequately investigate the State's witnesses from the Penitentiary; (e) failing to adequately investigate State witness Tom Curtis; (f) failing to appropriately respond to the State's assertion that Sister Crowley violated prison policy;

5. That the State violated his right to due process by failing to provide an updated criminal history report for Curtis; and

6. That Miller was ineffective as appellate counsel by failing to appeal Judge Eckrich's denial of Piper's motion for a mistrial and Judge Eckrich's refusal to strike Sagdalen and Carlin for cause.

Doc. 2-1 at 72–148. The Supreme Court of South Dakota affirmed the denial of Piper's habeas petition in late 2019, concluding that res judicata barred some claims and that others failed on the merits. Piper IV, 936 N.W.2d 793.

D. Federal Habeas Case

Piper filed his federal habeas petition in December 2020, Doc. 1, and his amended federal habeas petition in August 2022, Doc. 67. He raises these claims:

Claim I: Van Norman and Stonefield were ineffective by failing to adequately investigate and present life history and cognitive functioning evidence.

Claim II: Withdrawn.

Claim III: Judge Eckrich improperly denied Piper's motion to strike juror Lisa Sagdalen for cause and both trial and appellate counsel were ineffective in handling the Sagdalen issues.

Claim IV: Van Norman and Stonefield were ineffective during voir dire in handling potential juror Dan Carlin and juror Dennis Anthony.

Claim V: Van Norman and Stonefield were ineffective in preparing for and handling Sister Crowley's cross examination.

Claim VI: Miller was ineffective by failing to appeal Judge Eckrich's denial of a motion for a mistrial after the State elicited testimony about whether inmates were allowed television in prison.

Claim VII: Fitzerald violated Piper's rights by introducing evidence of lewd behavior at Higgins Gulch and Van Norman and Stonefield were ineffective in responding to Fitzgerald's actions.

Claim VIII: Van Norman and Stonefield were ineffective by failing to move for a mistrial based on Fitzgerald's cumulative prosecutorial misconduct.

Claim IX: The State violated Piper's due process rights by failing to disclose Tom Curtis's criminal history and Van Norman and Stonefield were ineffective by failing to adequately investigate Curtis's background.

Claim X: Judge Eckrich violated Piper's rights under the Due Process Clause and Eighth Amendment by refusing to admit allegedly inconsistent arguments Fitzgerald made in Poage's trial.

Claim XI: Piper's guilty pleas were not knowing, voluntary, and intelligent.

Claim XII: Piper had a statutory right to withdraw his guilty pleas under South Dakota law and the State violated due process by arbitrarily denying him this right.

> Claim XIII: Piper was prejudiced because of the cumulative effect of the errors in his case.

Doc. 67. Respondent argues that some of these claims are procedurally defaulted because Piper never raised them in state court while others are procedurally defaulted because the Supreme Court of South Dakota held that they were barred by res judicata. Piper argues that Martinez v. Ryan, 566 U.S. 1 (2012), allows him to avoid procedural default of the claims he failed to raise previously, that ineffective assistance of appellate counsel allows him to avoid default of others, and that res judicata is not an independent and adequate rule in South Dakota.

II. Governing Doctrines

Four doctrines govern the parties' arguments on procedural default. To limit repetition, this Court first describes these doctrines and addresses some general arguments the parties raise before applying the doctrines to Piper's claims later in this opinion.

A. Exhaustion and Procedural Default

Federal courts typically cannot consider a state prisoner's habeas claims unless the prisoner has previously raised those claims in state court. O'Sullivan v. Boerckel, 526 U.S. 838, 842 (1999). Congress codified this requirement in 28 U.S.C. § 2254, making state prisoners "exhaus[t] the remedies available in the courts of the State" before they can obtain federal relief. 28 U.S.C. § 2254(b)(1)(A). "Ordinarily, a state prisoner satisfies this exhaustion requirement by raising his federal claim before the state courts in accordance with state procedures." Shinn v. Ramirez, 596 U.S. 366, 378 (2022). The exhaustion requirement protects the state courts' role in enforcing federal law, allows state courts the first opportunity to correct possible constitutional defects in state court convictions, and prevents the potentially "unseemly" disruption of state judicial proceedings through premature federal court intervention. Rose v. Lundy, 455 U.S. 509, 518 (1982) (cleaned up and citation omitted).

These interests in comity and federalism also underlie the procedural default doctrine. Shinn, 596 U.S. at 378; Davila v. Davis, 582 U.S. 521, 527–28 (2017). Procedural default occurs when a prisoner does not properly exhaust his claims in state court and is now barred from doing so because of his failure to follow the state's procedural rules. Abdullah v. Groose, 75 F.3d 408, 411 (8th Cir. 1996) (en banc); Wiegers v. Weber, 37 F. App'x 218, 219–20 (8th Cir. 2002) (per curiam) (unpublished). If the petitioner is barred from raising his claims because "untimeliness or some other state procedural hurdle" prevents him from doing so, then he has technically exhausted his state court remedies as there are no longer any such remedies available. Grass v. Reitz, 643 F.3d 579, 584 (8th Cir. 2011); see also Woodford v. Ngo, 548 U.S. 81, 92–93 (2006) ("In habeas, state-court remedies are described as having been 'exhausted' when they are no longer available, regardless of the reason for their unavailability."). Exhaustion in this sense, however, "does not automatically entitle the habeas petitioner to litigate his . . . claims in federal court." Woodford, 548 U.S. at 93. Rather, the state procedural rule will bar federal review if the rule is "*independent* of the federal question and *adequate* to support the judgment." Lee v. Kemna, 534 U.S. 362, 375 (2002) (cleaned up and citation omitted). The only way to avoid an independent and adequate state procedural bar is for the petitioner to show "cause"—meaning "something *external* to the petitioner, something that cannot fairly be attributed to him" that hindered compliance with the state procedural rule—and "actual prejudice,"[12] Coleman v. Thompson, 501 U.S. 722, 750, 753 (1991). The procedural default doctrine thus "ensures that the States' interest in correcting their own mistakes is respected in all federal habeas cases." Edwards v. Carpenter, 529 U.S. 446, 452–53 (2000) (cleaned up and citation omitted).

[12]A petitioner can also avoid procedural default by showing "actual innocence," but Piper makes no assertion of actual innocence here. Grass, 643 F.3d at 584.

B. Martinez Exception

Piper contends that Martinez allows him to overcome the procedural default of some claims because Kinney himself was ineffective by failing to raise these claims during state habeas proceedings. Attorney error can constitute cause to excuse a procedural default if it occurs at a stage of the case in which the defendant has a constitutional right to effective assistance of counsel. Coleman, 501 U.S. at 754. The rationale for this is that a state's failure to provide effective counsel when the Constitution requires it to do so makes counsel's mistakes attributable to the state and thus external to the petitioner. Id. at 754. But the result is different when "the State has no responsibility to ensure that the petitioner was represented by competent counsel." Id. In that situation, counsel's errors are "attributed to the prisoner under well-settled principles of agency law." Davila, 582 U.S. at 528–29 (cleaned up and citation omitted); see also Link v. Wabash R.R. Co., 370 U.S. 626, 634 (1962) (stating that in "our system of representative litigation . . . each party is deemed bound by the acts of his lawyer-agent"). Because there is no constitutional right to an attorney in state postconviction proceedings, ineffective assistance of counsel during those proceedings generally does not qualify as cause to excuse a procedural default. Coleman, 501 U.S. at 752.

The Supreme Court recognized a narrow exception to this general rule in Martinez v. Ryan, 566 U.S. 1 (2012), holding that courts may find cause to excuse procedural default of a "substantial" claim of ineffective assistance of trial counsel when state law requires prisoners to raise such claims at the initial-review stage of collateral proceedings and the "cause" consists of there being no counsel or "ineffective" counsel during this collateral proceeding. Trevino v. Thaler, 569 U.S. 413, 423 (2013). A year later, in Trevino, the Court extended this exception to situations in which the state's "procedural framework, by reason of its design and operation,

makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal." Id. at 429. Two aspects of Texas law convinced the Court in Trevino that Martinez applied to defendants convicted in that state. Trevino, 569 U.S. at 423–28. First, Texas procedure made it "virtually impossible" to develop the sort of extra-record evidence necessary to bring an ineffective assistance of counsel claim on direct appeal. Id. at 424 (cleaned up and citation omitted). Although Texas argued that defendants could expand the record via a motion for a new trial, Texas courts had found that this procedure was often inadequate given the time constraints Texas imposed and counsel's lack of access to trial transcripts. Id. at 424–25. Second, refusing to extend Martinez "would create significant unfairness" because Texas courts had "in effect . . . directed defendants to raise claims of ineffective assistance of trial counsel on collateral, rather than on direct, review." Id. at 425–26.

Defendants convicted in South Dakota face the same problem as those convicted in Texas: the first chance to present a claim of ineffective assistance of trial counsel will almost always be on collateral review by filing a state habeas action. The Supreme Court of South Dakota does not consider ineffective-assistance-of-counsel claims on direct appeal "absent exceptional circumstances." State v. Alvarez, 982 N.W.2d 12, 20 (S.D. 2022) (cleaned up and citation omitted). This "rule is a practical one, necessitated by the fact that the record on direct appeal typically does not afford a basis to review the performance of trial counsel." Id. (cleaned up and citation omitted); see also State v. Craig, 850 N.W.2d 828, 838–39 (S.D. 2014) (explaining that it is "rare" for ineffective-assistance-of-counsel claims to be ripe for review on direct appeal (cleaned up and citation omitted)). South Dakota appears to have no established procedure for developing ineffective-assistance-of-trial-counsel claims for direct appeal. In fact, the Supreme Court of

South Dakota has said that "it is only through habeas corpus that a sufficient record can be made to allow the appropriate review of a claim of ineffective assistance of counsel." State v. Hanneman, 823 N.W.2d 357, 360 (S.D. 2012) (cleaned up and citation omitted). Habeas corpus proceedings allow trial counsel to explain their decisions and provide the Supreme Court of South Dakota "with a more complete picture of what occurred." Id. (cleaned up and citation omitted). The Supreme Court of South Dakota has essentially directed defendants to raise their ineffective-assistance-of-counsel claims in habeas proceedings, State v. Hauge, 932 N.W.2d 165, 171 (S.D. 2019) (explaining that such claims are "best made by filing" a habeas petition); State v. Schmidt, 825 N.W.2d 889, 899 (S.D. 2012) (stating that a habeas proceeding is the "preferred arena" for such claims (cleaned up and citation omitted)); State v. Beck, 785 N.W.2d 288, 296 (S.D. 2010) (stating that the court "has consistently held that claims of ineffective assistance of counsel generally will not be considered on direct appeal" (cleaned up and citation omitted)), and will hear such claims on direct appeal "only where counsel was so ineffective and the representation so casual that the trial record evidences a manifest usurpation of the defendant's constitutional rights," State v. Wilson, 947 N.W.2d 131, 139 n.14 (S.D. 2020) (cleaned up and citation omitted). This Court has previously found that the Martinez exception applies to South Dakota inmates, Dunkelberger v. Young, 20-CV-4117, 2021 WL 928139, at *2 (D.S.D. Mar. 11, 2021); Sund v. Young,14-CV-5070, 2015 WL 4249405, at *4 (D.S.D. July 13, 2015), and Respondents agree that the exception applies in South Dakota.

C. Showing Required Under Martinez

Piper can avoid procedural default under Martinez by showing (1) that his ineffective assistance of trial counsel claims are "substantial"; (2) that state habeas counsel's failure to raise these claims constitutes ineffective assistance under Strickland v. Washington, 466 U.S. 668

(1984); and (3) that the procedural default prejudiced him. Martinez, 566 U.S. at 14; Dorsey v. Vandergriff, 30 F.4th 752, 755–56 (8th Cir. 2022); Harris v. Wallace, 984 F.3d 641, 648–49 (8th Cir. 2021).

This Court explains these elements in turn. As to the first element, a claim that trial counsel was ineffective is "substantial" if it has "some merit," meaning that trial counsel's ineffectiveness "must at least be debatable among jurists of reason." Dorsey, 30 F.4th at 756–57 (citation omitted). Strickland, of course, requires a petitioner claiming ineffective assistance to show both that counsel's performance was constitutionally deficient and that he was prejudiced by this deficiency. Strickland, 466 U.S. at 687. To establish that his ineffective assistance of trial counsel claims are substantial, then, Piper must "show that it is at least debatable among jurists of reason whether his trial counsel's performance was deficient and whether this deficient performance prejudiced him." Marcyniuk v. Payne, 39 F.4th 988, 996 (8th Cir. 2022). Piper can establish deficient performance by showing trial counsel's representation fell "below an objective standard of reasonableness." Slocum v. Kelley, 854 F.3d 524, 532 (8th Cir. 2017) (cleaned up and citation omitted). To establish prejudice, Piper "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. (cleaned up and citation omitted).

The second element of the Martinez analysis requires applying the Strickland standard to Kinney's performance as state habeas counsel. Under this element, Piper must at least establish that Kinney performed deficiently by failing to raise his ineffective assistance of trial counsel claims.[13] Deck v. Jennings, 978 F.3d 578, 582 (8th Cir. 2020); Harris, 984 F.3d at 649.

[13]The Ninth and Fifth Circuits have held that Martinez requires petitioners to show that postconviction counsel performed deficiently *and* that this performance prejudiced them, "i.e., that there was a reasonable probability that, absent the deficient performance, the result of the post-

The third Martinez element requires Piper to show actual prejudice under Coleman's cause and prejudice standard. Thomas v. Payne, 960 F.3d 465, 477–78 (8th Cir. 2020).

D. Res Judicata

As explained above, the Supreme Court of South Dakota held that res judicata barred certain claims that Piper could have brought in earlier proceedings but did not. A state procedural rule like res judicata will not bar a habeas claim unless it is independent of federal law and "firmly established, regularly followed, and readily ascertainable." White v. Bowersox, 206 F.3d 776, 780 (8th Cir. 2000); see also Sloan v. Delo, 54 F.3d 1371, 1379–80 (8th Cir. 1995) (explaining that a state law is "adequate" to bar federal habeas review if the rule is clear, does not "thwart the assertion of federal rights," and is firmly established and regularly followed (citation omitted)).

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conviction proceedings would have been different." Runningeagle v. Ryan, 825 F.3d 970, 982 (9th Cir. 2016) (cleaned up and citation omitted); Wessinger v. Vannoy, 864 F.3d 387, 391 (5th Cir. 2017). Other circuits take a different approach, concluding that "when a petitioner shows that post-conviction relief counsel's performance was unreasonably deficient, the requirement that the deficient performance result in prejudice may be satisfied with a substantial claim of ineffective assistance of trial counsel that would otherwise have been deemed defaulted." Brian R. Means, Postconviction Remedies § 24:17 (Oct. 2023 update); see Workman v. Superintendent Albion SCI, 915 F.3d 928, 939 (3d Cir. 2019) ("In our view, . . . when a petitioner shows that post-conviction relief counsel's performance was unreasonably deficient, the requirement that the deficient performance result in prejudice may be satisfied with a substantial claim of ineffective assistance of trial counsel that would otherwise have been deemed defaulted." (cleaned up and citation omitted)); Owens v. Stirling, 967 F.3d 396, 423 (4th Cir. 2020) ("Instead, they have reasoned that a state prisoner satisfies Martinez by showing, *first*, that initial postconviction counsel performed deficiently, under the first prong of Strickland, by failing to exhaust the underlying ineffective-assistance-of-trial-counsel claim, but not that said counsel's deficient performance was prejudicial, under the second prong of Strickland; and *second*, that the underlying claim is substantial, or has some merit, with respect to both prongs of Strickland."); see also Owens, 967 F.3d at 423 (adopting that approach); Brown v. Brown, 847 F.3d 502, 513 (7th Cir. 2017) ("To demonstrate cause under Martinez-Trevino, the petitioner must show deficient performance by counsel on collateral review as required under the first prong of the Strickland analysis. Actual resulting prejudice can be established with a substantial claim of ineffective assistance of trial counsel that would otherwise have been deemed defaulted." (internal citations omitted)). The Eighth Circuit appears not to have explicitly ruled on this issue, although it did address both Strickland's performance and prejudice prongs when applying Martinez in Barnett v. Roper, 904 F.3d 623, 631 (8th Cir. 2018). See also Thomas v. Payne, 960 F.3d 465, 474–75 (8th Cir. 2020).

The res judicata rule was firmly established and regularly applied before Piper procedurally defaulted some of his claims. As the Supreme Court of South Dakota stated in Piper IV, the term "res judicata" encompasses both issue preclusion and claim preclusion:

> Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided. Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit.

936 N.W.2d at 804 (cleaned up and citation omitted). Longstanding South Dakota habeas precedent makes clear that both variations of res judicata apply, meaning that a claim is barred if (1) the claim could have been raised on direct appeal but was not; or (2) the claim was raised and decided on direct appeal. Loop v. Class, 554 N.W.2d 189, 193 (S.D. 1996) ("The rule is when a petitioner takes a direct appeal, he cannot thereafter, in a post-conviction proceeding, raise any matter of which he was aware at the time of the direct appeal but did not raise."); Weddell v. Weber, 604 N.W.2d 274, 283–84 (S.D. 2000) (stating in a habeas case that "[i]t is settled law in South Dakota that a judgment subject to res judicata constitutes an absolute bar against the prosecution, not only of every claim or demand therein in controversy, *but also of all other admissible matters that might have been offered to sustain or defeat such claims or demands*" (cleaned up and citation omitted)); Moeller v. Weber, 689 N.W.2d 1, 6 (S.D. 2004) (explaining that "[h]abeas review is not a substitute for a direct appeal," and that habeas petitions "are subject to the doctrine[] of res judicata"); Miller v. State, 338 N.W.2d 673, 675–76 (S.D. 1983) (explaining that the "general rule is that a petitioner who takes a direct appeal cannot thereafter raise in a post-conviction proceeding any matter which he knew at the time of the direct appeal, but did not raise" and applying that rule to bar the petitioner's claim); Application of Thwing, 182 N.W.2d 308, 310–11 (1970) (holding that res judicata prohibited petitioner from bringing jury instruction claim in

habeas petition because he had failed to raise the issue on direct appeal); see also Piper IV, 936 N.W.2d at 804 ("[E]ven for claims alleging the deprivation of constitutional rights, we have traditionally applied the doctrine of res judicata to determine whether a post-conviction claim is cognizable in a habeas corpus action or whether it has been defaulted because it was not made in an earlier proceeding.").

The Supreme Court of South Dakota consistently applies res judicata to bar habeas claims that were or could have been raised on direct appeal. See Ramos v. Weber, 616 N.W.2d 88, 91–92 (S.D. 2000) (applying res judicata to bar constitutional claim that could have been raised on direct appeal but was raised for the first time in habeas proceeding); Rhines v. Weber, 608 N.W.2d 303, 316 (S.D. 2000) (applying res judicata to habeas claims that the Supreme Court of South Dakota had addressed on the petitioner's direct appeal); Miller, 338 N.W.2d at 675–76; Application of Thwing, 182 N.W.2d at 310–11. The Eighth Circuit recognized the adequacy of South Dakota's res judicata bar in Rhines v. Young, 899 F.3d 482 (8th Cir. 2018). The state trial court in Rhines concluded that res judicata barred the petitioner's claim of ineffective presentation of mitigation evidence because the claim had been raised and decided in a prior habeas petition. Id. at 488–90. The Eighth Circuit held that this res judicata ruling was "an independent and adequate state ground that bars federal habeas relief on this claim." Id. at 490–91.

Piper disagrees. He argues that Haase v. Weber, 693 N.W.2d 668 (S.D. 2005), and Rhines show that the Supreme Court of South Dakota does not regularly apply the res judicata rule. As the Supreme Court of South Dakota recognized, Haase was a "unique" case. 693 N.W.2d at 669. Haase had his first state habeas petition denied because his attorney wrote a letter to the judge saying Haase had no colorable habeas claims. Id. A state trial judge denied Haase's second habeas petition because it was filed more than five years after his judgment and because he had not shown

reasonable cause for failing to raise a particular claim in his first petition. Id. Haase's third habeas petition alleged only that his second habeas counsel was ineffective by failing to appeal the state judge's denial of his second habeas petition. Id. Under these "troubling" facts, a three-justice majority of the Supreme Court of South Dakota remanded the case to the trial judge to consider Haase's claims on the merits:

> No judge has ever made an independent review of any of Haase's grounds for habeas relief. Haase has suffered this fundamental injustice through no fault of his own but, rather, through the mistakes of prior counsel and courts. Now, as a result of various procedural barriers, it is unlikely that his habeas grounds could ever be reviewed by a judge on their merits. Therefore, under the unique facts of this case, we believe it is in the best interests of justice and judicial efficiency to remand this case back to the trial court in order for the court to proceed directly to the merits of Haase's habeas claims, thereby providing Haase with a judicial determination of the merits of his claims and circumventing the procedural purgatory within which Haase now finds himself. Cf. People v. Gaines, 105 Ill.2d 79, 85 Ill. Dec. 269, 473 N.E.2d 868, 875 (1984) ("The strict application of the doctrine of res judicata may be relaxed, however, where fundamental fairness so requires.").

Id. at 669–70. Two justices dissented, arguing that the majority's holding violated South Dakota's habeas statutes. Id. at 670–75.

Piper also argues that Rhines actually shows that res judicata is not regularly applied because the trial court in that case addressed some ineffective assistance of counsel claims that could have been raised in a prior habeas petition but were not. Like Haase, Rhines was a unique case. A South Dakota jury convicted Rhines of murder and sentenced him to death. Rhines, 899 F.3d at 485. The Supreme Court of South Dakota affirmed Rhines's conviction and sentence on direct appeal and later affirmed the denial of Rhines's state habeas petition. Id. When Rhines filed a federal habeas petition, the federal district court concluded that several claims were unexhausted and stayed the case pending exhaustion of those claims in state court so that Rhines could attempt to exhaust state law claims without risking the one-year limitation under the

Antiterrorism and Effective Death Penalty Act (AEDPA) elapsing. Id. at 488. The Eighth Circuit reversed, relying on pre-AEDPA case law and a strict application of Rose v. Lundy to conclude that the district court could not stay the federal case containing Rhines's exhausted claims while he exhausted his other claims in state court. The Supreme Court reversed the Eighth Circuit, holding that stay and abeyance in a mixed habeas petition is permissible under some circumstances. Rhines v. Weber, 544 U.S. 269, 277–79 (2005). On remand, the federal district court again stayed Rhines's case pending exhaustion of his claims in state court, finding among other things that ineffectiveness by Rhines's first postconviction attorneys provided good cause for his failure to exhaust the claims earlier. Rhines, 899 F.3d at 489; Rhines v. Weber, 408 F. Supp. 2d 844, 847–49 (D.S.D. 2005). Rhines returned to state court and filed a successive habeas petition. Rhines, 899 F.3d at 489. The state trial court granted the state summary judgment on the merits of some of Rhines's claims, without mentioning that Rhines had failed to include those claims in his prior state habeas petition. See Rhines v. Weber, 00-cv-5020, Doc. 204-1. The Supreme Court of South Dakota issued a one-page order denying Rhines a certificate of probable cause necessary under South Dakota law to pursue an appeal. Id. at Doc. 215-69; Rhines, 899 F.3d at 489.

The main problem with Piper's reliance on Haase and Rhines is that a procedural rule need not be applied in every case to be considered regularly followed. In Dugger v. Adams, 489 U.S. 401 (1989), for instance, the Supreme Court held that a state regularly applied a procedural rule that claims not raised on direct appeal cannot be raised in a state habeas petition even though the state supreme court had "addressed the merits in several cases raising [new] claims on postconviction review." Id. at 410 n.6. These "several cases" did not render the rule inadequate when the state supreme court "faithfully" applied the rule in the "vast majority of cases." Id. The

Supreme Court reached a similar conclusion in Johnson v. Lee, another case involving a challenge to a state rule barring postconviction review of claims that could have been raised on direct appeal. 578 U.S. 605 (2016) (per curiam). The Ninth Circuit had held that the rule—referred to as the "Dixon bar" in California—was not regularly followed based on the petitioner's evidence that, out of 210 summary denials the California Supreme Court issued in a single day, the court had failed to cite the rule in nine cases in which it should have applied. Id. at 607. The Supreme Court reversed, concluding that the Dixon bar was "longstanding, oft-cited, and shared by habeas courts across the Nation." Id. at 606. Citing Dugger, the Court found that the nine denials lacking citations to the Dixon bar "hardly support[ed] an inference of inconsistency," especially because none of the denials ignored the bar to grant relief. Id. at 608–09. And it was not as though the Dixon bar was "unique," the Court explained. Id. Rather, "[f]ederal and state habeas courts across the country" bar petitioners from using postconviction proceedings to raise claims that could have been raised on direct appeal. Id. "For such well-established and ubiquitous rules," the Court wrote, "it takes more than a few outliers to show inadequacy." Id.

Like the challenges in Dugger and Johnson, Piper's cites to Haase and Rhines fall far short of showing that the Supreme Court of South Dakota applies res judicata inconsistently. Haase appears to be limited to its facts; Piper has not cited—and this Court has not found—any case from the Supreme Court of South Dakota applying Haase to ignore a res judicata bar and consider a defaulted claim on the merits. See generally Piper IV, 936 N.W.2d at 806 n.13 (stating that Haase was decided by a "narrow majority" and that it "departs from our case law applying issue and claim preclusion in post-conviction collateral challenges"). Tellingly, the Supreme Court of South Dakota cited out-of-state precedent rather than one of its own decisions when concluding that Haase's claims should be addressed on the merits. And the decision in Rhines to which Piper cites

was made by the state trial court, not the Supreme Court of South Dakota. Isolated decisions like Haase and the trial court decision in Rhines do not justify ignoring South Dakota's sovereign decision to apply res judicata to some of Piper's claims, especially given how widespread this rule is. See Johnson, 578 U.S. at 609 ("Federal habeas courts must not lightly disregard state procedural rules that are substantially similar to those to which we give full force in our own courts." (cleaned up and citation omitted)); id. at 612 ("A State's procedural rules are of vital importance to the orderly administration of its criminal courts; when a federal court permits them to be readily evaded, it undermines the criminal justice system." (cleaned up and citation omitted)).

Piper also argues that Foster v. Chatman, 578 U.S. 488 (2016), shows that South Dakota's res judicata rule is not independent of federal law. "When application of a state law bar depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law . . . ." Id. at 497. In Foster, a Georgia habeas court issued an opinion stating that res judicata barred the petitioner's Batson claim but then engaged in a four-page "Batson analysis" to determine whether the petitioner had shown "any change in the facts sufficient to overcome the res judicata bar." Foster, 578 U.S. at 498 (cleaned up and citation omitted). The court ultimately concluded that the petitioner's Batson claim was "without merit." Id. (cleaned up and citation omitted). Given these facts, the Supreme Court ruled that the habeas court's "application of res judicata to Foster's Batson claim was not independent of the merits of his federal constitutional challenge." Id.

Piper believes that South Dakota's res judicata rule is likewise dependent on federal law. He claims that Haase created a "fundamental-fairness exception to the application of res judicata" and that fundamental fairness is the "essence of due process." Doc. 104 at 4. According to Piper, Haase requires South Dakota courts to review "the facts and the law supporting the underlying

claim in order to decide whether application of a res judicata rule would be fundamentally unfair." Id. at 5. Piper is wrong for at least three reasons.

First, Haase did not analyze the facts and law underlying the petitioner's claims when deciding not to apply res judicata, and thus cannot even arguably be read as holding that South Dakota courts must engage in such an analysis to determine whether applying res judicata would be fundamentally unfair. Haase, 693 N.W.2d at 669–70. Instead, Haase turned on the petitioner, through no fault of his own, being denied any habeas review at all. Id.; see also Piper IV, 936 N.W.2d at 806 n.13 (explaining that Haase did not apply to Piper's case because he had "not been denied previous post-conviction review").

Second, Piper's case is not analogous to Foster. The res judicata bar in Foster was not independent of federal law because the state habeas court conducted a Batson analysis to determine whether the petitioner had shown a sufficient "change in the facts" to overcome the bar and ultimately concluded that the claim was "*without merit*." Foster, 578 U.S. at 498. In contrast, the Supreme Court of South Dakota applied res judicata to Piper's claims because he failed to raise them at the appropriate time, not because of any conclusion the court made about the merits of Piper's federal constitutional claims. Piper IV, 936 N.W.2d at 804–09, 812–16. The court's application of res judicata to Piper's claims is far removed from any case finding that a state rule depended on federal law. Compare Stewart v. Smith, 536 U.S. 856, 861 (2002) (per curiam) (holding that state procedural rule was independent of federal law where rule required state court to determine the particular constitutional right alleged to have been violated but the state court did not examine the merits of the claim and the rule did not require it to), and Campbell v. Burris, 515 F.3d 172, 177 (3d Cir. 2008) (holding that "plain error" exception to state procedural bar did not deprive the bar of its independence because state court could apply the exception using state law

"without resolving the merits of the federal constitutional issue"), with Ake v. Oklahoma, 470 U.S. 68, 74–75 (1985) (holding, in a direct review case, that a state procedural bar was not independent because it turned "on an antecedent ruling on federal law, that is, on the determination of whether federal constitutional error has been committed"); Roy v. Coxon, 907 F.2d 385, 391 (2d Cir. 1990) (holding that state's application of a plain-error exception to its contemporaneous objection rule was not independent of federal law where the state relied heavily on federal law when deciding there was no plain error).

Third, the Supreme Court of South Dakota's rejection of Piper's argument that preclusion principles "should yield to a broad general concept of fundamental fairness" does not deprive the res judicata bar of its independence, if that is indeed what Piper is arguing. Piper IV, 936 N.W.2d at 806. Nothing suggests that the Supreme Court of South Dakota used federal due process principles to interpret the requirements of fundamental fairness, and the court's rejection of Piper's argument did not depend on the merits of his federal constitutional claims. In short, none of Piper's arguments show that, as a general matter, South Dakota's res judicata rule depends on federal law or is inadequate to bar federal review of a defaulted claim.[14]

E. Ineffective Assistance of Appellate Counsel

As explained above, attorney error can constitute cause to excuse a procedural default if it occurs during a stage of the case where the defendant has a constitutional right to effective assistance of counsel. Coleman, 501 U.S. at 754. Defendants have a constitutional right to

[14]Piper argues that Respondents waived any arguments in Document 97 concerning procedural default, exhaustion, and res judicata by failing to raise them in earlier briefs. Doc. 104 at 2–3; Doc. 116 at 123. This Court finds no such waiver occurred. The briefing schedule here was unique, Piper had plenty of notice that Respondents were asserting procedural default and res judicata as defenses, and Piper had a chance to respond to any such arguments Respondents raised. See Docs. 100, 104.

effective assistance on direct appeal, Evitts v. Lucey, 469 U.S. 387, 396–97 (1985), and ineffective assistance of appellate counsel can serve as both a standalone claim and as cause to excuse procedural default of another claim, Reese v. Delo, 94 F.3d 1177, 1182 (8th Cir. 1996); Edwards v. Carpenter, 529 U.S. 446, 450–51 (2000). Two conditions must be met for ineffective assistance of appellate counsel to serve as cause, however. First, appellate counsel's failure to raise a claim on direct appeal must itself constitute ineffective assistance under Strickland to constitute cause to excuse procedural default of another claim. Evans v. Luebbers, 371 F.3d 438, 445 (8th Cir. 2004). Second, the prisoner must have either exhausted the ineffective-assistance-of-appellate-counsel claim in state court or be able to show cause and prejudice to excuse procedural default of the ineffective-assistance claim itself. Edwards, 529 U.S. at 450–51 ("[A] procedurally defaulted ineffective-assistance-of-counsel claim can serve as cause to excuse the procedural default of another habeas claim only if the habeas petitioner can satisfy the 'cause and prejudice' standard with respect to the ineffective-assistance claim itself."); Taylor v. Bowersox, 329 F.3d 963, 971 (8th Cir. 2003) (holding that exhaustion doctrine requires claim for ineffective assistance of direct appeal counsel be initially presented to the state court as an independent claim before it can be used to establish cause for a procedural default). Unlike with defaulted claims of ineffective assistance of trial counsel, however, prisoners cannot use the ineffective assistance of postconviction counsel to excuse the procedural default of a claim of ineffective assistance of appellate counsel. Davila, 582 U.S. at 529 (declining to "extend Martinez to allow a federal court to hear a substantial, but procedurally defaulted, claim of ineffective assistance of appellate counsel when a prisoner's state postconviction counsel provides ineffective assistance by failing to raise that claim"). In other words, the Martinez/Trevino exception provides cause for the

procedural default of trial-counsel-ineffectiveness claims but not for the default of appellate-counsel-ineffectiveness claims. Id.

III. Analysis of Claims

A. Claim I: Failure to Adequately Investigate and Present Life History and Cognitive Functioning Evidence

1. Evidence that may be considered

Piper acknowledges that he never presented Claim I or his supporting evidence in state court and agrees that this claim is procedurally defaulted. Doc. 60 at 3; Doc. 62 at 3–4. He argues that he can avoid this procedural default under Martinez, however, because Kinney himself was ineffective by not raising Claim I during state habeas proceedings. This Court starts by deciding what evidence it can consider when analyzing Claim I. Piper filed a motion for testing to support Claim I, asking that four experts be allowed to visit him in prison to evaluate him for brain damage and FASD now. Doc. 60. He argued that the results of these tests would help him both to succeed on the merits of Claim I and to demonstrate cause and prejudice to excuse his procedural default of this claim. Doc. 62 at 3–4.

Piper submitted affidavits from the four experts in support of his motion for testing. Docs. 62-1–62-4. Dr. Jeffrey Lewine, a neuroscientist, explained that FASD "is often associated with compromised cognitive skills, poor decision making, anger management issues and impulsivity, executive dysfunction, and neurological compromise." Doc. 62-1 at ¶ 8. He asserted that he has reviewed Piper's records and recommended that Piper undergo a quantitative electroencephalogram to test for brain dysfunction. Id. at ¶¶ 6–15.

Dr. Paul Connor, a clinical psychologist, wrote that Piper's records revealed "a number of factors that raised concerns" that Piper "could have an FASD," including Linda consuming alcohol while pregnant with Piper, many ear infections in childhood, behavioral difficulties at a young age,

and having ADHD and a learning disorder. Doc. 62-2 at 2. Dr. Connor recommended that Piper undergo a neuropsychological evaluation to help determine whether he has FASD or some other neurodevelopmental disorder. Id. at 3.

Dr. Julian Davies, a pediatrician, reviewed Piper's records and reached the provisional opinion that he would be diagnosed with Neurobehavioral Disorder/Alcohol Exposed, an FASD also known as moderate Alcohol-Related Neurodevelopmental Disorder (ARND). Doc. 62-3 at 2. Dr. Davies based this opinion on Piper's prenatal exposure to alcohol, non-clinical photographs from Piper's childhood to young adulthood showing "an upper lip thickness that appears to be on the borderline of the FAS range," and his conclusion that Piper's records "support findings of moderate functional brain impairments." Id. at 4–6.

Dr. Natalie Novick Brown, a psychologist, wrote that her review of Piper's records "indicates" that Piper's "functional history is consistent with" FASD. Doc. 62-4 at 3. She pointed to Piper's prenatal alcohol exposure as well as certain "physiological indicia of possible FASD," including Piper's premature birth, having neonatal jaundice, suffering from projectile vomiting for the first two months of life, and having recurrent ear infections. Id. at 4–5. According to Dr. Brown, the "substantial discrepancy between Mr. Piper's pattern of academic dysfunction and high-average IQ of 117 was a red flag indicative of FASD." Id. at 6. She also remarked that unlike ADHD, "FASD accounts for all of Mr. Piper's functioning and behavior throughout life." Id. at 20.

Piper also filed affidavits from Linda, his older siblings Sheryl Engle and John Piper III, and various others. Doc. 62-5; Doc. 41. Linda admitted in her affidavit that the information written in Dr. Clark's 1994 report "is true." Doc. 62-5 at ¶ 2. Engle said she overheard Linda talk about drinking alcohol while pregnant with all her children, and both Engle and John detailed

Linda's heavy drinking when they and Piper were growing up, the beatings their parents dispensed, and Piper's poor social functioning. Doc. 41 at 3–12. Other witnesses confirmed Linda's heavy drinking, Piper's odd behaviors and impulsivity, and his struggle to appreciate social cues and boundaries.[15] Doc. 2-2 at 171–76; Doc. 41 at 13–18.

This Court issued a previous opinion finding that 28 U.S.C. § 2254(e)(2) and the Supreme Court's recent decision in Shinn barred Piper's motion for testing. Piper v. Att'y Gen. of S.D., 20-CV-5074, 2023 WL 3750418, at *14–22 (D.S.D. June 1, 2023). As this Court explained, § 2254(e)(2) strictly limits a federal habeas court's authority to consider new evidence the prisoner neglected to offer in state court. If the prisoner "has failed to develop the factual basis of a claim in State court proceedings," § 2254(e)(2) bars federal courts from holding "an evidentiary hearing on the claim"—or, indeed, even considering extra-record evidence submitted to support the claim—unless the prisoner can satisfy some narrow exceptions not applicable here. 28 U.S.C. § 2254(e)(2)(A)(i), (ii); Shinn, 596 U.S. at 383–90; Holland v. Jackson, 542 U.S. 649, 653 (2004) (per curiam). These strict limits in § 2254(e)(2) apply only when a prisoner is "at fault" for failing to develop the factual basis of a claim, meaning that he "bears responsibility for the failure." Shinn, 596 U.S. at 382 (cleaned up and citation omitted).

[15]At least one of the witnesses Piper now relies on had very different things to say during his initial sentencing hearing in 2001. Brian Webb, one of Piper's boy scout leaders, stated in a 2001 affidavit that Linda was "active in troop meetings and was always willing to volunteer," that she "did her best to get [Piper] involved in scouts and always seemed to be there for him if he needed her," that she "was always concerned about his affairs and activities and seemed to push him to participate and to follow the rules," and that Piper's family "appeared to be a good" one in "which there was love and support." Doc. 121-2 at 219–20. Webb's current affidavit repeats none of these positive observations. Instead, Webb describes Linda as having a "bad attitude" and a "negative influence on her children," frequently being drunk, and screaming loudly when she was unhappy about things. Doc. 2-2 at 171–72.

Supreme Court decisions predating Martinez held that prisoners bear responsibility under § 2254(e)(2) for state postconviction counsel's negligence. Shinn, 596 U.S. at 383–84. The issue in Shinn was whether a prisoner who satisfies the Martinez exception is still at fault under § 2254(e)(2) for state postconviction counsel's failure to develop the record. The prisoners in Shinn argued that it was illogical to find them faultless for failing to raise a claim because of deficient postconviction counsel but at fault for this same counsel's failure to develop the factual basis for the claim. 596 U.S. at 384. The Supreme Court rejected this argument, finding that § 2254(e)(2) trumped the judge-made rule in Martinez. Shinn, 596 U.S. at 383–87. A prisoner is thus "at fault" under § 2254(e)(2) even when state postconviction counsel negligently fails to develop the record for a claim of ineffective assistance of trial counsel. Id. at 382–84. "In such a case," the Court explained, "a federal court may order an evidentiary hearing or otherwise expand the state-court record only if the prisoner can satisfy § 2254(e)(2)'s stringent requirements." Id. at 384.

This Court denied Piper's motion for testing because it had to deem Piper responsible for Kinney's alleged failure to develop the record in state court. Unfortunately for Piper, that finding not only bars this Court from considering the affidavits from his experts and others when analyzing the merits of Claim I, but also when assessing cause and prejudice under Martinez. Shinn held that prisoners cannot evade § 2254(e)(2) by offering new evidence during a Martinez hearing and then using that evidence to establish the merits of their underlying claim. Shinn, 596 U.S. at 388–90. Although recognizing that this holding would render many Martinez hearings "a nullity," the Court in Shinn found this "a reason to dispense with Martinez hearings altogether, not to set § 2254(e)(2) aside." Shinn, 596 U.S. at 389. Thus, if § 2254(e)(2) applies and a prisoner cannot meet its requirements, "a federal court may not hold an evidentiary hearing—or otherwise consider

new evidence—to assess cause and prejudice under Martinez." Shinn, 596 U.S. at 389. As the Court explained, holding a Martinez hearing when the new evidence could not be used to decide the merits of the underlying ineffective-assistance-of-counsel claim would "needlessly prolong" the habeas case, which is something federal courts "may *never*" do. Shinn, 596 U.S. at 390 (cleaned up and citation omitted); see also id. (stating that a "Martinez hearing is improper if the newly developed evidence never would entitle the prisoner to federal habeas relief" (cleaned up and citation omitted)).

The Eighth Circuit addressed Shinn for the first time in Marcyniuk, concluding that Shinn "explicitly rejects the idea that because § 2254(e)(2) bars only an evidentiary hearing on the claim, a federal court may hold an evidentiary hearing to determine whether there is cause and prejudice." Marcyniuk, 39 F.4th at 999 (cleaned up and citation omitted); see also id. at 1002 n.10 (explaining that the Eighth Circuit "need not comment on the extent to which Shinn reaches requests for evidentiary hearings on cause and prejudice *where the basis of the petitioner's cause argument is not ineffective assistance of post-conviction counsel*" but noting that the Supreme Court had expressed doubt about a similar argument in Shinn (emphasis added)).[16] Other circuits have similarly held that Shinn and § 2254(e)(2) bar courts from considering new evidence when assessing whether a claim is substantial under Martinez. See Stokes v. Stirling, 64 F.4th 131, 136 (4th Cir. 2023) (stating that Shinn "prohibits a petitioner from introducing evidence to support either their underlying constitutional claim or a Martinez claim that PCR counsel were ineffective"); Rogers v. Mays, 69 F.4th 381, 396–98 (6th Cir. 2023) (en banc) (refusing to consider

[16]At least one circuit appears to disagree with Marcyniuk's reading of Shinn. The Fifth Circuit recently concluded that, under circuit precedent, "evidence outside the state record is admissible in Martinez claims for the limited purpose of establishing an excuse for procedural default, even in the wake of [Shinn] and Shoop [v. Twyford, 596 U.S. 811 (2022)]. Mullis v. Lumpkin, 70 F.4th 906, 911 (5th Cir. 2023).

new evidence not offered in state court when analyzing whether the petitioner's ineffective-assistance-of-trial-counsel claims were substantial under Martinez); see also Lacy v. Payne, 19-cv-95-DPM, 2023 WL 3182927, at *8 (E.D. Ark. May 1, 2023) (concluding that Shinn and § 2254(e)(2) barred the court from considering the petitioner's new evidence when deciding whether ineffective-assistance-of-trial-counsel claims were substantial under Martinez). The Eighth Circuit addressed Shinn a second time very recently in Black v. Falkenrath, 93 F.4th 1107 (8th Cir. 2024), stating that "[w]hile Shinn reserved deciding whether habeas petitioners are entitled to Martinez hearings when the circumstances in 28 U.S.C. § 2254(e)(2) are not satisfied . . . a Martinez hearing is improper if the newly developed evidence would never entitle the petitioner to federal habeas relief." Black, 93 F.4th at 1109. Considering the state court record only, the Eighth Circuit held that Black was not entitled to a Martinez hearing because he had failed to show that his trial counsel was ineffective. Id. at 1110.

Piper argued at the October 2023 hearing in this case and in a brief submitted later that the Eighth Circuit's opinion in Marcyniuk misreads Shinn and that this Court should hold a hearing on cause and prejudice under Martinez. Doc. 116 at 32–42; Doc. 118. No such hearing is appropriate here, even if the Eighth Circuit would permit Martinez hearings in certain case where § 2254(e)(2) applied and the petitioner could not satisfy its requirements. As explained below, neither Claim I nor any of Piper's other procedurally defaulted ineffective-assistance-of-trial-counsel claims can succeed on the state court record alone. This Court could not consider evidence from a Martinez hearing on the merits of Piper's claims, so holding such a hearing would needlessly prolong Piper's habeas case. See Shoop v. Twyford, 596 U.S. 811, 820 (2022) ("If § 2254(e)(2) applies and the prisoner cannot satisfy its stringent requirements, holding an evidentiary hearing or otherwise expanding the state-court record would prolong federal habeas

proceedings with no purpose." (cleaned up and citations omitted)). This Court analyzes Claim I on the state court record alone.

2. Standard Governing Claim I

This Court measures counsel's performance "against an objective standard of reasonableness under prevailing professional norms." Rompilla v. Beard, 545 U.S. 374, 380 (2005) (cleaned up and citations omitted). The performance question under Claim I is whether counsel reasonably investigated Piper's case when preparing for his resentencing. Strickland established that attorneys in a capital case have a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691. As the Supreme Court explained, the respect afforded counsel's strategic decisions depends on the extent of the investigation they conducted: "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Wiggins v. Smith, 539 U.S. 510, 521 (2003) (cleaned up and citation omitted). Courts evaluating the reasonableness of the investigation must consider not just the evidence known to counsel, "but also whether the known evidence would lead a reasonable attorney to investigate further." Id. at 527.

The Supreme Court has looked to "[p]revailing norms of practice as reflected in American Bar Association [(ABA)] standards" as "guides to determining what is reasonable." Strickland, 466 U.S. at 688. The ABA Guidelines published over two decades before Piper's resentencing trial provided that "investigations into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" Wiggins, 539 U.S. at 524 (quoting 1989 version of ABA

Guidelines); see also Porter v. McCollum, 558 U.S. 30, 39 (2009) (per curiam) ("It is unquestioned that under the prevailing professional norms at the time of [petitioner's] trial, counsel had an obligation to conduct a thorough investigation of the defendant's background." (cleaned up and citation omitted)). The 2003 ABA Guidelines recognize the mitigating value of neurological damage caused by fetal alcohol syndrome (FAS) and recommend that a capital defense team include someone qualified to screen for FAS and other conditions. ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003 ABA Guidelines), reprinted in 31 Hofstra L. Rev. 913, 956–57, 1060–61 (2003).

Still, the ABA Guidelines are not the definitive word on what counsel must do in every case. Indeed, they are "only guides to what reasonableness means, not its definition." Bobby v. Van Hook, 558 U.S. 4, 8 (2009) (per curiam) (cleaned up and citation omitted); see also Roe v. Flores-Ortega, 528 U.S. 470, 479 (2000) ("Nonetheless, prevailing norms of practice as reflected in [ABA] standards and the like are only guides, and imposing specific guidelines on counsel is not appropriate." (cleaned up and citation omitted)). Counsel need not "investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing." Wiggins, 539 U.S. at 533. And courts evaluating the reasonableness of an investigation cannot play Monday morning quarterback; they must instead focus on "counsel's perspective at the time investigative decisions are made" and give "a heavy measure of deference to counsel's judgments." Rompilla, 545 U.S. at 381 (cleaned up and citation omitted).

Piper's Claim I.B alleges that trial counsel failed to conduct a timely and adequate background investigation while Claim I.C alleges that they failed to investigate and present cognitive functioning evidence. Doc. 67 ¶¶ 44–126. This Court analyzes Claim I.C first.

3. Claim I.C

Piper asserts that his records contained "many red flags" suggesting that he may have brain damage and FASD, including Dr. Clark's report noting that Linda drank "some alcohol" while pregnant with Piper and that ADD did not explain all his behavioral difficulties, a premature birth, Linda's problems during labor, neonatal jaundice, projectile vomiting shortly after birth, and recurrent severe ear infections. Doc. 62 at 3; Doc. 67 ¶¶ 94–129; Doc. 85 at 10–11, 17–18; Doc. 86 at 9. Piper alleges that Van Norman and Stonefield knew of these red flags yet failed to have their experts arrive at a diagnosis, test him for brain dysfunction, screen him for FASD, or even write a report. Doc. 86 at 16–17; Doc. 67 at 43–46. Rather, Piper claims that his attorneys directed Dr. Ertz and Dr. Wortzel to conduct a "truncated analysis" focused only on youthful age, substance abuse, and group dynamics that influenced the crime. Doc. 86 at 16; Doc. 67 ¶¶ 47, 103.

Piper faces a difficult task in showing that reasonable jurists could debate whether Van Norman and Stonefield's investigation fell below an objective standard of reasonableness. Van Norman and Stonefield knew the mitigating value of psychological evidence. They mailed Judge Eckrich the 2003 ABA Guidelines, Doc. 121-4 at 329, and, when moving to appoint Dr. Ertz, quoted the Guideline's statement that the defense team in a capital case "should contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments," Doc. 121-5 at 524 (quoting 2003 ABA Guideline 4.1(A)(2)). Van Norman's compensation vouchers show that he began investigating Piper's mental condition, including the possibility that Piper had FASD, shortly after being appointed in August 2009. See, e.g., Doc. 121-4 at 463; Doc. 121-10 at 329, 343, 350–52, 374, 385, 417, 421–23, 428. Among other notations concerning Piper's psychiatric issues, the vouchers contain a September 2009 entry for "Research FASD/ADHD/sociopathy," Doc. 121-4 at 463, a November 6, 2009 entry for "FASD/other mental health research," Doc. 121-10 at 421, and a November 18,

2009 entry for "FASD (fetal alcohol) work-up," Doc. 121-10 at 423. The vouchers show multiple entries for communications with a "psych." in November 2009, indicating that Van Norman was consulting with a psychologist or psychiatrist at the same time he was investigating FASD. Id. at 421–23, 425. In Summer 2010, Van Norman had a conference with a "social worker/consultant regarding childhood/birth issues," id. at 371, and a conference with a "special education consultant" on "ADHD, birth issues," id. at 374. Van Norman spoke with the doctor who delivered Piper in September 2010, id. at 350, and he and Stonefield met with Dr. Ertz the next month, id. at 336, 343. Van Norman and Stonefield's communication with Dr. Ertz and Dr. Wortzel increased in Spring 2011 and continued until Piper's trial. Id. at 286–89, 291–92, 306, 459, 488–93, 495–97, 515, 517–18.

The record belies Piper's claim that his attorneys directed Dr. Ertz and Dr. Wortzel to focus only on age, drug use, and group dynamics. True, Stonefield said during a January 2011 hearing that Dr. Ertz would testify about these three mitigating factors. Doc. 88-1 at 21. But he went on to explain that the records review Dr. Ertz would perform could "also help develop mitigating evidence" and that they planned to have Dr. Ertz review "certain records and then discuss with us the potential mitigatory factors that are arising from those records." Id. at 21–22. Counsels' motion to appoint Dr. Ertz also recognized that Dr. Ertz's role would be broader than simply testifying about youth, drug use, and group dynamics, explaining that "[s]chool and health records from Piper's youth also may produce mitigating evidence if examined by a mental health professional." Doc. 121-5 at 525. And it is hard to believe that Van Norman and Stonefield, who cited the Guidelines' suggestion that the defense team include a person qualified to screen the defendant for mental impairments when seeking appointment of Dr. Ertz, would then limit their experts' analysis to three predetermined issues.

In short, this is not a case where counsel failed to investigate FASD altogether or somehow hampered their experts' investigation. See Williams v. Stirling, 914 F.3d 302, 308–09, 314–15 (4th Cir. 2019) (finding ineffective assistance of counsel where counsel did not investigate FAS at all despite knowing that the defendant's mother drank while pregnant with him); Caro v. Woodford, 280 F.3d 1247, 1254 (9th Cir. 2002) (finding ineffective assistance in part because counsel failed "to provide mental health experts with information needed to develop an accurate profile of the defendant's mental health"). The issue, rather, is whether the investigation underlying counsels' decision not to further develop potential FASD evidence "*was itself reasonable*." Wiggins, 539 U.S. at 523. This Court does not know for certain how thoroughly counsel investigated the possibility that Piper had FASD or precisely what occurred during their consultations with experts. But the information obtained by Van Norman and Stonefield includes no real evidence that "would lead a reasonable attorney to investigate further" whether Piper had FASD. Wiggins, 539 U.S. at 527.

First, neither psychologist Rose nor psychiatrist Clark mentioned FASD in their reports evaluating Piper at age 13. Doc. 2 at 233–43; Doc. 66-6. Dr. Clark's failure to mention FASD could have been particularly influential, as she knew that Linda drank "some" alcohol while pregnant with Piper and performed a neurodevelopmental assessment to screen Piper for cognitive dysfunction. Doc. 2 at 235, 237–43. Second, psychiatrist Stephen Manlove evaluated Piper in 2000 and evidently never mentioned anything about FASD.[17] In September 2000, Rensch

[17]The record shows that Piper's current attorneys received an evaluation done by Dr. Manlove because their expert listed a "psychiatric evaluation" by Dr. Manlove as something they reviewed. Doc. 2 at 121. Dr. Manlove's psychiatric evaluation is not itself in the record. According to Piper's expert, Dr. Manlove diagnosed Piper with antisocial personality disorder but lacked access to Dr. Clark's evaluation or Piper's school records. Id. at 113. Piper's expert theorized that, had Dr. Manlove had access to these documents, he "likely" would "have ruled out antisocial personality disorder and advised counsel of the need for one or more FASD experts." Id. at 119.

successfully moved to appoint Dr. Manlove to "perform a psychiatric evaluation upon" Piper to determine whether he "is suffering from any mental illness, insanity, or any mental disease or defect." Doc. 121 at 381, 642. Rensch wrote that the facts of the case indicated "the possibility of insanity, mental illness, and/or diminished capacity." Id. at 381. At Piper's change of plea hearing in January 2001, Rensch explained that although a report had not been prepared, a psychiatrist had evaluated Piper and found no "issue" of insanity or diminished capacity.[18] Doc. 121-2 at 174. Third, Van Norman and Stonefield's experts might not have believed that further testing of Piper was necessary. Although Dr. Ertz and Dr. Wortzel both reviewed Dr. Clark's evaluation and Sheldon's social history, there is no evidence that either flagged FASD as something that should be investigated further or said that Piper needed to be tested for brain damage. In fact, Dr. Ertz testified that Dr. Clark's evaluation of Piper was "a very good pediatric workup." Doc. 90-7 at 199. And Dr. Wortzel, when asked on cross whether a brain scan or imaging test would have helped determine whether Piper had brain damage, said such tests are "really experimental in nature at this point in time and not intended for single subject use, *which is precisely why I didn't recommend that we go that route in a case like this.*" Doc. 90-8 at 135–36 (emphasis added). An attorney is typically not considered ineffective for relying on an expert's advice. See Haight v. Jordan, 59 F.4th 817, 839 (6th Cir. 2023) (per curiam) ("It is not unreasonable for counsel, untrained in the field of mental health, to rely on the professional opinions of expert witnesses." (cleaned up and citation omitted)); Anderson, 938 F.3d at 956–58

[18]Piper faults Van Norman and Stonefield for failing to have their experts write a report, but there could have been good reasons for not requesting one. Rensch testified during Piper's first state habeas case that Dr. Manlove gave him an oral report and agreed that defense attorneys, for strategic reasons, "[s]ometimes" request that psychiatric evaluations not be put in writing. Doc. 119 at 310. Duffy, Piper's other attorney for his initial case, testified that one of the reasons he was concerned about Piper having a jury trial was his "discussion with Mr. Rensch about potential possibilities of psychiatric testimony in this case." Id. at 462.

(finding that attorneys' failure to investigate FASD was not ineffective assistance where no one told them that defendant's mother drank while pregnant and experts did not say that defendant was brain damaged); Marcrum v. Luebbers, 509 F.3d 489, 511 (8th Cir. 2007) ("Where counsel has obtained the assistance of a qualified expert on the issue of the defendant's sanity and nothing has happened that should have alerted counsel to any reason why the expert's advice was inadequate, counsel has no obligation to shop for a better opinion.").

But even if Piper's counsel performed unreasonably in not further investigating possible FASD, Piper cannot show a substantial claim of prejudice. To establish prejudice, Piper must show a reasonable probability that, but for counsels' failure to further investigate FASD, at least one juror would have voted differently. Wiggins, 539 U.S. at 536–37. Piper's argument for prejudice assumes that further investigation would have led to an FASD diagnosis and that his attorneys would have presented that diagnosis to the jury. Doc. 85 at 36–38. As explained above, though, Shinn prohibits the testing Piper wanted done and precludes consideration of the affidavits from his experts. Rogers, 69 F.4th at 396–97 (refusing to consider new evidence not offered in state court when analyzing whether the petitioner's ineffective-assistance-of-trial-counsel claims were substantial under Martinez). That leaves this Court to speculate about whether Piper actually has FASD. Courts routinely hold that speculation is not enough to show a reasonable probability that the results of a petitioner's trial would have been different; this Court has no choice but to reach that same conclusion here. See id. at 397 (rejecting claim that trial counsel was ineffective for failing to develop mitigating evidence where none of the proposed mitigation evidence was in the state court record); Carter v. Mitchell, 443 F.3d 517, 528–30 (6th Cir. 2006) (declining to find prejudice from a failure to hire a neuropsychologist to uncover alleged brain damage where petitioner failed to present "actual, probative evidence" that he had brain damage); Armstrong v.

Kemna, 534 F.3d 857, 867 (8th Cir. 2008) ("Ordinarily, a defendant's failure to present some evidence from the uncalled witness regarding that witness's potential testimony would be fatal to an ineffective assistance of counsel claim." (cleaned up and citation omitted)); United States v. Vazquez-Garcia, 211 F. App'x 544, 546 (8th Cir. 2007) (unpublished per curiam) (declining to find that counsel's failure to interview a witness prejudiced the petitioner when the petitioner did not offer any independent evidence about what the witness would have said); Goins v. Warden, 576 F. App'x 167, 173 (4th Cir. 2014) (unpublished per curiam) (concluding that petitioner's failure to make a proffer in state court as to what an expert would have said about mental health evidence "reduces any claim of prejudice to mere speculation and is fatal to his claim"); Smith v. Adams, 506 F. App'x 561, 565 (9th Cir. 2013) (unpublished) ("Smith merely speculates as to the expert testimony that could have been produced, but speculation about what an expert could have said is not enough to establish prejudice." (cleaned up and citation omitted)).

Piper also has not shown that Kinney performed deficiently by failing to raise a claim that counsels' investigation of FASD was unreasonable. The record when Kinney started work on Piper's most recent state habeas case showed:

- that neither psychologist Rose nor pediatrician Clark mentioned FASD in their reports of evaluating Piper at age 13;
- that neither retained trial mitigation psychologist Ertz nor neuropsychiatrist Wortzel testified to any suspicion of FASD;
- that none of the psychiatrists whom the state called perceived Piper to have FASD; and
- that Van Norman and Stonefield conducted a mitigation investigation including at least some investigation of FASD.

On this record, the possibility that Van Norman and Stonefield's investigation of FASD was deficient was not so obvious that Kinney was ineffective in failing to raise such a claim.

4. Claim I.B

Piper alleges that Stonefield and Van Norman's late start on his background investigation left too little time for the mitigation specialist and forced them to hire a specialist who lived in Arizona and refused to fly. Doc. 67 ¶ 46. He faults Sheldon for not traveling to Alaska to visit his acquaintances and family in person and argues that her investigation was "flimsy," Id. ¶ 58, and discovered only "rudimentary information," Id. ¶ 54. Piper claims that an adequate investigation would have revealed the "trove of mitigating evidence" contained in the affidavits from Linda, Sheryl Engle, John Piper III, and various others. Doc. 86 at 14.

Claim I.B. is not a substantial claim of deficient performance. Van Norman and Stonefield were appointed to represent Piper in August 2009. They had reams of information to review given the procedural history of Piper's case and the records generated by his codefendants' cases. Doc. 90-11 at 11, 119–20. Contrary to Piper's suggestion, Stonefield and Van Norman did not squander the first 18 months after being appointed. Rather, they moved to withdraw Piper's guilty pleas in early October 2009. Doc. 2 at 288, 339–49, 367. They filed several supplements to the motion and deposed a law enforcement officer about whether evidence had been withheld in Piper's earlier case. Id. at 381–88. Stonefield and Van Norman testified that the motion to withdraw was important because it could have been dispositive of Piper's case.[19] Doc. 90-11 at 40, 120. As Stonefield explained at the state habeas hearing, the ruling on the motion to withdraw would also "determine scheduling" and the type of proceeding they "were actually going to have." Id. at 123. In fact, it was not until January 4, 2011, after Judge Eckrich had denied the motion to withdraw and the Supreme Court of South Dakota had denied the petition to appeal this ruling, that Judge Eckrich entered a scheduling order setting the resentencing trial for July 2011. Doc. 121-5 at 456.

[19]Indeed, Piper's current habeas petition raises a claim challenging his guilty pleas.

And while Piper argues that Van Norman and Stonefield waited until 18 months after being appointed to begin investigating his background, this does not match the record. Stonefield and Van Norman were well aware of their duty to thoroughly investigate all mitigation evidence; they not only mailed Judge Eckrich the 2003 ABA Guidelines, Doc. 121-4 at 329, but also cited to the guidelines and Supreme Court cases addressing what a reasonable mitigation investigation entails when they moved to appoint Sheldon, Doc. 121-5 at 592–608. Stonefield testified that, while they awaited Judge Eckrich's ruling on the motion to withdraw, they continued preparing for trial and reviewing the records and discovery. Doc. 90-11 at 123. He explained during a January 28, 2011 motions hearing that the defense team had already done some things a mitigation specialist would do, such as gathering documents and speaking to "quite a few witnesses already, including the family members." Doc. 88-1 at 10; see also Doc. 88-1 at 14 (Van Norman explaining during the same hearing that the defense team had already gathered some documents).

Indeed, the compensation vouchers Van Norman and Stonefield submitted to the court showed that they started working on Piper's mitigation case in August 2009 and continued thereafter. Doc. 121-4 at 460, 463, 465–67, 471, 473. This work included hiring an investigator; requesting Piper's prison records; interviewing his prior attorneys; tracking down and interviewing witnesses in Alaska, Oregon, Nevada, Louisiana, Michigan, and South and North Dakota; frequent contact with Piper's family; genealogical research on Piper's extended family; reviewing Piper's medical and juvenile records; speaking with the doctor who delivered Piper; reviewing background checks on adult males in Piper's past; researching mental conditions Piper may have; and consultation with experts. Id. at 289, 460, 463–68, 470–71; Doc. 121-5 at 302–03, 507; Doc. 121-8 at 389–90; Doc. 121-10 at 288–90, 292, 323, 327–29, 335–36, 343, 350–52, 358, 369, 371, 374, 382, 385–87, 397–98, 417–21, 423–25, 428–32, 439, 441, 445–47, 456, 458–59, 477–78, 481,

484, 488–92, 514–15, 518, 520, 555. Although Piper argues that counsel should have hired a mitigation specialist sooner, they filed a motion requesting that Sheldon be appointed shortly after Judge Eckrich's January 4, 2011 order setting a trial date. Doc. 88-1 at 6, 19. And Sheldon, who said she could do a "competent" job in Piper's case in 200 hours, had roughly five months to complete her background investigation.[20] Doc. 88-1 at 10. Hiring a mitigation specialist five months before trial is a far cry from cases finding that an untimely investigation constituted deficient performance. See Rowland v. Chappell, 876 F.3d 1174, 1185 (9th Cir. 2017) (finding that counsel performed deficiently by retaining a psychiatrist "only a few days" before the penalty phase began); Jells v. Mitchell, 538 F.3d 478, 493–94 (6th Cir. 2008) (holding that counsel was deficient where they hired a mitigation phase expert two days after the defendant was convicted and only 16 days before the mitigation hearing); see also Williams v. Taylor, 529 U.S. 362, 395 (2000) (finding it significant that counsel did not begin preparing for the sentencing phase until a week before trial).

Piper's argument about Sheldon's investigation being "flimsy" also falls flat, especially when considered alongside all the work Van Norman and Stonefield did. Sheldon reviewed Piper's school, court, psychological, and family records. Doc. 90-6 at 225. She spent 19 hours with Piper in person and interviewed, albeit by telephone, Linda, Piper's father, Piper's siblings John and Sheryl,[21] some of his teachers, his friends, and a few extended relatives. Doc. 90-7 at 19, 32–33, 41, 59, 83; Doc. 90-6 at 225, 234, 239; Doc. 121-9 at 377. She attempted contact with numerous others but was unsuccessful. Doc. 121-9 at 377. Sheldon gathered evidence that Piper

[20]Judge Eckrich, when granting Piper's motion for a mitigation specialist, observed that "there certainly can be plenty of time, as I understand it, for Ms. Sheldon to get her work done." Doc. 88-1 at 19.

[21]Van Norman wrote to Piper's eldest sibling, Jake, asking that he speak with Sheldon, but Jake refused. Doc. 90-6 at 235.

was born prematurely, had jaundice, threw up for the first month of his life, Doc. 90-6 at 233, had severe ear infections throughout childhood, id. at 234, suffered a head injury requiring over ten stiches at age three, id. at 235, did poorly on standardized tests, id. at 242; and had difficulty making friends, id. at 245; Doc. 90-7 at 57. She also elicited statements from Linda, John, and Sheryl about the frequent corporal punishment used in the Piper household. Doc. 90-6 at 235–36.

The social history Sheldon prepared detailed Piper's struggles with impulsivity and ADHD, his poor academic performance, and his use of alcohol and hard drugs at a young age. Doc. 66-1 at 21–22, 24, 27–35, 37–40, 42, 49–54, 56. It discussed the violence Piper faced at home, describing how he endured beatings from his parents and older brother. Id. at 9, 17, 45–46. It also described how Piper had told Sheldon that Linda "w[ould] have a beer out by herself or drink at home alone," that his parents liked to "drink and dance at the bar," and get drunk at the club on the weekends. Id. at 16. The social history detailed instances when a doctor, teacher, or probation officer concluded that Piper had grave problems and needed counseling or inpatient treatment, but Piper's parents either downplayed the seriousness of his issues or disregarded the recommendation. Id. at 33, 35–37, 39, 41, 44–48. There was nothing inherently deficient about Sheldon's background investigation, even accounting for her reliance on telephone interviews. See Sells v. Stephens, 536 F. App'x 483, 493 (5th Cir. 2013) (unpublished) (rejecting claim that "an investigator's use of a telephone to speak with potential witnesses should be considered a sign of constitutional deficiency").

Piper has not shown that the adequacy of the background investigation would be debatable among jurists of reason. And even if he had, he cannot show a substantial claim of prejudice. As with Piper's expert reports on FASD, Shinn bars this Court from considering the affidavits from his family members and others. Because speculation about what the witnesses would have said is

not enough to support a finding of prejudice, Claim I.B fails. See Armstrong, 534 F.3d at 867; Vazquez-Garcia, 211 F. App'x at 546. Respondents are entitled to summary judgment on the entirety of Claim I.

B. Claim III: Juror Sagdalen

Claim III of Piper's petition involves potential juror Lisa Sagdalen. Doc. 67 at 67–80. Piper alleges that Judge Eckrich improperly denied his motion to strike Sagdalen for cause (Claim III.B), that this denial caused prejudice by forcing him to waste a peremptory strike on Sagdalen rather than using it on biased Juror Anthony (Claim III.C), that counsel was ineffective by not objecting to Judge Eckrich's questioning of Sagdalen (Claim III.D), and that Miller was ineffective by failing to argue on direct appeal that Judge Eckrich erred by denying the motion to strike Sagdalen for cause (Claim III.E). "[A] juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Adams v. Texas, 448 U.S. 38, 45 (1980). And "[s]o long as the jury that sits is impartial," a defendant's loss of a peremptory strike to fix a court's erroneous failure to dismiss a juror for cause does not violate the Constitution. Ross v. Oklahoma, 487 U.S. 81, 88 (1988). In other words, a prisoner complaining about the loss of a peremptory strike cannot establish a constitutional violation without showing that a juror who heard the case was biased. Ramsey v. Bowersox, 149 F.3d 749, 758 (8th Cir. 1998).

Piper did not claim on direct appeal that Judge Eckrich erred by denying his motion to strike Sagdalen or Carlin for cause. Piper IV, 936 N.W.2d at 812; Doc. 2-1 at 7–43 (Piper's brief on direct appeal). When asked about appealing denials of challenges to potential jurors, Miller testified that he had raised only the issues that he did because he had read the entire record and

concluded that he "had no issue that was even arguably close" to the strength of the claim that Judge Eckrich erred by denying Piper's motion to withdraw his guilty plea. Doc. 90-11 at 218. In his state habeas case, Piper argued at the trial court level that Van Norman and Stonefield were ineffective in handling the voir dire of Sagdalen and Carlin and that Miller performed ineffectively by failing to appeal Judge Eckrich's denial of counsels' motions to strike these potential jurors for cause. Doc. 85-1 at 31, 34–35. Piper expanded and refined his arguments in his state habeas appeal, arguing that the denial of counsel's motion to strike Sagdalen and Carlin for cause violated his right to a fair trial, that counsel was ineffective by not objecting to Judge Eckrich's questioning of Sagdalen and Carlin, and that Miller was ineffective by not appealing the denial of the motions to strike Sagdalen and Carlin for cause. Doc. 2-1 at 122–27. Although Piper argued that these alleged errors prejudiced him, he never claimed in state court that any of the jurors who ultimately heard his case were impermissibly biased. See Doc. 2-1 at 119–27; Piper's Reply Brief, 2018 WL 10152750, at *16–18 (July 10, 2018).

The Supreme Court of South Dakota held that Piper's voir dire claims failed "for a variety of reasons." Piper IV, 936 N.W.2d at 812. First, res judicata barred "any free-standing fair trial or due process claim associated with the jury selection process" because Piper failed to raise it on appeal. Id. Second, Piper did not prove either Strickland prong on his claim that trial counsel handled the Sagdalen and Carlin voir dire ineffectively. Id. The court found Piper's deficient performance argument unconvincing, noting that counsel had challenged Sagdalen and Carlin for cause and then removed them from the jury using peremptory strikes. Id. As for prejudice, the court explained that the loss of a peremptory challenge to correct a trial court error does not violate the Constitution and that any juror bias claim must turn on the jurors who actually sat. Id. at 812–13. Because Sagdalen and Carlin did not sit on Piper's jury, the court explained, Piper was "unable

to sustain his post-conviction jury selection argument . . . either on its merits or as a component of an ineffective assistance of counsel claim." Id. at 813. Third, the court rejected Piper's claim that Miller was ineffective by failing to raise the juror selection claims on direct appeal. Id. at 814 n.19. The court concluded that the jury selection claims "lack[ed] merit" and noted Miller's testimony that he did not raise the claims "because of their relative weakness." Id.

Piper argued in his petition that all the subparts within Claim III were exhausted in state court. Doc. 67 at 67 n.8. He asserted that the ineffective assistance of Miller as appellate counsel "both provides a basis for relief and constitutes cause and prejudice to overcome any [procedural] default" of his claim that Judge Eckrich erred by denying his motion to strike Sagdalen for cause. Doc. 67 at 80.

Respondents argue that Claims III.B and III.C are procedurally defaulted and barred by res judicata. Doc. 75 at 5–8. They also assert that, under AEDPA's deferential standard of review, this Court should affirm the Supreme Court of South Dakota's decision that Piper failed to show that counsel was ineffective by not objecting to Judge Eckrich's questioning of Sagdalen and that Miller was ineffective by not arguing that Judge Eckrich had erred by refusing to strike Sagdalen. Doc. 75 at 8–10. Respondents additionally note that Piper never claimed in state court that Anthony was impartial as he does now. Respondents thus argue that this Court is limited to the form of the argument made in state court when reviewing Claim III.B and that res judicata bars Claim III.D to the extent that Piper relies on the seating of Juror Anthony to establish prejudice.

1. Claims III.B and III.C

Piper offers three reasons he can avoid procedural default of Claims III.B and III.C; none are persuasive. He argues first that res judicata in South Dakota is not adequate and independent because of Haase and the related arguments discussed above. This argument fails for the reasons

already explained. Piper argues next that res judicata does not bar claim III.B because the Supreme Court of South Dakota intertwined its res judicata analysis with federal law. That is not correct. The Supreme Court of South Dakota held that res judicata barred any free-standing fair trial claim concerning jury selection and then, alternatively, that the claim failed "either on its merits or as a component of an ineffective assistance of counsel claim." Piper IV, 936 N.W.2d at 812–13. When a state court clearly imposes a procedural bar like the Supreme Court of South Dakota did here, that bar does not lose its independence simply because the state court relies on federal law in reaching an alternative holding on the merits. Coleman, 501 U.S. at 733; Harris v. Reed, 489 U.S. 255, 264 n.10 (1989); Taylor v. Norris, 401 F.3d 883, 886 (8th Cir. 2005).

Piper's last argument is that Miller's ineffectiveness in failing to argue on appeal that Judge Eckrich should have struck Sagdalen provides cause to excuse the procedural default of Claims III.B and C. This argument raises three preliminary questions. The first is whether this Court should rule now on whether Miller's ineffectiveness can constitute cause or defer the issue to the next round of briefing. Piper's brief points to Miller's ineffectiveness as cause to excuse the procedural default of Claims III.B and C but then says he "defers discussion of the merits of the appellate ineffectiveness claim." Doc. 86 at 39. This Court structured the deadlines in this case so that it could decide whether Piper's claims were exhausted or procedurally defaulted before considering whether Piper is entitled to any relief on his remaining claims. After Piper filed an amended petition, Respondents filed four motions for summary judgment arguing, among other things, that Piper's procedural default on certain claims could not be excused under Martinez, that res judicata barred review of some of Piper's claims, and that Respondents were entitled to summary judgment on still other claims because the relevant state court decisions were not contrary to or an unreasonable application of clearly established federal law. Piper then moved

for clarification, asking whether he needed only to address "issues of exhaustion and default at this time" or whether he should also address "all the procedural and substantive arguments made" by Respondents. Doc. 80 at 2. This Court ordered as follows:

> [Piper's response] should address Respondents' arguments that Piper's procedurally defaulted claims are not excused under Martinez, Respondents' arguments that res judicata constitutes an independent and adequate ground barring review of some of his claims, and any other issues Piper has with Respondents' briefing on exhaustion and procedural default. But Piper need not address Respondents' arguments that certain state court decisions were not contrary to or an unreasonable application of clearly established federal law. As noted in the scheduling order, this Court wants to decide issues of exhaustion and procedural default before ruling on whether Piper is entitled to any relief on his claims.

Doc. 84 at 2–3. This Court's order made clear that it intended to decide issues of res judicata and procedural default on this round of briefing and that Piper should draft his response accordingly. Deciding whether Miller's alleged ineffectiveness allows Piper to avoid res judicata of Claims III.B and C necessarily involves a review of Miller's performance; as explained already, Miller's failure to raise a claim on direct appeal cannot serve as cause to excuse a procedural default unless the failure itself constitutes ineffective assistance under Strickland. Evans v. Luebbers, 371 F.3d 438, 445 (8th Cir. 2004). Consistent with the prior order, this Court decides now whether Miller's alleged ineffectiveness allows Piper to avoid the res judicata bar.[22]

The second preliminary question concerns what standard should apply to Piper's claim that Miller's ineffectiveness excuses the procedural default of Claims III.B and C. The federal

[22]Proceeding this way will not prejudice Piper. Piper's argument that Miller was ineffective by not appealing the issues relating to voir dire of Sagdalen fails without a showing that the seated jury was biased. Piper relies on Juror Anthony to make this showing, but, as this Court explains later in this opinion, Piper does not even have a substantial claim that Juror Anthony was impermissibly biased. Moreover, this Court, for the reasons explained below, cannot consider the Juror Anthony aspect of Claim III.E when analyzing whether Miller was ineffective. In short, nothing Piper could write in further briefing would show that Miller was ineffective.

appellate courts are split on whether a claim of ineffective assistance of counsel advanced as cause to excuse default of another claim should be reviewed *de novo* or under 2254(d)(1)'s deferential standard. Tavarez v. Larkin, 814 F.3d 644, 650 n.3 (2d Cir. 2016) (noting circuit split and collecting cases). As far as this Court can tell, the Eighth Circuit has never decided the issue. See Clemons v. Luebbers, 381 F.3d 744, 752 n.4 (8th Cir. 2004) (declining to decide what standard applies to a previously adjudicated ineffective-assistance-of-counsel claim because the result would be the same under either analysis). Giving Piper the benefit of the doubt, this Court will review *de novo* whether Miller's alleged ineffective assistance constitutes cause to excuse the procedural default of Claim III.B.

The third preliminary question is whether this Court can consider Piper's argument that Anthony's sitting on the jury prejudiced him when analyzing whether Miller performed ineffectively. A claim of ineffective assistance of appellate counsel cannot serve as cause to excuse a procedural default unless the prisoner either exhausted the claim in state court or can show cause and prejudice to excuse the default of the ineffective assistance claim itself. Edwards, 529 U.S. at 452–53. A prisoner has not properly exhausted a claim unless he "fairly presented" it to the state court. Picard v. Connor, 404 U.S. 270, 275–76 (1971). A "fair presentation," in turn, requires that the prisoner "present the same facts and legal theories to the state court that he later presents to the federal courts." Morris v. Norris, 83 F.3d 268, 270 (8th Cir. 1996) (cleaned up and citation omitted). Although the federal claim "cannot contain significant additional facts[,] . . . closely related claims containing an arguable factual commonality may be reviewed." Ward v. Norris, 577 F.3d 925, 935 (8th Cir. 2009) (cleaned up and citations omitted).

Piper did not fairly present the Juror Anthony aspect of Claim III.E to the Supreme Court of South Dakota. Claim III.E relies on Juror Anthony's supposed bias both to show that Piper's

claim concerning the Sagdalen voir dire is meritorious and that Miller's failure to raise the Sagdalen claim prejudiced him. Doc. 67 at 78–80. But Piper never made any argument about Anthony or any of the other jurors who heard his case when arguing in state court that Miller was ineffective. See Doc. 2-1 at 119–27. Instead, Piper argued that unlike the federal rule, South Dakota law did not require him to show that a member of the jury was biased to succeed on a fair trial claim. See Piper's Reply Brief, 2018 WL 10152750, at *16–18. The Supreme Court of South Dakota disagreed, explaining that the loss of a peremptory challenge does not violate the Constitution absent a showing of juror bias. Piper IV, 936 N.W.2d at 812–13. Piper did not make this showing, so the court found that his jury selection claims failed, and that Miller was not ineffective for failing to raise these meritless claims on appeal. Id. at 812–13, 814 n.19. Claim III.E now seeks to supply the missing element of prejudice for Piper's fair trial claim and to address the very reason the Supreme Court of South Dakota rejected the claim that Miller was ineffective. Although Piper is correct that claims raised in federal habeas need not "precisely replicate" their state court counterparts, Doc. 104 at 13, the Juror Anthony aspect of Claim III.E is simply too different from the ineffective assistance claim Piper raised in state court to be considered fairly presented, see Nash v. Russell, 807 F.3d 892, 898 (8th Cir. 2015) (holding that the petitioner did not fairly present his claim where he made a facial challenge to a state evidentiary rule in state court and then an as-applied challenge in his federal habeas petition); Williams v. Norris, 576 F.3d 850, 865 (8th Cir. 2009) (holding that the petitioner did not fairly present his claims that the state had inappropriately struck two specific African American jurors where the petitioner's direct appeal challenged "the State's use of peremptory strikes generally, but not the strikes" of the two jurors specifically); Wooten v. Norris, 578 F.3d 767, 777–78 (8th Cir. 2009) (concluding that claim that trial counsel was ineffective in the penalty phase by failing to assert mental infirmities to rebut

the state's arguments about a death-qualifying aggravator was procedurally defaulted because while the petitioner had argued in state court that trial counsel was generally ineffective for failing to present additional mitigation evidence, he did not identify what the mitigation was or how it would have impacted the trial). This Court thus cannot consider the Juror Anthony aspect of Claim III.E when analyzing whether Miller performed ineffectively.

Even on *de novo* review, Piper cannot show that Miller performed ineffectively by failing to argue on direct appeal that Judge Eckrich erred by denying his challenge to Sagdalen for cause. To establish ineffectiveness, Piper must show that Miller's failure to raise the Sagdalen claim on direct appeal was constitutionally deficient and that this deficiency prejudiced him. Strickland, 466 U.S. at 687. Under the performance prong, Piper must overcome "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. "Because of this presumption and the reality that effective appellate advocacy often entails screening out weaker issues, the Sixth Amendment does not require that appellate counsel raise every colorable or non-frivolous issue on appeal." Roe v. Delo, 160 F.3d 416, 418 (8th Cir. 1998). Indeed, "[d]eclining to raise a claim on appeal . . . is not deficient performance unless that claim was plainly stronger than those actually presented to the appellate court." Davila, 582 U.S. at 533. Miller testified that he did not raise any juror challenge claims because they were not "even arguably close" to as strong as the guilty plea claim. Doc. 90-11 at 218. This conclusion seems reasonable. As explained already, Piper's Sagdalen and Carlin claims were meritless because Piper did not include any evidence or argument that the seated jury was biased. Because Miller was not constitutionally ineffective, Piper cannot rely on Claim III.E as cause to excuse his procedural default of Claims III.B and C. Respondents are thus entitled to summary judgment on claims III.B and C.

2. Claim III.D

Piper did not raise the Juror Anthony aspect of Claim III.D below but he did exhaust at least a part of Claim III.D by arguing in his state habeas case that trial counsel was ineffective for failing to object to Judge Eckrich's improper questioning of Sagdalen. The Supreme Court of South Dakota rejected that form of Claim III.D on the merits. This Court denies Respondents' motion for summary judgment on the merits of Claim III.D without prejudice to Respondents renewing that motion in the next round of briefing. The Juror Anthony aspect of Claim III.D is procedurally defaulted, however.

3. Claim III.E

As explained already, Piper exhausted part of Claim III.E in his state habeas case and the Supreme Court of South Dakota rejected that part of Claim III.E on the merits. This Court denies Respondents' motion for summary judgment on the merits of Claim III.E but Respondents can renew that motion in the next round of briefing.

C. Claim IV: Potential Juror Dan Carlin and Juror Dennis Anthony

1. Claim IV.A

Claim IV.A alleges that Van Norman and Stonefield were ineffective by not objecting to Judge Eckrich's questioning of potential juror Dan Carlin. Piper asserts that Judge Eckrich would have struck Carlin for cause if counsel had only objected to the Judge's questions, that this would have saved Piper a peremptory strike, and that he could then have used that strike on biased Juror Anthony. Doc. 67 at 86. Piper argued in state court that trial counsel was ineffective by failing to object to Judge Eckrich's questioning of Carlin, and the Supreme Court of South Dakota rejected this claim on the merits. Piper IV, 936 N.W.2d at 812–13. As noted already, though, Piper never argued that Anthony or any of the other jurors who sat were biased when raising his ineffectiveness

claims in state court. See Doc. 2-1 at 119–27; Piper's Reply Brief, 2018 WL 10152750, at *16–18.

Respondents move for summary judgment on Claim IV.A, arguing that the Supreme Court of South Dakota's decision was not contrary to or an unreasonable application of federal law and that res judicata bars the Juror Anthony aspect of Claim IV.A. Doc. 75 at 8–9; Doc. 97 at 26–27. Respondents' motion for summary judgment on the merits of Claim IV.A is denied for now but can be renewed in the next round of briefing. The Juror Anthony aspect of Claim IV.A is procedurally defaulted, however.

2. Claim IV.B: Juror Dennis Anthony

Claim IV.B alleges that trial counsel performed ineffectively by not challenging Juror Anthony for cause or not requesting an additional peremptory strike to use on him. Doc. 67 at 87. Piper acknowledges that he did not exhaust Claim IV.B in state court but argues that he can overcome procedural default of this claim under Martinez because Kinney himself was ineffective for failing to raise this claim.

Capital defendants like Piper have a constitutional right to be sentenced by an impartial jury. Morgan v. Illinois, 504 U.S. 719, 726–28 (1992). Voir dire, peremptory challenges, and the opportunity to challenge biased jurors for cause are critical to protecting this right. Id. at 729–30; Batson v. Kentucky, 476 U.S. 79, 91 (1986). The standard for excusing jurors for cause in a capital case is whether their "views would prevent or substantially impair the performance of [their] duties as a juror in accordance with [their] instructions and [their] oath." Morgan, 504 U.S. at 728 (cleaned up and citation omitted). So, for example, a juror who would "automatically vote for the death penalty in every case" would fail this standard because he would not "in good faith . . . consider the evidence of aggravating and mitigating circumstances as the instructions require." Id.

at 729. The same is true for a juror who would never vote for the death penalty, regardless of the circumstances. Id. at 728. The impaneling of even one "automatic death penalty" juror requires that a death sentence be reversed. Id. at 729.

To succeed on his claim that counsel was ineffective by failing to challenge Anthony for cause, Piper needs to show that Anthony was "impermissibly biased," that counsel was deficient in not challenging Anthony for cause, and that Anthony's presence on the jury led to an unfair trial. Williams v. Norris, 612 F.3d 941, 955 (8th Cir. 2010). "Absent the showing of a strategic decision, failure to request the removal of a biased juror can constitute ineffective assistance of counsel." Johnson v. Armontrout, 961 F.2d 748, 755 (8th Cir. 1992). Prejudice is presumed when counsel fails to challenge a biased juror. Sanders v. Norris, 529 F.3d 787, 791 (8th Cir. 2008). This Court must consider Anthony's entire voir dire—not just the statements Piper says show bias—when analyzing Piper's claim. See Murray v. Delo, 34 F.3d 1367, 1377 (8th Cir. 1994) (explaining that courts "review the entire record, not individual responses," when determining whether a juror was biased).

Piper points to three areas of Anthony's voir dire to show that Anthony was impermissibly biased. Doc. 67 at 74–76; 87. The first concerns Anthony's statement in the jury questionnaire about the appeals process:

> **Van Norman**: Okay. You also indicated in your questionnaire that - - and I'll quote you here, "I think if the court system imposes a ruling on this then it shouldn't be appeals after appeals or carried on for years . . ." Do you remember that?
> **Anthony**: Right.
> **Van Norman**: What do you mean by that?
> **Anthony**: Well, let's see. If a decision is made then it's made so it should be carried out - -
> **Van Norman**: Okay.
> **Anthony**: - - you know, one way or another - -
> **Van Norman**: Okay.

> **Anthony**: - - instead of going - - you know, carrying it on and on and on.
> **Van Norman**: Right.
> **Anthony**: So there would be a little bit of closure, I guess, for everybody.
> **Van Norman**: All right. Does it irritate you? Have you read in the newspaper that appeals can go on and on?
> **Anthony**: Oh, yeah, they go on for years sometimes.

Doc. 89 at 130–31.

The second area concerns Anthony's beliefs about the costs of sentencing someone to life in prison. Anthony had included a response in the juror questionnaire asking why the "taxpayers" should "have to pay for the upkeep for life?" Id. at 131–32. Under questioning from Van Norman, Anthony affirmed that this was "kind of - - kind of how I feel about it, yeah." Id. at 132.

The third area concerns Anthony's views on the death penalty. Anthony's juror questionnaire stated that he believed in an "eye for an eye" and that "[t]hey should get the same as what they caused." Id. at 132. When Anthony said he couldn't really explain what he meant by these statements, Van Norman asked whether he believed that a person who "intentionally takes a life" should "forfeit[]" his own life. Id. at 132. Anthony replied, "No, it depends on - - it all would depend on the circumstances . . . and, you know, what - - how the trial went." Id. Van Norman then got more specific:

> **Van Norman**: So the question I have got is based on part of what you answered in your questionnaire, and the question was, "Do you believe the State should impose a death penalty on everyone who, for any reason, intentionally kills another person?" that was the question, and you answered, "Yes."
> **Anthony**: Yes, I really think they should.
> **Van Norman**: Okay. So if a person kills without excuse, and I think we're - - we're excluding no excuse like self-defense - -
> **Anthony**: Yeah.
> **Van Norman**: - - or accident or insanity, we're setting those aside, right?
> **Anthony**: Right, yeah.

> **Van Norman**: Okay. Your belief then as a personal matter, as a personal belief we're talking about, is that if somebody intentionally kills, like Briley, then he should get the death penalty?
> **Anthony**: Yeah, I really think he should.

Id. at 133–34.

But the above statements, while concerning in isolation, do not capture the whole picture of Anthony's voir dire. Indeed, Anthony's responses when Van Norman pressed him further indicate that he would not be an automatic vote for the death penalty:

> **Van Norman**: Okay. In a trial like this what a jury has to do, and this isn't criticizing you, I'm just trying to explain the procedure here, what the jury has to do is sort through a lot of information.
> **Anthony**: Right.
> **Van Norman**: And in this instance given your state of mind, your belief there, it wouldn't matter to you to sort through that information, you already have a belief, right, and a conclusion?
> **Anthony**: Is there more evidence going to be presented?
> **Van Norman**: Sure, but my concern isn't that I have to prove anything to you, it's whether or not you already have a firm belief right now as we sit here. And your firm belief, I understand, is that since Briley is a convicted killer, that he intentionally killed somebody - -
> **Anthony**: Uh-huh.
> **Van Norman**: - - then he should get the death penalty.
> **Anthony**: I would say yes, but it would depend on what come [sic] up during this trial, or whatever it's going to be, the sentencing part.
> **Van Norman**: Okay. What can you envision - - again, you got a - - let's do a hypothetical situation.
> **Anthony**: Okay.
> **Van Norman**: Those can be tricky, but hypothetical situation where you got a convicted killer that you're passing judgment on, he's already convicted, you haven't to decide that, he plead guilty, okay. And it's a horrific crime, it's a bad crime, and the State has proven to you that there is a special aggravating circumstance about that crime and that makes that defendant eligible for the death penalty, okay?
> **Anthony**: Uh-huh, okay.
> **Van Norman**: Can you envision ever voting for life without the chance of parole for a person that was convicted in that situation?
> **Anthony**: In some instances, yes, because it's going to give him an awful long time to think about what he did.

> **Van Norman**: Okay. So you kind of view sitting for life as possibly - - well, not possibly, a severe punishment.
> **Anthony**: Yeah, already punishment.
> **Van Norman**: Okay. What about your concern that the taxpayers having to pay for somebody to sit for life, how does that figure into your estimation there?
> **Anthony**: Well, I don't know what it costs to feed and house and all that medical stuff, but you wouldn't have that to contend with, so that would be - -
> **Van Norman**: And if the Judge were to instruct you - - not instruct you to consider anything like that - - or, to instruct you not to consider anything like what the costs may or may not be, could you set that aside?
> **Anthony**: Yeah.
> **Van Norman**: Okay. Can you envision yourself under these circumstances I described coming back with a verdict of life without the possibility of parole?
> **Anthony**: Yes.
> **Van Norman:** Okay. I mean, that - - that's pretty firm that you could do that in your mind?
> **Anthony**: You bet, you bet.
> **Van Norman**: I'm take what you said here, and I'll read it again, "Do you believe the State should impose a death penalty on everyone who, for any reason, intentionally kills another person?" that was the question; you answered, "Yes." But that isn't your true feeling after we talked about it here.
> **Anthony**: Well, like I say, it's got to - - you got to hear more about what went on than just a question like that - -
> **Van Norman**: Okay.
> **Anthony**: - - I would think.

Doc. 89 at 134–36. Anthony went on to affirm that he could consider mitigating evidence, including youth, a troubled childhood, and what Piper had done in the years since the murder. Id. at 137–40. He said that he would extend mercy to Piper if he "thought it was appropriate," and agreed that he would follow the judge's instructions. Id. at 142.

Piper has not shown a substantial claim that Anthony was impermissibly biased in favor of the death penalty. Although Anthony's questionnaire and initial statements on the death penalty suggested such a bias, his voir dire as a whole shows that he was not a juror whose views on capital punishment would have prevented him from following the law and the judge's instructions.

Anthony repeatedly and unequivocally said that he could impose a life sentence on a hypothetical defendant who had pleaded guilty to a horrific murder and was eligible for the death penalty. Id. at 135–36, 138. He confirmed his willingness to follow the judge's instructions and agreed that he would consider the very type of mitigating evidence Piper planned to offer. Id. at 137–40, 142. Overall, the voir dire shows that Anthony wanted to hear all the evidence and would consider both the death and life sentence alternatives.

Piper also has not made a substantial showing that Van Norman was ineffective by failing to challenge Anthony for cause. Van Norman made clear during voir dire that he was troubled by some of Anthony's responses in the questionnaire. Id. at 139. When Van Norman sought to pin Anthony down, though, Anthony said he would need to hear the whole case and that he would consider a life sentence for a defendant in Piper's situation. It was objectively reasonable for Van Norman to conclude that Anthony's voir dire did make not him vulnerable to a meritorious challenge for cause, especially when Judge Eckrich had just denied two challenges for cause to potential juror Sagdalen,[23] whose voir dire was more problematic than Anthony's. Piper also has not shown that Judge Eckrich would have granted a request for an additional peremptory strike to use on Anthony or that Van Norman was ineffective for failing to make such a request. See Greenlee v. Wallace, 13-CV-1922, 2016 WL 4730312, at *9 (E.D. Mo. Sept. 12, 2016) (rejecting ineffective assistance claim in part because there was "no reason to conclude that the trial court would have granted a motion to strike" the juror in question). Indeed, Judge Eckrich had already set the number of peremptory strikes the parties would receive, giving each side one additional

[23]Sagdalen after all had described a Pennington County sheriff's deputy as her best friend, had talked with the deputy about the case generally, had read extensively about Poage's murder, and expressed an opinion that Piper should receive the death penalty. Doc. 2-2 at 160–63; Doc. 89 at 75–97.

strike but denying Piper's pretrial motion for 10 additional strikes. Doc. 121-5 at 535–36; Doc. 121-8 at 448–49.

Finally, Piper has not shown that Kinney was ineffective in failing to argue in the state habeas corpus case that Van Norman performed deficiently by not challenging Anthony for cause. Kinney raised other, stronger claims, and could reasonably have concluded that such a claim would not have aided in getting Piper's sentence vacated. See Deck, 978 F.3d at 584 (explaining that "competent performance does not require counsel to recognize and raise every conceivable constitutional claim" (cleaned up and citations omitted)); id. ("[D]eclining to raise a claim is not deficient performance unless that claim was plainly stronger than those actually presented." (cleaned up and citation omitted)). Respondent is entitled to summary judgment on Claim IV.B.

D. Claim V: Sister Crowley

Claim V alleges that Van Norman and Stonefield were ineffective when Fitzgerald cross-examined Sister Crowley about writing a letter to a female inmate at Piper's urging. Piper argues that Sister Crowley's actions did not violate prison rules and that trial counsel should have objected to the cross-examination and requested a recess to research the issue for themselves. Doc. 67 at 93. Piper raised this claim in his state habeas case, and everyone agrees it is exhausted. Doc. 75 at 1. The Supreme Court of South Dakota rejected the claim on its merits, noting that it was "still unsettled" whether the letter violated prison policy and finding that Piper had not proved either Strickland prong.[24] Piper IV, 936 N.W.2d at 816. Respondents move for summary judgment on

[24]Van Norman testified at the state habeas hearing that he had asked his paralegal to speak with the warden after Piper's trial and that his paralegal had drafted an affidavit saying that the warden was "very concerned about the exchange that had taken place" between Fitzgerald and Sister Crowley. Doc. 90-11 at 78; see also id. at 86 (Van Norman testifying on cross that the warden told his paralegal there was no policy forbidding inmates from communicating with other inmates through third parties). Judge Macy sustained a hearsay objection to Van Norman's description of the affidavit. Id. at 78. Piper included the paralegal's affidavit in the appendix of his federal

the merits of Claim V, arguing that the Supreme Court of South Dakota's decision is not contrary to nor an unreasonable application of federal law.[25] Doc. 75 at 9–12. This Court denies Respondents' motion without prejudice to refiling it in the next round of briefing.

E. Claim VI: Failure to Appeal Denial of Motion for Mistrial

Claim VI alleges that Miller was ineffective by failing to appeal the denial of Piper's motion for a mistrial made after the State elicited testimony about whether inmates were allowed television. Doc. 67 at 94–97. Piper properly exhausted this claim by raising it in his state habeas case. The Supreme Court of South Dakota rejected this claim, finding that Miller made a reasonable "strategic decision" not to appeal the issue based on its "relative strength" and that Piper had failed to prove prejudice. Piper IV, 936 N.W.2d at 816. Respondents moved for summary judgment on Claim VI in one of its opening briefs, arguing that the Supreme Court of South Dakota's decision was not contrary to or an unreasonable application of federal law. Doc. 75 at 12–13. In their reply brief, however, Respondents make the misguided argument that res judicata bars Claim VI and that the claim cannot be revived under Martinez. Doc. 97 at 29. Res judicata does not apply to Claim VI because Piper's habeas case was the first time he could raise it. And Martinez does not apply because Claim VI concerns appellate counsel rather than trial counsel and Piper properly exhausted the claim in state court. Respondents' motion for summary judgment on Claim VI is denied without prejudice to renewing the merits aspect of the motion in the next round of briefing.

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habeas case, Doc. 2-2 at 177–78, but it is unclear whether he made the affidavit part of the record in his state habeas case. Piper's appellate brief in his state habeas case stated that because the policy was never introduced at trial, it was "still unclear as to whether" Sister Crowley's letter violated any policy. Doc. 2-1 at 140.

[25]Respondents also argue that res judicata bars the "due process component" of Claim V. Doc. 97 at 28. Piper confirmed at the October 25, 2023 hearing that Claim V is a straight ineffective-assistance claim with no due process component.

F. Claim VII: Evidence of Lewd Behavior

Claim VII addresses the State's evidence and argument that Piper and his accomplices forced Poage to undress and made sexual comments to him out at Higgins Gulch. Claims VII.A and VII.B allege that Fitzgerald engaged in prosecutorial misconduct and violated Piper's due process rights by ignoring two court orders prohibiting sexual orientation evidence and repeatedly alluding to Piper's bisexuality. Doc. 67 at 100–10. Claim VII.C alleges that trial counsel was ineffective by failing to object, request a limiting instruction, or move for a mistrial when Fitzgerald repeatedly referenced the oral sex comment Piper made at Higgins Gulch. Id. at 111–13; Doc. 86 at 43–45. Piper acknowledges that these claims were not raised in state court and are procedurally defaulted. Doc. 67 at 100; Doc. 86 at 44. He agrees that he cannot overcome the procedural default of Claims VII.A and B but argues that Martinez excuses the default of Claim VII.C. Doc. 86 at 44; Doc. 116 at 103–04. Respondent moves for summary judgment on Claim VII, arguing that Martinez does not apply because trial counsel preserved the claim by objecting to the oral sex evidence and the default did not occur until Miller failed to raise the claim on direct appeal. Doc. 73 at 7–9; Doc. 97 at 30–31.

Piper agrees that his counsel objected to some of the evidence of lewd behavior at Higgins Gulch but argues that Fitzgerald went well beyond just mentioning the evidence in opening statements and introducing it through Curtis. He points to Fitzgerald's exchanges with Dr. Donald Habbe, Hoadley, Dr. Ertz, and Dr. Wortzel for support. Fitzgerald asked Dr. Habbe, a forensic pathologist, how often he found male homicide victims missing their clothes. Doc. 90 at 164. Van Norman objected, Judge Eckrich overruled him, and Dr. Haabe responded that "[i]t happens," but not as often as female victims are found without clothes. Id. Fitzgerald's exchange with Hoadley began with asking what Piper said to Poage after he was made to strip. Doc. 90-4 at 36–37. When

Hoadley replied that Piper had asked for the pin to Poage's ATM card, Fitzgerald said he would ask a "little bit more leading question" and inquired when Piper told "the naked Mr. Poage that he was going to have to suck his dick?" Id. at 37. Piper's counsel did not object, and Hoadley replied that Piper had asked Poage what he would "say if I told you I wanted you to suck my dick?" Id. Piper also cites to Fitzgerald asking Dr. Ertz whether the American Psychiatric Association once defined homosexuality as a mental disorder, Doc. 90-8 at 67, asking Dr. Ertz and Dr. Wortzel about Piper's oral sex comment at Higgins Gulch, id. at 54–55, 122, and referring in closing argument to the oral sex comment and Page's threat to have someone "rape and sodomize" Poage,[26] Doc. 90-10 at 42–43. Trial counsel did not object to these statements.

Piper argues that Fitzgerald's conduct violated two court orders—Judge Eckrich's order granting Piper's motion in limine on sexual orientation evidence and his statement at the pretrial hearing that he would "stand by" this ruling. Piper claims that this violation constituted prosecutorial misconduct and that trial counsel was ineffective by failing to request a mistrial or a cautionary instruction to remedy the misconduct. Doc. 86 at 43–45.

This is not a substantial claim of ineffective assistance and Kinney was not deficient for failing to raise it in state court. Piper has not pointed to any evidence or argument offered by Fitzgerald that Piper was bisexual in general or suggesting that he had or wanted to have sex with men on occasions unrelated to Poage's kidnapping and murder. Rather, Piper's claim relies on the

[26]Piper claims in his petition that the State never presented evidence to support Fitzgerald's statement on Page's conduct at Higgins Gulch. Doc. 67 at 102. Not so. In a police interview played for the jury, Piper said that Page "likes naked guys" and "was getting into it" when Poage disrobed. Doc. 95 at 38–39; Doc. 90-2 at 150–52. He also disclosed that Page had told Poage that he "could have Russell come down here and just rape your ass." Doc. 95 at 40. Piper admitted to laughing at this. Id. at 40–41. Piper also told police he was bisexual. Doc. 90-1 at 191. Consistent with Judge Eckrich's order on the motion in limine, however, that portion of the interview was not shown to the jury. Doc. 95 at 38–39; Doc. 90-1 at 190–91.

flawed premise that Judge Eckrich's pretrial orders prohibited Fitzgerald from offering evidence or argument about the lewd behavior that occurred at Higgins Gulch. But Piper's motion in limine focused only on his sexual orientation, seeking to prohibit evidence or argument that he was bisexual or "had sexual relationships with other males." Doc. 121-5 at 551. The motion cited to testimony by Russell Olson in Piper's first trial that he and Piper had engaged in sexual relations, and did not make any reference to Poage being made to strip naked, Piper making an oral sex comment at Higgins Gulch, or Page suggesting to get "Russell" to rape Poage. Id. at 551–53. When Stonefield brought up Judge Eckrich's order at the pretrial hearing, he said that the court had "granted a motion in limine on Mr. Piper's supposed bisexuality or sexual relationship with Russ Olson"; Stonefield did not argue for all the lewd behavior at Higgins Gulch to be excluded. Doc. 90 at 24. Nor did Judge Eckrich's order on the motion in limine or his ruling at the pretrial hearing extend to lewd behavior at Higgins Gulch. More importantly still, Judge Eckrich's decision that Curtis could testify about Piper's oral sex comment shows that Judge Eckrich did not view the lewd behavior at Higgins Gulch as "a sexual orientation reference," Doc. 90-1 at 193, but rather as "part of the res gestae," Doc. 90-3 at 8–9.

This distinction between Piper's sexual orientation in general and the lewd behavior at Higgins Gulch is hardly surprising. The lewd behavior at Higgins Gulch was part of Poage's kidnapping and murder and probative of whether the State had proved the aggravating circumstance that Piper's crime was "outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery." See Doc. 90-10 at 42–43 (Fitzgerald arguing in closing that sexual behavior at Higgins Gulch and Piper laughing at Page's rape threat was evidence of torture and depravity of mind); Doc. 121-10 at 177 (final instructions explaining that "torture includes serious psychological abuse of a victim resulting in severe mental

anguish to the victim in anticipation of serious physical harm"); id. at 212 (verdict form asking jury to select whether Poage's murder involved torture, depravity of mind, or an aggravated battery). Evidence directly relating to the elements and immediate context of a crime does not become inadmissible just because it might shed light on a defendant's sexual orientation. See United States v. Forrest, 429 F.3d 73, 79–80 (4th Cir. 2005) (holding that pornographic photos of adult males, which defendant argued portrayed him as homosexual, were not unfairly prejudicial in sexual exploitation of a minor case where photos were "highly relevant" to rebut the defendant's theories); United States v. Isley, 369 F. App'x 80, 91–93 (11th Cir. 2010) (per curiam) (unpublished) (upholding district court's decision to admit evidence in fraud prosecution that defendant used her employer's money to make a charitable donation to a lesbian advocacy organization where donation was "part and parcel" of evidence that defendant was misappropriating her employer's funds and the nature of the donation was relevant to show that it was not related to her employer's business); United States v. Yazzie, 59 F.3d 807, 811–12 (9th Cir. 1995) (holding that pornographic magazines showing naked men were not unfairly prejudicial where defendant used the magazines to perpetrate the sexual abuse of a minor and the magazines corroborated the victim's description of the abuse).

Fitzgerald did not violate Judge Eckrich's orders by introducing evidence of the lewd behavior at Higgins Gulch, and a motion for a mistrial based on this evidence would not have succeeded. No reasonable jurist would say that trial counsel was ineffective for failing to move for a mistrial based on a violation of a pretrial ruling when the evidence submitted did not in fact violate the ruling. Piper also asserts that trial counsel should have requested a limiting instruction that the jury could not consider his sexual orientation. But reasonable counsel rationally could fear and make a proper strategic decision that such an instruction would have just drawn attention

to the issue Piper sought to prohibit with his motion in limine. Respondents are entitled to summary judgment on Claim VII.[27]

G. Claim VIII

Claim VIII alleges that trial counsel was ineffective by failing to move for a mistrial based on Fitzgerald's "cumulative" prosecutorial misconduct. Doc. 67 at 113–28. In Piper's view, this misconduct consists of Fitzgerald: (1) eliciting testimony about prison privileges despite a court order excluding such evidence; (2) suggesting during Hoadley's testimony that the jury was too weak to impose a death sentence; (3) violating Judge Eckrich's rulings by eliciting testimony about lewd behavior at Higgins Gulch and "falsely insinuating" that Poage was sexually assaulted; and (4) surprising trial counsel with two undisclosed experts, Dr. Pesce and Dr. Franks. Piper acknowledges that Claim VIII is procedurally defaulted but argues that he can show cause under Martinez.[28] Doc. 86 at 46; Doc. 67 at 114.

Piper cannot satisfy Martinez unless he establishes a substantial claim that trial counsel was ineffective by failing to move for a mistrial based on Fitzgerald's cumulative prosecutorial misconduct and that Kinney was himself ineffective for failing to raise this claim in the state habeas case. A prisoner alleging prosecutorial misconduct must prove (1) the prosecutor's conduct was improper and (2) that the improper conduct was so prejudicial that the prisoner was denied a fair

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[27]Piper argued in his petition that trial counsel was ineffective by failing to object when Fitzgerald asked Hoadley a leading question about Piper's oral sex comment at Higgins Gulch. Doc. 67 at 112. He did not mention this argument in his briefs, and such an objection would not have been successful in any event. Doc. 86 at 43–45; Doc. 104 at 16. Stonefield had objected to what he believed was a leading question earlier in Hoadley's direct. Doc. 90-4 at 18. Judge Eckrich overruled the objection, agreeing with Fitzgerald that Hoadley was a hostile witness. Id.; see State v. Rodriguez, 952 N.W.2d 244, 255–56 (S.D. 2020) (stating that leading questions are appropriate when a party calls a hostile witness).

[28]Parts of Claim VIII read as though Piper is also raising a standalone prosecutorial misconduct claim. Piper agrees that such a claim is procedurally defaulted, however, and that this default cannot be excused. Doc. 116 at 112.

trial. State v. Hankins, 982 N.W.2d 21, 33 (S.D. 2022); see also United States v. Kopecky, 891 F.3d 340, 343 (8th Cir. 2018). "Prosecutorial misconduct implies a dishonest act or an attempt to persuade the jury by use of deception or by reprehensible methods." Hankins, 982 N.W.2d at 33 (cleaned up and citation omitted); see also United States v. Crawford, 523 F.3d 858, 861 (8th Cir. 2008) ("A prosecutor's comments are improper if they are likely to inflame bias in the jury and to result in a verdict based on something other than the evidence." (cleaned up and citation omitted)). A prosecutor's misconduct results in prejudice when it "so infects the trial with unfairness as to make the resulting convictions a denial of due process." Hankins, 982 N.W.2d at 33 (cleaned up and citation omitted); see also Kopecky, 891 F.3d at 343 ("The ultimate question is whether the prosecutor's comments, if improper, so infected the trial with unfairness as to make the resulting conviction a denial of due process." (cleaned up and citation omitted)). Courts in South Dakota will not grant a mistrial based on prosecutorial misconduct unless the conduct "in all probability . . . produced some effect upon the jury's verdict and is harmful to the [defendant's] substantial rights." State v. Mitchell, 491 N.W.2d 438, 441 (S.D. 1992) (cleaned up and citation omitted); State v. Hofman, 562 N.W.2d 898, 902 (S.D. 1997) (same). This Court reviews each instance of alleged prosecutorial misconduct and then considers whether trial counsel was ineffective by not moving for a mistrial based on the cumulative effect of the misconduct.

1. Prison Privileges

Piper's prison privileges argument focuses on four questions Fitzgerald asked Penitentiary employee Brad Woodward. Doc. 67 at 116. The first such question was whether the prison restricted communications by inmates in Piper's unit, and Woodward replied that the inmates "can communicate with the guys in their section" but could not pass notes. Doc. 90-2 at 119. The

second was Fitzgerald returning to this issue after asking about inmates using a "fishing line"[29] to pass messages:

> **Fitzgerald**: But they can talk amongst themselves in the same unit?
> **Woodward**: Right.
> **Fitzgerald**: All right. Do you know if inmate Elijah Page and the defendant were housed in close proximity to each other for a period of time?
> **Woodward**: I believe they were for a period of time.
> **Fitzgerald**: Do you know how long?
> **Woodward**: I don't.

Id. at 119–20. The third question was whether Piper had been allowed to attend college and Woodward responding that Piper had taken some college courses. Id. at 120. The fourth was whether inmates are allowed television and Woodward replying "Yes" before Van Norman could object. Id. at 121. Piper claims that Fitzgerald violated Judge Eckrich's order by asking these questions and that evidence of prison privileges was irrelevant and prejudicial.

Piper's position has several problems, the first being his argument that all four areas of Fitzgerald's questions violated a court order. That argument appears to be based on Judge Eckrich's oral ruling during the July 18, 2011 pretrial hearing in chambers. Stonefield argued during the hearing that the State should not be allowed to mention the privileges available to inmates serving life without parole. Doc. 90 at 28–29. He relied on a South Carolina case, State v. Burkhart, 640 S.E.2d 450, 487–89 (S.C. 2007), holding that evidence of prison privileges in a death penalty case was not relevant under state law. Doc. 90 at 29. Fitzgerald replied that some discussion of prison life was necessary to show that Piper was not a model prisoner, having received 75 disciplinary write ups while in the Penitentiary. Id. at 30. He gave the example of Piper communicating with other inmates despite being in solitary confinement for much of the

[29]Woodward testified that a "fishing line" is a string of clothing or bedding inmates use to move notes or contraband through the unit. Doc. 90-2 at 119.

day. Id. Judge Eckrich agreed that certain evidence about Piper's conditions of confinement could be admissible but doubted the relevance of particular privileges like cable television or reading subscriptions. Id. at 30–31. He said that he would read Burkhart and directed Fitzgerald to "stay away from any kind of specifics" for "the moment." Id. at 33–34. Judge Eckrich did not mention the prison privilege issue again until Fitzgerald asked about inmates having television. Doc. 90-2 at 121–22. Judge Eckrich then called a recess, told Fitzgerald he had "stepped over the line there," and ruled that prison privileges were irrelevant under Burkhart. Id. at 122. Just a few moments later, however, Judge Eckrich said that he "actually had [the prison-privilege issue] as a pending motion," although he knew he "did discuss it some, just to be clear."[30] Id. at 123.

Fitzgerald's question about Piper taking college courses did not violate any pretrial order; Piper's attorneys mentioned the college courses in opening statements, Doc. 90 at 114, and pointed to the taking of college courses as evidence that Piper had changed since the murder, Doc. 90-10 at 71, 88, 91. The questions about communication between prisoners included Fitzgerald's suggestion that Piper could speak with Page. But it is not clear that these violated Judge Eckrich's order either. After all, an inmate's ability to speak with other inmates was not mentioned during the July 18 hearing as a "privilege" Piper wanted to exclude. In fact, Fitzgerald cited Piper violating a rule about communication between inmates as an example of a disciplinary issue he wanted to present. Doc. 90 at 30–34. And Judge Eckrich said that some evidence of prison life would be admissible to show why Piper had received write ups. Id. The television question is the only instance of questioning appearing to violate Judge Eckrich's pretrial ruling expressing doubt

[30]Respondents concede that Fitzgerald, in asking about television privileges, "broached the limits of an order in limine." Doc. 75 at 12.

about television privileges being relevant and direction to Fitzgerald to "stay away from any kind of specifics" for the "moment." Id. at 34.

Piper however cannot show prejudice even though the television question appeared to violate Judge Eckrich's order. Any prejudicial effect from the television reference was minimal given that it occurred just once during a ten-day trial, Judge Eckrich sustained an objection to it,[31] and the jury heard a mountain of properly admitted evidence establishing the aggravating factors and horrendous circumstances of Poage's murder. See United States v. Thao, 76 F.4th 773, 779 (8th Cir. 2023) (explaining that any "misconduct must be put in context of the length of the trial" when determining the prejudicial effect of prosecutorial misconduct); id. (stating that courts should also consider the strength of the properly admitted evidence of guilt); United States v. Fenner, 600 F.3d 1014, 1022 (8th Cir. 2010) (finding no prejudice from the government's use of leading questions because the district court sustained objections to all but two of them and the government rephrased). These circumstances make it very unlikely that a brief reference to television in prison influenced the jury's verdict or caused it to reach a decision on an improper basis. Beyond that, the Supreme Court of South Dakota has suggested that the circumstances of prison life can be relevant in a death penalty case. See State v. Rhines, 548 N.W.2d 415, 453–54 (S.D. 1996). The petitioner in Rhines argued that the jury's question about whether prison conditions "might allow 'distraction from his punishment'" and whether he would be eligible for work release showed that the jury considered irrelevant or unfairly prejudicial matters. Id. The court rejected this argument, explaining that "[p]rison life was an appropriate topic for discussion when weighing the alternatives of life imprisonment and the death penalty." Id. at 454; see also State v. Holden, 488

[31] Judge Eckrich instructed the jurors at the beginning of trial that they must ignore any question to which he sustained an objection and should not try to guess what the answer might have been. Doc. 90 at 82.

S.E.2d 514, 528 (N.C. 1997) (approving argument that the defendant would enjoy various privileges if the jury sentenced him to life in prison rather than death). Although this Court does not read Rhines as allowing prosecutors to make a sentence of life in prison sound cushy, there does not appear to be any prohibition per se in South Dakota on evidence about prison conditions that apply to a person serving a life sentence. The fact that Fitzgerald mentioned television being available in prison on this record was not prejudicial, particularly given Judge Eckrich's sustaining of the objection to the question.

2. Hoadley Letter

On direct examination, Fitzgerald asked Hoadley about a letter he had written to Piper a few years before the resentencing trial. Doc. 90-4 at 64. Piper claims that Fitzgerald tried to goad the jury into a death sentence in the following exchange:

> **Fitzgerald**: All right, and then in there you said - - writing this letter and you say that you believed that he was "trying to do any kind of manipulation you can to get off death row," is that right?
> ....
> **Hoadley**: I said, "Why should I believe that you aren't just realizing your own mortality and trying to do anything - - any kind of manipulation you can to get off death row?"
> **Fitzgerald**: And then what did you say?
> **Hoadley**: I said, "Honestly, if you don't ask for it they will never kill you anyway."
> **Fitzgerald**: All right. And what does the next sentence say?
> **Hoadley**: I said, "I do hope that you do get out of death row, and if you ever get a jury to do the sentencing you probably will." Actually I said, "You will."
> **Fitzgerald**: All right. So you don't believe a jury like this could impose the death sentence.

Id. at 69–70. Stonefield objected immediately and Judge Eckrich sustained the objection before Hoadley could respond. Id. at 70.

Fitzgerald's statement that Hoadley did not believe that "a jury like this could impose the death sentence" was improper. Hoadley's thoughts on the matter were irrelevant and Fitzgerald

had no legitimate reason for commenting on them. Fitzgerald's statement, however, cannot be deemed so prejudicial that it denied Piper due process. Like the television availability question, Fitzgerald's statement occurred once during a ten-day trial, Judge Eckrich sustained an objection to it, and the jury heard overwhelming evidence on the aggravating factors and the brutality of Poage's murder.

3. Sexual Orientation and Alluding to Sexual Assault

Piper argues that Fitzgerald violated two court orders by eliciting testimony about the lewd behavior at Higgins Gulch. Doc. 67 at 119. This Court has already determined, however, that evidence of such behavior occurring at Higgins Gulch did not violate Judge Eckrich's orders and that Fitzgerald did not act improperly by discussing the evidence.

Piper also claims that Fitzgerald falsely insinuated that Poage was sexually assaulted through his questions of Dr. Habbe and Hoadley. Id. at 119–21. Fitzgerald asked Dr. Habbe how often he found male homicide victims missing their clothing, and Dr. Habbe responded that it occurred sometimes but was more common for female homicide victims to be found naked. Doc. 90 at 164. The Hoadley question Piper complains of occurred on redirect, after Hoadley testified on cross that no one did anything sexual to Poage:

> **Fitzgerald**: Okay. Now, if I recall, yesterday you said that when Briley Piper was forcing Chester Allan Poage to strip naked, and you were asked by the Defense whether there was any sexual act, you said, "Absolutely no." Do you remember that?
> **Hoadley**: Yep.
> **Fitzgerald**: All right. But that's exactly[32] the way you said it when the police talked to you back on April 25th of 2000, correct?
> **Hoadley**: No.
> **Fitzgerald**: Yeah. You said, "I don't know, nothing happened while I was around." That's what you told the police.
> **Hoadley**: And I was never not around, so - -

[32]Fitzgerald may have meant to say (or perhaps did and the court reporter missed it) "that's *not* exactly" the way Hoadley said it in 2000.

> **Fitzgerald**: Well, that's not what you told the police though, is it. Or would you like to see the transcript?
> **Hoadley**: You just read the transcript.
> **Fitzgerald**: I did; so that's what you said. "Did it happen earlier?" You said, "I don't know, nothing happened while I was around." That's what you told the police.
> **Hoadley**: And there wasn't a point where I wasn't around so therefore nothing happened.
> **Fitzgerald**: So that's how you remember it now 11 years later.
> **Hoadley**: And then too.
> **Fitzgerald**: Oh, but that's not what you said.

Doc. 90-5 at 44–45. Fitzgerald had a good-faith basis for the questions he posed to Dr. Habbe and Hoadley. There was evidence that Piper and his accomplices forced Poage to strip, after which Piper asked what Poage would say if requested to perform oral sex on the trio and Page taunted Poage by suggesting they bring Russell there to rape Poage. Judge Eckrich allowed Fitzgerald to treat Hoadley as a hostile witness, and while Fitzgerald was making too much out of a slightly different answer Hoadley gave eleven years prior, Fitzgerald probing a perceived inconsistency in Hoadley's account of one aspect of circumstances surrounding the murder was not prosecutorial misconduct and had a good-faith basis. See United States v. Mosquera, 886 F.3d 1032, 1047 (11th Cir. 2018) ("In at least some circumstances, a prosecutor must have a good-faith basis for questions asked during trial."); see also 75 Am. Jur. 2d Trial § 410 (Updated Feb. 2024) ("A lawyer must not pursue a line of questioning when there is no reasonable expectation of being able to prove the matters to which the line refers, so that a prosecutor who asks questions that imply the existence of a prejudicial fact must be prepared to prove that fact. Prosecutorial misconduct may occur when a prosecutor asks a question for which the prosecutor has no reason to believe there is a foundation of fact or law." (footnotes omitted)).

4. State's Experts

Piper argues that Fitzgerald "surprised" his trial counsel by not notifying them that Dr. Pesce and Dr. Franks would be testifying as experts and not providing their curriculum vitaes. Doc. 67 at 114–16. During the January 28, 2011 hearing, Judge Eckrich had ordered the State to "identify within your witness list who your expert is going to be." Doc. 88-1 at 85. On May 26, 2011, Fitzgerald filed an amended witness list naming, among other witnesses, "Dr. Ron Franks, Psychiatrist, University of Southern Alabama," and "Dr. Ulysses Peese, [sic] S.D. Division of Mental Health." Doc. 121-9 at 208–09. Fitzgerald failed to comply with Judge Eckrich's order by not specifically identifying Dr. Franks and Dr. Pesce as expert witnesses. Piper's attorneys were not surprised that these witnesses were testifying as experts, however. They received Dr. Pesce's records for treatment of Piper in March 2011, id. at 487–500; Doc. 89 at 17–19, and filed pretrial motions discussing the possibility that Dr. Pesce would provide expert testimony, Doc. 121-9 at 307–09, 370–75. Dr. Franks, whom Fitzgerald identified as a psychiatrist in his witness list, testified as an expert for the State in Hoadley's trial. Doc. 89 at 21–22; Doc. 121-8 at 170.

Beyond the experts not being a surprise to his attorneys, Piper also cannot show any prejudice from Fitzgerald's supposed misconduct. Judge Eckrich held a preliminary hearing with Dr. Pesce because of Van Norman's complaints about a lack of notice and an inability to speak with the doctor before trial. Dr. Pesce described his credentials and proposed testimony at the hearing, and Van Norman was allowed to question him on these topics. Doc. 90-2 at 12–50. When asked what he would have done differently if he had received access to Dr. Pesce earlier, Van Norman simply said that he would have "talked to him informally the length I could" and that this discussion would have been more thorough than the discussion during the preliminary hearing.[33]

[33]Judge Eckrich did not impose any time or topic limits when Van Norman questioned Dr. Pesce during the preliminary hearing. Doc. 90-2 at 12–50.

Id. at 50. Judge Eckrich denied Piper's motion to preclude Dr. Pesce from testifying but ruled that Dr. Pesce should not stray too far afield from the topics discussed in his treatment records for Piper. Id. at 50–51. On Judge Eckrich's order, Van Norman was also allowed to interview Dr. Franks off the record before he testified. Doc. 90-3 at 9, 101–02. Piper has made no attempt to explain how Fitzgerald's failure to comply with Judge Eckrich's orders on expert witnesses made the trial so unfair that his conviction amounted to a denial of due process.

5. Ineffective Assistance and Cumulative Effect of Alleged Prosecutorial Misconduct

Piper argues that he was prejudiced by the cumulative effect of Fitzgerald's misconduct and that trial counsel were ineffective by failing to move for a mistrial based on the sum of Fitzgerald's misdeeds. This is not a substantial claim of ineffective assistance. Much of the conduct Piper complains of—Fitzgerald offering evidence of lewd behavior at Higgins Gulch, questioning Woodward about college courses and communication in prison, and asking Dr. Habbe and Hoadley the questions discussed in section III.G.3 of this opinion—was not improper at all. Courts only consider "the cumulative effect of the improprieties," not the cumulative effect of *alleged* improprieties. United States v. Milk, 447 F.3d 593, 602 (8th Cir. 2006). And while Fitzgerald's comment on the Hoadley letter and the television question were improper, that does not mean Piper would have been successful in moving for a mistrial based on the cumulative effect of Fitzgerald's misconduct. See Donnelly v. DeChristoforo, 416 U.S. 637, 647–48 (1974) (distinguishing between "ordinary trial error of a prosecutor" and the "sort of egregious misconduct" that amounts "to a denial of constitutional due process"); Hankins, 982 N.W.2d at 34 (explaining that due process guarantees the defendant the right to a fair trial, not an "error-free" one (cleaned up and citation omitted)). Instead, the question is whether Fitzgerald's misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process."

Donnelly, 416 U.S. at 643; Hankins, 982 N.W.2d at 33 (same); State v. Smith, 599 N.W.2d 344, 355 (S.D. 1999) (same).

No reasonable jurist would find that the cumulative effect of Fitzgerald's misconduct rose to this level. Judge Eckrich minimized any prejudice from the television question and comment on the Hoadley letter by sustaining objections to them and instructing the jury that "[o]ffered testimony . . . not received . . . should not be considered." Doc. 90-10 at 27; Doc. 90 at 82. If any prejudice remained, it was dwarfed by the properly admitted evidence. The State established the aggravating factors and presented extensive evidence of Poage's gruesome murder. After all, near the start of this brutality, a combat-boot clad Piper kicked the defenseless Poage in the face so hard that he knocked him unconscious. Piper and his accomplices then forced Poage to drink hydrochloric acid mixed with beer and discussed in Poage's presence various ways of killing him. They drove Poage to a remote location where they made him strip in the below-freezing night and tried burying him in the snow and drowning him in an icy creek. This didn't kill Poage, so Piper stabbed him in the head with a knife and kicked him with his combat boots. Piper stood by while Page and Hoadley similarly stabbed and beat Poage. Poage pleaded for mercy throughout the attack, but Piper and his accomplices ignored and taunted him. Given the "ordinary" nature of Fitzgerald's misconduct and the overwhelming evidence against Piper, trial counsel and Kinney were not ineffective in failing to argue for a mistrial based on cumulative prosecutorial misconduct. Respondents are entitled to summary judgment on Claim VIII.

H. Claim IX: Tom Curtis

Claim IX addresses the shortcoming in disclosure and use in cross-examination of Curtis's criminal history. Piper alleges in Claims IX.A–IX.D that the State violated his due process rights by (1) failing to disclose that Curtis was awaiting sentencing on rape convictions in Utah when he

testified at Piper's resentencing trial in July 2011, and (2) failing to correct Curtis's omission of the rape convictions when describing his criminal history to the jury. Doc. 67 at 128–35; see Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that the State violates due process when it suppresses evidence favorable to the defense and material to the defendant's guilt or punishment); Napue v. Illinois, 360 U.S. 264, 265, 269 (1959) (holding that the State violated due process when it failed to correct testimony it knew to be false). Claim IX.E alleges that trial counsel were ineffective by failing to adequately investigate Curtis's background and failing to request Curtis's updated criminal history. Doc. 67 at 135–37.

Piper raised a version of these arguments in his state habeas case. At the state habeas hearing, Van Norman testified that his paralegal had checked Curtis's record after Piper's resentencing trial and discovered that Curtis had been convicted of several rape charges concurrent with his cocaine distribution charges.[34] Doc. 90-11 at 50, 52, 101. During Piper's resentencing trial, Curtis admitted to being convicted by a jury (wrongly, according to Curtis) on cocaine distribution charges but never mentioned the rape convictions. Doc. 90-3 at 36–39. Van Norman testified that Fitzgerald had provided a criminal history for Curtis at some point before Piper's resentencing but that this history did not include the Utah convictions. Doc. 90-11 at 49, 101. Van Norman acknowledged that he could have received the criminal history before Curtis's convictions for rape and cocaine distribution occurred and that he did not request an updated criminal history for Curtis right before trial. Id. at 49–50, 54, 94, 217. On appeal of Piper's habeas case, Kolbeck argued that the State had violated Piper's due process rights by failing to provide an updated

[34]A 2013 opinion from the Utah Court of Appeals, over two years after Piper's resentencing trial, shows that a jury convicted Curtis of four counts of giving a minor female victim cocaine and four counts of raping her. State v. Curtis, 317 P.3d 968, 971–72 (Utah Ct. App. 2013). At trial, Curtis testified that a jury found him guilty of eight charges, but they were all drug distribution charges. Doc. 90-3 at 37–39.

criminal history that included Curtis's rape convictions and by permitting Curtis to lie under oath about his Utah convictions. Doc. 2-1 at 135–39. He also asserted that trial counsel was ineffective by failing to adequately investigate Curtis's criminal background. Id. Although Kolbeck's appellate brief cited Van Norman's testimony about the rape convictions, it appears that Piper's state habeas attorneys never offered a judgment or other document establishing that Curtis had, in fact, been convicted of rape in Utah. The State's appellate brief argued that Piper had not identified impeaching convictions that trial counsel had failed to discover, and that Piper was simply speculating that Curtis had convictions in Utah "beyond those that were known by his counsel and used as impeachment." State's Appeal Brief, 2018 WL 10152749, at *67–69 (July 10, 2018).

The Supreme Court of South Dakota rejected both Piper's ineffective assistance claim and his claim that the State violated his due process rights by failing to provide an updated criminal history for Curtis. Piper IV, 936 N.W.2d at 815. The court declined to find prejudice on the ineffective assistance claim, concluding that Piper had failed to show that an investigation of Curtis would have "yielded meaningful impeachment information." Id. And it ruled that Piper had defaulted his due process claim by not raising it on direct appeal.[35] Id. at 815 nn.21 & 22. The

[35]The Supreme Court of South Dakota seemed to address Piper's due process argument twice, in footnotes 21 and 22. Footnote 21 addressed procedural default and the issue of whether Curtis's criminal history was material:

> Piper also now alleges that the State's failure to provide Curtis' criminal history report is, itself, a free-standing due process claim that is cognizable in this habeas case despite the fact it was not raised on direct review. We disagree, but even if the claim were not precluded, we are not convinced on this record that Piper could sustain his burden to demonstrate the omitted information was material.

Piper IV, 936 N.W.2d at 815 n.21. Footnote 22 addressed procedural default and Piper's claim that the State should have provided his attorneys with Curtis's updated criminal history:

> Piper further argues that the State violated his due process rights when it failed to provide his resentencing counsel with Curtis' updated criminal history. Because Piper did not raise this issue on

court referred generally to Curtis's criminal history and did not mention his rape convictions in either ruling. Id.

Respondents move for summary judgment on Claims IX.A–IX.D and IX.E, arguing that res judicata bars Piper's due process claim and that the Supreme Court of South Dakota's ruling on the ineffective assistance claim was not contrary to or an unreasonable application of federal law. Respondents assert that Piper failed to offer evidence of Curtis's rape conviction in his state habeas case and that he cannot do so now. Doc. 75 at 14–15; Doc. 97 at 31. Piper responds that the Supreme Court of South Dakota's rejection of his ineffective assistance claim involved an unreasonable determination of fact because it ignored Van Norman's testimony at the habeas hearing about Curtis's rape convictions.[36] Doc. 67 at 136. He also contends that he can show cause to excuse any procedural default of his due process claims. Id.; Doc. 86 at 47.

1. Claims IX.A–IX.D

The Supreme Court of South Dakota found that Piper procedurally defaulted the due process claims he now brings in Claims IX.A–IX.D by failing to raise them on direct appeal. Piper IV, 936 N.W.2d at 815 nn.21 & 22. Piper argues that the State's failure to disclose Curtis's updated criminal history provides cause to excuse this default. Doc. 67 at 136; Doc. 86 at 47. Piper is correct that a prosecutor's suppression of evidence may sometimes constitute cause to excuse procedural default of a Brady or Napue claim like he tries to raise here. See Banks v. Dretke, 540

> appeal in Piper III, he is foreclosed from bringing this claim now as a free-standing claim.

Id. at 815 n.22.

[36]Piper's initial federal habeas petition alleged that state habeas counsel was ineffective by failing to prove that Curtis had lied when testifying about his Utah convictions. Doc. 1-1 at 126. Piper's amended petition drops this claim, contending instead that Van Norman's testimony about the rape charge could establish that a proper investigation would have produced meaningful impeachment material. Doc. 67 at 136.

U.S. 668, 691–92 (2004); Dansby v. Payne, 47 F.4th 647, 657, 659–60 (8th Cir. 2022). This rule only applies, however, when the suppression of evidence "is the reason for the petitioner's default." Dansby, 47 F.4th at 659. "A petitioner has not shown cause if he had evidentiary support for his claim before his default, or if the evidence was reasonably available through other means." Id. (cleaned up and citations omitted).

Piper has not shown cause for defaulting this issue. He has not cited any evidence that the State knew of Curtis's rape convictions or any case suggesting that the State had a constitutional duty to discover and divulge these out-of-state convictions. See United States v. Jones, 34 F.3d 596, 599 (8th Cir. 1994) ("[T]he prosecutor has no duty to undertake a fishing expedition in other jurisdictions in an effort to find impeaching evidence." (cleaned up and citations omitted)). Nor has Piper established that the State suppressed Curtis's convictions. Rather, Piper through trial counsel learned of Curtis's rape convictions shortly after the trial when Van Norman directed his paralegal to check Curtis's record and Van Norman's testimony suggested that the Utah convictions were quite recent.[37] Doc. 90-11 at 50, 52. The paralegal's discovery of Curtis's rape convictions suggests that when the convictions occurred, they were available to Piper's attorneys.[38]

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[37]Van Norman testified that: "Mr. Fitzgerald's office provided a rap sheet. It didn't include, as I recall, the Utah convictions. Keep in mind, those were arrests at the time, I think, we were preparing for trial. I don't know the timeline on when he was convicted relative to when we even started jury selection, but he got convicted shortly before he testified at the sentencing trial." Doc. 90-11 at 49.

[38]Piper does not point to anything in the record about being unable to discover Curtis's criminal record. This Court's independent review of the record shows the following. In January 2011, Piper moved to have the State produce the criminal histories of all of its witnesses by a month before trial. Doc. 121-6 at 50–51. The motion said that Piper lacked the ability to find this information on his own. Id. At a January 2011 motions hearing, the State told Judge Eckrich that it could not have the FBI run the criminal histories at the defense's request, but that the defense could supply a court order to the FBI and get the criminal histories that way. Doc. 121-8 at 361–62. Judge Eckrich said that he would grant Piper's motion and the State said it would provide Piper with the appropriate address. Id. at 362. At a May 6, 2011 hearing, Fitzgerald again said that the FBI would not allow the prosecution to request criminal histories on the defense's behalf but that there

See Jones, 34 F.3d at 600 (finding that an attorney's discovery of prosecution witness's out-of-state convictions "suggests" these convictions were "also . . . accessible to" the defendant's attorneys). This is a serious problem for Piper as "[l]ack of production by state officials is not cause excusing procedural default if the information the officials failed to produce is reasonably available through other means." Zeitvogel v. Delo, 84 F.3d 276, 279–80 (8th Cir. 1996); see also Jones, 34 F.3d at 600 ("When information is readily available to the defendant, it is not Brady material, and the prosecution does not violate Brady by not discovering and disclosing the

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was a mechanism by which the defense could request a court order and give that to the FBI. Doc. 121-9 at 104–05. Van Norman said he was aware of the State's change in procedure and that he would submit a proposed order to the Court. Id. at 105. On May 15, 2011, Van Norman emailed Judge Eckrich asking that he execute a proposed order for criminal histories, saying that the defense needed a copy to send to the FBI. Doc. 121-8 at 648. Judge Eckrich wrote back that he had no proposed order and told Van Norman to get him one. Id. Judge Eckrich filed an order on May 20, 2011, requesting that the FBI produce to the court criminal record checks for the State's witnesses, including Curtis. Doc. 121-9 at 71. On May 23, 2011, Van Norman's paralegal emailed Judge Eckrich asking whether a copy of the signed order had been sent to the FBI or whether she should send it herself. Id. at 127. Judge Eckrich said the paralegal needed to send it. Id. At a June 17, 2011 hearing, Judge Eckrich said he had not received any criminal histories yet and Van Norman said he would follow up on it. Id. at 337. On June 29, 2011, Van Norman sent a letter to Judge Eckrich saying that his efforts to secure the criminal rap sheets of the state's witnesses through the FBI had been fruitless and that the defense would be constitutionally deficient without these criminal histories. Id. at 408–09. That same day, Judge Eckrich sent an email to Fitzgerald and Van Norman saying that he could not explain why the FBI had not supplied the criminal rap sheets and directing Fitzgerald to "produce and deliver to Mr. Van Norman a Triple I for each witness you intend to call at trial." Id. at 407. On July 1, 2011, Judge Eckrich entered an order requiring Fitzgerald to produce by the end of that day the "criminal records (NCIC or Triple I reports)" for all State witnesses. Id. at 416–17. Fitzgerald responded that same day, objecting to the order and attaching a memo from the FBI supposedly saying that prosecutors are not to run criminal histories for defense counsel. Id. at 422–27. Fitzgerald said that the state would nevertheless attempt to comply with the order. Id. at 422. On July 5, 2011, the State filed a "Supplementary Discovery Response" explaining that it had provided the "Triple I/History" for Tom Curtis and other State witnesses to Van Norman. Id. at 473. The record does not appear to contain Curtis's "Triple I," so this Court does not know when the State ran Curtis's Triple I. This Court did not find any complaints about Piper's counsel lacking a criminal history for Curtis after this July 5, 2011 disclosure. Van Norman's billing records show that his paralegal contacted the clerk for Daggett County, Utah, on August 16, 2011, about Curtis. Doc. 121-10 at 282. She contacted the "Utah Court" about Curtis on August 29, 2011. Id. at 283. Daggett County is the County where Curtis was convicted of rape. Doc. 67 ¶ 352.

information."); id. at 559–600 (finding that a Missouri prosecutor did not violate Brady by failing to disclose the Illinois convictions of one of its witnesses where prosecutor had checked the witness's Missouri record and did not know of the Illinois convictions, and the Illinois convictions were accessible and part of the public record); Johns v. Bowersox, 203 F.3d 538, 545 (8th Cir. 2000) ("There is no suppression of evidence if the defendant could have learned of the information through reasonable diligence." (cleaned up and citation omitted)).

And even if Piper could show that the State suppressed the convictions, he would still need to show that this was "the reason for [his] default." Dansby, 47 F.4th at 659. Van Norman testified that he learned of the rape convictions "several weeks" after trial, Doc. 90-11 at 52, and that he told Miller about this information and urged him to raise the issue on appeal, id. at 77. The thorny question here is whether claims involving nondisclosure of Curtis's rape convictions could have been raised on direct appeal or belonged among claims in the state habeas case. Testimony of Van Norman and Miller illustrate this debate. Van Norman's principal concern upon learning of Curtis's undisclosed rape convictions was the possibility that Curtis was receiving consideration from Utah for testifying at Piper's resentencing trial. Id. at 44–57. When asked what issues he believed Miller should have raised on appeal, Van Norman mentioned Curtis, testifying that he

> urged Mr. Miller to ask for - - the Supreme Court, the State Supreme Court, to remand the case for exploration of that information similar to what had happened with the Toby Gibbens [sic][39] issue for Briley on his first appeal to the Supreme Court after Judge Johnson imposed the death penalty. It was a valid issue, especially after I received the information I did via my paralegal that he had rape convictions. He lied about it, obviously, or omitted during his testimony. That should have been done. It was not done despite our urging."

[39]The correct spelling is "Tobe Givens."

Id. at 77. The Tobe Givens issue Van Norman referenced involved Piper's claim in his first appeal, after Judge Johnson had sentenced Piper to death, that Fitzgerald had an undisclosed sentencing agreement with state witness Toby Givens. Doc. 121-3 at 261–62; Piper I, 709 N.W.2d at 793–94. The Supreme Court of South Dakota had entered a limited remand of Piper's first appeal in 2002, directing the trial judge to hold a hearing on whether there was an undisclosed agreement with Givens and whether Piper's death sentence was grossly disproportionate to Hoadley's life sentence. Piper I, 709 N.W.2d at 793; Doc. 121-3 at 261–62. A bit later in the habeas hearing, Van Norman testified: "There were other issues that should have been raised, in my opinion, and it's contingent on whether or not there would have been further information on a remand. And so if the remand would have been denied had the request been made, then we would not have had a record for the two issues, the Crowley and the Curtis issues, to be developed on appeal." Doc. 90-11 at 81. On cross-examination, the State asked Van Norman what evidence he had that Curtis received undisclosed consideration for his testimony and what steps Van Norman took after trial to follow up on this. Id. at 102. Van Norman testified "What I followed up was the convictions, and I talked to Mr. Miller about the possibility of a remand to get this straight." Id. He said that he "handed it off to Mr. Miller at that point with specific disclosures." Id.

Miller, however, testified that the "gist" of the complaint he received from Van Norman was that Curtis had a deal to receive a more lenient sentence in Utah for testifying at Piper's trial, although Miller acknowledged that "there may have been other things with regards to Mr. Curtis." Id. at 217. Miller went on to explain that "the record does not reflect that there was any undisclosed deal or promises of leniency. And again, the record could be developed by way of a habeas proceeding, and so it was a bad appeal issue because the record wasn't sufficient. It was a potential habeas issue, and so I left it alone." Id. at 217–18. Miller knew of Curtis's rape convictions and

perhaps could have sought some limited remand to the trial court to create a record for pursuit of these due process claims on direct appeal to the Supreme Court of South Dakota. Some state appellate courts may view the matter like Miller did: an issue better developed in a subsequent state habeas case. After all, South Dakota law provides that the "original pleadings, papers, offered exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases." SDCL § 15-26A-47; see also State v. Rederth, 376 N.W.2d 579, 580 (S.D. 1985) ("Appeals are decided entirely on the record received from the trial court. This court cannot take new evidence on appeal, or take judicial notice of facts subject to reasonable dispute." (cleaned up and citation omitted)); Toben v. Jeske, 718 N.W.2d 32, 35–36 (S.D. 2006) (declining to consider affidavit attached to appellate brief because it was not part of the settled record). However, the Supreme Court of South Dakota had previously dealt with a similar Brady issue—the Tobe Givens plea deal—in Piper's prior appeal through a remand to develop the record before direct appeal. Piper I, 709 N.W.2d at 793 (discussing how the court had remanded Piper's case for a determination of whether there had been an undisclosed agreement between the State and Tobe Givens); see also State v. Birdshead, 871 N.W.2d 62, 79 (S.D. 2015) (remanding case so that trial court could include alleged Brady material in the settled record where trial court said it would include material in the record but failed to do so).

The court, albeit in a footnote and with no analysis, deemed Piper foreclosed from bringing this as a freestanding claim in his state habeas case because it was not raised on direct appeal. Piper IV, 936 N.W.2d at 815 n.22. Miller's decision not to pursue these claims—rather than the State's suppression of evidence—caused what the Supreme Court of South Dakota deemed to be Piper's procedural default. See Dansby, 47 F.4th at 559–61 (holding that state's alleged suppression of information about prosecution witness did not provide cause to excuse procedural

default of Brady/Napue claims where the petitioner could have learned of information by interviewing witness before trial and could have filed a petition in state court when witness supposedly recanted his testimony several years after the trial); Sullivan v. United States, 587 F. App'x 935, 944 (6th Cir. 2014) ("Sullivan has procedurally defaulted on any Brady claims concerning these documents because his appellate counsel, who had these documents, did not raise these claims on direct appeal."); Hammonds v. Allen, 849 F. Supp. 2d 1262, 1294 (M.D. Ala. 2012) (holding that State's suppression of evidence did not provide cause to excuse procedural default of Brady claim where petitioner knew of evidence before filing appeal). This result seems harsh because Miller's decision to await a habeas case to develop the record for such a Brady claim was not irrational. See, e.g., Welch v. Lund, 616 F.3d 756, 758 (8th Cir. 2010) (stating that a "state prisoner is not required to pursue extraordinary remedies outside of the standard review process" (cleaned up and citation omitted)). Respondents nonetheless are entitled to summary judgment on the due process claims Piper raises in Claim IX because of the unique South Dakota procedure for remands to develop Brady claims.

2. Claim IX.E

This Court denies Respondents' motion for summary judgment on the merits of Claim IX.E—ineffective assistance of counsel by failing to investigate Curtis's criminal history—without prejudice to Respondents renewing the motion in the next round of briefing. See Doc. 67 at 128–29.

I. Claim X: Inconsistent Arguments

Claim X alleges that Judge Eckrich violated Piper's rights under the due process clause and Eighth Amendment by refusing to admit supposedly inconsistent arguments Fitzgerald made in Page's trial. Piper raised this claim in his state habeas case, but the Supreme Court of South

Dakota rejected it. The court held that res judicata barred the claim because Piper failed to raise it on direct appeal and, alternatively, that the claim failed on the merits. Piper IV, 936 N.W.2d at 809–10. Respondents move for summary judgment on Claim X, arguing that res judicata bars it and that the Supreme Court of South Dakota's merits decision was not contrary to or an unreasonable application of federal law. Doc. 75 at 16. Piper responds that Miller was ineffective in failing to raise the inconsistent argument claim on direct appeal and that this ineffectiveness provides cause to excuse any procedural default.

Respondents are entitled to summary judgment on Claim X. Again, ineffective assistance of appellate counsel constitutes cause only if the prisoner either *properly* exhausted the ineffective assistance of appellate counsel claim in state court or can show cause and prejudice to excuse procedural default of the claim. Edwards, 529 U.S. at 453 (explaining that a claim of appellate counsel ineffectiveness was still procedurally defaulted where the petitioner presented the claim in state court "but in such a manner that the state court could not, consistent with its own procedural rules, have entertained it"). Piper argues that he exhausted his claim that Miller was ineffective by raising it in his reply brief in his state habeas appeal. Doc. 67 at 145; Doc. 86 at 47. Not so.

The closest Piper came to raising the issue was a heading in his reply brief stating that "Appellate counsel was ineffective by not appealing and preserving all issues for appeal." Piper's Reply Brief, 2018 WL 10152750, at *23 (July 10, 2018); Doc. 67 at 145 (citing to this statement as evidence that Piper exhausted his claim that Miller was ineffective). The text following this heading, however, focused mainly on whether Piper's attorneys should have raised the guilty plea issue earlier; Piper did not specifically argue that Miller was ineffective by failing to raise the inconsistent argument issue on direct appeal. See Piper's Reply Brief, 2018 WL 10152750, at *23–25. A general heading like the one in Piper's reply brief is not nearly specific enough on its

own to show that Piper properly presented his claim that Miller was ineffective by failing to raise the inconsistent argument issue. See Kelley v. Sec'y for the Dep't of Corr., 377 F.3d 1317, 1344 (11th Cir. 2004) ("[H]abeas petitioners cannot preserve otherwise unexhausted, specific claims of ineffective assistance merely by arguing that their lawyers were ineffective in a general and unspecified way."); Ellis v. Raemisch, 872 F.3d 1064, 1091 (10th Cir. 2017) ("[I]t is not enough that a prisoner has generally presented a Strickland claim of ineffective assistance to the appropriate state court; the prisoner must have presented—and thereby exhausted—the substance of the exact ground of ineffectiveness (i.e., deficient attorney conduct) upon which the prisoner later seeks habeas relief in federal court."); Flieger v. Delo, 16 F.3d 878, 885 (8th Cir. 1994) ("A habeas petitioner who asserts only broadly in his state petition for relief that his counsel has been ineffective has not immunized his federal habeas claim's specific variations from the effects of the state's procedural requirements. Nor has a petitioner who presents to the state courts a broad claim of ineffectiveness as well as some specific ineffectiveness claims properly presented all conceivable specific variations for purposes of federal habeas review." (internal citations omitted)). And even if Piper had been more specific, the Supreme Court of South Dakota does not consider arguments raised for the first time in a reply brief. Mach v. Connors, 979 N.W.2d 161, 173 (S.D. 2022); State v. Roedder, 923 N.W.2d 537, 545 (S.D. 2019); see also Atwater v. Crosby, 451 F.3d 799, 810 (11th Cir. 2006) (holding that petitioner procedurally defaulted habeas claim he raised for the first time in a reply brief before the state supreme court where the state's rules deemed arguments raised for the first time in a reply brief waived).

J. Claim XI: Guilty Pleas

Claim XI alleges that Piper's guilty pleas were not knowing, voluntary, and intelligent because the state trial judge incorrectly told him that all twelve jurors would need to agree before

he could receive a life sentence and that pleading guilty would require him to be sentenced by the court rather than a jury. Doc. 67 at 146. The Supreme Court of South Dakota rejected this claim when Piper raised it in his state habeas case, Doc. 2-1 at 90–100, finding that res judicata applied because Piper failed to raise the claim when appealing his initial death sentence and in his first habeas proceeding, and that the claim would fail on the merits "[e]ven if we were inclined to review" it, Piper IV, 936 N.W.2d at 803–07.

Respondents move for summary judgment on Claim XI, arguing that res judicata bars the claim and, alternatively, that the Supreme Court of South Dakota's decision was not contrary to or an unreasonable application of federal law. Docs. 77, 78. Piper argues that the Supreme Court of South Dakota's res judicata ruling does not bar Claim XI because it was not adequate to support the judgment or independent of federal law.

1. Adequacy

Some background on the guilty plea claim aids understanding both Piper's adequacy argument and the Supreme Court of South Dakota's application of res judicata. The Supreme Court of South Dakota held that Piper first defaulted the guilty plea claim when he failed to raise it in his initial appeal of his death sentence. Piper IV, 936 N.W.2d at 805. As the court found, Piper's initial appeal in Piper I made no claim that his guilty plea was not knowing, voluntary, or intelligent. Instead, he challenged the constitutionality of South Dakota's capital punishment statutes. He argued that the statutes violated the Supreme Court's decision in Ring v. Arizona, 536 U.S. 584 (2002), by depriving him of his right to be sentenced by a jury after pleading guilty. Piper I, 709 N.W.2d at 803;[40] Piper I Brief, 2003 WL 24309259, at *92–95 (May 22, 2003); see

[40]As a reminder, Piper I, decided in 2006 was Piper's initial appeal of his death sentence; Piper II, decided in 2009, was Piper's initial state habeas case; Piper III, decided in 2014, was Piper's direct

Ring, 536 U.S. at 588–89, 608–09 (holding that Arizona's death penalty scheme violated the Sixth Amendment by requiring that a judge—rather than a jury—determine the existence of aggravating factors after the defendant's conviction). Piper claimed that the only appropriate remedy for his unconstitutional sentence was to reduce it to one of life imprisonment. Piper I Brief, 2003 WL 24309259, at *97; Piper I Reply Brief, 2004 WL 3769922, at *13 (Feb. 18, 2004). The Supreme Court of South Dakota rejected Piper's challenge to the statutes, finding that South Dakota law did not prevent a defendant who pleads guilty from exercising his right to a jury at the sentencing phase and that Piper had waived his right to a jury sentence by pleading guilty and "expressly declining the circuit court's offer to empanel a jury to consider his sentence." Piper I, 709 N.W.2d at 803–10.

The Supreme Court of South Dakota held that Piper defaulted his guilty plea claim a second time by failing to raise it in Piper II, his initial state habeas case. Piper IV, 936 N.W.2d at 805. As with his initial appeal, Piper's first state habeas case did not challenge his guilty plea. See Piper II Brief, 2008 WL 6722279 (Oct. 7, 2008); Piper II Reply Brief, 2009 WL 2598204 (Jan. 22, 2009); Piper IV, 936 N.W.2d at 801. Rather, Piper focused solely on his death sentence, arguing that it should be reduced to life in prison because the trial judge's misstatement of the juror unanimity requirement rendered his waiver of the right to a jury sentencing invalid. Piper II Brief, 2008 WL 6722279; Piper IV, 936 N.W.2d at 801–02; Piper II, 771 N.W.2d at 356, 360. The Supreme Court of South Dakota agreed in part with Piper, finding that he did not validly waive his right to have a jury decide whether to impose the death penalty because the state trial judge did not make clear that he would receive a life sentence if even one juror voted against the death

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appeal after his jury resentencing; and Piper IV, decided in 2019, was Piper's second state habeas case.

penalty. Piper II, 771 N.W.2d at 358–60. Rather than converting Piper's sentence to one of life imprisonment, however, the court remanded Piper's case for resentencing by a jury. Id. at 360.

On remand, Piper, now represented by Van Norman and Stonefield, moved for the first time to withdraw his guilty plea. Doc. 2 at 288, 339–49, 367–80. He claimed that he should be allowed to withdraw his guilty pleas under SDCL § 23A-27-11[41] for several reasons, including that he was never informed that he did not have to plead guilty to receive a court sentencing. Doc. 2 at 339–48. Judge Eckrich denied Piper's motion to withdraw his guilty plea on the merits. Id. at 381–88. Piper appealed this denial in Piper III but the Supreme Court of South Dakota affirmed, finding that Judge Eckrich had no jurisdiction to consider the merits of Piper's motion because it was beyond the scope of the limited remand in Piper II. Piper III, 842 N.W.2d at 343–44.

Piper raised the guilty plea claim in his second state habeas case, arguing that his plea was not knowing and voluntary because the trial court misadvised him on the unanimity requirement and suggested that the guilt and sentencing forums had to be the same. Doc. 85-1 at 32–34. At the state habeas hearing, Miller testified that he and Piper agreed not to challenge the guilty plea in Piper II, Piper's first habeas case. Doc. 90-11 at 198, 203. Miller explained that he told Piper that it would be premature to challenge his guilty plea, that he did not have the experience to accurately advise him on the pros and cons of withdrawing his guilty plea, and that South Dakota's rules of criminal procedure would give him an "absolute right" to move to withdraw his guilty plea if he succeeded in his habeas petition. Id. at 199–202. Miller recognized, however, that Piper could have challenged his guilty plea in his first habeas case. Id. at 204.

[41]Section 23A-27-11 provides: "A motion to withdraw a plea of guilty or nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice a court after sentence may set aside a judgment of conviction and permit the defendant to withdraw his plea."

The Supreme Court of South Dakota applied res judicata to the guilty plea claim in Piper IV because Piper failed to raise the claim on direct appeal in Piper I or in his first habeas case in Piper II. Piper IV, 936 N.W.2d at 805. It rejected Piper's argument that § 23A-27-11 allowed him to "choose, unilaterally and for strategic reasons, when to advance his challenge to the guilty pleas." Piper IV, 936 N.W.2d at 806. The court found nothing in the text of the statute that "purport[s] to displace other limitations that might restrict the availability of motions to withdraw guilty pleas, such as those imposed by basic rules of claim preclusion and procedural default in post-conviction cases." Id.

This Court has already found that, as a general matter, South Dakota's res judicata rule is firmly established and regularly followed in state habeas cases. Piper argues, however, that the court's application of res judicata to the guilty plea claim was too novel to constitute an adequate state procedural ground barring review. Relying on Cruz v. Arizona, 598 U.S. 17 (2023), he argues that the res judicata ruling was unforeseeable because the Supreme Court of South Dakota had never had the occasion to apply the doctrine to a motion to withdraw a guilty plea filed after a death sentence was vacated and before a new sentence was imposed. Doc. 86 at 49; Doc. 104 at 18–19. He claims he had "every reason to believe" that § 23A-27-11 would allow him to move to withdraw his guilty plea after resentencing was granted. Doc. 104 at 18.

Cruz was one of the "rare[]" and "exceptional" cases in which the Supreme Court found a state's procedural rule inadequate. 598 U.S. at 26. At issue was the Arizona Supreme Court's decision that Cruz had not satisfied state Rule 32.1(g) allowing defendants to file a successive habeas petition if there has been "a significant change in the law." Id. at 24–25. Cruz was convicted of murder and sentenced to death in 2005. Id. at 22. He argued on direct appeal that

the trial judge violated Simmons v. South Carolina, 512 U.S. 154 (1994), by refusing to let him tell the jury that a life sentence would be without parole. Cruz, 598 U.S. at 21.

The Arizona Supreme Court affirmed Cruz's conviction, holding that Simmons did not apply to Arizona's sentencing scheme. Id. at 21–22. The court continued to follow that holding until 2016 when the Supreme Court in Lynch v. Arizona held that Simmons did indeed apply in Arizona. Lynch, 578 U.S. 613, 614–16 (2016) (per curiam). Cruz moved for postconviction relief under Rule 32.1(g), arguing that Lynch constituted "a significant change in the law." Cruz, 598 U.S. at 24. A "[s]traightforward" reading of Arizona precedent suggested that Cruz was correct; the Arizona Supreme Court had interpreted Rule 32.1(g) as requiring "a transformative event, a clear break from the past" and said that the "archetype of such a change occurs when an appellate court overrules previously binding case law." Cruz, 598 U.S. at 27 (cleaned up and citations omitted). Seemingly ignoring this precedent, however, the Arizona Supreme Court held that Cruz failed to satisfy Rule 32.1(g). Id. It reasoned that Lynch "was not a significant change in the law" because Lynch "relied on Simmons, and Simmons was clearly established at the time of Cruz's trial despite the misapplication of that law by the Arizona courts." Id. (cleaned up and citations omitted). Adopting an "entirely new" interpretation of Rule 32.1(g), the Arizona Supreme Court held that the rule "requires a significant change in the law[,] not a significant change in the *application* of the law." Id. (cleaned up and citation omitted).

The Supreme Court vacated the decision, finding the Arizona Supreme Court's application of Rule 32.1(g) to Lynch too "novel and unfounded" to be adequate. Cruz, 598 U.S. at 26–29. Rather than being firmly established and regularly followed, the Arizona Supreme Court's decision "abruptly departed from and directly conflicted with its prior interpretations" of Rule 32.1(g). Id. at 32. Importantly, the Court distinguished between extending earlier jurisprudence "to new

situations as they arise"—something states are "free" to do—and "foreclose[ing] federal review by adopting a novel and unforeseeable approach . . . that lacks fair or substantial support in prior state law"—something courts "cannot do." Id. at 30–31 (cleaned up and citation omitted).

The Supreme Court of South Dakota's res judicata holding is an example of a state court applying its precedent to a new situation in a foreseeable way. Before Piper I and Piper II, the court had consistently applied res judicata to bar habeas claims that could have been brought in an earlier proceeding. See, e.g., Weddell, 604 N.W.2d at 283–84 (stating in a habeas case that "[i]t is settled law in South Dakota that a judgment subject to res judicata constitutes an absolute bar against the prosecution, not only of every claim or demand therein in controversy, *but also of all other admissible matters that might have been offered to sustain or defeat such claims or demands*" (cleaned up and citation omitted)); Ramos, 616 N.W.2d at 91–92 (holding that res judicata barred the petitioner from making a due process challenge to his sentence after he made an unsuccessful Eighth Amendment challenge on direct appeal); id. ("Under the doctrine of res judicata, we will not review successive attacks on a sentence, especially when all the grounds could have been raised in the earlier proceeding."). Although the court had never applied res judicata to a factual situation like Piper's, South Dakota case law made it foreseeable that the doctrine would bar Piper's challenge to his guilty plea after he forwent two previous opportunities to raise the claim. If anything is novel about the issue, it's the idea that Piper, after eight years of litigation and two trips to the Supreme Court of South Dakota trying to have his sentence reduced to life imprisonment, could suddenly change tactics, challenge his guilty plea, and restart the entire case. Piper's argument that § 23A-27-11 justified his belief that he could move to withdraw his guilty plea after his death sentence was vacated does not change the analysis. Neither the text of § 23A-27-11 nor the case law applying it "purport to displace other limitations that might restrict the

availability of motions to withdraw guilty pleas, such as those imposed by basic rules of claim preclusion and procedural default in post-conviction cases." Piper IV, 936 N.W.2d at 806; see also id. (stating that no cases "support the view that SDCL 23A-27-11 can be viewed in isolation as an unrestricted right to challenge a guilty plea at any point in the indeterminate future").

At bottom, this is not one of the rare and exceptional cases in which a state court's procedural rule is inadequate to support the judgment below. See Cruz, 598 U.S. at 26 (explaining that the novelty aspect of inadequacy is "reserved for the rarest of situations"). Unlike Cruz and other cases Piper cites, the Supreme Court of South Dakota's res judicata holding did not lack support in prior state law, conflict with state precedent, or announce a completely new rule. See id. at 24–32; NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 455–58 (1958) (finding inadequate the Alabama Supreme Court's ruling that it could not consider the NAACP's constitutional claims because the organization sought review under a writ of certiorari rather than a writ of mandamus where this ruling was irreconcilable with the court's "past unambiguous holdings," was so novel a reading of state law that the NAACP could not "fairly be deemed to have been apprised of its existence," and the court had previously reviewed constitutional claims raised by a Ku Klux Klan member even though he had used a writ of certiorari); White, 206 F.3d at 781–82 (holding that the petitioner's procedural default was not adequate to bar review where the default was based on two limitations "newly introduced" in the petitioner's case and neither the petitioner nor his attorneys "could reasonably have anticipated any such" limitations). Nor is this a case where the Supreme Court of South Dakota required pointless compliance with a state procedural rule regardless of the rule's purpose. See Lee v. Kemna, 534 U.S. 362, 381–87 (2002) (finding that a state procedural rule was inadequate for several reasons, including that the petitioner "substantially complied" with the rule given the realities of the case and that this compliance

served the rule's purpose). Indeed, barring the guilty plea claim undoubtedly served the purpose of claim preclusion, which is designed to encourage finality in litigation and "force a plaintiff to explore all the facts, develop all the theories, and demand all the remedies in the first suit." Healy Ranch, Inc. v. Healy, 978 N.W.2d 786, 802 (S.D. 2022) (cleaned up and citation omitted). Piper had a fair opportunity to raise his guilty plea claim in state court and the Supreme Court of South Dakota's res judicata holding is adequate to support the judgment below.

2. Independence

Piper also argues that the Supreme Court of South Dakota's res judicata ruling cannot bar review of his guilty plea claim because the ruling depended on federal law. Doc. 67 at 158–61. He claims that the ruling rested on a fundamental fairness rationale, that South Dakota courts equate fundamental fairness with due process, and that the Supreme Court of South Dakota's rejection of his fundamental fairness argument "was, in essence, a constitutional due process ruling." Id. at 160–61.

Piper's arguments are unconvincing. First, they rest on the mistaken belief that Haase created a fundamental fairness exception requiring South Dakota courts to review the facts and law of the underlying claim to determine whether it would be fundamentally unfair, under federal due process principles, to apply res judicata. This is a vast overreading of Haase. As explained above, Haase did not engage in any such analysis itself and no cases from the Supreme Court of South Dakota have interpreted Haase in that way. Second, the cases Piper cites to support his argument that the res judicata ruling depends on federal law involve a state court considering the merits of the underlying federal claim when deciding whether to apply a state procedural bar. See, e.g., Foster, 578 U.S. at 498; Ake, 470 U.S. at 75; Cooper v. Neven, 641 F.3d 322, 332–33 (9th Cir. 2011). In contrast, the Supreme Court of South Dakota's res judicata ruling—including the

court's rejection of Piper's argument that "preclusion principles should yield to a broad general concept of fundamental fairness"—had nothing to do with the federal merits of Piper's guilty plea claim. Piper IV, 936 N.W.2d at 803–07. Rather, the court found no fundamental unfairness in applying res judicata given Piper's previous opportunities to raise the guilty plea claim and his apparent strategic decision not to challenge the guilty plea until after the court affirmed his death sentence and remanded for a jury resentencing. Id. at 806. Piper has cited no case suggesting that this decision—made without reference to the merits of his claim or federal due process principles—somehow made the res judicata ruling dependent on federal law. See generally Rocha v. Thaler, 626 F.3d 815, 824 (5th Cir. 2010) (stating, in a case where the state court did not consider the merits of the underlying federal constitutional claim, that a "state court does not undermine the independent state-law character of its procedural-default doctrine by using a federal standard to determine whether an otherwise defaulted successive habeas application should be permitted to bypass a procedural bar").

Piper also argues in his petition that the res judicata ruling became interwoven with his "underlying right to due process" when the Supreme Court of South Dakota "determined that the need for finality outweighed the constitutional requirement of knowing, intelligent, and voluntary waiver." Doc. 67 at 161. Piper did not develop this argument at all in his briefs, and it lacks merit in any event. The court never weighed the need for finality against the constitutional requirements of a guilty plea, let alone did so in a way that made the res judicata ruling dependent on federal law. Instead, it explained that the need for finality exists even in death penalty cases, particularly in ones like Piper's where the petitioner was raising "untimely arguments arising from an original uncontested guilty plea and without alleging actual innocence." Piper IV, 936 N.W.2d at 807. The

res judicata ruling is an adequate and independent rule barring federal review of Piper's guilty plea claim. Respondents are entitled to summary judgment on Claim XI.

K. Claim XII: Right to Withdraw Guilty Plea

Claim XII alleges that § 23A-27-11 gave Piper a statutory right to withdraw his guilty plea and that South Dakota violated due process by arbitrarily denying him this right. Piper acknowledges that he never raised this claim in state court. Respondents moved for summary judgment on Claim XII, arguing that res judicata bars the claim and that it fails on the merits. Doc. 77; Doc. 78 at 1–2. Piper now argues that Respondents waived any procedural defense to Claim XII because Respondent's motion for summary judgment treated the claim as exhausted and addressed it on the merits. Doc. 86 at 50; Doc. 116 at 124–25.

There was no waiver here. Although Respondents' summary judgment brief focused largely on the merits of Claims XI and XII, Respondents specifically argued that res judicata bars Claim XII. Doc. 78 at 1–2; Doc. 77; see also Doc. 97 at 32–34 (Respondents' reply brief addressing procedural default of Claim XII); Doc. 68 at 2 (Respondents' answer to Piper's petition raising procedural default as a defense in general). In any case, this Court would exercise its discretion to consider the procedural default defense even if Respondents did not adequately raise it in their initial summary judgment brief. See Dansby v. Hobbs, 766 F.3d 809, 824 (8th Cir. 2014) (explaining that a "federal court has discretion to address procedural default in a habeas corpus case despite the State's failure to present the issue properly" so long as the parties have notice and an opportunity to be heard). After all, Piper knew that procedural default was a potential defense to Claim XII when he filed his petition, and this Court allowed him to respond to any "new" arguments Respondents raised in their reply brief. Docs. 100, 104.

Piper failed to raise Claim XII in state court and res judicata would bar any attempt to do so now. Piper argued in his petition that there was cause to excuse his procedural default because South Dakota law provided no mechanism by which he could have raised this claim. He asserted that the Supreme Court of South Dakota ruled in Piper IV that the trial court had no authority to consider his motion to withdraw his guilty plea, that this ruling extinguished his "life and liberty interest," and that South Dakota law provided no mechanism by which he could litigate the constitutional deprivation caused by the ruling in Piper IV. Doc. 67 at 162. At the October 25, 2023 hearing, however, Piper's attorneys admitted that they had "no arguments as to how" this Court could reach Claim XII. Doc. 116 at 120–21. If Piper is still relying on the argument in his petition, he has not met his burden to show cause. Although Piper claimed that Piper IV extinguished his liberty interest, he pointed to the Piper III decision— when the court held that the trial judge had no jurisdiction to consider Piper's motion to withdraw—as being the arbitrary denial of his statutory right to withdraw his guilty plea. Doc. 67 at 162, 165, 167. Piper was free to raise Claim XII in his second habeas case, Piper IV. He chose not to, however, and is barred from doing so now. Respondents are entitled to summary judgment on Claim XII.

L. Claim XIII: Cumulative Prejudice

Claim XIII alleges that Piper is entitled to habeas relief because of the cumulative prejudice of the constitutional violations in his case. He argues that he raised this claim in his reply brief in Piper IV but says that the Supreme Court of South Dakota never addressed it. Doc. 67 at 168. Piper also acknowledges, however, that the Eighth Circuit has held that neither the cumulative effect of trial errors nor the cumulative effect of attorney errors are grounds for habeas relief. Wainwright v. Lockhart, 80 F.3d 1226, 1233 (8th Cir. 1996). Respondents have not moved for summary judgment on Claim XIII. At the October 25 hearing, Respondents' attorneys said they

did not realize Claim XIII was a free-standing claim. Doc. 116 at 7–8. Respondents may move for summary judgment on Claim XIII in the next round of briefing.

IV. Conclusion

To recap, Respondents are entitled to summary judgment on Claims I, III.B, III.C, IV.B, VII, VIII, IX.A–D, X, XI, and XII. Piper's remaining claims, then, are Claims III.D, III.E, IV.A, V, VI, IX.E, and XIII.

For the reasons stated above, it his hereby

ORDERED that Respondents' Motion for Summary Judgment on Claim 1, Doc. 69, is granted. It is further

ORDERED that Respondents' Motion for Partial Summary Judgment on Claims 4.B, 7, and 8, Doc. 72, is granted. It is further

ORDERED that Respondents' Motion for Partial Summary Judgment on Claims 3, 4.A, 5, 6, 9, and 10, Doc. 74, is granted in part and denied in part as explained above. It is further

ORDERED that Respondents' Motion for Partial Summary Judgment on Claims 11 and 12, Doc. 77, is granted. It is further

ORDERED that Respondents file a motion for summary judgment on Piper's remaining claims on or before May 31, 2024. Piper will have until July 31, 2024, to respond, and Respondents will have 21 days thereafter to file a reply.

DATED this 29th day of March, 2024.

BY THE COURT:

ROBERTO A. LANGE
CHIEF JUDGE

936 N.W.2d 793
Supreme Court of South Dakota.

Briley W. PIPER, Petitioner and Appellant,
v.
Darrin YOUNG, Warden of the South Dakota State Penitentiary, Respondent and Appellee.

#28153
|
ARGUED OCTOBER 1, 2018
|
OPINION FILED 12/11/2019

Synopsis

Background: Following affirmance conviction for murder and other crimes and death sentence on direct review, 709 N.W.2d 783, grant of first petition for habeas relief, 771 N.W.2d 352, remand for resentencing by a jury, in which death penalty was again imposed, and affirmance of death sentence and denial of motion to withdraw guilty pleas, 842 N.W.2d 338, petitioner filed second petition for writ of habeas corpus. Following denial of defendant's second motion to withdraw his guilty pleas, by the Circuit Court, Fourth Judicial Circuit, Lawrence County, Jerome A. Eckrich, III, Retired Judge, the Circuit Court, Randall L. Macy, Retired Judge, denied habeas relief. Petitioner appealed.

Holdings: The Supreme Court, Salter, J., held that:

[1] res judicata barred petitioner's due process challenge to his guilty pleas;

[2] record demonstrated that petitioner's guilty pleas were voluntary;

[3] trial counsel's incorrect legal advice did not render guilty pleas unintelligent under the circumstances;

[4] petitioner was not entitled to habeas relief on ground that resentencing court should have allowed him to introduce evidence of prosecutor's allegedly inconsistent arguments;

[5] trial counsel's incorrect legal advice did not amount to ineffective assistance under the circumstances;

[6] resentencing counsel's tactical decision to call expert witnesses did not amount to ineffective assistance;

[7] resentencing counsel's efforts during voir dire were not deficient and thus not ineffective assistance; and

[8] appellate counsel's failure to appeal denial of mistrial in resentencing proceeding was not ineffective assistance.

Affirmed.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

West Headnotes (44)

[1] **Habeas Corpus** Scope and Standards of Review

Supreme Court's review of a habeas corpus proceeding is limited because it is a collateral attack on a final judgment.

[2] **Habeas Corpus** Habeas corpus as substitute remedy

Habeas proceedings are not a substitute for appeal.

[3] **Habeas Corpus** Improper restraint or detention in general

Courts may use the habeas corpus procedure in the narrow realm of post-conviction litigation to determine: (1) whether the court has jurisdiction of the crime and the person of the defendant; (2) whether the sentence was authorized by law; and (3) in certain cases, whether an incarcerated defendant has been deprived of basic constitutional rights.

[4] **Res Judicata** Res Judicata

Res Judicata Collateral estoppel and issue preclusion in general

Res judicata involves two distinct concepts—issue preclusion and claim preclusion.

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2 Cases that cite this headnote

[5] **Res Judicata** Collateral estoppel and issue preclusion in general

"Issue preclusion" refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided.

4 Cases that cite this headnote

[6] **Res Judicata** Matters Which Could Have Been Litigated or Determined

"Claim preclusion" refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit.

2 Cases that cite this headnote

[7] **Habeas Corpus** Particular issues and problems

Res judicata barred claim in second habeas petition that petitioner's guilty pleas to murder and other crimes violated due process based on trial court's misstatement that unanimity was required for jury to decide against death penalty and on attorney advice that ultimately proved incorrect, though petitioner asserted that there was no statutory time limit on post-sentencing motions to withdraw guilty pleas to correct manifest injustice, and that fundamental fairness required review of claim; petitioner's due process argument was rebranded claim from direct appeal that sentencing procedure violated Sixth Amendment, petitioner had opportunity to challenge his pleas on direct appeal and in first habeas petition but did not, and petitioner offered no reason for delay other than his own strategy. U.S. Const. Amends. 6, 14; S.D. Codified Laws § 23A-27-11.

2 Cases that cite this headnote

[8] **Criminal Law** Voluntary Character

An individual's challenge to his earlier guilty plea prompts a close examination of all the circumstances that existed at the time of the plea to determine whether it was made voluntarily and intelligently.

1 Case that cites this headnote

[9] **Jury** Form and sufficiency

Though closely related, the terms "voluntary" and "intelligent" reflect perceptible differences that should not be conflated when examining the sufficiency of a defendant's decision to waive his right to a jury trial by pleading guilty. U.S. Const. Amend. 6.

[10] **Habeas Corpus** Voluntariness of plea

Record in habeas proceeding demonstrated that petitioner's guilty pleas to murder and other crimes were voluntary, as required for waiver of right to jury trial on guilt to be valid; record indicated that petitioner told trial court that he wanted to plead guilty to accept responsibility for his actions, that testimony of trial attorneys established petitioner's strategy was purposeful, not accidental, as attorney believed evidence was overwhelming and conviction by jury was certain, and, confronted with such circumstances, petitioner pled guilty as part of strategy to develop a mitigation case and avoid sentencing before a jury in favor of sentencing before a seasoned trial judge, that petitioner pled guilty without prompting or plea agreement, and that there was no evidence of any threats, coercion, or broken promises. U.S. Const. Amend. 6.

[11] **Criminal Law** Voluntary Character

Rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision.

[12] **Criminal Law** Voluntary Character

A voluntary plea of guilty intelligently made in the light of the then applicable law does

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not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise.

[13] **Criminal Law** Ascertainment by court; advising and informing accused

A plea of guilty triggered by the expectations of a competently counseled defendant that the State will have a strong case against him is not subject to later attack on the ground that it was not intelligently made because the defendant's lawyer correctly advised him with respect to the then existing law as to possible penalties but later pronouncements of the courts hold differently.

[14] **Criminal Law** Ascertainment by court; advising and informing accused

Jury Form and sufficiency

Fact that trial counsel's advice to defendant that guilt and sentencing forums for capital murder had to be the same was incorrect did not render defendant's guilty pleas to murder and other crimes unintelligent, and thus did not render defendant's waiver of right to jury trial invalid; incorrectness of the legal advice was not known until Supreme Court later held that capital punishment statutes did not require judge to conduct sentencing phase of capital case following guilty plea, prior to that time, the question was an open one, and counsel's advice was competent concerning the then-unsettled legal question of whether guilt and sentencing forums had to be the same. U.S. Const. Amend. 6; S.D. Codified Laws §§ 23A-27A-2, 23A-27A-6.

[15] **Habeas Corpus** Particular issues and problems

Res judicata barred claim in second habeas petition that resentencing court should have allowed petitioner to introduce evidence that prosecutor made inconsistent arguments about leadership roles of petitioner and co-defendant during kidnapping and murder, where petitioner did not make that argument in his direct appeal from jury resentencing, though he could have done so.

3 Cases that cite this headnote

[16] **Habeas Corpus** Procedural errors

Petitioner was not entitled to habeas relief on ground that resentencing court should have allowed him to introduce as mitigating evidence that prosecutor made inconsistent arguments about leadership roles of petitioner and co-defendant during kidnapping and murder; prosecutor's comments were offered in context of two adversarial proceedings, there was no claim that prosecutor inaccurately described the relative factual roles of petitioner and his co-defendants, and prosecutor's argument at resentencing was not, itself, evidence and did not prevent petitioner from presenting a different view of his relative culpability to the jury.

[17] **Criminal Law** Review De Novo

Criminal Law Counsel

Supreme Court reviews a circuit court's determination of Sixth Amendment ineffective assistance of counsel claims as mixed questions for which the Supreme Court reviews the circuit court's determination of a constitutional violation de novo and its findings of fact for clear error. U.S. Const. Amend. 6.

1 Case that cites this headnote

[18] **Criminal Law** Deficient representation and prejudice in general

A petitioner's ineffective assistance claim is determined under the two-pronged standard set out in *Strickland*. U.S. Const. Amend. 6.

[19] **Criminal Law** Deficient representation in general

The defendant asserting ineffective assistance must first show that counsel's performance was deficient; this requires showing that counsel made errors so serious that counsel was not

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functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. U.S. Const. Amend. 6.

[20] **Criminal Law** Prejudice in general

Defendant must show that counsel's deficient performance prejudiced the defense to establish ineffective assistance; this requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. U.S. Const. Amend. 6.

[21] **Criminal Law** Deficient representation and prejudice in general

Unless a defendant makes both showings of deficient performance and prejudice to establish ineffective assistance, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. U.S. Const. Amend. 6.

[22] **Habeas Corpus** Arraignment and plea

For ineffective assistance claims in habeas proceedings relating to the advice of his original trial counsel, a petitioner has a heightened burden to establish that his attorneys committed gross error in recommending that he plead guilty. U.S. Const. Amend. 6.

1 Case that cites this headnote

[23] **Criminal Law** Presumptions and burden of proof in general

For ineffective assistance claims arising from either a guilty plea or a trial, a habeas applicant must rebut the strong presumption that counsel was competent. U.S. Const. Amend. 6.

2 Cases that cite this headnote

[24] **Criminal Law** Strategy and tactics in general

Supreme Court's function in evaluating an ineffective assistance claim is not to second guess the decisions of experienced trial attorneys regarding matters of trial tactics unless the record shows that counsel failed to investigate and consider possible defenses. U.S. Const. Amend. 6.

1 Case that cites this headnote

[25] **Criminal Law** Adequacy of Representation

A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time, in determining whether counsel rendered ineffective assistance. U.S. Const. Amend. 6.

1 Case that cites this headnote

[26] **Criminal Law** Plea

Prejudice prong of the *Strickland* test in guilty plea cases begins with considering the likelihood that the defendant would not have pled guilty in the absence of counsel's allegedly deficient advice. U.S. Const. Amend. 6.

[27] **Criminal Law** Plea

To satisfy the prejudice requirement of an ineffective assistance claim, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. U.S. Const. Amend. 6.

1 Case that cites this headnote

[28] **Criminal Law** Prejudice in general

Criminal Law Plea

Complete assessment of prejudice on an ineffective assistance claim, including for cases involving trials, will turn on whether, in the absence of the guilty plea or counsel's unprofessional errors at trial, the outcome of

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the proceeding would have been different. U.S. Const. Amend. 6.

[29] **Criminal Law** Plea

Trial counsel's advice to defendant, that capital murder guilt and sentencing forums had to be the same, was reasonable and not deficient performance, as element of ineffective assistance, though that advice proved to be incorrect; legal issue was unsettled at time defendant pled guilty and was clarified only by subsequent decision of the Supreme Court, trial counsel provided reasonable advice based upon plausible reading of sentencing-procedure statutes, and counsel were experienced criminal defense attorneys. U.S. Const. Amend. 6; S.D. Codified Laws §§ 23A-27A-2, 23A-27A-6.

[30] **Criminal Law** Plea

Defendant did not establish any prejudice from trial counsel's legal advice on unsettled issue of law that capital murder guilt and sentencing forums had to be the same, and thus defendant did not demonstrate that counsel rendered ineffective assistance, though that legal advice proved to be incorrect, where defendant did not assert that he would not have pled guilty but for his counsel's advice or that the result of a trial would have been different. U.S. Const. Amend. 6.

[31] **Criminal Law** Presentation of evidence in sentencing phase

Resentencing counsel's tactical decision to call neuropsychologist and psychologists as experts to testify mitigating factors did not amount to ineffective assistance, in resentencing proceeding in capital murder prosecution, though experts acknowledged presence of certain aggravating factors on cross-examination, including that defendant stole victim's property and committed murder involving torture to eliminate victim as witness; experts provided valuable insight into defendant's behaviors and assisted with defendant's efforts to present his mitigation case, and fact that experts acknowledged presence of aggravating factors was no more damaging to defendant's case than his own admissions to same aggravating factors. U.S. Const. Amend. 6; S.D. Codified Laws § 23A-27A-1.

[32] **Criminal Law** Other particular issues in death penalty cases

Resentencing counsel's efforts during voir dire as to two potential jurors were not deficient and thus not ineffective assistance, in resentencing proceeding in capital murder trial; resentencing counsel challenged the two potential jurors defendant identified, citing concerns regarding jurors' inclination to impose death penalty, and when resentencing court denied the cause challenges, counsel exercised peremptory strikes to ensure that the two jurors did not become part of the jury that considered defendant's sentence. U.S. Const. Amend. 6.

[33] **Jury** Competence for Trial of Cause

Jury Summoning and impaneling; voir dire

Sixth and Fourteenth Amendments guarantee a defendant a fair and impartial jury, but not a fair and impartial venire. U.S. Const. Amends. 6, 14.

[34] **Jury** Competence for Trial of Cause

Jury Summoning and impaneling; voir dire

Practical rules for selecting jurors through voir dire and a system of cause and peremptory challenges are essential to vindicate the right to a fair, impartial jury, but these rules are not, themselves, constitutional in nature. U.S. Const. Amend. 6.

[35] **Constitutional Law** Fourteenth Amendment in general

Jury Competence for Trial of Cause

Jury Peremptory challenges

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Central point of analysis concerning whether a jury was fair and impartial, as guaranteed by the Sixth and Fourteenth Amendments, focuses upon the jury that heard the case—not those prospective jurors who may have been included in the venire, even when defense counsel felt compelled to use peremptory challenges in order to assure the fairness and impartiality of those ultimately selected to serve on the jury. U.S. Const. Amends. 6, 14.

[36] **Jury** Punishment prescribed for offense

Proper standard for determining when a prospective juror may be excused for cause because of his or her views on capital punishment is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.

[37] **Jury** View of capital punishment

As long as jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case, excluding individuals who would not impose the death penalty does not violate the Sixth Amendment cross-section clause or the impartial jury right. U.S. Const. Amend. 6.

[38] **Criminal Law** Other particular issues in death penalty cases

Capital murder defendant's assertion that removal for cause of prospective juror, who expressed difficulty in imposing a death sentence, "tilted" jury toward death penalty was insufficient to meet heavy burden of proving resentencing counsel rendered ineffective assistance by failing to object to prospective juror's removal in resentencing proceeding, especially given that defendant did not indicate ultimate makeup of jury that actually heard the case. U.S. Const. Amend. 6.

[39] **Criminal Law** Other particular issues in death penalty cases

Capital murder defendant failed to demonstrate that resentencing counsel rendered deficient performance in their trial preparation for correctional officers' testimony, and thus defendant failed to establish ineffective assistance of counsel, though resentencing counsel did not travel to meet with witnesses in person before resentencing hearing, and defendant alleged that his counsel were unprepared for witnesses, where attorneys were able to contact the witnesses by email and telephone to conduct interviews. U.S. Const. Amend. 6.

[40] **Criminal Law** Other particular issues in death penalty cases

Resentencing counsel's alleged failure to conduct adequate trial preparation concerning correctional officers' testimony did not prejudice defendant, and thus did not constitute ineffective assistance, in resentencing proceeding in capital murder prosecution, though counsel did not meet with witnesses in person, and defendant asserted that counsel was unprepared for witnesses because they "changed their tone" during resentencing hearing when they were previously "laudatory" of defendant during their telephone interviews; there was no indication that witnesses' testimony, even if it was unexpectedly unflattering of defendant, would have changed had counsel interviewed officers in person, and given general nature of description of testimony, there was no indication that jury's result was impacted by the testimony. U.S. Const. Amend. 6.

[41] **Criminal Law** Experts; opinion testimony

Decision to forego a pretrial interview of a rebuttal expert witness for the State may be reasonable, in determining whether counsel rendered ineffective assistance, since the scope of the rebuttal will be limited by the testimony of witnesses who have not yet testified. U.S. Const. Amend. 6.

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[42] **Criminal Law** Other particular issues in death penalty cases

Capital murder defendant could not show that resentencing counsel's failure to investigate reasons why State witness was being held by out-of-state authorities prejudiced the outcome of his resentencing, and thus he could not establish ineffective assistance of counsel, in the absence of the predicate showing that the investigation would have yielded meaningful impeachment information. U.S. Const. Amend. 6.

[43] **Criminal Law** Presentation of evidence in sentencing phase

Capital murder defendant failed to demonstrate that his resentencing counsel acted unreasonably in allowing State to cross-examine mitigation witness as to whether witness had written letter to female inmate at defendant's urging in violation of prison policy, and in failing to investigate whether mitigation witness violated prison policy, and thus defendant failed to establish ineffective assistance of counsel, though counsel indicated that, in hindsight, he would have handled mitigation witness's cross examination differently; benefit of hindsight could not be utilized in determining the existence of ineffective assistance, and whether the letter actually violated policy was still unsettled, despite fact that witness acknowledged that she violated the policy. U.S. Const. Amend. 6.

1 Case that cites this headnote

[44] **Criminal Law** Raising issues on appeal; briefs

Appellate counsel's failure to appeal denial of mistrial in resentencing proceeding in capital murder prosecution when State violated motion in limine by asking a witness about defendant's prison privileges was reasonable, and thus did not amount to ineffective assistance, where appellate counsel testified that he made strategic decision not to appeal the issue based upon his assessment of its relative strength. U.S. Const. Amend. 6.

1 Case that cites this headnote

***799** APPEAL FROM THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, LAWRENCE COUNTY, SOUTH DAKOTA, THE HONORABLE RANDALL L. MACY, Retired Judge

Attorneys and Law Firms

RYAN KOLBECK, Sioux Falls, South Dakota, Attorney for petitioner and appellant.

MARTY J. JACKLEY, Attorney General, PAUL S. SWEDLUND, MATTHEW W. TEMPLAR, Assistant Attorneys General, Pierre, South Dakota, Attorneys for respondent and appellee.

Opinion

SALTER, Justice

[¶1.] Briley Piper pled guilty to five separate crimes, including first-degree felony murder, and was originally sentenced to death following a court sentencing. We affirmed his sentence on direct review, but later granted habeas relief, vacated the death sentence, and remanded the case for resentencing by a jury. The jury also sentenced Piper to death, which we affirmed in his second direct appeal. Piper now appeals the circuit court's denial of his second application for writ of habeas corpus, claiming his original guilty pleas were not made voluntarily and intelligently. Piper also claims that the resentencing court abused its discretion when it denied his motion to introduce evidence of what he alleged were the State's inconsistent previous arguments. Finally, Piper argues he received ineffective assistance of counsel at his initial change of plea hearing and at his jury resentencing. We affirm.

Background

[¶2.] In March of 2000, Chester Allan Poage was brutally beaten and killed at a remote location in Lawrence County. His body was found approximately one month later, and law enforcement officers quickly identified Briley Piper, Elijah Page, and Darrell Hoadley as suspects in the murder and a related burglary and theft at Poage's home. The State charged

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the three with first-degree murder, kidnapping, first-degree robbery, first-degree burglary, and grand theft. The State also filed a notice of its intent to seek the death penalty for each of the three co-defendants. A more complete factual summation is set forth in *State v. Piper* (*Piper I*), 2006 S.D. 1, 709 N.W.2d 783, but here we confine ourselves to the procedural progression of this case through its successive stages of litigation.

The Guilty Pleas and Court Sentencing

[¶3.] On January 3, 2001, Piper pled guilty to all five principal charges.[1] His guilty pleas came shortly before his capital murder trial was scheduled to begin and after the circuit court[2] denied, in part, his ***800** motions to suppress statements to law enforcement officers and to a former jail cellmate. The pleas were not prompted by a plea agreement and were unanticipated by the prosecutor and the circuit court, who were expecting to discuss additional pretrial motions at the hearing.

1 The indictment alleged first-degree murder under premeditated murder and felony murder theories. Piper pled guilty to the latter.

2 The Honorable Warren G. Johnson, now a retired circuit court judge, acted as the plea-taking court and imposed the initial sentence.

[¶4.] During what became his change of plea hearing, Piper's attorneys opined that the text of SDCL 23A-27A-2 and SDCL 23A-27A-6 seemed to contemplate that the court would sentence the defendant in a capital case following a guilty plea. The issue was a novel one, though, and the court called a recess to consider it further. At the heart of the inquiry, and a recurring theme in all of Piper's post-plea litigation, was whether the same forum (court or jury) had to decide both the guilt and sentencing phases, or whether a defendant in a capital case could have alternate forums at each phase.[3] When the January 3 hearing resumed, the parties and the court did not discuss the topic further, but the record supports the inference that the court, counsel, and Piper all understood that Piper would continue with his stated intention of pleading guilty and asking the court to conduct his sentencing.

3 South Dakota's capital punishment procedure provides for a bifurcated proceeding. *See* SDCL ch. 23A-27A. The initial phase focuses upon determining a defendant's guilt, as would be the case in any criminal action. If the defendant is found guilty, either after a jury trial or pursuant to a plea, eligibility for the death penalty is determined in a second, sentencing phase. If the question of punishment is tried to a jury, and the jury finds the existence of at least one statutory aggravating factor, it may recommend a sentence of death. SDCL 23A-27A-4.

[¶5.] The court advised Piper of his constitutional rights, including the separate right to have his sentence determined by a jury. The court explained the effect of Piper's waiver of a jury trial and the statutory maximum penalty for each offense, telling Piper specifically that the punishment for the murder conviction could include death by lethal injection. Piper acknowledged the risks of his pleas and waived his rights to a jury trial,[4] telling the court that he was pleading guilty to take responsibility for his conduct. After canvassing Piper further, the court determined that the pleas were voluntary and intelligent and accepted them.

4 Piper also waived his right against self-incrimination and his right to confront witnesses against him. *See Boykin v. Alabama*, 395 U.S. 238, 243, 89 S. Ct. 1709, 1712, 23 L. Ed. 2d. 274 (1969).

[¶6.] After three days of evidence, the court imposed a sentence of death for the first-degree murder conviction, life imprisonment for the kidnapping conviction, and consecutive maximum sentences for the robbery, burglary, and grand theft convictions. As to the murder sentence, the court found the existence of three statutory aggravating factors, which authorized the capital sentence. *See* SDCL 23A-27A-6. In this regard, the court specifically found that Piper had killed Poage "for the purpose of receiving money or any other thing of monetary value[,]" that the killing "was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim[,]" and that the killing "was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of the defendant or another[.]"[5] *See* SDCL 23A-27A-1(3), (6), (9).

5 Page also pled guilty to all five charges. He was also sentenced to death by the court, and was later executed. Hoadley pled not guilty and requested a jury trial. A jury found Hoadley guilty of the same offenses, but could not reach a unanimous decision on the death penalty. Therefore, Hoadley

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was sentenced to life imprisonment without parole. *See* SDCL 23A-27A-4 ("If a sentence of death is not recommended by the jury, the court shall sentence the defendant to life imprisonment.").

801** ***Piper I

[¶7.] In the decision now known as *Piper I*, we affirmed Piper's death sentence. 2006 S.D. 1, 709 N.W.2d 783. Among the arguments we considered was Piper's claim that SDCL 23A-27A-2[6] and SDCL 23A-27A-6[7] were unconstitutional because they deprived him of his right to have a jury determine his sentence in contravention of *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). In *Ring*, the United States Supreme Court held that Arizona's death penalty statutes violated a defendant's Sixth Amendment right to a jury trial because they required a judge, instead of a jury, to determine the existence of statutory aggravating factors following a guilty plea in a capital case. 536 U.S. at 589, 122 S. Ct. at 2432.

6 SDCL 23A-27A-2 provides, in part:

> [i]n all cases in which the death penalty may be imposed and which are tried by a jury, upon a return of a verdict of guilty by the jury, the court shall resume the trial and conduct a presentence hearing before the jury.

7 SDCL 23A-27A-6 provides:

> [i]n nonjury cases the judge shall, after conducting the presentence hearing as provided in § 23A-27A-2, designate, in writing, the aggravating circumstance or circumstances, if any, which he found beyond a reasonable doubt. Unless at least one of the statutory aggravating circumstances enumerated in § 23A-27A-1 is so found, the death penalty shall not be imposed.

[¶8.] Despite this argument on appeal, Piper expressed no more than a theoretical interest in having a jury determine his sentence. *Piper I*, 2006 S.D. 1, ¶ 66, 709 N.W.2d at 808-09. He had not made a *Ring* argument to the circuit court and was advised of his right to a jury for sentencing at his change of plea hearing. We affirmed Piper's sentence, holding Piper had, in fact, requested sentencing by the court and waived his right to jury sentencing:

> We will not, without any supporting authority, sanction the remarkable proposition that a defendant may waive the right to a jury at sentencing, allow the trial court to impose a sentence in accordance with the defendant's wishes, and then, to avoid an unfavorable sentence, invalidate the waiver on appeal by arguing a deprivation of the constitutional right that the defendant *did not want to exercise.*

Id. ¶ 68, 709 N.W.2d at 810.

[¶9.] Nevertheless, we also analyzed the merits of Piper's *Ring* claim. Construing the text of SDCL 23A-27A-2 and SDCL 23A-27A-6, we held that our capital punishment statutes only regulate the sentencing *procedure* and, unlike the statutes at issue in *Ring*, "do not purport to regulate the *right* to jury sentencing in capital cases." *Id.* ¶ 51, 709 N.W.2d at 804. The right to have a jury determine whether aggravating factors exist during the sentencing phase remains available to all defendants in capital cases by virtue of separate constitutional and statutory guarantees. *Id.* ¶¶ 52-56, 709 N.W.2d at 804-06.

[¶10.] Although Piper had argued that our statutes required a court to conduct the sentencing in a capital case involving a guilty plea, he did not make the alternative argument —that in the absence of a *Ring* deficiency, our statutes unconstitutionally required a capital defendant to plead guilty in order to be sentenced by a judge.

Piper II

[¶11.] Piper's first petition seeking a writ of habeas corpus was solely directed at his death sentence. In an entirely new ***802** claim, Piper alleged the plea-taking court misstated the unanimity requirement related to a jury's sentencing determination in a capital case. The plea-taking court had, in fact, incorrectly advised Piper that the jury must unanimously agree on any sentence. Piper claimed the court's advisement suggested that the jury must unanimously agree to recommend life in prison, overlooking the fact that one juror's decision to not impose the death penalty would result in a life sentence. Piper claimed the court's misstatement prevented a voluntary and intelligent waiver of his right to have a jury sentencing, but he made no argument about any potential impact on the guilty pleas, themselves.

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[¶12.] Piper was unsuccessful before the initial habeas court. [8] We reviewed the merits of the claim in *Piper v. Weber (Piper II)*, identified the erroneous unanimity advisement, and granted relief, but not the relief Piper had sought. 2009 S.D. 66, ¶¶ 20-21, 771 N.W.2d 352, 360. Piper argued that we should correct the plea-taking court's error by converting his sentence to life in prison without the possibility of parole. *Id.* We declined, however, and remanded the case for resentencing by a jury. *Id.*

8 The Honorable John Bastian, Circuit Court Judge, now retired.

Piper's First Motion to Withdraw his Pleas and Piper III

[¶13.] Following our remittal in *Piper II*, Piper moved for the first time to withdraw his guilty pleas pursuant to SDCL 23A-27-11, arguing among other things that the plea-taking court failed to ensure that Piper understood he did not have to plead guilty to obtain a court sentencing. The circuit court [9] denied the motion on its merits, finding no manifest injustice. *See* SDCL 23A-27-11 (stating that a motion to withdraw a guilty plea can be made after sentencing "to correct manifest injustice").

9 The Honorable Jerome A. Eckrich, III, Circuit Court Judge, now retired.

[¶14.] The case proceeded to a jury resentencing and concluded with the jury's unanimous recommendation to impose a sentence of death. The jury found the existence of the same three aggravating factors the plea-taking court had previously found. SDCL 23A-27A-1(3), (6), (9).

[¶15.] Piper appealed the jury's sentence, and in *State v. Piper* (*Piper III*), we held that Piper's 2011 death sentence was lawfully imposed by the jury. 2014 S.D. 2, ¶ 44, 842 N.W.2d 338, 351. We also affirmed the denial of Piper's motion to withdraw his guilty pleas made after *Piper II*, but not on the merits. *Id.* ¶ 13, 842 N.W.2d at 344. Instead, we held that the circuit court lacked jurisdiction to consider Piper's motion to withdraw his guilty pleas because the *Piper II* limited remand only authorized the circuit court to conduct a jury resentencing. *Id.*

Piper's Second Motion to Withdraw and the Current Habeas Action

[¶16.] In 2015, Piper filed a second habeas petition that is now at issue in this appeal. Navigating the holdings of *Piper I* and *Piper II*, the current petition alleges his 2001 guilty pleas were not voluntary and intelligent. Drawing on the plea-taking court's misstatement of the unanimity requirement identified in *Piper II*, Piper now argues that the error was more serious than he previously claimed because he waived his right to a jury trial, believing it was the only way to obtain sentencing by the court. The argument identifies what Piper believes is a lingering technical deficiency in the plea advisory, but he does not allege he wants a jury to determine the issue of guilt. Nor does he claim he is actually innocent.

***803** [¶17.] Also contained in Piper's second petition is the related claim that his original trial attorneys were ineffective when they advised him of his rights related to a jury trial. The petition alleges other ineffective assistance of counsel claims regarding his resentencing counsels' performance, including arguments that counsel: (1) failed to effectively conduct voir dire; (2) did not thoroughly investigate the State's witnesses; (3) failed to appeal the court's denial of a mistrial after it allowed testimony regarding penitentiary privileges; and (4) failed to either object or appeal issues regarding the cross-examination of a defense witness.

[¶18.] During the pendency of this second habeas action in the circuit court, [10] Piper again moved to withdraw his guilty plea, seeking a merits determination of whether his guilty pleas were valid. The circuit court denied his motion, stating it lacked jurisdiction to consider the motion because the request remained outside of the limited remand from *Piper II*. Piper appealed the court's denial immediately, but we dismissed the appeal in an unpublished order, concluding that we lacked appellate jurisdiction. *See State v. Kaufman*, 2016 S.D. 24, ¶ 12, 877 N.W.2d 590, 592 (holding that the Legislature has not provided a means to review the denial of motions to withdraw guilty pleas made 30 days after entry of judgment).

10 Judge Eckrich also determined Piper's second motion to withdraw his guilty pleas.

[¶19.] The litigation involving the second habeas petition remained pending before the circuit court, [11] which ultimately denied relief. The court reviewed the merits of the second motion to withdraw the pleas and determined that Piper's guilty pleas were voluntary and intelligent. The court noted that the claim could be barred under principles of claim preclusion because Piper had not challenged his guilty pleas until the remand proceedings following *Piper II*. The circuit court also determined that Piper's ineffective assistance of counsel claims were not sustainable because he

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had not demonstrated that his counsels' representation fell below an objective standard of reasonableness or that any error subjected him to prejudice.

11 The Honorable Randall Macy, Circuit Court Judge, now retired.

[¶20.] Piper appeals the circuit court's denial of his second writ of habeas corpus raising several issues, which we restate as follows:

1. Whether Piper's challenge to his guilty pleas presents a reviewable and meritorious habeas claim.

2. Whether Piper's claim that the resentencing court abused its discretion when it denied his motion to introduce evidence of the State's inconsistent arguments presents a reviewable and meritorious habeas claim.

3. Whether Piper's resentencing counsel provided ineffective assistance in violation of his Sixth and Fourteenth Amendment rights.

Analysis

The Reviewability of Piper's Challenge to his Guilty Pleas

[1] [2] [3] [¶21.] "Our review of [a] habeas corpus proceeding[ ] is limited because it 'is a collateral attack on a final judgment.' " *Miller v. Young*, 2018 S.D. 33, ¶ 12, 911 N.W.2d 644, 648 (quoting *Vanden Hoek v. Weber*, 2006 S.D. 102, ¶ 8, 724 N.W.2d 858, 861). It is not, as we have time and again held, a substitute for appeal.[12] *See, e.g.*, ***804** *Wright v. Young*, 2019 S.D. 22, ¶ 10, 927 N.W.2d 116, 119 (explaining that review of a habeas action is more limited than for a direct appeal because it is a "collateral attack upon a final judgment"). Courts may use the habeas corpus procedure in the narrow realm of post-conviction litigation to determine: "(1) whether the court has jurisdiction of the crime and the person of the defendant; (2) whether the sentence was authorized by law; and (3) in certain cases whether an incarcerated defendant has been deprived of basic constitutional rights." *Piper II*, 2009 S.D. 66, ¶ 7, 771 N.W.2d at 355.

12 While this often-repeated statement seems unremarkable in contemporary times, it marks an important distinction between direct appeals and habeas review that did not always exist. The right to appeal is often not conferred by constitution, and historically, people convicted of criminal offenses did not have the right to seek direct review until the enactment of statutes that authorized direct appeals. As a result, the United States Supreme Court has reflected on its own early practice of using the ancient writ of habeas corpus to find "jurisdiction" and correct trial errors. *See United States v. Cotton*, 535 U.S. 625, 630, 122 S. Ct. 1781, 1784-85, 152 L. Ed. 2d 860 (2002) (explaining that the "expansive notion of jurisdiction" can be traced to the time when defendants could not directly appeal their convictions). The advent of statutes providing for a right of appeal has eliminated the need to use habeas corpus proceedings to correct trial errors that could have been raised on direct appeal.

[4] [5] [6] [¶22.] However, even for claims alleging the deprivation of constitutional rights, we have traditionally applied the doctrine of res judicata to determine whether a post-conviction claim is cognizable in a habeas corpus action or whether it has been defaulted because it was not made in an earlier proceeding. *See, e.g.*, *Ramos v. Weber*, 2000 S.D. 111, ¶ 8, 616 N.W.2d 88, 91. Res judicata involves two distinct concepts—issue preclusion and claim preclusion:

> Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided .... Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit[.]

Am. Family Ins. Grp. v. Robnik, 2010 S.D. 69, ¶ 15, 787 N.W.2d 768, 774 (quoting *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1, 104 S. Ct. 892, 894 n.1, 79 L. Ed. 2d 56 (1984)).

[¶23.] In *Ramos*, for example, we applied res judicata principles to hold that a petitioner's due process challenge to his sentence was not cognizable in a habeas proceeding. 2000 S.D. 111, ¶ 8, 616 N.W.2d at 91. In his direct appeal, the petitioner had unsuccessfully argued that his sentence violated the Eighth Amendment's prohibition on cruel and unusual sentences. *Id.* ¶ 2, 616 N.W.2d at 90. In an ensuing habeas action, the petitioner again challenged his sentence,

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but this time claimed it violated the due process provisions of the Fourteenth Amendment. *Id.* ¶ 3, 616 N.W.2d at 90. Citing the petitioner's plain opportunity to litigate the due process claim earlier and the need for finality, we declined to review the new claim:

> The doctrine of res judicata disallows reconsidering an issue that was actually litigated *or that could have been raised and decided in a prior action.* The purpose behind the doctrine is to protect parties from being subjected twice to the same cause of action, since public policy is best served when litigation has a finality .... This due process challenge could have been raised in the direct appeal along with the Eighth Amendment challenge. Under the doctrine of res judicata, we will not review successive attacks on a sentence, especially ***805** when all the grounds could have been raised in the earlier proceeding.

Id. ¶ 8, 616 N.W.2d at 91-92 (internal quotations and citations omitted) (emphasis added); *see also LeGrand v. Weber*, 2014 S.D. 71, ¶ 28, 855 N.W.2d 121, 129 (applying preclusion principles to petitioner's request to withdraw his guilty plea in his habeas action after the Court had already decided the issue on direct appeal).

[¶24.] We applied the same preclusion rationale in *Miller v. State*, 338 N.W.2d 673 (S.D. 1983). In *Miller*, the petitioner argued, among other things, that the court's inquiry regarding the defendant's motion to remove the judge violated his due process rights. *Id.* at 675. Because the petitioner did not raise the issue earlier, we determined that the issue was not cognizable in a habeas action, citing "[t]he general rule ... that a petitioner who takes a direct appeal cannot thereafter raise in a post-conviction proceeding any matter which he knew at the time of the direct appeal, but did not raise." *Id.*

[7] [¶25.] Here, Piper's due process claim challenging his guilty pleas is twice procedurally defaulted under these same preclusion principles. He failed to raise the issue in his direct appeal in *Piper I*, and he again overlooked the claim during his initial habeas case in *Piper II*.

[¶26.] The due process argument Piper now seeks to advance bears a close and conspicuous relationship to his principal argument in *Piper I*, challenging the constitutionality of SDCL 23A-27A-2 and SDCL 23A-27A-6. 2006 S.D. 1, ¶¶ 48-49, 709 N.W.2d at 803-04. Piper's earlier argument that these statutes violated *Ring v. Arizona* and a capital defendant's Sixth Amendment right to have a jury determine his sentence necessarily implicated South Dakota's procedure for guilty pleas and sentencing in capital cases. *Id.*

[¶27.] Indeed, Piper's current claim is part and parcel of his original argument because it presents an alternative constitutional challenge to the same sentencing procedure. A lack of success on the *Ring* claim would prompt the inverted, but related, argument he now makes—that a defendant requesting court sentencing in a capital case must waive his jury trial right on the issue of guilt, ostensibly in violation of the Fourteenth Amendment's Due Process Clause.

[¶28.] Viewed in this way, the case presents essentially the same circumstances we confronted in *Ramos*, where we held that claim preclusion prevented a habeas petitioner from challenging his sentence on due process grounds after an unsuccessful Eighth Amendment challenge on direct appeal. 2000 S.D. 111, ¶ 8, 616 N.W.2d at 91. In this case, Piper seeks to do the same thing by transposing his original *Ring* claim from *Piper I* and rebranding it as a due process claim.

[¶29.] Similar res judicata considerations relating to *Piper II* also preclude Piper's current challenge to his guilty pleas. In *Piper II*, we accepted the argument that the plea-taking court incorrectly advised Piper that unanimity was required for a jury to decide against the death sentence and in favor of life imprisonment. 2009 S.D. 66, ¶ 17, 771 N.W.2d at 358-59. Therefore, we held that the plea record did not demonstrate a voluntary and intelligent waiver of the right to a jury sentencing—a holding Piper now attempts to extend to argue that his waiver to a jury trial on the question of guilt was similarly affected because he believed at the time of his guilty plea that the guilt and sentencing forums had to be the same.

[¶30.] However, Piper did not make this argument in *Piper II*. Instead, he sought to prevail on his request to convert his death sentence to a sentence of life in ***806** prison without the possibility of parole. *Id.* ¶ 20, 771 N.W.2d at 360. Piper's opportunity to challenge his guilty pleas was surely presented

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in *Piper II*, and if he intended to pursue it at all, he should have advanced the argument then rather than through the piecemeal method he now suggests. *See Gregory v. Class*, 1998 S.D. 106, ¶ 25, 584 N.W.2d 873, 880 (quoting *Murray v. Carrier*, 477 U.S. 478, 488, 106 S. Ct. 2639, 2645, 91 L. Ed. 2d 397 (1986)) ("The existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some *objective factor external to the defense* impeded counsel's efforts to comply with the State's procedural rule.")

[¶31.] In his submissions to the circuit court and on appeal, Piper offers the view that he could choose, unilaterally and for strategic reasons, when to advance his challenge to the guilty pleas. As support he cites the provisions of SDCL 23A-27-11, which allow an individual to move to withdraw an earlier guilty plea. Because the text of the rule imposes no time limits upon post-sentencing motions to withdraw guilty pleas to correct "manifest injustice," Piper argues he could, in his discretion, determine when to make his motion. SDCL 23A-27-11. The claim is not supportable, however, because it views the rule preeminently and overlooks other governing legal principles.

[¶32.] The plain text of SDCL 23A-27-11 does not purport to displace other limitations that might restrict the availability of motions to withdraw guilty pleas, such as those imposed by basic rules of claim preclusion and procedural default in post-conviction cases. Nor do our cases support the view that SDCL 23A-27-11 can be viewed in isolation as an unrestricted right to challenge a guilty plea at any point in the indeterminate future. To the contrary, we held in *LeGrand* that a habeas petitioner's effort to withdraw his guilty plea was barred under res judicata principles. 2014 S.D. 71, ¶ 31, 855 N.W.2d at 130; *see also State v. Goodwin*, 2004 S.D. 75, ¶ 4, 681 N.W.2d 847, 849 (citation omitted) (recognizing a strict standard for withdrawing guilty pleas after sentencing is necessary "to prevent a defendant from testing the weight of potential punishment, and then withdrawing the plea if he finds the sentence unexpectedly severe[ ]").

[¶33.] Piper's argument that preclusion principles should yield to a broad general concept of fundamental fairness is also not sustainable. [13] Simply put, Piper has not demonstrated what is fundamentally unfair with the application of res judicata here, given the opportunities he has had to litigate the claims he now asserts. Instead, the record here convinces us that Piper never sought to invoke his right to a jury trial on the issue of guilt until after our remand for jury sentencing and after we affirmed the imposition of his death sentence. He has not articulated a reason, or cause, for his delay other than his own strategy.

13 As support for his argument to avoid the preclusive effect of res judicata, Piper cites *Haase v. Weber*, 2005 S.D. 23, 693 N.W.2d 668. In *Haase*, a narrow majority of this Court vacated the circuit court's order dismissing the petitioner's successive habeas action and remanded the case with instructions to "consider any and all ... asserted grounds for habeas relief on their merits[ ]" because "various procedural barriers" had prevented review previously. 2005 S.D. 23, ¶ 5, 693 N.W.2d at 669-70. This rationale departs from our case law applying issue and claim preclusion in post-conviction collateral challenges. Regardless, though, *Haase* is inapplicable to Piper's case because, without question, he has not been denied previous post-conviction review.

[¶34.] We recognize the exceptional nature of a death sentence and the corresponding level of scrutiny that courts must ***807** apply throughout the trial, direct review, and post-conviction stages. However, the need for finality and the effectual administration of the law exists in capital and non-capital cases alike. "Collateral challenges to the sentence in a capital case, like collateral challenges to the sentence in a noncapital case, delay the enforcement of the judgment at issue and decrease the possibility that 'there will at some point be the certainty that comes with an end to litigation.' " *Teague v. Lane*, 489 U.S. 288, 314 n.2, 109 S. Ct. 1060, 1077 n.2, 103 L. Ed. 2d 334 (1989) (quoting *Sanders v. United States*, 373 U.S. 1, 25, 83 S. Ct. 1068, 1082, 10 L. Ed. 2d 148 (1963) (Harlan, J., dissenting)). The issue is particularly apparent where, as here, the petitioner seeks to recalibrate successive post-conviction challenges with untimely arguments arising from an original uncontested guilty plea and without alleging actual innocence:

> Every inroad on the concept of finality undermines confidence in the integrity of our procedures .... The impact is greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas. Moreover, the concern that unfair procedures may have resulted in the

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> conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea.

> or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes).

United States v. Timmreck, 441 U.S. 780, 784, 99 S. Ct. 2085, 2087-88, 60 L. Ed. 2d 634 (1979) (citation omitted).

The Merits of Piper's Voluntary and Intelligent Guilty Plea Waiver Claim

[8] [¶35.] Even if we were inclined to review the merits of Piper's claim that he did not voluntarily and intelligently waive his right to a jury trial on guilt, the claim is not meritorious. An individual's challenge to his earlier guilty plea presents a compelling paradox and prompts a close examination of all the circumstances that existed at the time of the plea to determine whether it was made voluntarily and intelligently. *See Goodwin*, 2004 S.D. 75, ¶ 11, 681 N.W.2d at 852.

[9] [¶36.] Though closely related, the terms voluntary and intelligent reflect perceptible differences that should not be conflated when examining the sufficiency of a defendant's decision to waive his right to a jury trial. *See State v. Nikolaev*, 2000 S.D. 142, ¶ 10, 619 N.W.2d 244, 247 ("[A] voluntary [plea] ... is by definition not the result of threats, force or promises made apart from the plea agreement, or any other form of coercion."); *see also In re Estate of Smid*, 2008 S.D. 82, ¶¶ 14-17, 756 N.W.2d 1, 7 (accepting the argument that a voluntary waiver of spousal inheritance rights does not mean knowing but simply means "done by design ... intentional[ly] ... or not accidental[ly]").

[¶37.] In *Brady v. United States*, the United States Supreme Court described "[t]he standard as to the voluntariness of guilty pleas" in the following terms:

> [A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises),

397 U.S. 742, 755, 90 S. Ct. 1463, 1472, 25 L. Ed. 2d 747 (1970) (citation omitted).

[10] [¶38.] Even if we assume, without deciding, that Piper would not have pled guilty and waived his right to a jury trial except for the reason that he wanted to have a court sentencing, "this assumption merely identifies ... a 'but-for' cause of ***808** his plea [and] ... does not necessarily prove that the plea was coerced and invalid as an involuntary act." *Id.* at 750, 90 S. Ct. at 1470. Here, the only inference we can draw from the record is that Piper's plea was voluntary, as the plea-taking court determined it to be.

[¶39.] Piper told the plea-taking court that he wanted to plead guilty to accept responsibility for his actions. The testimony of his trial attorneys further establishes that Piper's initial strategy was purposeful, not accidental. At least one of Piper's attorneys described the evidence against him as overwhelming and expressed certainty that Piper would be convicted by a jury—conclusions Piper has not challenged. Confronted with these circumstances, Piper intentionally waived his right to a jury trial and accepted responsibility as part of a strategy to develop a mitigation case and avoid sentencing before a jury in favor of sentencing before a seasoned trial judge. Piper pled guilty without prompting and without a plea agreement. There is no evidence of any threats, coercion, or broken promises. His pleas were, therefore, voluntary.

[11] **[12]** **[13]** [¶40.] Furthermore, "[t]he rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision." *Brady*, 397 U.S. at 757, 90 S. Ct. at 1473. Often, as in this case, "the decision to plead guilty is heavily influenced ... by the apparent likelihood of securing leniency should a guilty plea be offered and accepted." *Id.* at 756, 90 S. Ct. at 1473. Undertaking such a decision may present "questions for which there are no certain answers; judgments may be made that in the light of later events seem improvident, although they were perfectly sensible at the time." *Id.* at 756-57, 90 S. Ct. at 1473. Courts considering

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whether a defendant intelligently waived his right to a jury trial cannot revise legal history:

> [A] voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise. A plea of guilty triggered by the expectations of a competently counseled defendant that the State will have a strong case against him is not subject to later attack because the defendant's lawyer correctly advised him with respect to the then existing law as to possible penalties but later pronouncements of the courts, as in this case, hold [differently].

Id. at 757, 90 S. Ct. at 1473.

[14] [¶41.] Here, Piper's claim that his plea was not intelligent because his trial attorneys advised him that the guilt and sentencing forums must be the same is not supportable. Though Piper accurately describes the advice he received, the incorrectness of the advice was not known until our decision in *Piper I*, when we held that our capital punishment statutes do not require a judge to conduct the sentencing phase of a capital case following a guilty plea. 2006 S.D. 1, ¶ 48, 709 N.W.2d at 803. Prior to that time, the question was an open one, and even a former habeas attorney for Piper acknowledged that Piper's original trial lawyers had offered competent advice based upon a supportable reading of SDCL 23A-27A-2 and SDCL 23A-27A-6. [14]

14 This uncertainty in the state of the law represents a marked and consequential distinction with the plea-taking court's incorrect statement of the unanimity requirement we considered in *Piper II*, where the error was patent under existing law and immediately apparent from the record.

***809** [¶42.] This case bears strong similarities to *Brady*, where the petitioner argued his 1959 guilty plea to a federal kidnapping charge was not voluntary and intelligent based upon the United States Supreme Court's decision nine years later in *United States v. Jackson*, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968). The *Jackson* decision invalidated a part of the federal kidnapping statute that allowed the death penalty only upon a jury's recommendation, "thereby ma[king] the risk of death the price of a jury trial." *Brady*, 397 U.S. at 746, 90 S. Ct. at 1467 (discussing *Jackson*). The petitioner in *Brady* challenged his plea by alleging the prospect of a death sentence impacted his decision to plead guilty. *Id.* at 746, 90 S. Ct. at 1468. The United States Supreme Court denied post-conviction relief because the petitioner's guilty plea was intentional, not coerced, [15] and based upon a supportable view of the law as it existed at the time of his plea. *Id.* at 750, 90 S. Ct. at 1470.

15 In *Brady* and in *Jackson*, itself, the United States Supreme Court concluded that the procedure that allowed for a sentence of death only after a jury found guilt was not "inherently coercive of guilty pleas: 'the fact that the Federal Kidnapping Act tends to discourage defendants from insisting upon their innocence and demanding trial by jury hardly implies that every defendant who enters a guilty plea to a charge under the Act does so involuntarily.' " *Brady*, 397 U.S. at 746-47, 90 S. Ct. at 1468 (quoting *Jackson*, 390 U.S. at 583, 88 S. Ct. at 1217).

[¶43.] Applying these principles here, we are convinced that Piper's pleas were intelligent. His argument to the contrary overlooks essential historical facts associated with his pleas, including his reasons for pleading guilty and the competent advice he received concerning the then-unsettled question of whether the guilt and sentencing forums had to be the same. Piper's constitutional argument also incorrectly forecloses the possibility of a voluntary and intelligent waiver if the plea-taking court's advisory failed to anticipate our holding in *Piper I* or the resulting possible variations of different forums for guilt and sentencing. These facts, however, "do[ ] not impugn the truth or reliability of his plea[s]." [16] *Id.* at 757, 90 S. Ct. at 1473-74. When we examine the record from the change of plea hearing objectively, it "affirmatively show[s] the plea[s] w[ere] voluntary, that the defendant understood the consequences of pleading guilty, and that the defendant explicitly waived the constitutional right against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers." *Monette v. Weber*, 2009 S.D. 77, ¶ 10, 771 N.W.2d 920, 925 (citation and emphasis omitted).

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16 As our analysis in this case suggests, we did not grant relief in *Piper II* based upon the fact that Piper thought the guilt and sentencing forums in capital cases must be the same. Rather, we remanded the case for jury sentencing in *Piper II* to address an obvious deficiency in the plea-taking court's explanation of the unanimity requirement.

Inconsistent Closing Argument Claim

[¶44.] Piper claims that the resentencing court should have allowed him to introduce evidence that the prosecutor previously made inconsistent arguments about the leadership roles of Piper and Page during Poage's kidnapping and murder. However, this argument cannot serve as a basis for habeas relief for several reasons.

[15] [¶45.] First, Piper did not make what is essentially an evidentiary argument in *Piper III*, which was his direct appeal from the jury resentencing. He certainly could have, though, and based upon our analysis above, the claim is precluded, or defaulted, under well-established res judicata rules. *See Ramos*, 2000 S.D. 111, ¶ 8, 616 N.W.2d at 91.

***810** [¶46.] Second, the factual basis for the argument is unsupported, and even if we were to consider the merits of the claim, we cannot accept that the prosecutor's arguments were, in fact, inconsistent. As our opinions in *Piper I* and *State v. Page*, 2006 S.D. 2, 709 N.W.2d 739, illustrate, the events associated with Poage's killing involved several different and distinct acts of cruelty and violence that occurred over the course of several hours and at different locations. At various times, both Piper and Page exhibited leadership roles, and each had significant individual culpability in torturing, beating, and killing Poage.

[16] [¶47.] Finally, Piper's inconsistent argument claim, itself, has a tenuous connection to any supporting legal authority. Though he contends the prosecutor's inconsistent arguments should have been introduced at his resentencing as mitigating evidence, we see the issue differently. The prosecutor's arguments were offered in the context of two adversarial proceedings, and there is no claim that the prosecutor inaccurately described the relative factual roles of the three defendants. In any event, the prosecutor's argument at the resentencing was not, itself, evidence and did not prevent Piper from presenting a different view of his relative culpability to the jury.

Piper's Ineffective Assistance of Counsel Claims

[17] **[18]** **[19]** **[20]** **[21]** [¶48.] We review a circuit court's determination of Sixth Amendment ineffective assistance of counsel claims as mixed questions for which we review the court's determination of a constitutional violation de novo and its findings of fact for clear error. *Wright,* 2019 S.D. 22, ¶ 10, 927 N.W.2d at 119. A petitioner's ineffective assistance claim is determined under the familiar two-pronged standard set out in *Strickland v. Washington*:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d. 674 (1984).

[22] [¶49.] In this case, we face the uncommon situation where we review ineffective assistance claims alleged to arise from Piper's original guilty pleas as well as claims from his jury resentencing. For the claims relating to the advice of his original trial counsel, Piper has a heightened burden to establish that his attorneys committed "gross error ... in recommending that [he] plead guilty." *McDonough v. Weber*, 2015 S.D. 1, ¶ 16, 859 N.W.2d 26, 34 (quoting *Coon v. Weber*, 2002 S.D. 48, ¶ 12, 644 N.W.2d 638, 643).

[23] **[24]** **[25]** [¶50.] For ineffective assistance claims arising from either a guilty plea or a trial, "[a] habeas applicant must rebut the 'strong presumption' that counsel was competent." *Jenner v. Dooley*, 1999 S.D. 20, ¶ 16, 590

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N.W.2d 463, 470 (citing *Kimmelman v. Morrison*, 477 U.S. 365, 381, 106 S. Ct. 2574, 2586, 91 L. Ed. 2d 305 (1986)). Our function is not to "second guess the decisions of experienced trial attorneys regarding matters of trial tactics unless the record shows that counsel failed to investigate and consider possible defenses ***811** ...." *Randall v. Weber*, 2002 S.D. 149, ¶ 7, 655 N.W.2d 92, 96 (quoting *Sprik v. Class*, 1997 S.D. 134, ¶ 24, 572 N.W.2d 824, 829). "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065.

[26] **[27]** **[28]** [¶51.] The second prong of the *Strickland* test in guilty plea cases begins with considering the likelihood that the defendant would not have pled guilty in the absence of counsel's allegedly deficient advice. *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203 (1985). "[I]n order to satisfy the "prejudice" requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* The complete assessment of prejudice, including for cases involving trials, will turn on whether, in the absence of the guilty plea or counsel's unprofessional errors at trial, the outcome of the proceeding would have been different. *See Coon*, 2002 S.D. 48, ¶ 13, 644 N.W.2d at 643; *see also Jenner*, 1999 S.D. 20, ¶ 16, 590 N.W.2d at 470-71.

a. Trial Counsels' Advice about Then-Existing South Dakota Law

[¶52.] Whether stated as a free-standing claim or an ineffective assistance of counsel claim, Piper's argument that incorrect legal advice rendered his guilty pleas involuntary and unintelligent is not sustainable. Our analysis of this issue above effectively resolves Piper's argument that his trial counsel were ineffective because they advised him that the guilt and sentencing forums had to be the same.

[29] [¶53.] The record here allows but one conclusion concerning counsels' advice—it was reasonable based upon the then-existing state of the law. The only evidence regarding the standard of care came in the form of testimony from one of Piper's first habeas attorneys, who stated that the issue was unsettled at the time Piper pled guilty and was clarified only with our decision in *Piper I*. In his opinion, Piper's trial counsel provided reasonable advice based upon a plausible reading of SDCL 23A-27A-2 and SDCL 23A-27A-6. Although we are free, as law-trained judges, to "substitute [our] own judgment as to whether counsel's representation was ineffective[,]" we decline to do so here. *Davi v. Class*, 2000 S.D. 30, ¶ 15, 609 N.W.2d 107, 112. Piper's trial counsel were experienced criminal defense attorneys, and though their opinion regarding guilty plea and sentencing procedure proved to be incorrect, the advice was reasonable at the time of Piper's plea.

[30] [¶54.] Nor has Piper established any prejudice from counsels' advice. Piper has not alleged, much less established, that he would not have pled guilty but for his counsels' advice or, further, that the result at a trial would have been different. Indeed, Piper has not argued he had any reasonable chance of avoiding a conviction.

b. Presenting Expert Testimony

[31] [¶55.] Piper argues that his resentencing attorneys were ineffective because the experts they called acknowledged the presence of certain aggravating circumstances on cross-examination. Piper's trial counsel elicited expert testimony regarding mitigating factors from neuropsychologist Dr. Dewey Ertz and psychologist Dr. Hal Wortzel. Dr. Wortzel testified that Piper was immature and impulsive given his young age (Piper was 19 when he participated in Poage's killing), and Dr. ***812** Ertz testified that Piper displayed behaviors consistent with heavy marijuana and LSD use in addition to displaying ADHD symptomatology. However, these experts also agreed that Piper stole Poage's property and committed the murder, which involved torture, in order to eliminate Poage as a witness. *See* SDCL 23A-27A-1 (listing aggravating circumstances in capital cases).

[¶56.] Under the *Strickland* analysis, we cannot say counsels' decision to call these two experts was deficient. They provided valuable insight into Piper's behaviors and assisted with Piper's effort to present his mitigation case. The fact that they candidly acknowledged the presence of aggravating factors was no more damaging to Piper's case than his own admissions to the same aggravating factors. Even if the decision to call the experts was deficient, we are unable to conclude that the tactical decision impacted the outcome of the resentencing. Piper is, therefore, unable to demonstrate ineffective assistance of counsel.

c. Voir Dire

[¶57.] Piper also claims that his resentencing counsel committed errors during voir dire that deprived him of his

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right to a fair trial and that his appellate counsels' failure to appeal this issue constitutes ineffective assistance. Neither theory is sustainable for a variety of reasons.

[¶58.] First, any free-standing fair trial or due process claim associated with the jury selection process has been procedurally defaulted because it was not advanced on direct appeal from the jury resentencing in *Piper III*. It is therefore precluded under the res judicata principles discussed above.

[32] [¶59.] Second, the jury selection claim does not become more persuasive when it is viewed through the lens of the *Strickland* analysis. As to the first prong of *Strickland*, Piper has not demonstrated his attorneys' efforts fell below a standard of reasonableness. Indeed, Piper's counsel challenged the two potential jurors he identifies—Sagdalen and Carlin—for cause, citing concerns about what he describes as an inclination to impose the death penalty. When the court denied the cause challenges, Piper's attorneys exercised peremptory strikes to ensure that the two jurors did not become part of the jury that considered Piper's sentence. [17]

17 The resentencing court allowed 21 peremptory challenges for each side.

[33] **[34]** [¶60.] Beyond this, Piper cannot show prejudice under the second prong of *Strickland* even if we consider the jury selection issue on its merits as a free-standing, non-defaulted claim. The Sixth and Fourteenth Amendments guarantee a defendant a fair and impartial jury, but not a fair and impartial venire. Practical rules for selecting jurors through voir dire and a system of cause and peremptory challenges are essential to vindicate the right to a fair, impartial jury, but these rules are not, themselves, constitutional in nature. *See Miller*, 2018 S.D. 33, ¶ 23, 911 N.W.2d at 651 (" '[A] principal reason for peremptories' is to 'help secure the constitutional guarantee of a trial by an impartial jury.' ") (quoting *Rivera v. Illinois*, 556 U.S. 148, 159, 129 S. Ct. 1446, 1454, 173 L. Ed. 2d. 320 (2009)). The central point of analysis focuses upon the jury that heard the case—not those prospective jurors who may have been included in the venire.

[35] [¶61.] This is true even when defense counsel felt compelled to use peremptory challenges in order to assure the fairness and impartiality of those ultimately selected to serve on the jury. In ***813** *Ross v. Oklahoma*, the United States Supreme Court recognized as much:

> Petitioner was undoubtedly required to exercise a peremptory challenge to cure the trial court's error. But we reject the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury. We have long recognized that peremptory challenges are not of constitutional dimension. They are a means to achieve the end of an impartial jury. So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated.

487 U.S. 81, 88, 108 S. Ct. 2273, 2278, 101 L. Ed. 2d. 80 (1988) (citations omitted).

[¶62.] Even if prospective jurors Sagdalen and Carlin should have been removed from the venire for cause, Piper's right to a fair and impartial jury was not implicated because they did not sit on his jury. *See State v. Verhoef*, 2001 S.D. 58, ¶ 19, 627 N.W.2d 437, 442 ("[Defendant] has failed to show that the twelve jurors who heard the evidence and convicted him based upon that evidence were not impartial."). Therefore, Piper is unable to sustain his post-conviction jury selection argument concerning Sagdalen and Carlin either on its merits or as a component of an ineffective assistance of counsel claim.

[¶63.] Piper's claim that potential juror Monteforte was incorrectly removed for cause because he expressed difficulty imposing a death sentence is a claim of circuit court error that should have been litigated on direct appeal in *Piper III*. Because it was not, it is now precluded in this habeas action. The claim is not meritorious, in any event, either as a separate claim or an ineffective assistance claim.

[36] **[37]** [¶64.] "[T]he proper standard for determining when a prospective juror may be excused for cause because of his or her views on capital punishment ... is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *Wainwright v. Witt*, 469 U.S. 412, 424, 105

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S. Ct. 844, 852, 83 L. Ed. 2d 841 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45, 100 S. Ct. 2521, 2526, 65 L. Ed. 2d 581 (1980)). As long as jurors "can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case[,]" excluding individuals who would not impose the death penalty does not violate the Sixth Amendment cross-section clause or the impartial jury right. [18] *Lockhart v. McCree*, 476 U.S. 162, 184, 106 S. Ct. 1758, 1770, 90 L. Ed. 2d 137 (1986); *see also State v. McDowell*, 391 N.W.2d 661, 664-65 (S.D. 1986).

18 This process is sometimes known as "death qualifying" a jury in a capital case. *See State v. McDowell*, 391 N.W.2d 661, 664-65 (S.D. 1986).

[38] [¶65.] Nevertheless, Piper argues that his counsel failed to object to Monteforte's removal, and his appellate counsel was ineffective when it chose to not appeal the issue. Again, however, Piper does not discuss the ultimate makeup of the jury that actually heard the case, other than to express that Monteforte's removal "tilted" the jury toward the death penalty. This argument does not meet the heavy burden of proving ineffective assistance of counsel under either prong of *Strickland*, or even on its merits. Moreover, testimony during voir dire reveals that Monteforte's "views [would] 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *State v. Rhines*, 1996 S.D. 55, ¶ 44, 548 N.W.2d 415, 431 (quoting ***814** *Wainwright*, 469 U.S. at 424, 105 S. Ct. at 852). [19]

19 Because each of Piper's jury selection arguments lack merit, his claim that his appellate counsel was deficient for not advancing them on direct appeal is similarly unsupported. Counsel testified that he did not pursue the arguments because of their relative weakness. *See*, *e.g., Jones v. Barnes*, 463 U.S. 745, 751-52, 103 S. Ct. 3308, 3313, 77 L. Ed. 2d. 987 (1983) (discussing the importance of a trained advocate determining best issues to appeal).

d. Trial Preparation Concerning Correctional Officers' Testimony

[39] **[40]** [¶66.] Piper further claims that his resentencing counsel was ineffective in their investigation of the State's witnesses before trial, including several correctional officers whose addresses were listed by the State as simply, the "Penitentiary." Piper's counsel testified at the habeas hearing that they had difficulty contacting the State's witnesses, and they did not travel to meet with the witnesses in person before trial. However, his attorneys were able to contact the witnesses by email and telephone to conduct interviews. Piper claims his attorneys were unprepared for these witnesses because they "changed their tone" during the resentencing hearing when they were previously "laudatory" of Piper during their telephone interview.

[¶67.] We have held that "[a]n attorney must make a reasonable investigation and must make reasonable decisions to forego particular investigations. A difference in trial tactics does not amount to ineffective assistance of counsel." *Brakeall v. Weber*, 2003 S.D. 90, ¶ 16, 668 N.W.2d 79, 85 (quoting *Randall*, 2002 S.D. 149, ¶ 7, 655 N.W.2d at 96). Here, we are unable to conclude that counsel was deficient in their preparation. Furthermore, we cannot find the existence of prejudice. There is no indication that the witnesses' testimony, even if it was unexpectedly unflattering for Piper, would have changed had counsel interviewed the officers in person. Given the general nature of the description of the testimony, Piper has also not established that the jury's result was impacted by the testimony.

e. Trial Preparation Concerning the State's Expert Witnesses

[¶68.] In a separate claim of deficient representation, Piper alleges that his resentencing counsel acquiesced to expert testimony offered by the State through psychologist Dr. Ronald Franks despite not interviewing him before trial or having his curriculum vitae. However, the State had previously only identified Dr. Franks as a rebuttal witness. When the State decided to call him in its case in chief instead, the resentencing court ordered a recess, and Piper's attorneys interviewed Dr. Franks before his testimony.

[41] [¶69.] The decision to forego a pretrial interview of a rebuttal expert witness may be reasonable since the scope of the rebuttal will be limited by the testimony of witnesses who have not yet testified. However, even if it were deficient, Piper has not alleged specific prejudice, and we are unable to discern any from the record.

[¶70.] Piper is also critical of his attorneys' efforts concerning another State expert, Dr. Ulises Pesce, who is a psychiatrist. The State disclosed Dr. Pesce as an expert after the court's deadline, and Piper's attorneys moved to exclude his testimony. Their efforts were reasonable under the circumstances, but the resentencing court denied their motion to exclude and allowed testimony from Dr. Pesce. From our review, this is less an ineffective assistance of counsel

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argument and more a claim that the court abused its discretion by allowing the testimony. The claim ***815** should have been made on direct appeal, and Piper's failure to do so renders it defaulted and precluded in this habeas action. [20]

20 Other than stating that Dr. Pesce provided testimony "about Piper's mental condition and antisocial personality disorder[,]" Piper does not allege that he was prejudiced by his attorneys' conduct. *See Steiner v. Weber*, 2011 S.D. 40, ¶ 6, 815 N.W.2d 549, 551-52 (*Strickland* requires a showing that "counsel's deficient performance" changed the outcome.). Piper has also not alleged that the result at trial would have been different in the absence of Dr. Pesce's testimony.

f. Trial Preparation Concerning State Witness Tom Curtis

[42] [¶71.] In a separate claim alleging insufficient preparation, Piper argues his attorneys failed to investigate the reasons why State witness Tom Curtis was being held by Utah authorities. Curtis' involvement in Piper's case dates back to 2000 when he was housed with Piper, Hoadley, and Page in the Lawrence County Jail. Curtis testified at Piper's 2001 sentencing hearing that Piper had conceived a plan to kill prison guards in an attempt to break out of jail. The State called Curtis again at Piper's 2011 resentencing, and he provided the same testimony.

[¶72.] At the time of the 2011 hearing, Curtis was incarcerated in Utah, waiting to be sentenced on felony charges. Piper claims that his counsels' failure to investigate Curtis' current status means that they were unable to impeach him. [21] However, Piper's claim that his counsel failed to investigate Curtis' pending charges lacks a predicate showing that the investigation would have yielded meaningful impeachment information. Without it, Piper cannot show how counsels' failure prejudiced the outcome of his resentencing. [22] *See Fast Horse v. Weber*, 2013 S.D. 74, ¶ 19, 838 N.W.2d 831, 837-38 (concluding that counsel's decision to not interview a witness did not change the outcome of the trial).

21 Piper also now alleges that the State's failure to provide Curtis' criminal history report is, itself, a free-standing due process claim that is cognizable in this habeas case despite the fact it was not raised on direct review. We disagree, but even if the claim were not precluded, we are not convinced on this record that Piper could sustain his burden to demonstrate the omitted information was material. *See Giglio v. United States*, 405 U.S. 150, 154, 92 S. Ct. 763, 766, 31 L. Ed. 2d 104 (1972) ("A finding of materiality of the evidence is required under *Brady* [*v. Maryland*].").

22 Piper further argues that the State violated his due process rights when it failed to provide his resentencing counsel with Curtis' updated criminal history. Because Piper did not raise this issue on appeal in *Piper III*, he is foreclosed from bringing this claim now as a free-standing claim.

g. Trial Preparation Concerning Sister Crowley

[43] [¶73.] Piper's resentencing counsel called Sister Gabrielle Crowley, a Catholic nun, as a mitigation witness to testify about Piper's spiritual growth after she befriended him at the penitentiary. On cross-examination, the State inquired if Sister Crowley had written a letter to a female inmate at Piper's urging in violation of prison policy. Piper now alleges that there is insufficient evidence to support the claim that the letter violated prison policy, and he claims his attorneys were ineffective because they did not investigate whether prison policy was implicated and allowed the cross-examination to continue without objecting.

[¶74.] At the second habeas hearing, one of Piper's attorneys testified that, in hindsight, he would handle Sister Crowley's cross-examination differently. We do not, however, utilize the benefit of hindsight in ***816** our analysis of ineffective assistance of counsel claim, which is instead "evaluated from counsel's perspective at the time of the alleged error ...." *State v. Thomas*, 2011 S.D. 15, ¶ 21, 796 N.W.2d 706, 713 (quoting *Steichen v. Weber*, 2009 S.D. 4, ¶ 25, 760 N.W.2d 381, 393). Whether the letter actually violated policy is still unsettled, despite the fact that Sister Crowley acknowledged she had violated the policy. Under the circumstances, Piper has failed to prove his counsel acted unreasonably. Further, Piper fails to show how the alleged error prejudiced the outcome of his resentencing. [23]

23 Like the Tom Curtis claim, Piper argues a due process violation occurred when the prosecution allegedly misled the jury about whether Sister Crowley violated prison policy. Because Piper did not raise this issue on appeal in *Piper III*, he is

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foreclosed from bringing it now as a free-standing claim.

h. Appellate Counsels' Decision Not to Appeal Denial of Mistrial

[44] [¶75.] Last, Piper claims ineffective assistance of counsel because his resentencing counsel failed to appeal the denial of a mistrial motion when the State violated a motion in limine by asking a witness about Piper's prison privileges. Although Piper's counsel objected and moved for a mistrial, the resentencing court denied Piper's motion. At the second habeas hearing, Piper's appellate counsel testified that he made a strategic decision not to appeal the issue based upon his assessment of its relative strength. *See Rhines v. Weber,* 2000 S.D. 19, ¶ 14, 608 N.W.2d 303, 307 (discussing highly deferential review of counsel's conduct). We conclude this assessment was reasonable. Further, Piper does not articulate how his counsels' failure to raise this issue on appeal prejudiced him, and therefore does not satisfy the second prong of the *Strickland* test.

Conclusion

[¶76.] Piper cannot challenge his guilty plea or alleged inconsistent arguments on the merits under the procedural framework of a habeas action. Further, Piper has not met his burden to show deficient performance and prejudice under *Strickland* on his ineffective assistance of counsel claims. We affirm on all issues.

[¶77.] GILBERTSON, Chief Justice, and KERN and JENSEN, Justices, concur.

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842 N.W.2d 338
Supreme Court of South Dakota.

STATE of South Dakota,
Plaintiff and Appellee,
v.
Briley W. PIPER,
Defendant and Appellant.

No. 26126.
|
Argued March 18, 2013.
|
Decided Jan. 8, 2014.

Synopsis

Background: After defendant's death sentence on felony murder conviction, to which defendant pled guilty, was affirmed, 709 N.W.2d 783, 2006 SD 1, defendant filed request for writ of habeas corpus. The Circuit Court, Fourth Judicial Circuit, Lawrence County, John W. Bastian, J., denied defendant relief. He appealed. The Supreme Court, Meierhenry, J., 771 N.W.2d 352, 2009 SD 66,granted defendant's writ of habeas corpus and vacated his death sentence. On remand, the Circuit Court, Jerome A. Eckrich, III., J., denied defendant's motion to withdraw guilty plea and, after jury trial, sentenced defendant to death. Defendant appealed.

Holdings: The Supreme Court, Wilbur, J., held that:

consideration of defendant's motion to withdraw guilty plea was not authorized on remand;

death sentence was not imposed under influence of passion, prejudice, or any other arbitrary factor;

evidence was sufficient to support jury's findings of aggravating circumstances in sentencing defendant to death;

defendant's death sentence was not disproportionate to his co-defendant's life sentence; and

death sentence was proportionate when compared to penalty imposed in similar cases.

Affirmed.

Attorneys and Law Firms

***341** Marty J. Jackley, Attorney General, Paul S. Swedlund, Assistant Attorney General, Pierre, South Dakota, Attorneys for plaintiff and appellee.

Steve Miller, Sioux Falls, South Dakota, Attorney for defendant and appellant.

Opinion

WILBUR, Justice.

[¶ 1.] Briley Piper pleaded guilty to several offenses, including felony murder. The plea-taking court sentenced Piper to death on the murder charge. This Court

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affirmed Piper's death sentence. Piper then sought habeas relief claiming that he did not validly waive his right to have a jury determine whether to impose the death penalty. This Court granted Piper's writ of habeas corpus and vacated his death sentence. Once the case was remanded to the circuit court for a jury sentencing procedure, Piper filed a motion to withdraw his guilty pleas, which the circuit court denied on the merits. The case proceeded to a jury sentencing. The jury found the existence of three aggravating factors and sentenced Piper to death. Piper appeals the denial of his motion to withdraw his guilty pleas and the proportionality of his sentence. We affirm.

FACTS AND PROCEDURAL HISTORY

[¶ 2.] In 2000, Piper was charged with five offenses, including the murder of Chester Allan Poage.[1] On January 3, 2001, Piper appeared before Judge Warren G. Johnson (the plea-taking court) and pleaded guilty to the charges of first-degree felony murder, kidnapping, first-degree robbery, first-degree burglary, and grand theft. After accepting Piper's guilty pleas to the charged offenses, the court held a three-day sentencing hearing, and ultimately sentenced Piper to death.[2]

[¶ 3.] This Court affirmed Piper's conviction and sentence in *State v. Piper* (*Piper I*), 2006 S.D. 1, 709 N.W.2d 783. Piper then filed an application for writ of habeas corpus claiming that he did not validly waive his right to have a jury determine whether to impose the death penalty. The habeas court denied the application and Piper appealed that decision.

[¶ 4.] In *Piper v. Weber* (*Piper II*), we noted that the plea-taking court did not explain to Piper that if the jury was not unanimous in its decision to impose the death penalty, then Piper would receive a life sentence. 2009 S.D. 66, ¶ 17, 771 N.W.2d 352, 358. We reversed the habeas ***342** court and held that Piper did not validly waive his right to have a jury determine whether to impose the death penalty. *Id.* ¶ 21, 771 N.W.2d at 360. Thus, we "vacate[d] Piper's death sentence and remand[ed] for a new sentencing proceeding that afford[ed] Piper the right to have a jury decide whether the death penalty should be imposed." *Id.*

[¶ 5.] Upon remittal and prior to his new sentencing hearing, Piper filed the motion that is the subject of this appeal—a motion to withdraw his guilty pleas for felony murder and the other four non-capital offenses. In his motion, Piper argued that his guilty pleas were not knowing and voluntary because the plea-taking court failed to advise Piper of his purported right to have a jury determine guilt on all of the underlying charges and then to have a sentencing hearing before the circuit court. Piper also alleged that the plea-taking court failed to advise him that he could receive consecutive sentences upon

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his convictions for kidnapping, robbery, burglary, and grand theft.

[¶ 6.] After conducting a motion hearing and familiarizing himself with the contents of the parties' submissions and both files in *Piper I* and *Piper II,* Judge Jerome A. Eckrich III (the circuit court) denied the motion on the merits. The case proceeded to a jury sentencing hearing in July 2011. The jury returned a unanimous verdict finding the existence of three aggravating circumstances pursuant to SDCL 23A–27A–1(3), (6), and (9) and unanimously recommended that a death sentence be imposed.

[¶ 7.] In addition to this Court's automatic review of the death sentence pursuant to SDCL 23A–27A–9, Piper raises two issues. We review the issues presented in the following order:

1. Whether Piper's motion to withdraw his guilty pleas was improperly denied.

2. Whether Piper's sentence was lawfully imposed under SDCL 23A–27A–9 and SDCL 23A–27A–12. [3]

DECISION

[¶ 8.] **1. Whether Piper's motion to withdraw his guilty pleas was improperly denied.**

[¶ 9.] Statute, refined by case law, grants this Court broad authority to narrow the scope of further proceedings when judgment is remitted to the circuit court. [4] SDCL 15–30–14 provides that "[i]n all cases the Supreme Court shall remit its judgment or decision to the court from which the appeal was taken, *to be enforced accordingly;* and if from a judgment, final judgment shall thereupon be entered in the court below in accordance therewith, except where otherwise ordered." (Emphasis added.) *See* SDCL 15–30–11 ("[T]he settled record on appeal shall be remitted to the court from which the appeal was taken, and further proceedings shall be had *in accordance therewith.*") (emphasis added), 23A–32–19 ("The Supreme Court by its judgment may reverse, affirm, or modify the judgment or order appealed from...."). *See also* SDCL 23A–32–14 (civil appellate procedure applies to criminal appeals unless otherwise provided).

***343** [¶ 10.] Taken together, these statutes establish that the scope of the circuit court's jurisdiction must conform to the dictates of our opinion. Indeed, in anticipation of this deference, we release our jurisdiction when the remittitur is returned to the circuit court, except in the narrow circumstances of "fraud, mistake, or inadvertence." *Bahlkow v. Preston,* 62 S.D. 36, 251 N.W. 299, 299–300 (1933). If the circuit court's original jurisdiction could spontaneously resurrect on remittal, the defined roles of our tiered judicial system—as set forth in statute and case law—and the judicial certainty and efficiency they foster would be nullified. [5]

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[¶ 11.] Our directives on remittal are clear on the face of our opinions. If we affirm, the circuit court shall enter final judgment. *See* SDCL 15–30–14, 23A–32–19. Where we order reversal without any qualification, as in a general remand, "[t]he mandate ... nullifies the judgment, findings of fact, and conclusions of law, and *leaves the case standing as if no judgment or decree had ever been entered.*" *Gluscic v. Avera St. Luke's,* 2002 S.D. 93, ¶ 20, 649 N.W.2d 916, 920 (quoting *Janssen v. Tusha,* 67 S.D. 597, 601, 297 N.W. 119, 120 (1941)). Between these two extremes is the limited remand, for which our instructions must exactly govern. "When the scope of remand is limited, the entire case is not reopened, but rather, the lower tribunal is only authorized to carry out the appellate court's mandate." *In re Conditional Use Permit Granted to Van Zanten,* 1999 S.D. 79, ¶ 13, 598 N.W.2d 861, 864 (citing 5 Am.Jur.2d *Appellate Review* § 787 (1995)). This procedure mirrors that performed by the United States Supreme Court: "[W]hen the direction contained in the mandate is precise and unambiguous, it is the duty of the [lower court] to carry it into execution, and not to look elsewhere for authority to change its meaning." *West v. Brashear,* 39 U.S. 51, 54, 14 Pet. 51, 10 L.Ed. 350 (1840).

[¶ 12.] We strictly and purposely limited our remand instructions in *Piper II* to correct the specific error that had occurred—the denial of a jury at sentencing. In *Piper II,* we "vacate[d] Piper's death sentence and remand[ed] for a new sentencing proceeding that afford[ed] Piper the right to have a jury decide whether the death penalty should be imposed." *Piper II,* 2009 S.D. 66, ¶ 21, 771 N.W.2d at 360. As evidenced by authorities cited in the opinion, namely *State v. Apple,* 2008 S.D. 120, ¶¶ 22–23, 759 N.W.2d 283, 291, and *State v. Goodwin,* 2004 S.D. 75, ¶ 18, 681 N.W.2d 847, 854, we were aware of the possibility of remanding the case to the circuit court for the explicit purpose of permitting Piper to withdraw his guilty pleas. Yet, we unanimously did not give that instruction. This was because, as both the circuit court and Piper acknowledged, ***344** the sufficiency of Piper's admission of guilt was not before us in *Piper II,* and our limited scope of remand was written accordingly.

[¶ 13.] In spite of this fact, however, the circuit court considered Piper's motion to withdraw his guilty pleas and denied it on the merits. This was in excess of what was permitted by our limited remand. Rather, the circuit court should have denied the motion to withdraw on the basis of the limited nature of the remand. The circuit court reached the correct result—denial of the motion to withdraw—albeit for the wrong reason. *See, e.g., State v. Hart,* 1998 S.D. 93, ¶ 43, n. 9, 584 N.W.2d 863, 871 n. 9; *Kehn v. Hoeksema,* 524 N.W.2d 879, 880–81 (S.D.1994) (affirming the decision of the circuit court because it reached the right result for the wrong reason). Thus, we affirm the denial of the motion and decline to address the merits of Piper's request to withdraw his pleas as

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being beyond the scope of our remand in *Piper II*.

[¶ 14.] **2. Whether Piper's sentence was lawfully imposed.**

[¶ 15.] "In every case [in South Dakota] where the death penalty is imposed, this Court is required to conduct an independent review of the sentence." *Piper I,* 2006 S.D. 1, ¶ 26, 709 N.W.2d at 797 (citing SDCL 23A–27A–9). We must decide:

> (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and
>
> (2) Whether the evidence supports the jury's ... finding of a statutory aggravating circumstance as enumerated in § 23A–27A–1; and
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

SDCL 23A–27A–12. [6]

[¶ 16.] **Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor.**

[¶ 17.] Piper's death sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor. SDCL 23A–27A–12(1). The jury received relevant evidence regarding the impact of the crime on Poage's mother and sister, Piper's history, and evidence of aggravating and mitigating circumstances. Our review of the record contains no independent basis to invalidate the sentence due to the influence of passion, prejudice, or any other arbitrary factor.

[¶ 18.] **Whether the evidence supports the jury's finding of a statutory aggravating circumstance as enumerated in § 23A–27A–1.**

[¶ 19.] There is evidence in the record from Piper's sentencing hearing that supports the jury's finding of three aggravating circumstances beyond a reasonable doubt. SDCL 23A–27A–12(2). *See* SDCL 23A–27A–1(3), (6), & (9). "In order to be eligible for the death penalty, one of the ... aggravating circumstances [enumerated] in SDCL 23A–27A–1 must ***345** be found beyond a reasonable doubt." *Piper I,* 2006 S.D. 1, ¶ 28, 709 N.W.2d at 797.

[¶ 20.] In this case, the jury found the existence of three aggravating circumstances beyond a reasonable doubt pursuant to SDCL 23A–27A–1(3), (6), and (9). The jury determined the State proved beyond a reasonable doubt that Piper "committed the offense for the benefit of [himself] or another, for the purpose of receiving money or any other thing of monetary value" pursuant to SDCL 23A–27A–1(3). The record demonstrates the jury was presented with evidence that Piper, Page, and Hoadley

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killed Poage for the purpose of stealing items from Poage's house. Piper and Page initially formed the plan to rob Poage and later informed Hoadley of their plan. After brutally murdering Poage, the trio returned to the Poage home and stole electronics, antique watches, coin collections, and other items of limited value. Piper, Page, and Hoadley fled South Dakota in Poage's Chevrolet Blazer. They obtained Poage's ATM card and pin number and successfully withdrew money from Poage's bank account following Poage's murder.

[¶ 21.] Additionally, the jury found that the State proved beyond a reasonable doubt that "the offense was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement" pursuant to SDCL 23A–27A–1(9). The jury heard Piper's statements to law enforcement during two interviews on April 28, 2000. From these statements, it can be gleaned that Piper, Page, and Hoadley killed Poage in order to eliminate Poage as a witness to the robbery—the objective of the whole scheme that evening.

[¶ 22.] Furthermore, Piper and his co-defendants transported Poage to a wooded, sparsely-populated, and rugged location, where they murdered Poage and disposed of his body. Testimony at the sentencing hearing indicated that the nearest house to the location where Poage's body was recovered was approximately 2.85 miles away. There was evidence in the record that, immediately following the murder and the ransacking of the Poage home, Piper and his co-defendants left South Dakota and went to Piper's sister's home in Missouri. Prior to their return to Rapid City, the group pawned many of Poage's possessions and utilized his ATM card at several locations in Nebraska and South Dakota. When taken as a whole, there is sufficient evidence to support the jury's finding beyond a reasonable doubt the alleged aggravating circumstances under SDCL 23A–27A–1(9).

[¶ 23.] The jury also found that "the offense was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim" under SDCL 23A–27A–1(6). Depravity of the mind is defined as:

> (1) the defendant committed torture upon the living victim; (2) the defendant subjected the body of the deceased victim to mutilation or serious disfigurement; (3) the defendant relished the murder; (4) the defendant inflicted gratuitous violence upon the victim; (5) the senselessness of the crime; or (6) the helplessness of the victim.

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Piper I, 2006 S.D. 1, ¶ 30, 709 N.W.2d at 799 (quoting *State v. Rhines* (*Rhines I*), 1996 S.D. 55, ¶ 143, 548 N.W.2d 415, 448). The other terms of SDCL 23A–27A–1(6) are defined as:

> Torture requires: (1) the unnecessary and wanton infliction of severe pain, agony, ***346** or anguish; and (2) the intent to inflict such pain, agony or anguish.... Unnecessary pain implies suffering in excess of what is required to accomplish the murder. Aggravated battery requires the infliction of serious physical abuse upon the victim, by depriving him of a member of his body, or by rendering a member of his body useless, or by seriously disfiguring his body or a member thereof ... and by proving specific intent to inflict unnecessary pain in excess of what was required to accomplish the murder.

Piper I, 2006 S.D. 1, ¶ 30, 709 N.W.2d at 799 (internal citations and quotation marks omitted).

[¶ 24.] The jury was presented with evidence that, after Page pointed a pistol at Poage and ordered Poage to the floor, Piper kicked Poage in the face hard enough to render Poage unconscious. Piper then watched as his co-defendants bound Poage's hands and feet and placed him upright in a chair. Piper stood on a four-way tire iron on Poage's feet to prevent him from moving. Poage was forced to drink a concoction of crushed up pills, beer, and hydrochloric acid. And all the while Poage pleaded for an explanation as to why the men were harming him.

[¶ 25.] Next, the trio ushered Poage to his Blazer, placed Poage in the backseat, and threatened to kill him if he tried to escape. Piper drove the group in Poage's Blazer to Higgins Gulch.

[¶ 26.] Once at Higgins Gulch, Poage was forced, in freezing temperatures and 12–inches of snow, to strip his body of his clothing, except for his shoes, socks, and undershirt. From the evidence, Poage endured their attempt to bury him in the snow and to drown him in the ice-cold waters of the creek. Poage was repeatedly kicked, which caused disfiguring injuries to Poage's ears and head. Piper admitted to law enforcement that he kicked Poage multiple times in his head and body while wearing combat-style boots. When Poage attempted to make an escape from the men, Piper ordered Page to chase Poage. The jury heard evidence that Poage asked to warm himself inside the Blazer,

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but the group refused to allow Poage to enter the vehicle because he was bleeding. Following instructions, Poage went to the ice-cold creek and washed his body. However, after complying with his captors' demands, Poage was not allowed into the vehicle. Later, Page and Hoadley dropped large stones on Poage's head, while Piper stood by and did nothing to aid a helpless Poage. Throughout the events of that evening, Poage pleaded with the co-defendants offering all of his possessions to the group in exchange for his life.

[¶ 27.] For the first time in open court at the sentencing hearing, Piper presented evidence that he took part in stabbing Poage.[7] Dr. Dewey Ertz, a licensed psychologist who examined Piper on two occasions, testified on direct examination by defense counsel:

> **Q:** Did [Piper] tell you whether or not he had stabbed Chester Poage?
>
> **A:** He told me that he had.
>
> **Q:** Now, that wasn't something that was in his interview that you viewed with the police officers.
>
> **A:** No, it was not.

Evidence presented at the sentencing hearing revealed that Poage was stabbed three times in his head and neck.

***347** [¶ 28.] The jury was presented with evidence that Poage's murder involved "gratuitous violence." Indeed, Piper admitted to law enforcement that he taunted and laughed at the victim throughout the four-hour ordeal.

[¶ 29.] Furthermore, the crime was senseless in that Piper and his co-defendants gained little, monetarily, after Poage offered all of his possessions in exchange for his life. Based on the evidence presented at the sentencing hearing, there is sufficient support for the jury's finding beyond a reasonable doubt the alleged aggravating circumstance under SDCL 23A–27A–1(6).

[¶ 30.] Under SDCL 23A–27A–1, the judge "shall include in instructions to the jury for it to consider[ ] any mitigating circumstances[.]" SDCL 23A–27A–2, the presentencing hearing statute, mandates "[a]t such hearing the jury shall receive all relevant evidence, including ... (4) [a]ll evidence concerning any mitigating circumstances." At the sentencing hearing, the jury was presented with the following mitigating evidence. As a child, Piper was involved in Boy Scouts, swimming, football, and martial arts. Piper had problems socializing at school, was impulsive, was diagnosed with Attention Deficit and Hyperactive Disorder, and had other learning issues. Following graduation, Piper began college at the University of Alaska at Anchorage, but eventually dropped out. And, while in prison, Piper completed 42 college credit hours through Ohio University and was baptized into the Catholic faith. Lastly, Piper provided

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a statement at the end of the sentencing hearing apologizing to both the Poage family and his own family. [8]

[¶ 31.] **Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.**

[¶ 32.] Finally, Piper's death sentence is not excessive or disproportionate compared to the penalty imposed in similar cases when considering the nature of the crime and extent of Piper's actions. SDCL 23A–27A–12(3).

> [S]imilar cases for purposes of SDCL 23A–27A–12(3) are those cases in which a capital sentencing proceeding was actually conducted, whether the sentence imposed was life or death. Because the aim of proportionality review is to ascertain what other capital sentencing authorities have done with similar capital murder offenses, the only cases that could be deemed similar ... are those in which imposition of the death penalty was properly before the sentencing authority for determination.

State v. Robert, 2012 S.D. 60, ¶ 28, 820 N.W.2d 136, 145 (quoting *Rhines I,* 1996 S.D. 55, ¶ 185, 548 N.W.2d at 455–56) (internal quotation marks omitted). "For purposes of comparative proportionality review, 'a death sentence is comparatively excessive if other defendants with similar characteristics generally receive sentences ***348** other than death for committing factually similar offenses in the same jurisdiction.' " *State v. Berget,* 2013 S.D. 1, ¶ 21, 826 N.W.2d 1, 12 (quoting *Rhines I,* 1996 S.D. 55, ¶ 205, 548 N.W.2d at 457). We have previously recognized that "[t]he disparity in suffering endured by victims is an important and legitimate consideration when evaluating the proportionality of a death sentence." *Rhines I,* 1996 S.D. 55, ¶ 207, 548 N.W.2d at 458.

[¶ 33.] Piper raises only one argument concerning the proportionality of his sentence. Piper asserts that his sentence is internally disproportionate; i.e., disproportionate to the life sentence a jury gave to Piper's co-defendant Hoadley. Piper is asking this Court to revisit its earlier proportionality ruling in *Piper I* in light of Hoadley's new testimony at the July 2011 sentencing hearing, which portrayed Piper as more of a bystander in the murder than an active participant. *See* 2006 S.D. 1, ¶¶ 69–96, 709 N.W.2d at 810–18. Piper now argues that Hoadley testified under oath

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and was subject to cross-examination, which, Piper contends, was the reason this Court gave in *Piper I* for not considering Hoadley's out-of-court statements.

[¶ 34.] We again rely on Piper's own statements—to law enforcement, to friends, to cellmates, and to medical professionals—as to the degree of Piper's involvement in the crime. Though Hoadley's recent version indicates that Piper had minimal involvement with the events at the gulch, Hoadley earlier told a different version of events detailing Piper's active involvement in the crime to friend-turned-police-informant Danny Burkhart.[9] Hoadley's current version of events was testified to 11 years after the murder while Hoadley's statements to Burkhart occurred shortly after the murder. And, at Piper's sentencing hearing in July 2011, Hoadley admitted that in making his statements to Burkhart, he had "no motiv[e] to make up [a] story at that time[.]"

[¶ 35.] From the evidence presented at the sentencing hearing, excluding Hoadley's testimony, Piper's degree of involvement in Poage's murder was not equal to co-defendant Hoadley's involvement. " '[A] death sentence should not be invalidated simply because a jury determined that another defendant, who committed an analogous crime, deserved mercy.' " *Id.* ¶ 96, 709 N.W.2d at 818 (quoting *Rhines I,* 1996 S.D. 55, ¶ 206, 548 N.W.2d at 457). Piper and co-defendant Page initially formed the plan to rob Poage and it was not until later that they informed Hoadley of their plan. Piper kicked Poage in the head rendering Poage unconscious. Piper held Poage's feet down with a tire iron while Page forced Poage to drink a toxic liquid. During these events, Piper indicated to law enforcement that Hoadley was a bystander. Piper drove the group to Higgins Gulch in Poage's Blazer. There is evidence in the record that Piper kicked Poage several times in the head and body at the gulch and taunted Poage. Piper presented evidence at the sentencing hearing that he did take part in the stabbing of Poage. Because Piper's level of involvement in the crime itself was greater than co-defendant Hoadley's involvement, Piper's death sentence is not internally disproportionate to co-defendant Hoadley's life sentence.

[¶ 36.] Piper's sentence is proportionate when compared to the penalty imposed in similar cases when considering the nature of the crime and extent of ***349** Piper's actions. This Court has recently updated the list of cases that are applicable to our proportionality review. *See Robert,* 2012 S.D. 60, ¶¶ 29–31, 820 N.W.2d at 145–46. We now review and include the summary of *State v. Robert* in our "universe" of cases for comparison and take judicial notice of the case summaries set forth in previous decisions. *See id.* (summarizing *State v. Wright,* 2009 S.D. 51, 768 N.W.2d 512, as a case where a jury, faced with a decision of whether to impose the death penalty, sentenced the defendant to life in prison and taking judicial notice of the "universe" of cases). *See also State v. Page,* 2006 S.D. 2, ¶ 60, 709 N.W.2d

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739, 760–61 (taking judicial notice of co-defendant Piper's case and the case summaries set forth in *Rhines I* and in *Moeller II* and stating that co-defendant Hoadley's conviction was a case where the jury, faced with the decision of whether to impose the death penalty, imposed a life sentence); *Piper I,* 2006 S.D. 1, ¶ 38, 709 N.W.2d at 801 (taking judicial notice of co-defendant Page's case and the case summaries set forth in *Rhines I* and in *Moeller II* and stating that co-defendant Hoadley's conviction was a case where the jury imposed a life sentence); *Rhines I,* 1996 S.D. 55, ¶¶ 187–204, 548 N.W.2d at 456–57 (summarizing six cases where the jury imposed a life sentence and one case where the jury imposed a death sentence). [10]

[¶ 37.] Eric Robert and his co-defendant, Rodney Berget, inmates at the South Dakota State Penitentiary, brutally assaulted correctional officer, Ronald Johnson, by striking him in the face and head with a lead pipe causing disfiguring injuries. *See generally Robert,* 2012 S.D. 60, 820 N.W.2d 136. The two men then wrapped Johnson's head in plastic wrap to prevent Johnson from crying for help and from breathing. Johnson died from the injuries he received in the attack. Following the attack, Robert and Berget dragged Johnson's lifeless body to a concealed area where Robert dressed himself in Johnson's uniform and Berget climbed into a box placed on a four-wheel cart. The men attempted to escape the prison. When they were unsuccessful, Robert and Berget surrendered to prison officials.

[¶ 38.] Robert pleaded guilty to first-degree murder and opted to have a sentencing hearing before the circuit court instead of a jury. The circuit court found that the State had proved beyond a reasonable doubt the existence of two aggravating circumstances: the crime was committed against a law enforcement official and the crime was committed by a person in lawful confinement.

[¶ 39.] At Robert's sentencing hearing, the court was presented evidence of Robert's violent and abusive past, including a kidnapping conviction, his rehabilitative prospects, and the severity and depravity of the crime. Even though Robert waived the presentation of mitigating evidence, the court considered the mitigating evidence it could find, including Robert's high intelligence, college degree from the University of Wisconsin, and his ability, because of his education and work history, to function as a productive member of society. ***350** The circuit court sentenced Robert to death.

[¶ 40.] Similar to the disfiguring injuries that Robert and his co-defendant inflicted upon Johnson, Piper and his co-defendants caused disfiguring injuries to Poage. Robert and his co-defendant delivered several blows to Johnson's head, which led to the exposure of Johnson's brain in at least three locations. In the present case, the evidence presented to the jury indicated that Poage had been

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kicked in his head to the point that his ears had been forcibly detached. Poage had also been stabbed several times in the head. Piper admitted to kicking Poage several times, once in the face at the Spearfish home, and then several more times in the head and body at the gulch. Piper presented evidence at trial that he took part in the stabbing. However, in contrast to the beating and ultimate killing of Johnson, the brutality and torture of Poage lasted several hours.

[¶ 41.] Piper was the first of the three men to direct an assault against Poage. The force with which Piper kicked Poage in the face was so hard that it rendered Poage unconscious. Following that attack, Piper held a tire iron to Poage's feet while co-defendant Page forced Poage to drink a toxic liquid. Piper drove the men in Poage's vehicle to the gulch. At the gulch, evidence in the record indicates that Piper kicked Poage several more times and stabbed him. During this time, Piper made jokes and comments as to the beatings and as to the amount of pain inflicted upon Poage at the hands of his co-defendants. The jury heard evidence that Poage asked to warm himself inside the Blazer and the group refused to allow Poage to enter the vehicle because he was bleeding. Following instructions, Poage went to the ice-cold creek and washed his body. However, after complying, Poage was not allowed inside the vehicle. Throughout the evening, Poage begged for his life and repeatedly asked the men why they were hurting him. Lastly, in contrast to his statements of remorse at this sentencing hearing, Piper bragged when he told his friends and cellmate about the events of the evening.

[¶ 42.] The mitigating evidence presented to the jury indicates that Piper had a relatively decent childhood. Piper was involved in Boy Scouts, sports, and martial arts. Similar to Robert, Piper had the opportunity to go to college and the record indicates that he did go to the University of Alaska at Anchorage for a short time following his graduation from high school.

[¶ 43.] Perhaps, most important, the jury heard evidence of Piper's manipulative personality. Piper and co-defendant Page initially decided together to rob Poage and later told Hoadley of their idea. When Poage attempted to escape from his captors at the gulch, Piper instructed Page to run after him. Furthermore, during Piper's incarceration he exhibited his manipulative personality. When he was initially imprisoned, the jury heard evidence that Piper attempted to coerce other inmates to join his escape plot from the Lawrence County jail. The record also indicates Piper manipulated a nun by convincing her to write a letter to another incarcerated individual, a violation of prison policy.[11] Prison officials, who have worked with Piper, Page, and Hoadley, testified that Piper had a leadership personality while Page and Hoadley were described ***351** as "followers." We conclude that Piper's death sentence is not excessive or disproportionate compared to other

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similar cases when considering the nature of the crime and extent of Piper's actions. death sentence was lawfully imposed by the jury. Thus, we affirm Piper's death sentence.

CONCLUSION

[¶ 44.] We affirm the denial of Piper's motion to withdraw his guilty pleas, not on the merits as determined by the circuit court, but because of the limited nature of our remand in *Piper II*. In addition, Piper's death sentence was lawfully imposed by the jury. Thus, we affirm Piper's death sentence.

[¶ 45.] GILBERTSON, Chief Justice, and KONENKAMP, ZINTER and SEVERSON, Justices, concur.

All Citations

842 N.W.2d 338, 2014 S.D. 2

Footnotes

1 For a full recitation of the underlying facts of this case, see this Court's opinion in *State v. Piper* (*Piper I*), 2006 S.D. 1, ¶¶ 2–11, 709 N.W.2d 783, 790–92.

2 In separate proceedings, Piper's co-defendant, Elijah Page, pleaded guilty to the same charges and was sentenced to death by the same judge. Another co-defendant, Darrell Hoadley, maintained a not guilty plea to the same charges and proceeded to a jury trial. The jury convicted Hoadley, but did not impose the death penalty.

3 Piper's second presented issue ("[Whether] Piper's death sentence is disproportionate to the life sentence imposed on co-[d]efendant Hoadley") is part and parcel of our proportionality analysis and is considered here.

4 Whether a circuit court conformed to our mandate is a question subject to de novo review. *See Weins v. Sporleder,* 2000 S.D. 10, ¶ 10, 605 N.W.2d 488, 490.

5 The United States Supreme Court examined the ramifications of a lower court departing from the mandate given on appeal and concluded:

> Argument to show that a subordinate court is bound to proceed in such an event and dispose of the case as directed ... is unnecessary, as any other rule would operate as a repeal of the Constitution and the laws of Congress passed to carry the judicial power conferred by the Constitution into effect.

Tyler v. Magwire, 84 U.S. 253, 282–83, 17 Wall. 253, 21 L.Ed. 576 (1872). The integrity of a hierarchical system of appellate review is not something to be lightly cast aside. As the Fourth Circuit Court of Appeals explained:

> The principle of hierarchy is no empty shell. It protects the very value and essential nature of an appeal, namely the chance afforded litigants for review of a judgment and for correction, generally by a larger judicial body, of errors that may have serious consequences or work significant injustice.

Doe v. Chao, 511 F.3d 461, 465 (4th Cir.2007).

6 Piper raises only one argument concerning the lawful imposition of the death sentence by the jury. He argues that, because co-defendant Hoadley testified at the July 2011 sentencing hearing that Piper played a less active role in the murder, Piper's sentence is now internally disproportionate to Hoadley's life sentence. Because our review of the imposition of the death sentence is mandatory under SDCL 23A–27A–9, our review must consist of an examination of all three statutory factors contained within SDCL 23A–27A–12, including the proportionality of Piper's sentence.

7 In the opening statement, counsel for Piper stated, "And this is something else that I believe this evidence will show here, is that [Piper] did stab Chester Poage. That's not something that's been established before. Now we admit that."

8 Piper stated in court:

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> I'm here because I'm responsible for the death of Allan Poage, and that's a responsibility that I'm going to pay for for the rest of my life. When I did this I was very young, and if there was anything that I could do to change what I did that night I would do it.
>
> To Mrs. Poage, to you and your loved ones, I am so very sorry for what I have done to your son and for what this has done to you. I know I will never deserve your forgiveness.
>
> To my mom and dad, what I have done I'll never be able to make up to you. The shame that I brought to you, and the fact that you still both love me is my greatest blessing.
>
> I owe so many other apologies, ones that I'll never be able to make. And I am so sorry for what I did.

9 The statements that Hoadley made to Burkhart occurred prior to Hoadley's arrest and were tape recorded.

10 The universe of cases in which a capital sentencing proceeding was conducted includes: *State v. Howard Adams; State v. Steven Bittner; State v. William J. Helmer; State v. Donald Moeller; State v. James Elmer Smith; State v. Edwin Swallow; State v. David Waff; State v. Charles Russell Rhines; State v. Robert Leroy Anderson; State v. Darrell Hoadley; State v. Elijah Page; State v. Briley Piper; State v. Daphne Wright;* and *State v. Eric Robert*. Because we reversed Rodney Berget's death sentence in *State v. Berget*, 2013 S.D. 1, ¶ 119, 826 N.W.2d 1, 37, *Berget* is not considered in our "universe" of cases.

11 In response to the State's question of whether the nun knew it was a violation of prison policy for an inmate to write another inmate, the nun testified "I—I did not—I did not think of it at the time, and now, yes, I know that is, but I—when I wrote the letter I did not realize it."

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KeyCite Yellow Flag - Negative Treatment
Distinguished by State v. Berget, S.D., August 13, 2014

771 N.W.2d 352
Supreme Court of South Dakota.

Briley PIPER, Petitioner
and Appellant,
v.
Douglas WEBER, Warden,
South Dakota State Penitentiary,
Respondent and Appellee.

No. 24868.
|
Argued April 28, 2009.
|
Decided July 29, 2009.

Synopsis

Background: Following appellate affirmance of murder conviction and death sentence, 2006 SD 1, 709 N.W.2d 783, defendant filed request for writ of habeas corpus. The Circuit Court, Fourth Judicial Circuit, Lawrence County, John W. Bastian, J., denied relief. Defendant appealed.

Holdings: The Supreme Court, Meierhenry, J., held that:

waiver of the right to have a jury decide the death penalty stage was not knowing and voluntary, as defendant was not properly informed that the vote of one juror could spare him from death, and

death penalty would be vacated and the case remanded for a new sentencing proceeding.

Vacated and remanded.

Attorneys and Law Firms

***354** Steve Miller, Steven R. Binger of Binger Law Office, Sioux Falls, South Dakota, Attorneys for petitioner and appellant.

Lawrence E. Long, Attorney General, Gary Campbell, Assistant Attorney General, Pierre, South Dakota, Attorneys for respondent and appellee.

Opinion

MEIERHENRY, Justice.

[¶ 1.] Briley Piper appeals the circuit court's denial of his writ of habeas corpus. He contends that he did not validly waive his right to have a jury determine whether to impose the death penalty and that his appellate counsel provided ineffective assistance of counsel in his direct appeal.

BACKGROUND

[¶ 2.] The facts of this case are available in their entirety in this Court's opinion affirming Piper's conviction and death sentence on direct appeal. *State v. Piper,* 2006 SD 1, 709 N.W.2d 783. The following facts relate to the issues raised in Piper's request for habeas corpus relief.

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Piper, Elijah Page, and Darrell Hoadley kidnapped and murdered Chester Allen Poage on or about March 12 and 13, 2000, for the purpose of stealing from Poage's family home in Spearfish, South Dakota. Piper was charged with first degree premeditated murder, first degree felony murder, kidnapping, first degree robbery, first degree burglary and grand theft.

[¶ 3.] Piper first pleaded not guilty. He later appeared before the judge to change his plea to guilty to the charges of first degree felony murder, kidnapping, and the remainder of the charges. The State was not aware of Piper's intent to change his plea but contemporaneously informed the judge that it still intended to seek the death penalty. The judge then had a discussion on the record with counsel concerning the death penalty phase of the proceedings. The judge indicated that he was unsure whether the death penalty determination would be made by the court or by a jury when a defendant pleads guilty to first degree murder. Defense counsel for Piper offered their interpretation of the statutes. They believed the statutes required the judge rather than a jury to decide if death should be imposed.

[¶ 4.] Following the short discussion with counsel concerning the proper procedure, the judge advised Piper that he had the "right to a jury trial here in Lawrence County by a jury of 12 fair and impartial jurors." The judge further explained that the jury would have to determine whether the penalty should be a life or death sentence and that the verdict would have to be unanimous. Piper indicated that he did not understand the unanimity requirement. In response, the judge explained that by waiving jury sentencing, Piper traded "12 lay people for one judge to make that call." The judge emphasized that by pleading guilty, Piper was waiving his right to have a jury make the death penalty determination. The judge then accepted Piper's guilty plea and set a date for the sentencing hearing. After a three-day hearing, the judge sentenced Piper to death.

***355** [¶ 5.] Piper's co-defendant, Page, was also sentenced to death by the same judge. The other co-defendant, Hoadley, maintained his not guilty plea and proceeded to jury trial. The jury returned a guilty verdict but did not impose the death penalty. Because of the discrepancy in sentences of the co-defendants, Piper challenged the proportionality of his death sentence to this Court. The case was remanded for the judge to conduct an intra-case proportionality review. The judge conducted the proportionality review and affirmed his earlier decision to impose the death penalty. Piper appealed his death sentence, and the majority of this Court affirmed. * Subsequently, Piper filed an application for writ of habeas corpus in circuit court. The habeas court denied the application. Piper now appeals the denial of habeas relief and raises two issues: (1) whether his waiver of his right to have a jury determine the death penalty was constitutionally valid, and (2)

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whether his counsel rendered ineffective assistance in his direct appeal.

STANDARD OF REVIEW

[¶ 6.] The United States Supreme Court has said that: "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100–year prison term differs from one of only a year or two." *Woodson v. North Carolina,* 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976). "[T]he qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." *California v. Ramos,* 463 U.S. 992, 998–99, 103 S.Ct. 3446, 3452, 77 L.Ed.2d 1171 (1983) (citations omitted); *see also Piper,* 2006 SD 1, ¶ 75, 709 N.W.2d at 811 (citations omitted); *State v. Page,* 2006 SD 2, ¶ 98, 709 N.W.2d 739, 771 (citations omitted). This Court has embraced the Supreme Court's recognition that " 'death is a different kind of punishment from any other which may be imposed in this country' and that '[t]he penalty of death is qualitatively different from a sentence of imprisonment, however long.' " *Page,* 2006 SD 2, ¶ 98, 709 N.W.2d at 771 (quoting *Lankford v. Idaho,* 500 U.S. 110, 125, 125 n. 21, 111 S.Ct. 1723 n. 21, 114 L.Ed.2d 173 (1991)).

[¶ 7.] Habeas corpus proceedings are reviewed under a narrow standard of review. *Steichen v. Weber,* 2009 SD 4, ¶ 4, 760 N.W.2d 381, 386 (citing *Erickson v. Weber,* 2008 SD 30, ¶ 17, 748 N.W.2d 739, 744).

> Habeas corpus can be used only to review (1) whether the court has jurisdiction of the crime and the person of the defendant; (2) whether the sentence was authorized by law; and (3) in certain cases whether an incarcerated defendant has been deprived of basic constitutional rights. Habeas corpus is not a remedy to correct irregular procedures, rather, habeas corpus reaches only jurisdictional error. For purposes of habeas corpus, constitutional violations in a criminal case deprive the trial court of jurisdiction. Further, we may not upset the habeas court's findings unless they are clearly erroneous.

Id. (quoting *Erickson,* 2008 SD 30, ¶ 17, 748 N.W.2d at 744). "Habeas corpus review does not substitute for direct

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review." *Id.* The applicant for habeas corpus must ***356** satisfy the initial burden to prove the need for relief by a preponderance of the evidence. *Id.*

ANALYSIS

[¶ 8.] Piper's habeas argument is directed at invalid waiver of his right to a jury in the death penalty phase and ineffective assistance of counsel. Piper contends that he was misled by the judge's advice that a jury would have to choose a sentence unanimously. Since we decide this case on the issue of whether Piper validly waived his right to a jury on the death penalty phase, we do not reach his ineffective assistance of counsel claim.

[¶ 9.] SDCL 23A–27A governs the capital sentencing procedure in South Dakota. *See* SDCL 23A–27A–6; SDCL 23A–27A–2. The statutes provide that if a jury does not unanimously decide to sentence the defendant to death, a life sentence is automatically imposed. SDCL 23A–27A–4; SDCL 23A–27A–5. In pertinent part, SDCL 23A–27A–4 provides: "If an aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. *If a sentence of death is not recommended by the jury, the court shall sentence the defendant to life imprisonment.*" SDCL 23A–27A–4 (emphasis added). Our reading of the statute is that the jury has to unanimously agree to impose the death penalty. If the jury cannot agree to a death sentence, an automatic life sentence is imposed. Consequently, if one juror votes against imposing death, the defendant will receive a life sentence.

[¶ 10.] South Dakota modeled its capital sentencing scheme after the Georgia death penalty statutes, which the United States Supreme Court determined to be constitutional in *Gregg v. Georgia. See Rhines v. Weber,* 2000 SD 19, ¶ 49, 608 N.W.2d 303, 314; *see also Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). The Georgia Supreme Court, applying similar statutes, said:

> We interpret [the statutes] to mean ... in a murder case, after conviction, where only two sentences can be imposed, life imprisonment or death, if the convicting jury is unable to agree on which of those two sentences to impose, the trial judge must impose the lesser, life imprisonment."

Miller v. State, 237 Ga. 557, 229 S.E.2d 376, 377 (1976); *see also Zant v. Stephens,* 456 U.S. 410, 420, 102 S.Ct. 1856, 1860, 72 L.Ed.2d 222 (1982) (jury must unanimously recommend the death penalty).

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[¶ 11.] Piper contends that he did not knowingly and voluntarily waive his right to have a jury make the death penalty determination. Piper specifically points to the judge's failure to clarify that a jury would have to *unanimously* sentence him to death, and that if one juror voted against the death penalty, he would receive a life sentence. The verbatim record of the judge's explanation supports Piper's claim.

[¶ 12.] The judge first advised:

> **Judge:** With respect to Count IA, which is a Class A felony, you not only have a jury trial right as to the charge itself as to the issue of guilt or innocence, but you have the 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.*
>
> Is that your understanding, [Defense Counsel]?
>
> *357 **Piper's counsel:** Correct.
>
> **Judge:** [Counsel for the State]?
>
> **State's counsel:** Yes.
>
> **Judge:** Do you understand that, Mr. Piper?
>
> **Piper:** I didn't understand the last part.

(Emphasis added). After Piper expressed that he did not understand jury sentencing, the judge advised:

> **Judge:** Okay. As I understand it, based upon the statutes and the cases so far decided by the Supreme Court of this state concerning the death penalty, that the state of the law is that if you were convicted of either Count I, premeditated murder, or Count IA, felony murder, which is the charge that you intend to plead guilty to today, then we would have a sentencing hearing.
>
> 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; and even if the jury found that the State had proved one or more aggravating circumstances—*
>
> **Piper's counsel:** Those are circumstances with which the jury would be justified in giving you the death penalty if they saw necessary. Aggravating circumstances is simply something—The jury must find that it exists in order to impose the sentence of death. If they don't find that that exists, they can't. And if they do find that it exists, they don't have to, but they can.

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Judge: Do you understand that, Mr. Piper?

Piper: Yes.

Judge: Is there anything you want me to explain in more detail about that?

Piper: No.

Judge: If I do the sentencing instead of the jury, I still have the same situation. I must find one or more aggravating circumstances to be proved by the evidence, and even if I found those to be proved by the evidence, I could sentence you to life imprisonment rather than to death by lethal injection. Do you understand that?

Piper: Yes.

Judge: 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. Do you understand that?

Piper: Yes.

(Emphasis added). The judge did not clarify further.

[¶ 13.] The United States Supreme Court has held that a defendant waives several constitutional rights when entering a guilty plea.

> First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. *Second, is the right to trial by jury.* Third, is the right to confront one's accusers. [A court] cannot presume a waiver of these three important federal rights from a silent record.

Boykin v. Alabama, 395 U.S. 238, 243, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274 (1969) (emphasis added) (internal citations omitted); *see also State v. Apple,* 2008 SD 120, ¶ 11, 759 N.W.2d 283, 287 (citing *Nachtigall v. Erickson,* 85 S.D. 122, 126–27, 178 N.W.2d 198, 200 (1970) (applying the *Boykin* rights to South Dakota)). Further, the Supreme Court has considered the right to a jury trial for both parts of bifurcated proceedings, such as death penalty proceedings. The Supreme Court recently noted that "[t]his Court has repeatedly held that, under the Sixth ***358** Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established by a reasonable doubt, not merely by a preponderance of the evidence." *Cunningham v. California,* 549

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U.S. 270, 281, 127 S.Ct. 856, 863–64, 166 L.Ed.2d 856 (2007).

[¶ 14.] Since the 1979 reenactment of the South Dakota death penalty statutes, five defendants have been sentenced to death in South Dakota. *See Page,* 2006 SD 2, 709 N.W.2d 739; *Piper,* 2006 SD 1, 709 N.W.2d 783; *State v. Anderson,* 2003 SD 65, 664 N.W.2d 48; *State v. Moeller,* 2000 SD 122, 616 N.W.2d 424; *State v. Rhines,* 1996 SD 55, 548 N.W.2d 415. Of the five, only Piper and Page pleaded guilty and were sentenced by the trial court. Thus, Piper's case was the first time this Court addressed whether South Dakota's statutory scheme allowed a jury to determine the death penalty following a guilty plea or whether the statute unconstitutionally required the judge to determine the death penalty.

[¶ 15.] On direct appeal, Piper argued that the South Dakota death penalty statutes were unconstitutional. *Piper,* 2006 SD 1, ¶ 47, 709 N.W.2d at 803. Piper argued that the statutes did not allow for jury sentencing if the defendant pleaded guilty. *Id.* In *Ring v. Arizona,* the United States Supreme 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.* ¶ 48, 709 N.W.2d at 803 (citing *Ring v. Arizona,* 536 U.S. 584, 609, 122 S.Ct. 2428, 2443, 153 L.Ed.2d 556 (2002)). The majority of this Court determined that the South Dakota statutes were not unconstitutional because even though the death penalty statute "does not authorize jury sentencing in capital cases following a guilty plea, other statutes provide that right." *Id.* ¶ 56, 709 N.W.2d at 806. Although the opinion stated that Piper waived his right to a jury trial, the issue of whether Piper constitutionally waived his right to have a jury decide the death penalty was not raised on appeal. It had not been raised because Piper's main challenge was that the statute unconstitutionally did not allow for a jury on the death penalty phase. On habeas, Piper claims ineffective assistance of appellate counsel for not raising the voluntariness issue on appeal. Thus, the question, as now framed, of whether Piper's waiver was knowing and voluntary is squarely before us for the first time.

[¶ 16.] We have said that " 'the trial court must be able to determine from its own record that the accused has made a free and intelligent waiver of his constitutional rights before a guilty plea is accepted.' " *Apple,* 2008 SD 120, ¶ 10, 759 N.W.2d at 287 (quoting *State v. Sutton,* 317 N.W.2d 414, 416 (S.D.1982)). "A judge has the duty to make sure that a defendant understands the consequences of entering a guilty plea and the rights the defendant is waiving." *Id.* ¶ 21, 759 N.W.2d at 290. This Court considers the totality of the circumstances in determining whether a guilty plea is knowing and voluntary. *Id.* ¶ 14, 759 N.W.2d at 288. Piper's waiver of his right to have a jury decide the death penalty stage is also considered under the totality of the circumstances.

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[¶ 17.] Central to the totality of the circumstances analysis is the judge's lack of a clear explanation regarding juror unanimity in the death penalty phase. The judge did not explain to Piper that if the jury did not unanimously decide to impose death, then a life sentence would be imposed. The judge only explained that "all 12 jurors must agree on the penalty." ***359** Although Piper's attorneys testified in Piper's habeas hearing that they had fully explained the unanimity requirement, their explanation alone in this case is not sufficient to find a voluntary waiver. This is especially true in light of the fact that 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. During Piper's change of plea hearing, defense counsel said: "I'm seizing upon ... the plain language of that statute: 'In nonjury cases the judge shall ...,' so it's our position that upon the acceptance of the plea, we will come before you for a sentence of life or death." Consequently, when Piper entered his guilty plea, he was doing so under counsels' advice that by entering his guilty plea, he was not entitled to a jury on the sentencing phase. The judge's explanation did not clearly dispel that misunderstanding. Nor did the judge's explanation point out that if Piper chose to let the jury decide whether to impose the death penalty, one juror could spare him from death.

[¶ 18.] Other courts have held that the failure to fully advise a defendant of the requirement of jury unanimity warrants reversal. *See Harris v. State,* 295 Md. 329, 455 A.2d 979, 984 (1983), *State v. Martinez,* 132 N.M. 32, 43 P.3d 1042, 1048–49 (2002); *Commonwealth v. O'Donnell,* 559 Pa. 320, 740 A.2d 198, 213 (1999). The Maryland Court of Appeals determined that "[i]t is one thing to be told that the jury would have to be unanimous before imposing death or life imprisonment, but quite another to not being made aware that if, after a reasonable time, the jury is unable to agree, the court shall dismiss the jury and impose a life sentence." *Harris,* 455 A.2d at 984. Because of the court's failure to advise the defendant, the court remanded for a new sentencing proceeding. *Id.* The New Mexico Supreme Court held that the defendant's waiver of jury sentencing cannot be knowing and intelligent unless the defendant is aware of the unanimity requirement. *Martinez,* 43 P.3d at 1048–49. The court determined that the unanimity feature of "jury sentencing is an especially crucial piece of information for a defendant who faces a potential sentence of death," and that this error constituted fundamental error. *Id.* at 1049. The court remanded for a new sentencing proceeding. *Id.* The Pennsylvania Supreme Court also determined that "[g]iven the unique role a sentencing jury plays in the penalty phase of a capital case, it also seems appropriate for any colloquy preceding a trial court's acceptance of a capital defendant's waiver to a penalty-phase jury to inform the defendant of the requirement under Pennsylvania law that a penalty-

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phase jury render a unanimous verdict." *O'Donnell,* 740 A.2d at 213 (internal citation omitted).

[¶ 19.] The fact that one juror has the potential to save a defendant's life cannot be underplayed. 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. The judge explained as follows: "[t]he 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." Even if Piper's lawyers had explained the unanimity requirement to him before he entered his plea, the judge's explanation, at least, would have been confusing and, at most, in direct contradiction. 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 ***360** death sentence requires that we accord higher scrutiny to capital sentencing determinations. *Ramos,* 463 U.S. at 998–99, 103 S.Ct. at 3452 (citation omitted). For this reason, in a death penalty plea, more so than in other pleas, the trial court has the duty to ensure "that the defendant truly understands the charges, the penalties, and the consequences of a guilty plea." *Apple,* 2008 SD 120, ¶ 21, 759 N.W.2d at 291.

[¶ 20.] Piper argues that the remedy for an unconstitutional waiver of his right to jury trial is to invalidate his death sentence and impose a life sentence. Piper cites to SDCL 23A–27A–14 to support this argument. SDCL 23A–27A–14 provides that:

> In the event the death penalty for a Class A felony is held to be unconstitutional by the South Dakota Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a Class A felony shall have such person brought before the court, and the court shall sentence such person to life imprisonment.

SDCL 23A–27A–14. We are not, however, holding that the death penalty is unconstitutional. Rather we determine that Piper's waiver of his right to jury trial was unconstitutional.

CONCLUSION

[¶ 21.] We hold that Piper did not validly waive his right to have a jury determine

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the death penalty. We, therefore, vacate Piper's death sentence and remand for a new sentencing proceeding that affords Piper the right to have a jury decide whether the death penalty should be imposed. *See Quist v. Leapley,* 486 N.W.2d 265, 268–69 (S.D.1992) (invalid plea reversed and remanded); *see also Apple,* 2008 SD 120, ¶¶ 22–23, 759 N.W.2d at 291 (reversed to allow defendant to withdraw guilty plea because plea was not intelligent and voluntary,); *State v. Goodwin,* 2004 SD 75, ¶ 18, 681 N.W.2d 847, 854 (invalid guilty plea reversed to allow the defendant to withdraw his plea and proceed to trial). Because we reverse based on the unanimity requirement, we do not reach Piper's other issue of ineffective assistance of counsel.

[¶ 22.] GILBERTSON, Chief Justice, and KONENKAMP, ZINTER, and SEVERSON, Justices, concur.

All Citations

771 N.W.2d 352, 2009 S.D. 66

Footnotes

* Piper originally appealed in 2002. This Court requested additional briefing after the United States Supreme Court decided *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Piper's appeal was argued in March of 2004 and decided in January of 2006.

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KeyCite Yellow Flag - Negative Treatment
Habeas Corpus Granted in Part by Piper v. Weber, S.D., July 29, 2009

709 N.W.2d 783
Supreme Court of South Dakota.

STATE of South Dakota,
Plaintiff and Appellee,
v.
Briley PIPER, Defendant
and Appellant.

No. 21813.
|
Argued March 24, 2004.
|
Decided Jan. 4, 2006.

Synopsis

Background: Defendant was convicted on his plea of guilty in the Circuit Court, Fourth Judicial District, Lawrence County, Warren G. Johnson, J., of felony murder, kidnapping, robbery in the first degree, burglary in the first degree, and grand theft. Defendant received a sentence of death on the murder charge. Defendant appealed.

Holdings: The Supreme Court, Gilbertson, C.J., held that:

there was no evidence that state withheld from defendant evidence that defendant could have used to impeach cooperating witness, and, as such, there was no *Brady* violation;

sufficient evidence supported existence of aggravating factors that defendant committed offense for benefit of himself or another, for purpose of receiving money or any other thing of monetary value, and that he committed offense for purpose of avoiding arrest;

evidence supported existence of aggravating factor that murder was "outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim";

sentencing judge's decision to impose death penalty on defendant was not based on any passion, prejudice, or irrational factors;

defendant's death sentence was not disproportionate to other relevant class cases when considering nature and extent of his criminal actions;

capital sentencing statutes did not prevent capital defendants who entered guilty pleas from asserting their right to jury trial at sentencing, and, as such, statutes did not violate right of jury trial under Federal or State Constitution;

defendant, by entering guilty plea, waived his right to have jury determine whether alleged aggravating circumstances in his case existed beyond a reasonable doubt; and

defendant's death sentence was not grossly disproportionate to co-defendant's

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sentence of life in prison without the possibility of parole.

Affirmed.

Sabers, J., filed dissenting opinion, in which Meierhenry, J., joined.

Attorneys and Law Firms

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Opinion

Introduction..... ¶ 1

Facts and Procedure..... .. ¶ 2 - ¶ 11

Analysis and Decision

1. Undisclosed agreement between State and cooperating witness.. ¶ 12 - ¶ 22
2. Cruel and unusual punishment.....¶ 23 - ¶ 24
3. Proportionality of death sentence to similar cases..... ¶ 25 - ¶ 43
4. Failure of indictment to allege any aggravating circumstances.....¶ 44 - ¶ 45
5. Capital sentencing scheme violates right to jury trial.....¶ 46 - ¶ 68
6. Proportionality of sentence to co-defendant Hoadley's sentence.. ¶ 69 - ¶ 99

Dissenting Opinion, Sabers, J..... ..... ¶ 100

5. Capital sentencing scheme violates right to jury trial.....- ...¶ 101 ¶ 114
6. Proportionality of sentence to co-defendant Hoadley's sentence.. - ...¶ 115 ¶ 121

*790 GILBERTSON, Chief Justice.

[¶ 1.] Briley Piper (Piper) pleaded guilty to felony murder, kidnapping, robbery in the first degree, burglary in the first degree, and grand theft. After waiving his right to a jury trial and sentencing by jury, the circuit court sentenced Piper to death by lethal injection on the murder charge.

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He now appeals and raises several issues for our review. For the reasons stated herein, we affirm.

FACTS AND PROCEDURE

[¶ 2.] On March 12-13, 2000, Piper and two others, Elijah Page (Page) and Darrell Hoadley (Hoadley), kidnapped and killed Chester Allan Poage (Poage) so that they could steal property from the home Poage lived in with his mother and sister in Spearfish, South Dakota.

[¶ 3.] Piper, Page and Hoadley, all of whom were friends with each other and with Poage, met up with Poage at approximately 8:00 p.m. on March 12, 2000. Piper had informed another friend, Nathan Whartman (Whartman), that Poage would give him a ride to the Job Corps facilities. Poage complied with the request for the ride, and he, along with Piper, Page and Hoadley, picked Whartman up and dropped Whartman off at Job Corps. The remaining four then went to Poage's house and played PlayStation games.[1] While there, Piper, Page and Hoadley convinced Poage to leave his house, and the four left in Poage's 1997 Chevrolet Blazer.[2] All four ended up at the house in which Piper, Page and Hoadley had been staying.

[¶ 4.] Once there, Page exposed a .22 caliber pistol, which he had stolen from Poage's mother's room at the Poage residence, and ordered Poage to get on the floor. Once Poage was on the floor, Piper kicked him in the face, knocking him unconscious. While Poage was unconscious, he was tied up with a cord and sat upright in a chair. After he regained consciousness, Piper laid a tire iron across his feet to prevent him from moving, while Page made him drink a mixture containing crushed pills, beer and hydrochloric acid. During this time, Poage begged for an explanation as to why his alleged friends were doing this. In response, Page hit him in the face and told him to "shut up." While Piper and Page discussed their plan to kill Poage, which included slitting the victim's throat, Poage pleaded for his life and offered to give them everything he owned in exchange for his release. At this point, Page asked Poage for the personal identification number for his ATM card, and Poage gave it to him.

[¶ 5.] Next, the group escorted Poage to his own vehicle, placed him in the back seat and threatened his life if he attempted to escape. Piper got in the driver's seat. The group stopped at a gas station, and then Piper drove the group to Higgins Gulch in the Black Hills, a wooded area about seven miles away from the house where Piper, Page, and Hoadley had been staying. Upon arriving at Higgins Gulch, the group forced Poage out of his vehicle into twelve-inch deep snow. Poage was forced by Piper and Page to take off all of ***791** his clothes, except his tank-top style undershirt, shoes, and socks in temperatures of about twenty-five degrees Fahrenheit. The three young men then took Poage's wallet.

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[¶ 6.] Thereafter, the three tried holding Poage down and covering him up with snow. Poage was then escorted to an icy creek, just over fifty feet from the road they had driven on to reach the gulch. Page and Piper admitted kicking him numerous times in various parts of his body and head. At one point in the attack, Poage did try to escape, but upon Piper's urging, Page recaptured him and continued to beat his near-naked body in the freezing temperatures. Poage was also made to lie in the icy creek water for a lengthy period of time. Piper later stated he had kicked Poage at the gulch a couple of times in the body and a couple of times in the head. Throughout the beatings, Piper laughed and said things like "Ohh ... like that would suck" and "Ah, that's got to hurt."

[¶ 7.] At one point, Poage asked to be let into his vehicle to warm himself. The record indicates that Poage said he preferred to bleed to death in the warmth rather than freeze to death in the cold. Piper agreed to grant his request, so long as he washed the blood off of his body in the creek. After rinsing in the icy waters, Piper refused to let him warm himself in the vehicle. Instead, they continued beating and taunting Poage.

[¶ 8.] Next, Poage was dragged back into the creek, where Piper and the others attempted to drown the victim. The co-defendants' stories diverge somewhat on the final fate of Poage. One witness stated that Piper admitted standing on Poage's neck to help Hoadley drown him, then Piper stabbed him twice or more-once by the ear and then under the chin. Piper's brief contends he did not participate in the drowning attempts or stabbings, but instead that he went back to Poage's vehicle. After the drowning attempts, stabbings, beatings and stoning, Poage was still moving. According to Piper, Hoadley threw the final rock that killed Poage, but at that point Piper was not there to personally witness this act. Both Page and Hoadley admitted they jointly dropped large rocks on Poage's head, actions which they believed finally killed him. Approximately four hours after the three kidnapped Poage, and about three hours after the beatings began at the gulch, Poage was left for dead in the creek.

[¶ 9.] Piper drove the three away from the secluded area in Poage's vehicle, and they proceeded to discuss how they would divide Poage's property. They went to Poage's house and stole numerous items. The group then drove to Hannibal, Missouri, together. There, they visited Piper's sister, but upon her refusal to let them stay, they headed back to South Dakota. The group returned to Rapid City, South Dakota, using Poage's ATM card for cash and pawning some of Poage's property throughout the trip. [3] Eventually, the three went their own ways. Piper ultimately ended up in his home state of Alaska. [4]

***792** [¶ 10.] On April 22, 2000, over a month after the three left Poage for dead, a woman who owned land near

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Higgins Gulch spotted what was later determined to be Poage's remains in the creek. His body was found, clad in a sleeveless t-shirt, socks and shoes. Donald Habbe (Habbe), a forensic pathologist from the Clinical Laboratory in Rapid City, performed an autopsy on the body. Habbe discovered numerous head injuries and stab wounds. Some examples of the head injuries inflicted included: stab wound to the jugular vein, another stab wound through the skull, and a complex, spider-web shaped skull fracture that measured five inches. Habbe determined the cause of death was the "stab wounds and the blunt force injury to the head."

[¶ 11.] After the body was discovered, Piper became a suspect. Law enforcement from South Dakota tracked him down in Alaska, questioned him and arrested him for first degree murder. While still in Alaska, he gave a detailed statement describing Poage's murder and his participation in it to South Dakota law enforcement. He was subsequently extradited to South Dakota. Piper was then jailed in Lawrence County, South Dakota. He later pleaded guilty to, and was convicted of, first degree felony murder; kidnapping; robbery in the first degree; burglary in the first degree; and grand theft. A sentencing hearing began on January 17, 2001, and lasted for three days. At the hearing, the State argued for the death sentence, and Piper argued against imposing such a sentence. After argument, the circuit court ruled that the death penalty would be imposed for the first degree murder conviction. Thereafter, co-defendant Page also pleaded guilty to the same charges, and after an extensive sentencing hearing, he was also sentenced to death by the same judge. Hoadley then stood trial in front of a jury on the same charges.[5] He was found guilty of the same charges but the jury sentenced him to life in prison. *See State v. Hoadley,* 2002 SD 109, 651 N.W.2d 249. Thereafter, Piper appealed to this Court. We remanded Piper's case to the circuit court for an intra-case proportionality review after a jury sentenced co-defendant Hoadley to life imprisonment. The circuit court held a hearing and subsequently entered findings of fact and conclusions of law affirming Piper's death sentence. He now appeals the following issues:

1. Whether the circuit court erred in finding there was no undisclosed agreement between the State and a cooperating witness.

2. Whether the imposition of the death penalty upon Piper constituted cruel and unusual punishment.

3. Whether Piper's sentence of death was grossly disproportionate to other cases in South Dakota wherein the death penalty was imposed or could have been imposed.

4. Whether the circuit court had jurisdiction to impose the death penalty when aggravating

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circumstances were not presented or alleged in an indictment or information.

5. Whether South Dakota's capital sentencing scheme in nonjury trials violates the Sixth Amendment right to a jury trial as incorporated to the states through the Fourteenth Amendment.

6. Whether Piper's sentence of death was grossly disproportionate to co-defendant Hoadley's sentence of life ***793** imprisonment without the possibility of parole.

ANALYSIS AND DECISION

[¶ 12.] **1. Whether the circuit court erred in finding there was no undisclosed agreement between the State and a cooperating witness.**

[¶ 13.] After oral arguments in Piper's first appeal, we remanded Piper's case to the circuit court for *inter alia* a determination as to whether there had been an undisclosed agreement between the State and witness Tobe Givens (Givens). On remand, the circuit court held two evidentiary hearings. After conducting the hearings, the court rejected Piper's claim of an undisclosed agreement and entered findings of fact and conclusions of law to that effect. The circuit court specifically concluded "[t]here were no other sentencing concessions made by the State to Givens in exchange for Givens' testimony other than those found in the [previous] plea agreement." Piper now renews his argument claiming he was denied due process of law because the State failed to disclose that Givens testified in the hope he would receive an early release from jail.

[¶ 14.] At Piper's sentencing hearing, three inmates from the Lawrence County jail testified that Piper confessed to them about partaking in Poage's murder. The inmates were Kenneth Tingley (Tingley), Tom Curtis (Curtis), and Givens. These witnesses also testified about a plan Piper had concocted to escape from jail, which involved murdering jail guards. [6]

[¶ 15.] Givens was the third inmate who testified for the State at the sentencing ***794** hearing. Givens admitted entering a plea agreement, which reduced an aggravated assault to a simple assault in exchange for his testimony. At the time of the sentencing hearing, he committed two more simple assaults, for which he claimed he was sentenced to, and would be spending, a year in jail.

[¶ 16.] Givens claimed Piper offered him $50,000 to kill one of the guards and aid in Piper's escape. He further alleged that he was supposed to get into a fight with one of the female guards, and that he had even tried to call C.R. for Piper to let her know what day they would plan the escape so she could pick them up. Givens also testified regarding the version of facts surrounding Poage's murder that Piper

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gave him, including the torture, forcing Poage to drink the hydrochloric acid concoction, and the beating at Higgins Gulch.

[¶ 17.] After the sentencing hearing, the state's attorney's office did not object to the release of Givens for time served on his simple assault charges. An affidavit of the State's Attorney relates that the prosecutor delivered Givens' request for the sentence reduction to the sentencing judge for Givens and even commented on Givens' good behavior in jail. Piper argues that Givens' subsequent reduction in sentence is suspicious and points to collusion between the State and Givens. He argues that the State secretly promised additional benefits to Givens for his testimony at Piper's sentencing hearing. Thus, Piper alleges that the State violated a discovery order requiring all information regarding consideration, promises or favorable treatment given State's witnesses be disclosed, thereby violating his due process rights and as well as creating a Confrontation Clause violation.

[¶ 18.] The standard of review applicable to prosecutorial misconduct claims is the abuse of discretion standard. *State v. Corey,* 2001 SD 53, ¶ 19, 624 N.W.2d 841, 845. "Prosecutorial misconduct implies a dishonest act or an attempt to persuade the jury by use of deception or by reprehensible method." *State v. Lee,* 1999 SD 81, ¶ 21, 599 N.W.2d 630, 634 (citing *State v. Knecht,* 1997 SD 53, ¶ 17, 563 N.W.2d 413, 420 (quoting *State v. Davi,* 504 N.W.2d 844, 855 (S.D.1993))). We will not reverse based on prosecutorial misconduct unless there is prejudicial error. *Id.* "Prejudicial error is error which in all probability produced some effect upon the jury's verdict and is harmful to the substantial rights of the party assigning it." *Id.* (citing *State v. Hofman,* 1997 SD 51, ¶ 13, 562 N.W.2d 898, 902 (quoting *Robbins v. Buntrock,* 1996 SD 84, ¶ 6, 550 N.W.2d 422, 425)). In this case, Piper has not demonstrated that any misconduct occurred. The record indicates that Givens sent the State's Attorney a letter requesting that the prosecution schedule a hearing to reduce his sentence. The prosecutor received it, met with Givens, visited with law enforcement personnel about Givens' behavior while in jail, and decided not to object to an early release. Additionally, Givens had previously requested a reduction in sentence, but the judge informed him it would require a favorable recommendation from his "captors" prior to considering the request.[7] There is no ***795** evidence that this violated the discovery order requiring plea bargain disclosure. Thus, we address the alleged constitutional violations, which we review de novo. *State v. Martin,* 2003 SD 153, ¶ 13, 674 N.W.2d 291, 296 (citing *Wegleitner v. Sattler,* 1998 SD 88, ¶ 4, 582 N.W.2d 688, 689).

[¶ 19.] We have held the State's failure to disclose evidence may result in a violation of due process. *State v. Leisinger,* 2003 SD 118, ¶ 14, 670 N.W.2d 371,

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375-75.[8] We stated in *Leisinger,* that "[i]n *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the United States Supreme Court held 'that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.' " 2003 SD 118, ¶ 14, 670 N.W.2d at 374 (quoting *Strickler,* 527 U.S. at 280-282, 119 S.Ct. at 1948-49, 144 L.Ed.2d 286). *See also, Gonzalez,* 2001 SD 47, ¶ 1, 624 N.W.2d at 839 (holding State must produce evidence favorable to defendant upon request) (quoting *Brady,* 373 U.S. at 87, 83 S.Ct. at 1196-97, 10 L.Ed.2d 215); *State v. Gillespie,* 445 N.W.2d 661, 665 (S.D.1989) (holding the State must produce evidence favorable to defendant upon request) (citing *State v. Sahlie,* 90 S.D. 682, 687, 245 N.W.2d 476, 479 (1976); *State v. Clabaugh,* 346 N.W.2d 448, 450-51 (S.D.1984)) (finding due process requires State to produce information favorable to defense) (citing *Brady,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215; *State v. Parker,* 263 N.W.2d 679 (S.D.1978)). And, "evidence that could be used to impeach a witness for the prosecution falls within the *Brady* rule." *Reutter v. Solem,* 888 F.2d 578, 581 (8thCir.1989) (citing *United States v. Bagley,* 473 U.S. 667, 676, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481 (1985)). In addition, a new trial shall be granted if a true *Brady* violation has occurred, which is determined by answering three questions in the affirmative: "(1) was the evidence at issue favorable to the defendant because it is exculpatory or impeaching, (2) was the evidence suppressed by the State either willfully or inadvertently, and (3) did prejudice ensue from the suppression." *Leisinger,* 2003 SD 118, ¶ 14, 670 N.W.2d at 375 (quoting *Strickler,* 527 U.S. at 280-282, 119 S.Ct. at 1948-49, 144 L.Ed.2d 286).

[¶ 20.] In this case, the record does not indicate the State failed to disclose any information to the defense. Nothing indicates that the State negotiated Givens' early release in exchange for his testimony. Further, all of the information regarding plea agreements appears to have been disclosed prior to the sentencing hearing. Based upon the record before us, we have no reason to overturn the circuit court's finding that the State did not enter into an undisclosed agreement with Givens in order to secure his testimony. Absent such a finding that the State withheld evidence that Piper could have used to impeach Givens, Piper is unable to establish that a due process violation occurred.

[¶ 21.] Finally, under this issue, we address the potential Confrontation Clause violation. The Sixth Amendment of the United States Constitution provides: "In ***796** all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him[.]" *See Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (recent Supreme Court opinion tracing the history of a

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defendant's right to confront his accuser). Similarly, the South Dakota Constitution states: "In all criminal prosecutions the accused shall have the right to ... demand the nature and cause of the accusation against him; to have a copy thereof; to meet the witnesses against him face to face[.]" SD Const. art. VI, § 7. In *State v. Karlen,* we stated that the "Confrontation Clause provides two specific protections for criminal defendants. The first is the right to face his accusers and the second is the right to cross-examine those who testify against him." 1999 SD 12, ¶ 37, 589 N.W.2d 594, 602 (citing *Pennsylvania v. Ritchie,* 480 U.S. 39, 51, 107 S.Ct. 989, 998, 94 L.Ed.2d 40 (1987)). *See also State v. Perovich,* 2001 SD 96, ¶ 15, 632 N.W.2d 12, 16 (explaining the rights guaranteed by the Confrontation Clause). We have further recognized that exposing a witness's reason or motive for testifying is not only appropriate, it also serves an extremely important constitutional function. *State v. Collier,* 381 N.W.2d 269, 272 (S.D.1986) (holding State's failure to disclose evidence of an agreement with a coconspirator who testified at trial violated defendant's due process rights) (citing *Giglio v. United States,* 405 U.S. 150, 155, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972)); *State v. Bogenreif,* 465 N.W.2d 777, 782 (S.D.1991) (citing *Delaware v. Van Arsdall,* 475 U.S. 673, 678-79, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986))(additional citations omitted).

[¶ 22.] Based on the record before us, we do not believe Piper has shown the circuit court's finding, that there was not an undisclosed agreement between the State and Givens, was clearly erroneous. There was no indication, first, that the State knew anything about Givens' potential early release from the one-year term Givens was serving, or second, that the defense was prevented from doing an effective cross-examination. If there was not a secret agreement for the State to disclose, then no Confrontation Clause violation occurred. The State knew of the plea agreement regarding the reduction of Givens' charges from aggravated assault to simple assault, and it provided Piper notice of this agreement. "[T]he Confrontation Clause only guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Karlen,* 1999 SD 12, ¶ 41, 589 N.W.2d at 603. Accordingly, Piper's claims of constitutional violations based on Givens' testimony at his sentencing hearing fail.

[¶ 23.] **2. Whether the imposition of the death penalty upon Piper constituted cruel and unusual punishment.**

[¶ 24.] Piper next argues the imposition of the sentence of death by lethal injection is cruel and unusual punishment under both the South Dakota and Federal Constitutions. Our precedent clearly indicates that this Court does not find the death penalty by lethal injection to be cruel and unusual under either Article VI, section 23 of our state constitution,

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or the Eighth Amendment of the Federal Constitution. *See Moeller I,* 1996 SD 60, 548 N.W.2d 465. After giving a detailed history of the death penalty, *Moeller I* goes on to state that "[t]o survive constitutional scrutiny, the death penalty: (1) must comport with contemporary standard of decency; (2) must not be excessive in light of the crime committed; and (3) must serve a legitimate penological objective." *Id.* ¶ 102 (citing ***797** *Gregg v. Georgia,* 428 U.S. 153, 173-83, 96 S.Ct. 2909, 2924-29, 49 L.Ed.2d 859 (1976)). It then concludes that capital punishment meets these requirements based on public acquiescence of the punishment and the penological purpose of punishing the "most extreme crimes" and deterring capital offenders. *Id.* ¶¶ 106-07 (citations omitted). In *Moeller II,* we held this issue to be sufficiently resolved by our previous decisions and declined to address the issue. 2000 SD 122, ¶ 176 n. 18, 616 N.W.2d at 465 n. 18. Thus, we have clearly established in this state that the death penalty, *per se,* is not unconstitutional and see no reason to retrace our analysis here.

[¶ 25.] **3. Whether Piper's sentence of death was grossly disproportionate to other cases in South Dakota wherein the death penalty was imposed or could have been imposed.**

[¶ 26.] In every case where the death penalty is imposed, this Court is required to conduct an independent review of the sentence. SDCL 23A-27A-9. We must determine:

> (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and
>
> (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in § 23A-27A-1; and
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

SDCL 23A-27A-12; *Rhines I,* 1996 SD 55, ¶ 180, 548 N.W.2d at 454-55; *Moeller II,* 2000 SD 122, ¶ 163, 616 N.W.2d at 462-63.

[¶ 27.] First, we must determine whether Piper's sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. We have rejected Piper's due process and Confrontation Clause claims regarding the testimony of witness Givens. We cannot discern any independent basis from the record on which to invalidate Piper's sentence as the result of extenuating circumstances.

[¶ 28.] Next, we must determine whether the evidence supported the circuit court's finding of the alleged aggravating circumstances in Piper's case beyond a reasonable doubt. In order to be eligible for the death penalty, one of the following aggravating circumstances provided in

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SDCL 23A-27A-1 must be found beyond a reasonable doubt:

> (1) The offense was committed by a person with a prior record of conviction for a Class A or Class B felony, or the offense of murder was committed by a person who has a felony conviction for a crime of violence as defined in subdivision 22-1-2(9);
>
> (2) The defendant by the defendant's act knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;
>
> (3) *The defendant committed the offense for the benefit of the defendant or another, for the purpose of receiving money or any other thing of monetary value;*
>
> (4) The defendant committed the offense on a judicial officer, former judicial officer, prosecutor, or former prosecutor while such prosecutor, former prosecutor, judicial officer, or former judicial officer was engaged in the performance of such person's official duties or where a major part of the motivation for the offense came from the official actions of such judicial officer, former ***798** judicial officer, prosecutor, or former prosecutor;
>
> (5) The defendant caused or directed another to commit murder or committed murder as an agent or employee of another person;
>
> (6) *The offense was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.* Any murder is wantonly vile, horrible, and inhuman if the victim is less than thirteen years of age;
>
> (7) The offense was committed against a law enforcement officer, employee of a corrections institution, or firefighter while engaged in the performance of such person's official duties;
>
> (8) The offense was committed by a person in, or who has escaped from, the lawful custody of a law enforcement officer or place of lawful confinement;
>
> (9) *The offense was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of the defendant or another*; or
>
> (10) The offense was committed in the course of manufacturing, distributing, or dispensing substances listed in Schedules I and II in violation of § 22-42-2.

(emphasis added); *see* SDCL 23A-27A-6. We have previously held the aggravating factors under SDCL 23A-27A-1 to be constitutional. *Rhines I,* 1996 SD 55, ¶¶ 74-76, 548 N.W.2d at 437 (noting that the Supreme Court upheld a virtually identical statutory scheme in *Gregg,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859). Additionally, we acknowledge that once aggravating circumstances have

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been proven beyond a reasonable doubt, the lower court has broad discretion in determining whether to sentence a particular defendant to death. *Id.* ¶ 174, 548 N.W.2d at 454.

[¶ 29.] In Piper's case, the circuit court determined the aggravating factors set forth in SDCL 23A-27A-1(3), (6), and (9), were present beyond a reasonable doubt. First, the circuit judge found "[t]he State has proven beyond a reasonable doubt that Defendant Piper committed the offense for the benefit of himself and others, for the purpose of receiving money or other thing of monetary value," satisfying SDCL 23A-27A-1(3). Clearly, in this case Piper and the others killed Poage in order to steal items from Poage's home, such as the PlayStation, televisions and other items. Evidence also indicates Piper and his co-defendants killed Poage to avoid being apprehended by police. This could easily have been inferred from Piper's statement to the police, as the entire scheme revolved around successfully stealing Poage's personal possessions. Poage would have been the sole witness of the crimes committed, so eliminating him helped to eliminate a police messenger. The transporting of a robbery victim to a remote area in order to accomplish his murder can hardly be understood as other than a means of destroying or hiding evidence of a crime. Piper's statement to the police and the evidence contained in the record, including the trail of ATM withdrawals and Poage's pawned possessions, and the location and condition of the body, are more than sufficient to support the circuit court's finding beyond a reasonable doubt that Piper's conduct demonstrated aggravating circumstances as defined by SDCL 23A-27A-1(3) and (9).

[¶ 30.] Next, the circuit court determined that the "State has proven beyond a reasonable doubt that this offense was outrageously or wantonly vile, that it was horrible or inhuman in that it involved ***799** torture, depravity of mind, and an aggravated battery to the victim," as provided by SDCL 23A-27A-1(6). We have already explained each of the subparts of this statutory aggravator. Depravity of mind has six definitions.

> They are that: (1) the defendant committed torture upon the living victim; (2) the defendant subjected the body of the deceased victim to mutilation or serious disfigurement; (3) the defendant relished the murder; (4) the defendant inflicted gratuitous violence upon the victim; (5) the senselessness of the crime; or (6) the helplessness of the victim.

Rhines I, 1996 SD 55, ¶ 143, 548 N.W.2d at 448. Torture requires: "(1)

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the unnecessary and wanton infliction of severe pain, agony, or anguish; and (2) the intent to inflict such pain, agony or anguish.... '[U]nnecessary pain' implies suffering in excess of what is required to accomplish the murder." *Id.* ¶ 161 (citing *State v. Ramseur,* 106 N.J. 123, 524 A.2d 188, 229 (1987) (citing *State v. Sonnier,* 402 So.2d 650, 658-60 (La.1981), *cert. denied,* 463 U.S. 1229, 103 S.Ct. 3571, 77 L.Ed.2d 1412 (1983))). Aggravated battery requires the "infliction of serious physical abuse upon the victim, by depriving him of a member of his body, or by rendering a member of his body useless, or by seriously disfiguring his body or a member thereof ..." and by proving specific intent to inflict unnecessary pain in excess of what was required to accomplish the murder. *Moeller II,* 2000 SD 122, ¶ 123, 616 N.W.2d at 455.

[¶ 31.] The sentencing judge found that Piper acted with others, but that he was the "first physical aggressor." In fact, at the beginning of the long series of assaults, Piper was the one who kicked Poage in the face hard enough to knock the victim unconscious before binding him. The judge further found that Piper and his accomplices discussed the killing in front of the victim; and tortured the victim while he was still alive by forcing him to drink a toxic liquid; physically assaulted the victim; stripped the victim of his clothes; forced the victim into freezing temperatures and snow and icy water; the victim endured drowning attempts and was repeatedly kicked, stoned and stabbed over a period in excess of three hours. Piper admitted in his statement that he even laughed and taunted the victim throughout the torture. Piper's laughter indicates the murder involved "gratuitous violence." Furthermore, murder in exchange for petty items like video games indicates the crime was senseless, and Poage was clearly helpless when he was naked in freezing temperatures, fighting against three individuals who appeared to be armed with a gun. Thus, depravity of mind was clearly proven. *See Rhines I,* 1996 SD 55, ¶ 143, 548 N.W.2d at 448. With such gruesome facts, it takes no stretch of reasoning to conclude torture and aggravated assault as defined above were also present.

[¶ 32.] SDCL 23A-27A-1 provides "the judge shall consider ... any mitigating circumstances." *See also Lockett v. Ohio,* 438 U.S. 586, 604-05, 98 S.Ct. 2954, 2964-65, 57 L.Ed.2d 973 (1978) (sentencer must be allowed to consider any mitigating evidence). The required presentencing hearing statute, SDCL 23A-27A-2, mandates "[a]t such hearing the [judge] *shall* receive all relevant evidence, including ... (4) All evidence concerning any mitigating circumstances." (emphasis added). At the sentencing hearing, much evidence that was intended to mitigate was provided by the defense. Numerous affidavits acknowledged the following facts about Piper: Piper loved camping and fishing with family and friends as a child; Piper was diagnosed with Attention Deficit

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***800** and Hyperactive Disorder; Piper had problems socializing appropriately with others; Piper was a Cub Scout and Boy Scout as a child. In addition, Piper's parents testified about Piper's good qualities, including his ability to be caring and kind. Further, Piper apologized to the family at the hearing, stating that "I would die so you could have your son back, so you could have your brother back, because I know if someone killed my brother or my sister, or any member of my family, I-I would want them dead.... I'm sorry. I'm sorry, Judge."[9]

[¶ 33.] Piper argues that the court did not consider the positive aspects of pleading guilty or of his apology. The sentencing judge acknowledged the mitigation, and said that there was "no doubt that at one time" Piper was "a good kid and a good scout." Thus, the record demonstrates that the sentencing judge looked at both the aggravation and mitigation, and in his decision, gave credence to both. Piper additionally blames much of the torture on the other two assailants involved, but the evidence based upon his own admissions proves his significant involvement and leadership in the torture and death of the victim.

[¶ 34.] Piper also argues that because the circuit court referred to Poage by his middle name and nickname, Allan, and said, "If he is watching and listening, I don't think he will mind," the circuit judge impermissibly personalized the victim. Furthermore, the judge stated aloud how he wondered how much "Allan" suffered in his last hours. This, Piper argues, demonstrates strong emotion and an arbitrary result. Piper also contends that the trio did not intentionally torture the victim; rather they tried to kill him quickly, but were simply unable to do so.

[¶ 35.] We first point out that Piper failed to cite to any authority supporting his position under this issue. Also, the record in this case does not support Piper's contention of an arbitrary result. The record demonstrates that the judge considered all aggravation and mitigation appropriately under the statutes. The aggravators were sufficiently proven when viewing the evidence in a light most favorable to upholding the verdict. *See Rhines I,* 1996 SD 55, ¶ 157, 548 N.W.2d at 451. One need go no further than Piper's own statements as to the nature of his participation in this crime. Finally, the record does not show the sentencing judge's decision was based on any passion, prejudice or irrational factors.

[¶ 36.] Under SDCL 23A-27A-12, on review this Court must first determine if the appropriate statutory aggravating circumstances were present and whether the sentence was imposed under passion, prejudice, or other irrational facts. Then, we must also determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." SDCL 23A-27A-12(3). Therefore, our analysis

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requires us to look at the proportionality of the sentence. *Id.*

[¶ 37.] SDCL 23A-27A-13 provides, "[t]he court shall include in its decision a reference to those similar cases which it took into consideration." This Court's previous decisions have acknowledged that our analysis of similar cases under SDCL 23A-27A-12(3) compares cases involving a capital sentencing proceeding, whether life imprisonment or a death sentence was imposed. "Because the aim of proportionality review is to ascertain what other capital sentencing authorities have done with similar capital ***801** murder offenses, the only cases that could be deemed similar are those in which imposition of the death penalty was properly before the sentencing authority for determination." *Rhines I,* 1996 SD 55, ¶ 185, 548 N.W.2d at 455 (quoting *Tichnell v. State,* 297 Md. 432, 468 A.2d 1, 15-16 (1983), *cert. denied*, 466 U.S. 993, 104 S.Ct. 2374, 80 L.Ed.2d 846 (1984) (citing *Flamer v. State,* 490 A.2d 104, 139 (Del.1983), *cert. denied,* 474 U.S. 865, 106 S.Ct. 185, 88 L.Ed.2d 154 (1985))). With this holding, we rejected the defendant's argument that "the pool of similar cases for proportionality review should encompass all homicide cases that were prosecuted or could have been prosecuted under the State's current capital punishment scheme." *Id.* ¶ 184, 548 N.W.2d at 455. Our opinion in *Moeller II* rejected a similar argument. 2000 SD 122, ¶ 167, 616 N.W.2d at 463. Accordingly, we reject Piper's contention that the proper universe of similar cases is all convictions for Class A felonies in South Dakota.

[¶ 38.] Since the 1979 enactment of South Dakota's current capital punishment scheme, thirteen capital sentencing proceedings, including Piper's and his co-defendants Page's and Hoadley's, have been conducted. In seven of those proceedings, the jury declined to impose the death penalty and sentenced the defendant to life imprisonment. Our opinion in *Rhines I* summarized six of these cases. 1996 SD 55, ¶¶ 187-204, 548 N.W.2d at 456-57; *see also Moeller II,* 2000 SD 122, ¶ 168, 616 N.W.2d 424, 463-64 (taking judicial notice of the case summaries set out in *Rhines I*). Co-defendant Hoadley's conviction represents the seventh case. *State v. Hoadley,* 2002 SD 109, 651 N.W.2d 249. In *Rhines I,* 1996 SD 55, 548 N.W.2d 415; *Moeller I,* 1996 SD 60, 548 N.W.2d 465; and *State v. Anderson,* 2003 SD 65, 664 N.W.2d 48 (*Anderson II*), the jury imposed the death sentence. We take judicial notice of the summaries of each of these cases set forth in *Rhines I,* 1996 SD 55, ¶ 196, 548 N.W.2d at 456 (summarizing *Moeller I*) and *Moeller II,* 2000 SD 122, ¶¶ 169-171, 616 N.W.2d at 464 (summarizing *Rhines*, *Anderson I*,[10] and *Anderson II*). We take further judicial notice of co-defendant Page's case. *State v. Page,* 2006 SD 2, 709 N.W.2d 739.

[¶ 39.] We conclude Piper's sentence of death was not disproportionate to other relevant class cases when considering the nature and extent of his criminal

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actions. First, we note the only other case that involved the presence of as many aggravating factors as were found in Piper's and his co-defendants' cases was in the *Rhines* case. South Dakota reenacted the death penalty in 1979. Since that time, only defendants Moeller, Rhines, and Anderson have approached the sheer brutality exhibited by Piper and his co-defendant Page, and all have received the death penalty. Piper and Page jointly planned the murder scheme and it was only after it was agreed upon between them did they so inform Hoadley and involve him it its execution. Here, Piper was consistently identified as the first defendant to physically assault Poage. After co-defendant Page directed the victim at gun point to get on the ground, Piper kicked him in the head and knocked him unconscious. When Poage was forced to drink the concoction containing hydrochloric acid, Piper held him down with a tire iron. At the gulch, ***802** Piper kicked Poage several more times and stabbed him at least twice in the neck and once behind the ear.

[¶ 40.] In *Rhines I,* we recognized that "[t]he disparity in suffering endured by victims is an important and legitimate consideration when evaluating the proportionality of a death sentence." 1996 SD 55, ¶ 207, 548 N.W.2d at 458. The amount of torture Poage endured before his murder also appears to have been unprecedented in South Dakota, Piper being the direct cause of much of that torture. In the presence of a conscious Poage, Piper engaged co-defendant Page in a discussion concerning the "best" way to murder Poage, including slitting his throat. Piper also suggested to Page various ways to sharpen his knife. During the beatings at Higgins Gulch, Piper made several jokes and comments concerning the extreme amount of pain the victim must have felt, saying such things as "Ohh ... like that would suck" and "Ah, that's got to hurt." Piper told Poage he could warm up in his vehicle if he first cleaned himself in the icy cold creek, but after Poage complied, Piper refused because he did not want any blood in the vehicle. The record further shows that Piper bragged to others and relished the fact that Poage continually begged for his life throughout the ordeal. Piper's response to these repeated pleas for mercy were more stabbings, beatings and kicks to the head.

[¶ 41.] Finally, and perhaps most importantly, the circuit court identified Piper as the leader of the three co-defendants in the murder of Poage. The record demonstrates Piper's ability to direct and control Hoadley and to manipulate Page. By his own admission, Piper initiated the physical violence against Poage when he rendered him unconscious by kicking him in the head. The circuit court heard evidence that it was Piper who had first directed Page to stab the victim, and when Poage attempted escape, Piper told Page to run after him.

[¶ 42.] That Piper is a vicious schemer and leader is further evidenced by his

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actions since his imprisonment, including escape plots as well as schemes to murder prison guards and his co-defendant Page, whom he suspected of cooperating with the police against him.

[¶ 43.] Based upon Piper's role as instigator, and his brutalizing and torture of Poage, we conclude the imposition of the death penalty upon Piper was neither excessive nor disproportionate when compared to the applicable class of cases in South Dakota. [11]

[¶ 44.] 4. Whether the circuit court had jurisdiction to impose the death penalty when aggravating circumstances were not presented or alleged in an indictment or information.

[¶ 45.] In *Moeller v. Weber,* 2004 SD 110, 689 N.W.2d 1 (*Moeller III*), we dealt with this identical issue and held that failure to allege aggravating circumstances in an indictment is not unconstitutional under *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Since our holding in *Moeller III,* other state courts have likewise concluded that aggravating factors need not be pleaded in a ***803** state indictment. *See Bustamante v. Wall,* 866 A.2d 516, 522-23 (R.I.2005) (holding no constitutional requirement that aggravating factors be set forth in grand jury indictment); *McKaney v. Foreman ex rel County of Maricopa,* 209 Ariz. 268, 100 P.3d 18, 22 (2004) (no requirement that aggravating factors be pleaded in indictment). As in *Moeller III,* the State's formal notice of aggravating factors here provided sufficient notice to Piper under both our Federal and State Constitutions. [12]

[¶ 46.] 5. Whether South Dakota's capital sentencing scheme in nonjury trials violates the Sixth Amendment right to a jury trial as incorporated to the states through the Fourteenth Amendment.

[¶ 47.] Having rejected Piper's first claim based upon *Ring,* we now turn to his contention that the death penalty was unconstitutionally imposed in his case because the circuit court, rather than a jury, made the findings that the aggravated circumstances alleged by the State were present beyond a reasonable doubt. [13] Specifically, Piper believes that SDCL chapter 23A-27A is unconstitutional because it does not provide defendants who plead guilty to a capital offense with an opportunity to have the aggravating circumstances found by a jury as opposed to a judge. Although in this case the circuit court offered Piper the opportunity to have a sentencing hearing in front of a jury, an option which Piper expressly waived, Piper argues the circuit court did not possess the authority under South Dakota law to accept his waiver.

[¶ 48.] We agree with Piper's argument that under *Ring,* a capital sentencing scheme would be unconstitutional if it prevented a defendant who pleaded guilty from having alleged aggravating

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circumstances found by a jury. *See Ring,* 536 U.S. at 609, 122 S.Ct. at 2443, 153 L.Ed.2d 556. We do not believe, however, that there is any statutory impediment preventing a defendant who pleads guilty in South Dakota state court from exercising his right to a jury at the sentencing phase.

[¶ 49.] The South Dakota sentencing scheme involves two procedural statutes: SDCL 23A-27A-2 and SDCL 23A-27A-6. SDCL 23A-27A-2, which governs the procedure to be followed in capital cases where a jury makes the sentencing determination, requires the court to conduct a presentencing hearing before a jury. SDCL 23A-27A-2 provides:

> In all cases in which the death penalty may be imposed and which are tried by a jury, upon a return of a verdict of guilty by the jury, the court shall resume the trial and conduct a presentence hearing before the jury. Such hearing shall be conducted to hear additional evidence in mitigation and aggravation of punishment. At such hearing the jury shall receive all relevant evidence, including:
>
> (1) Evidence supporting any of the aggravating circumstances listed under § 23A-27A-1;
>
> (2) Testimony regarding the impact of the crime on the victim's family;
>
> (3) Any prior criminal or juvenile record of the defendant and such information ***804** about the defendant's characteristics, the defendant's financial condition, and the circumstances of the defendant's behavior as may be helpful in imposing sentence;
>
> (4) All evidence concerning any mitigating circumstances.

SDCL 23A-27A-6, which governs the procedure to be followed in capital cases where a jury trial is waived and the court makes the sentencing determination, provides:

> In nonjury cases the judge shall, *after conducting the presentence hearing as provided in § 23A-27A-2,* designate, in writing, the aggravating circumstance or circumstances, if any, which he found beyond a reasonable doubt. Unless at least one of the statutory aggravating circumstances enumerated in § 23A-27A-1 is so found, the death penalty shall not be imposed.

(emphasis added).

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[¶ 50.] We have long recognized the general rule that "[w]hen interpreting a statute we presume the Legislature intended to enact a valid statute, and where 'a statute can be construed so as not to violate the constitution,' we will adopt such a construction." *Martin,* 2003 SD 153, ¶ 26, 674 N.W.2d at 300 (quoting *State v. Allison,* 2000 SD 21, ¶ 25, 607 N.W.2d 1, 2 (citation omitted)). Therefore, we interpret SDCL 23A-27A-2 and SDCL chapter 23A-27 in general as providing for a sentencing hearing wherein a jury will determine the presence or absence of alleged aggravating factors when a defendant pleads guilty to a capital offense. We must reject as unconstitutional any reading of SDCL chapter 23A-27A that would *prevent* a capital defendant from having the opportunity to have a sentencing hearing before a jury.

[¶ 51.] The statutory scheme in SDCL chapter 23A-27A regulates the sentencing *procedure.* An examination of all relevant statutes reflects that SDCL 23A-27A-2 and 6 do not purport to regulate the *right* to jury sentencing in capital cases. There is certainly *no* language in either statute that clearly, or otherwise, states that the jury hearing on aggravating circumstances is inapplicable in nonjury cases when a defendant has pleaded guilty as Piper claims. Instead, a correct reading reflects that the statutes simply do not speak to the subject of the *right* to jury sentencing. Indeed, the purpose of SDCL 23A-27A-2 is to describe the procedure to be followed in cases "which *are tried by a jury,*" and SDCL 23A-27A-6 describes the procedure to be followed in "*nonjury* cases." (emphasis added.) This emphasized language, cases "which *are tried* by a jury" and "*nonjury cases,*" demonstrates that these statutes do not purport to "prevent" the right of jury sentencing. Rather, this emphasized language demonstrates that the statutes presume that the *right* to jury trial has been determined elsewhere.

[¶ 52.] Therefore, the South Dakota statutes are unlike the Arizona statutes that were invalidated in *Ring,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556. The *Ring* statutes expressly governed the *right* to jury sentencing because they explicitly provided that *only a judge* could consider the aggravating circumstances and impose a death sentence. [14] *Id.* at 592, 122 S.Ct. at 2434, 153 L.Ed.2d 556. In contrast, the South Dakota statutes are simply silent on ***805** the subject of the right to jury sentencing. This silence is hardly surprising because most provisions in our criminal code fail to expressly grant or deny the right to a jury trial. Rather, the code provisions leave it to the state and federal constitutions and specific implementing statutes to regulate the right to a jury trial.

[¶ 53.] The state and federal constitutions provide the foundation for South Dakota's jury implementing statutes. The Sixth Amendment to the United States Constitution guarantees the right to a jury trial in capital cases without qualification. [15] Article VI, section 6 and

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section 7 of the South Dakota Constitution also grant that right. The South Dakota language provides:

> The right of trial by jury shall remain inviolate and shall extend to all cases at law without regard to the amount in controversy[.][§ 6].
>
> In all criminal prosecutions the accused shall have the right ... to a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed. [§ 7].

"The obvious purpose of these [c]onstitutional provisions is to *guarantee* an accused the right to trial by jury. It is a right [that] cannot be denied or withheld by the state." *State v. Thwing,* 84 S.D. 391, 394, 172 N.W.2d 277, 278 (1969) (emphasis added). And, the scope of the right is broad. It extends to all cases "where such right existed at common law." *See State v. Mitchell,* 3 S.D. 223, 226, 52 N.W. 1052, 1052 (1892). Because the right of jury trial in capital cases existed under the common law at the time our Constitution was adopted, there is no dispute that the South Dakota Constitution guarantees that right in capital cases today. *See* 1887 South Dakota Terr. Compiled Laws §§ 7322-7336, 7484, 7489; *McCall v. United States,* 1 Dak 320, 46 N.W. 608 (Dakota Terr.1876).

[¶ 54.] This constitutional guarantee has been implemented by two statutes. The first, SDCL 23A-18-1 (Rule 23(a)), affords the *right* to jury trial in *all* cases contemplated by the constitution. The statute provides that: "[c]ases *required to be tried* by a jury *shall be so tried* unless the defendant waives a jury trial in writing or orally on the record with the approval of the court and the consent of the prosecuting attorney." *Id.* (emphasis added). Because it is well settled that both the guilt and sentencing phases of capital cases *are required to be tried by a jury,*[16] SDCL 23A-18-1 implements the constitutional guarantee and affirmatively directs that a jury *shall* be utilized. Thus, even if SDCL 23A-27A-2 and 23A-27A-6 fail to explicitly afford the right of jury sentencing, SDCL 23A-18-1 cures the alleged omission.

[¶ 55.] The second statute, SDCL 23A-45-13, further authorized the circuit court's offer of a jury sentencing in this case. In analyzing SDCL 23A-45-13, it must be reiterated that SDCL 23A-27A-2 and 23A-27A-6 are procedural statutes that do not expressly speak to the *right* of jury trial. Therefore, in cases like this where there is no statutory *prohibition* on the procedural right to a jury, ***806** SDCL 23A-45-13 authorizes the trial court to proceed "in any lawful manner."[17] It states "[i]f no procedure is specifically prescribed by statute or rule, a court may proceed in any lawful manner not inconsistent with this title or with any other applicable statute." *Id.*

[¶ 56.] Thus, even if we were to accept Piper's offered construction that SDCL

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chapter 23A-27A does not authorize jury sentencing in capital cases following a guilty plea, other statutes provide that right. SDCL 23A-45-13 fills the void by authorizing a trial court to "proceed in any lawful manner." And, SDCL 23A-18-1 not only authorized, but *required* the circuit court to offer a jury hearing and sentencing. As this Court has previously noted, trial courts must use this latter statute to properly guarantee a defendant's constitutional rights and to "provide an effective manner to try the case." *State v. Goodman,* 384 N.W.2d 677, 680 (S.D.1986).

[¶ 57.] In this case, however, Piper specifically asked to be sentenced by the circuit court, thereby waiving his constitutional right to have a jury determine whether the alleged aggravating circumstances in his case existed beyond a reasonable doubt. "Even fundamental rights can be waived." *State v. Garber,* 2004 SD 2, ¶ 25, 674 N.W.2d 320, 327 (quoting *State v. Henjum,* 1996 SD 7, ¶ 13, 542 N.W.2d 760, 763 (citation omitted)). The circuit court properly presented Piper with the option of exercising his right to sentencing by a jury as provided by South Dakota's capital punishment statutory scheme.

[¶ 58.] Now on appeal, dissatisfied with his choice, Piper asks this Court to invalidate his voluntary waiver of a jury sentencing. Piper argues that, even though he did not want a jury sentencing, *if he would have wanted one* that sentencing would have been unavailable. Piper contends that the circuit court had no authority to offer jury sentencing, and therefore, the circuit judge's offer of jury sentencing was "illusory." In circular reasoning, Piper concludes that such an illusory offer is insufficient to overcome an unconstitutionally imposed death sentence.

[¶ 59.] Piper is mistaken in three respects. First, as was explained above, the circuit court was authorized to offer a jury hearing at the sentencing phase of this capital case. Even assuming that the circuit court had no specific authority to offer a jury sentencing under the capital sentencing statutes, SDCL 23A-18-1 and 23A-45-13 explicitly authorized, and in fact required, use of a jury unless waived. Thus, the circuit court's offer was not illusory.

[¶ 60.] Second, even if one were to assume that there was no statutory authority to offer jury sentencing, the waiver was still valid because the *Ring* analysis is ***807** inapplicable when a defendant waives the right to jury sentencing. While Piper offers absolutely no authority for his contrary conclusion, all courts that have considered the issue uphold such waivers. The courts recognize that the *Ring* analysis is inapplicable because the defendant in *Ring* pleaded not guilty and went to trial, but was deprived of jury sentencing. Because *Ring* is limited to cases where a defendant is deprived of a *requested* jury sentencing, the authorities hold that guilty pleas and waivers are valid even if the underlying sentencing scheme

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explicitly and unequivocally precludes the defendant from receiving a jury sentence. *Colwell v. State,* 118 Nev. 807, 59 P.3d 463 (2002); *Moore v. State,* 771 N.E.2d 46 (Ind.2002).

[¶ 61.] For example, in *Colwell,* 59 P.3d 463, the Nevada Supreme Court considered this issue and concluded that "*Ring* is not applicable to [a defendant's] case [when], unlike *Ring,* [the defendant pleads] guilty and waive[s] his right to a jury trial." *Id.* at 473. The Nevada Supreme Court reached that conclusion even though the Nevada statutory framework, like Arizona's,[18] unequivocally *eliminated* the right to a jury at sentencing.[19] *Id.* Nevertheless, *Colwell* distinguished *Ring* because Ring pleaded not guilty and went to trial, unlike Colwell who pleaded guilty and waived his right to a jury trial. *Id. Colwell* ultimately observed that because the Supreme Court "has held that the valid entry of a guilty plea in a state criminal court involves the waiver of several federal constitutional rights[, a]mong these ... 'the right to trial by jury' [,] Colwell's guilty plea included an express waiver of his right to a jury trial and was valid." *Id.* at 474 (citing *Boykin v. Alabama,* 395 U.S. 238, 243, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274 (1969)).

[¶ 62.] The Indiana Supreme Court reached the same conclusion in *Moore,* 771 N.E.2d at 49. In *Moore,* the Indiana statutes, like those in Nevada, unequivocally, and unconstitutionally, foreclosed any possibility of a right to jury sentencing following a plea of guilty.[20] Nevertheless, the Indiana Supreme Court concluded that the defendant's voluntary plea of guilty to three counts of murder waived his entitlement to argue that the "Indiana capital sentencing statute violated the federal and state constitutions by depriving him of a jury determination of the aggravating circumstances that made him eligible for the death sentence." *Id. Moore* observed that because the defendant knew that his guilty plea would deprive him of access to a jury, he had forfeited his right to "have a jury recommend to the trial court whether or not a death penalty should be imposed against" the defendant. *Id.*

[¶ 63.] It must be further observed that Piper's waiver is also valid under United States Supreme Court authority ***808** and a prior decision of this Court. The United States Supreme Court has long held that a waiver of the right to a jury is valid even though the underlying right waived does not exist. *See Patton v. United States,* 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854 (1930) (waiving the right to a jury composed of twelve persons) (*abrogated on other grounds by Williams v. Florida,* 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970)). Similarly, in *Thwing,* 84 S.D. 391, 172 N.W.2d 277, this Court upheld waiver of a right to a jury trial even though the underlying right, an alleged right to a court trial, did not exist. This Court did so because "[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right." *Id.* at 395-96, 172

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N.W.2d at 279 (quoting *Singer v. United States,* 380 U.S. 24, 85 S.Ct. 783, 13 L.Ed.2d 630 (1965)).

[¶ 64.] As was previously pointed out, the law is quite settled that even assuming Piper had no statutory right to a jury hearing at sentencing, his decision to waive that "nonexistent" statutory right and proceed with sentencing before the circuit court was a valid waiver of his constitutional right to jury sentencing. *See Colwell,* 59 P.3d 463; *Moore,* 771 N.E.2d 46. *See also Sanchez v. Superior Court,* 102 Cal.App.4th 1266, 126 Cal.Rptr.2d 200, 206 (2002) (holding that after *Ring*, a defendant may validly waive his or her right to have the jury determine the degree of murder); *People v. Jackson,* 199 Ill.2d 286, 263 Ill.Dec. 819, 769 N.E.2d 21, 27 (2002) (stating that "[e]very fact necessary to establish the range within which a defendant may be sentenced is an element of the crime and thus falls within the constitutional rights of a jury trial and proof beyond a reasonable doubt, made applicable to the states by the due process clause of the fourteenth amendment. But by pleading guilty, a defendant *waives exactly those rights.*"); *People v. Chandler,* 321 Ill.App.3d 292, 254 Ill.Dec. 967, 748 N.E.2d 685, 690 (2001) (stating that "[h]aving waived a jury trial on all issues, defendant cannot now claim that he was deprived of the right to have a jury determine the issue of his future dangerousness."); *State v. Edwards,* 810 A.2d 226, 234 (R.I.2002) (holding that "[b]y waiving a jury, defendant accepted the procedure as followed in this case, that the trial justice, after finding him guilty of the offense of first-degree domestic murder, would proceed to find, as she did, that the aggravating circumstance of torture and aggravated battery had been proven beyond a reasonable doubt.").

[¶ 65.] It must also be observed that Piper's argument against following settled waiver jurisprudence, would shift to a capital defendant the exclusive right to control the sentence he or she receives. In order to control the sentence, a defendant need merely waive the right to jury, or presumably some other constitutional right, at sentencing. Should the defendant not receive the life sentence requested from the trial court, he or she then need only appeal arguing a denial of the constitutional right that he or she had expressly waived. *See People v. Rhoades,* 323 Ill.App.3d 644, 257 Ill.Dec. 342, 753 N.E.2d 537, 544 (2001). Because the reasoning advanced by Piper requires the invalidation of sentences when this appellate argument is made, and because a life sentence must be imposed under SDCL 23A-27A-14 whenever a death sentence is invalidated by this Court, the procedural maneuvering sanctioned would guarantee a capital defendant the absolute right to obtain a life sentence. The Legislature could not have intended such an absurd result in enacting SDCL 23A-27A-2, 6, and 14.

[¶ 66.] It must be finally noted that Piper's third and final argument on this issue is based upon a hypothetical that he *might*

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have asked for jury sentencing. ***809** However, Piper lacks standing to assert the invalidity of his waiver based upon a hypothetical. Because Piper waived the right to jury sentencing, he may not now argue that the statutes are unconstitutional as applied to him or someone else who *might have* requested a jury sentence. As the Supreme Court has explained:

> [a] party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights. As a general rule, if there is no constitutional defect in the application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations.[21]

County Court of Ulster County, N.Y. v. Allen, 442 U.S. 140, 154-155, 99 S.Ct. 2213, 2223, 60 L.Ed.2d 777, 790 (1979) (citing *Broadrick v. Oklahoma,* 413 U.S. 601, 610, 93 S.Ct. 2908, 2914, 37 L.Ed.2d 830 (1973)).[22] This Court has also rejected such claims based on hypotheticals. "Judicial machinery should be conserved for problems which are real and present or imminent, not squandered on problems which are abstract or hypothetical or remote." *Gottschalk v. Hegg,* 89 S.D. 89, 95, 228 N.W.2d 640, 643-644 (1975) (citation omitted). Therefore, in determining the constitutionality of statutes, " 'the mere fact that there might be a case[,] where to apply the provisions of [the statute] would result in [a constitutional violation,] does not render the [statute] unconstitutional, but merely prevents its application in such a case.' " *City of Pierre v. Russell,* 89 S.D. 70, 73, 228 N.W.2d 338, 341 (1975) (quoting *Clark Implement Co. v. Wadden,* 34 S.D. 550, 556-57, 149 N.W. 424, 426 (1914)). Piper fails to acknowledge that although he has construed the capital sentencing scheme in such a way that it *could be applied* to violate the Sixth Amendment right to jury, *it was not so applied* in this case.

[¶ 67.] In summary, Piper argues that the South Dakota capital sentencing statutes are unconstitutional, believing that they "prevent" the right of jury trial at sentencing. However, Piper fails to consider two relevant South Dakota statutes that provide for that right. Additionally, even if the right of jury trial is not allowed under the statutes, Piper's argument on waiver is not only unsupported, but is refuted by the United States Supreme Court, this Court, and the other State Supreme Courts that have considered this issue.

[¶ 68.] Piper, by pleading guilty and expressly declining the circuit court's

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offer to empanel a jury to consider his sentence, waived his right to challenge the jury sentencing scheme. Therefore, even if we read the capital sentencing statutes ***810** as failing to specifically mention the right of jury sentencing following a plea, in fact, even if we read them to explicitly "prevent" such jury sentencing, Piper voluntarily waived that right. Waivers are no stranger to our criminal procedure jurisprudence. We will not, without any supporting authority, sanction the remarkable proposition that a defendant may waive the right to a jury at sentencing, allow the trial court to impose a sentence in accordance with the defendant's wishes, and then, to avoid an unfavorable sentence, invalidate the waiver on appeal by arguing a deprivation of the constitutional right that the defendant *did not want to exercise. See Rhoades,* 257 Ill.Dec. 342, 753 N.E.2d at 544 (stating that a "[d]efendant should not be able to waive a right, receive a sentence he subjected himself to, and then contend that the right was violated."). This reasoning is illogical. More fundamentally, it is at odds with cases from this Court, the United States Supreme Court, and other state Supreme Courts.

[¶ 69.] **6. Whether Piper's sentence of death was grossly disproportionate to co-defendant Hoadley's sentence of life imprisonment without the possibility of parole.**

[¶ 70.] For the final issue on appeal, Piper asks this Court to overturn his death sentence as grossly disproportionate in light of co-defendant Hoadley's sentence of life imprisonment. After Hoadley was sentenced to life imprisonment, we remanded Piper's first appeal to the circuit court for an intra-case proportionality review as articulated by our opinion in *State v. Bonner,* 1998 SD 30, 577 N.W.2d 575. *See Hoadley,* 2002 SD 109, 651 N.W.2d 249 (affirming co-defendant Hoadley's life sentence without the possibility of parole). On remand, the circuit court held a hearing and subsequently entered extensive findings of fact and conclusions of law affirming Piper's death sentence. Piper goes beyond Eighth Amendment proportionality analysis and addresses our statutory review under SDCL chapter 23A-27A and its interpretative case law in a comparison of the culpability of himself and Hoadley. Since both statutory and constitutional reviews are invoked, we will address each.

[¶ 71.] Our proportionality review as set out in *Bonner,* 1998 SD 30, 577 N.W.2d 575, is derived from the Eighth Amendment's prohibition against cruel and unusual punishment. In this case, Piper claims his death sentence was unconstitutionally imposed because his co-defendant Hoadley received a sentence of life imprisonment. As we recognized in *Bonner:*

> [I]f the words "Equal Justice Under Law" call for more than just a

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> lofty inscription, then our vigilance ought to be aroused when extremely divergent sentences are imposed for the same offense. Gross disparity in punishment erodes public confidence in our institutions of justice.... Of course, equal treatment in sentencing does not mean senseless uniformity, *but when a sentence is so out of proportion to the offense and so different from what others have received for the same conduct, then decency and conscious urge us to examine it more closely.*

1998 SD 30, ¶ 12, 577 N.W.2d at 578-79 (emphasis added) (internal citation omitted). Thus, our task is to determine if Piper and Hoadley were sentenced for the same conduct, and if so, whether the divergent sentences imposed upon them resulted in gross disparity in punishment.

[¶ 72.] Since our opinion in *Bonner,* we have employed the following well-established principles in reviewing the proportionality of a given sentence:

> [T]o assess a challenge to proportionality we first determine whether the sentence appears grossly disproportionate. ***811** To accomplish this, we consider the conduct involved, and any relevant past conduct, with utmost deference to the Legislature and the sentencing court. If these circumstances fail to suggest gross disproportionality, our review ends. If, on the other hand, the sentence appears grossly disproportionate, we may, in addition to examining the other *Solem* factors, conduct an intra- and inter-jurisdictional analysis to aid our comparison or remand to the circuit court to conduct such comparison before resentencing. We may also consider other relevant factors, such as the effect upon society of this type of offense.

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Id. ¶ 17 (citing *Harmelin v. Michigan,* 501 U.S. 957, 1000, 111 S.Ct. 2680, 2704, 115 L.Ed.2d 836 (1991)).

[¶ 73.] The Legislature sanctioned capital punishment for murder when at least one aggravating circumstance exists. SDCL 23A-27A-1. In Piper's case, the circuit court found five aggravating circumstances.[23] As discussed above, the sentencing judge had ample factual justification for determining those aggravators were present in this case.

[¶ 74.] Piper pleaded guilty to first degree felony murder, kidnapping, first degree robbery, first degree burglary, and grand theft. His first degree murder conviction constituted a Class A felony carrying with it the maximum penalty of death. Piper waived his right to sentencing by jury and instead actively sought sentencing by the circuit court. His co-defendant Hoadley pleaded not guilty but was convicted by a jury of the same offenses to which Piper pleaded guilty. Hoadley, however, also sought sentencing by a jury. The jury found the same aggravating factors present in Hoadley's case as the circuit court found in Piper's case: SDCL 23A-27A-1(3), (6), and (9). After hearing the relevant evidence in mitigation and aggravation, the jury decided to impose life imprisonment upon Hoadley rather than the death penalty. For his proportionality argument, Piper primarily relies on the fact that Hoadley was convicted of the same crimes to which he pleaded guilty and the fact that the jury found the same aggravating factors in Hoadley's case as the circuit court determined were present in his case.

[¶ 75.] Initially, we note this Court's statement in *Bonner* that "[r]arely will disparity be so immediate, when accomplices sentenced for the same offense receive diametrically opposite punishments." 1998 SD 30, ¶ 18, 577 N.W.2d at 580. We further recognize "death is a different kind of punishment from any other which may be imposed in this country" and that "[t]he penalty of death is qualitatively different from a sentence of imprisonment, however long." *Lankford v. Idaho,* 500 U.S. 110, 125 n. 21, 111 S.Ct. 1723 n. 21, 1732, 114 L.Ed.2d 173 (1991) (citing *Gardner v. Florida,* 430 U.S. 349, 357, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977) and *Woodson v. North Carolina,* 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976)). This qualitative difference between Piper's death sentence and Hoadley's life sentence does not render the sentences *per se* disproportionate. In order for his sentence to be disparate under our *Bonner* analysis, Piper must first show ***812** his and Hoadley's "past records, demeanor, [and] *degree of criminal involvement* ... are sufficiently similar as to cause the sentence disparity between them to be unjust." *See Garber,* 2004 SD 2, ¶ 32, 674 N.W.2d at 328 (citing *Bonner,* 1998 SD 30, ¶ 20, 577 N.W.2d at 581) (emphasis added). Absent such a showing, we will not reverse the circuit court's sentencing decision because disparate treatment of co-defendants is

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permissible where one of the defendants is more culpable than a co-defendant. *Id.* ¶ 33.

[¶ 76.] Although the Supreme Court has addressed cases where one co-defendant received the death penalty while another did not, it has never held that all co-defendants convicted for the same capital offense must receive the same sentence. *See Enmund v. Florida,* 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); *Tison v. Arizona,* 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987). Research has not revealed any state supreme court that has so held, nor was Piper able to cite to such authority in his briefs to this Court. Indeed, the majority of states have explicitly held the opposite after concluding it was constitutionally permissible for one co-defendant to receive the death penalty while another receives a less severe sentence. *See Gavin v. State,* 891 So.2d 907 (Ala.Crim.App.2003) ("There is not a simplistic rule that a co-defendant may not be sentenced to death when another co-defendant receives a lesser sentence.") (affirming death sentence despite dismissal of capital charges against co-defendant) (quoting *Williams v. State,* 461 So.2d 834, 839 (Ala.Crim.App.1983), *rev'd on other grounds,* 461 So.2d 852 (Ala.1984)); *Taylor v. State,* 808 So.2d 1148, 1201 (Ala.Crim.App.2000) ("[W]hile our statute obliges us to consider the punishment given any accomplices, it does not require that every defendant involved in a crime receive the same punishment.") (affirming capital sentence despite life sentence of co-defendant) (quoting *McNair v. State,* 706 So.2d 828, 845 (Ala.Crim.App.1997)); *State v. Taylor,* 838 So.2d 729, 757 (La.2003) ("As a general rule, the fact a co-defendant has received a more lenient sentence does not necessarily indicate the [death] penalty imposed on defendant is excessive.") (affirming death sentence even though co-defendant sentenced to life for the same murder in subsequent trial) (citing *State v. Day,* 414 So.2d 349, 352 (La.1982)); *State v. Jaynes,* 353 N.C. 534, 549 S.E.2d 179, 203 (2001) ("[T]he fact that a defendant is sentenced to death while a co-defendant receives a life sentence for the same crime is not determinative of proportionality.") (affirming capital sentence where co-defendant received sentence of life-imprisonment) (quoting *State v. McNeill,* 349 N.C. 634, 509 S.E.2d 415, 427 (1998)); *State v. Morris,* 24 S.W.3d 788, 800 (Tenn.2000) ("Similarly, that a defendant in a similar case or even the same case has received a sentence less than death does not render a death sentence arbitrary, excessive, or disproportionate.") (citing *State v. Cauthern,* 967 S.W.2d 726, 741 (Tenn.1998) (affirming death penalty)).

[¶ 77.] The above-cited cases are consistent with the general proposition recognized in the noncapital *Garber* opinion, 2004 SD 2, ¶ 33, 674 N.W.2d 320, 328, that held the level of culpability for an offense is not always the same, even where a defendant has pleaded guilty

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to the same offense. Today, we hold this general proposition as applicable to our review of capital sentencing cases as well as noncapital cases.

[¶ 78.] Having determined there is no *per se* rule that all co-defendants convicted of the same capital offense must receive the same sentence, we next examine the acceptable ways in which co-defendants may be distinguished from each other. The Supreme Court has twice ***813** addressed situations where multiple co-defendants were convicted of the same capital offense. In *Enmund,* 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140, the Supreme Court reversed the death sentence of a defendant who was present in the getaway car used in an armed robbery that resulted in two murders. The defendant, Enmund, received the death penalty along with the co-defendant who actually committed the murders. The Supreme Court reversed:

> Because the Florida Supreme Court affirmed the death penalty in this case in the absence of proof that Enmund killed or attempted to kill, and regardless of whether Enmund intended or contemplated that life would be taken, we reverse the judgment upholding the death penalty and remand for further proceedings not inconsistent with this opinion.

Id. at 801, 102 S.Ct. at 3378-79, 73 L.Ed.2d 1140. Therefore, under *Enmund,* an accomplice to a felony may not be sentenced to death unless he either killed or intended a killing to occur: "For purposes of imposing the death penalty, Enmund's criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt." *Id.* In sum, a defendant's capital sentence must be based upon his own culpability in a murder and not upon his co-defendant's actions.

[¶ 79.] The Supreme Court clarified its holding in *Tison,* wherein the Court affirmed the capital sentence of two appellants who had helped two convicted murderers escape from an Arizona penitentiary. 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127. During the escape, the appellants watched while the two escaped convicts murdered a family of four that had pulled over to help the men with a flat tire. *Id.* at 141, 107 S.Ct. at 1679, 95 L.Ed.2d 127. Upholding the death sentences of the two appellants, the *Tison* Court ruled:

> [W]e hold that the reckless disregard for human life implicit in knowingly engaging

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> in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result.

481 U.S. at 157-58, 107 S.Ct. at 1688, 95 L.Ed.2d 127. This holding was based on the Court's reasoning that the *Enmund* culpability requirement may be established through "major participation in the felony committed, combined with reckless indifference to human life." *Id.* Thus, under *Enmund* and *Tison,* a defendant's death sentence must be rooted in his own culpability for the capital offense, as demonstrated by his actual killing, intent or knowledge that killing would occur, or through major participation in a crime involving reckless indifference to human life.

[¶ 80.] Accordingly, in reviewing situations where multiple defendants were involved in the commission of a capital offense, state courts have focused upon the relative culpability of the particular defendant. The Florida Supreme Court has stated that "[u]nderlying our relative culpability analysis is the principle that equally culpable co-defendants should be treated alike in capital sentencing and receive equal punishment." *Shere v. Moore,* 830 So.2d 56, 60 (Fla.2002) (citations omitted). However, "[w]here coperpetrators are not equally culpable; the death sentence of the more culpable defendant is not disproportionate where the other receives a life sentence." *Caballero v. State,* 851 So.2d 655, 663 (Fla.2003) (citing *Jennings v. State,* 718 So.2d 144, 153 (Fla.1998)). Generally, in determining the relative culpability of an appellant, state courts seek to distinguish between those co-defendants who were "active participants" in the crime ***814** from those who were only "passive participants." *People v. Caballero,* 206 Ill.2d 65, 276 Ill.Dec. 356, 794 N.E.2d 251, 269-71 (2002) ("[E]vidence that defendant was a follower, rather than a leader, in the commission of the crime has been held to be a significant factor in the analysis of disparate sentences.") (citing *People v. Jackson,* 145 Ill.2d 43, 163 Ill.Dec. 859, 582 N.E.2d 125 (1991) (citing *People v. Gleckler,* 82 Ill.2d 145, 44 Ill.Dec. 483, 411 N.E.2d 849 (1980))). *Accord Kormondy v. State,* 845 So.2d 41, 47-48 (Fla.2003) (upholding capital sentence where defendant was the "dominant force in the killing" and the "triggerman"); *Marquard v. State,* 850 So.2d 417, 424 (Fla.2002) (affirming death penalty where facts tended to show the defendant was the "dominant person in this entire course of events" including driving the group to a secluded area and ordering another co-defendant to stab the victim); *Taylor,* 838 So.2d at 757 (recognizing that capital

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sentences are "invariably returned by juries when defendant was the shooter"); *Simmons v. State,* 869 So.2d 995, 1007-08 (Miss.2004) (upholding death penalty where defendant "actively planned and participated" in a robbery and murder even though he was not the leader, planner, or instigator of the killing); *Cauthern,* 967 S.W.2d at 741 (affirming capital sentence where defendant could be characterized as "the leader in the perpetration of this crime; he knew the victims and planned the offenses"); *State v. Lafferty,* 20 P.3d 342, 375 (Utah 2001) (death sentence upheld where defendant was the "principle actor" who had "masterminded the scheme" that resulted in the deaths); *Harlow v. State,* 70 P.3d 179, 203-04 (Wyo.2003) (utilizing the language of *Tison* in upholding the death sentence for a defendant who was a "major participant in a murder" and "acted with reckless indifference to human life").

[¶ 81.] Having determined that the proportionality of co-defendants' disparate sentences should be grounded in the difference in their relative culpability for the crime, we must address the nature of the evidence upon which this determination may be based. In *Lafferty,* 20 P.3d at 375, the Supreme Court of Utah spoke in terms of "ample" evidence and "clear weight of the evidence" in determining that the defendant's culpability in the crime was not disproportionate to his death sentence. In *Cauthern,* the Tennessee Supreme Court detailed the facts of the case and concluded that "sufficient evidence" existed on which to base disparate sentences of co-defendants convicted of the same felony. 967 S.W.2d at 741. In a recent opinion, the Court of Criminal Appeals of Alabama upheld a defendant's capital sentence conviction based largely upon the testimony of one of his accomplices. *Gavin,* 891 So.2d at 975-77. In that case, the court found the accomplice's testimony to be "sufficiently corroborated" by the evidence in the case. *Id.*

[¶ 82.] With these recent decisions in mind, it appears that most state supreme courts are deferential to the facts as established by the finder of fact, whether it be a jury or trial court. According to the Florida Supreme Court: "a trial court's determination concerning the relative culpability of the co-perpetrators in a first degree murder case is a finding of fact and will be sustained on review if supported by competent substantial evidence." *Marquard,* 850 So.2d at 424 (quoting *Puccio v. State,* 701 So.2d 858, 860 (Fla.1997)).

[¶ 83.] SDCL 23A-27A-10 provides that this Court shall render its decision on "the factual substantiation of the verdict and the validity of the sentence." Although chapter 23A-27A is not specific as to the appropriate standard of review of proportionality in death penalty cases, our capital punishment statutory scheme seems to contemplate a heightened review by this Court. We agree with the Arizona ***815** Supreme Court in *Arizona v.*

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Watson, 129 Ariz. 60, 628 P.2d 943, 946 (1981), when it observed:

> The question before us is not whether the trial court properly imposed the death penalty but whether, based upon the record before us, we believe that the death penalty should be imposed. A finding merely that the imposition of the death penalty by the trial court was "factually supported" or "justified by the evidence" is not the separate and independent judgment by this court that the death penalty warrants. This is in keeping with the mandate of the United States Supreme Court that we must review carefully and with consistency death penalty cases and not engage in "cursory" or "rubber stamp" type of review.

(citing *Proffitt v. Florida,* 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976)).

[¶ 84.] Nevertheless, the trial court remains the finder of fact and this Court does not resolve conflicts in evidence, pass on credibility of the evidence, or weigh the evidence in a court trial any more than it does in a jury case. *State v. Romero,* 269 N.W.2d 791 (S.D.1978). Having no witnesses appear before us, we are unable to resolve conflicts in the evidence, pass on witness credibility or weigh evidence. *State v. Burtzlaff,* 493 N.W.2d 1, 4-5 (S.D.1992).

[¶ 85.] In sum, the Supreme Court's opinions in *Enmund* and *Tison* require this Court to focus upon the relative culpability of each co-defendant in the commission of the capital offense. *See Enmund,* 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140; *Tison,* 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127. In gauging the culpability of each defendant, this Court will first seek to ascertain whether or not the defendant actively participated in the crime or crimes and whether the defendant either intended to murder the victim or acted with reckless disregard for human life. The purpose of this inquiry is to distinguish the more passive accomplices from those who were active in committing the capital offense. In order to make this distinction, this Court will focus upon the relative actions and roles exhibited by the defendants. Jurisprudence from other jurisdictions strongly suggests that factors such as leadership in the crime or having been the "triggerman" are relevant and should be established by substantial, competent evidence. *See supra* ¶ 80.

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[¶ 86.] In assessing the relative culpability for Poage's murder, we acknowledge that the statements of co-defendants Piper, Page, and Hoadley are not all consistent with each other. This Court, however, will only consider Piper's own statements concerning his actions and his differentiations between his acts and those of Hoadley. The circuit court indicated on the record it did the same. The analysis requires this Court to do likewise because Piper, Page and Hoadley never testified under oath and were never subject to cross-examination. The statements of Piper and Page given at the time of their arrest seek to minimize their individual involvement to some extent and place the bulk of the blame for the planning and execution of this crime on the other. Nevertheless, this does not require us to accept at face value all the evidence and inferences brought forward by Piper. *See State v. Anderberg,* 89 S.D. 75, 80, 228 N.W.2d 631, 635 (1975).

[¶ 87.] After extensive review of the record, we conclude that Piper's degree of criminal involvement was not equal to co-defendant Hoadley's participation in Poage's murder.[24] In other words, there was a genuine and substantial difference ***816** between the actions of Piper and Hoadley which increased Piper's moral culpability for the violence and torture inflicted upon Poage. Piper, unlike Hoadley, openly discussed in front of the victim the various ways they might accomplish the murder. Although there was some finger pointing between Piper and Page as to whom originally thought of the attack on Poage, Hoadley was never mentioned by Piper as an instigator of the murder. When informed of the existing plot by Piper and Page, Piper stated that Hoadley agreed to back them up. At the house while Piper and Page were kicking Poage in the head, threatening him with a gun and making him drink the hydrochloric acid mixture, Piper described Hoadley as merely a bystander watching in disbelief.

[¶ 88.] Nor does the record show that Hoadley joked or taunted Poage during the attack. Piper was the defendant who falsely told Poage he would be allowed to warm himself in the vehicle if he first washed the blood off himself.

[¶ 89.] Perhaps most importantly, the record tends to show that Piper was the leader in planning and carrying out Poage's murder, whereas Hoadley was a follower. While Piper and Page were torturing Poage at Higgins Gulch, Piper said of Hoadley at one point, "He's just standing there.... He looked like a petrified tree, standing just like in the same footprints[.]"

[¶ 90.] Piper also argues that he did not actually kill Poage as he was up in Poage's vehicle when the rocks were dropped on Poage's head to end the hours of torture. However, his argument is factually challenged by Dr. Habbe who testified that the cause of death was "[t]he blunt force and the sharp force injuries. In other words, the stab wounds and the blunt force injury to the head." The

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stab wounds that came before the rock throwing and that were administered at least in part by Piper, were described by Dr. Habbe as potentially lethal wounds. Moreover, Piper planned and directed the plot from its inception. He cites to no authority which holds less culpable the masterminds of a murder plot while more severely punishing those who assist in carrying it out.

[¶ 91.] The record indicates Hoadley was remorseful for his actions. In contrast, Piper showed a complete lack of remorse for his actions. Just prior to his sentencing, Piper gave a tearful statement of remorse to the circuit court and the Poage family.[25] Piper's behavior outside ***817** the courtroom was markedly different. Several individuals testified at Piper's sentencing hearing and related that during this period of time Piper was gleefully willing to relive the details of his activities in the killing. For instance, witness C.R. described Piper's rendition of his own murderous actions as "[h]e was just kind of like laughing about it and thought it was just like a really cool neat thing, I guess, and so-I mean, he just gets really excited[.]" Prisoner Jeff Deux testified that "[h]e just said it would be kind of a weird experience to kill somebody." Piper told Christine Fanger "I always wanted to know what it felt like to kill someone." When describing to prisoner Tom Curtis his stabbing of Poage with a knife, Curtis found Piper "like he was reading out of a joke book or something like it was funny." Prisoner Givens was asked about Piper's demeanor as Piper explained the specific details of the torture and murder. According to Givens, "[b]asically he had no remorse." Not a single witness took the stand to dispute these witnesses or their opinions concerning Piper's lack of remorse.

[¶ 92.] While Piper was incarcerated in the Lawrence County jail for this proceeding, he formulated an escape plan and tried to enlist other prisoners in its execution. The plan called for an escape in which two female guards would be taken hostage and ultimately killed. Piper also indicated he wanted to kill Page as he suspected Page had cooperated with the law enforcement against him.

[¶ 93.] As far as a comparison of backgrounds, Hoadley "had an unfortunate childhood and suffered some difficult childhood experiences." The record also indicates he had some prior incidents involving threats of violence. On the other hand, it is clear that Piper was raised in a loving family and suffered no childhood traumas. Prior to his teen-age years he gave no one cause for concern. However, that radically changed. Even though he had the intelligence to complete high school and enter ***818** college, he had become heavily involved in the illegal drug culture. By the time he reached Spearfish, South Dakota, he had become a dealer in drugs and was capable of manipulating or getting others to do tasks, be it legal or illegal, which he wanted done. The circuit court referred to this just prior to passing sentence when it said, "[t]here's no doubt that at one time

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you were a good kid and a good scout. Somehow, within a few short years, you went from being a good son to a thief, a thug, and eventually a killer." While the reliability of some of the evidence of his involvement in previous illegal acts is in doubt, his overall personality traits are not.

[¶ 94.] The circuit court factually concluded:

> The Court has determined sincerity based upon its opportunity to observe [Piper] during the proceeding. Defendant Piper's lack of remorse and insincerity evidenced throughout the proceedings was, in fact, dissimilar from Defendant Hoadley.
>
> Defendant Piper's leadership role, and his greater participation in planning, direction, and execution of the murder and his relishing of the killing during and after the crime, distinguishes his degree of culpability from Defendant Hoadley's.
>
> Defendant Piper's plan to escape, including killing guards, attempting to recruit other prisoners in his scheme, further distinguished his behavior from that of Defendant Hoadley's.

[¶ 95.] If Hoadley had been absent that fateful day, there is nothing in the record to indicate that the torture/murder of Poage would not have taken place anyway. Piper and Page jointly planned and initiated it. On the other hand, if Piper had not been present that day, there is no evidence to indicate that Hoadley would have planned and executed the murder. Nor has Piper's "curiosity" with committing murder apparently been satisfied. He remains a threat to prison guards and anyone who would have the potential to come into contact with him.

[¶ 96.] As we observed in *Rhines I,* "a death sentence should not be invalidated simply because a jury determined that another defendant, who committed an analogous crime, deserved mercy. Proportionality review focuses not only on the crime, but also on the defendant." 1996 SD 55, ¶ 206, 548 N.W.2d at 457 (citing SDCL 23A-27A-12(3)); *State v. Benn,* 120 Wash.2d 631, 845 P.2d 289, 317 (1993) (holding "[s]imply comparing numbers of victims or other aggravating factors may superficially make two cases appear similar, where in fact there are mitigating circumstances in one case to explain either a jury's verdict not to impose the death penalty or a prosecutor's decision not to seek it") (quoting *State v. Lord,* 117 Wash.2d 829, 822 P.2d 177, 233 (1991), *cert. denied,* 510 U.S. 944, 114 S.Ct. 382, 126 L.Ed.2d 331 (1993)). The record shows Piper's conduct and general culpability for the murder of Poage, including the particularly heinous aggravating circumstances, were not the same as Hoadley's. Therefore, under our analysis as set forth in *Bonner*, the circumstances of Piper's case do not suggest gross disproportionality in light of Hoadley's sentence.

[¶ 97.] Affirmed.

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[¶ 98.] KONENKAMP and ZINTER, Justices, concur.

[¶ 99.] SABERS and MEIERHENRY, Justices, dissent.

SABERS, Justice (dissenting).

[¶ 100.] I respectfully dissent. South Dakota's capital sentencing scheme prevents a defendant who pleads guilty from having the alleged aggravating circumstances found by a jury. The scheme is ***819** therefore unconstitutional under *Apprendi, Ring* and *Blakely* and the majority opinion violates canons of statutory construction by ignoring statutory language to come to the conclusion that the sentencing procedure is constitutional. I also dissent from the majority opinion's conclusion that Piper and Page's sentences were not disproportionate in comparison to their co-defendant, Hoadley. We should reverse and remand for re-sentencing to life in prison without the possibility of parole.

[¶ 101.] **1. South Dakota's capital sentencing scheme in nonjury trials violates the Sixth Amendment right to a jury trial as incorporated to the states through the Fourteenth Amendment.**

[¶ 102.] *Apprendi v. New Jersey* held:

> Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.

530 U.S. 466, 490, 120 S.Ct. 2348, 2362, 147 L.Ed.2d 435.

[¶ 103.] In *Ring v. Arizona,* the Court applied its holding in *Apprendi* to hold that a capital defendant's Sixth Amendment rights were violated when the judge "imposed a sentence greater than the maximum he could have imposed under state law without the challenged factual finding." *Blakely v. Washington,* 542 U.S. 296, 303, 124 S.Ct. 2531, 2537, 159 L.Ed.2d 403 (2004) (citing *Ring,* 536 U.S. at 603-609, 122 S.Ct. 2428, 153 L.Ed.2d 556). Specifically, under Arizona's capital sentencing scheme, once the jury found a defendant guilty of first-degree murder, the judge was required to "conduct a separate sentencing hearing to determine the existence or nonexistence of [certain enumerated aggravating] circumstances ... for the purpose of determining the sentence to be imposed." The judge was required to make all of the factual findings regarding the question whether there were

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any aggravating circumstances. The Court wrote:

> Based solely on the jury's verdict finding Ring guilty of first-degree felony murder, the maximum punishment he could have received was life imprisonment. [ ] This was so because, in Arizona, a "death sentence may not legally be imposed ... unless at least one aggravating factor is found to exist beyond a reasonable doubt." [ ] The question presented is whether that aggravating factor may be found by the judge, as Arizona law specifies, or whether the Sixth Amendment's jury trial guarantee, [ ] made applicable to the States by the Fourteenth Amendment, requires that the aggravating factor determination be entrusted to the jury. [ ]

Ring, 536 U.S. at 597, 122 S.Ct. at 2437, 153 L.Ed.2d 556. The Court held that the aggravating factor determination had to be entrusted to the jury in order to preserve defendants' Sixth Amendment rights. *Id.*

[¶ 104.] In *Blakely v. Washington,* the defendant pleaded guilty to kidnapping his wife. 542 U.S. at 298, 124 S.Ct. at 2534, 159 L.Ed.2d 403. The facts supporting his guilty plea made him eligible for a maximum sentence of 53 months. *Id.* at 299, 124 S.Ct. at 2535, 159 L.Ed.2d 403. The Court sentenced him to 90 months after making a finding that he acted with "deliberate cruelty." *Id.* The trial court received the authority to enhance the sentence from the Washington criminal code, which provided that a trial court was entitled to impose a sentence above the standard range if it found "substantial and compelling reasons justifying an exceptional sentence." *Id.* at 299, 124 S.Ct. at 2535, 159 L.Ed.2d 403. The United States Supreme Court overturned the sentence, relying on *Ring* and *Apprendi*, stating:

> ***820** Our precedents make clear [ ] that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. See Ring,* at 602, 122 S.Ct. 2428 (" 'the maximum he would receive if punished according to the facts reflected in the jury verdict alone.' " (quoting *Apprendi, supra,* at 483, 120 S.Ct. 2348)); *Harris v. United States,* 536 U.S. 545, 563, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002) (plurality opinion) (same); *cf. Apprendi, supra,* at 488, 120 S.Ct. 2348 (facts admitted by the defendant). In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," *Bishop, supra,* § 87, at 55, and the judge exceeds his proper authority.

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Id. at 542 U.S. at 303-304, 124 S.Ct. at 2537, 159 L.Ed.2d 403 (emphasis in original). This line of cases makes clear that absent a valid knowing and voluntary waiver of the Sixth Amendment right to a jury trial, a judge may only sentence based on "the facts reflected in the jury verdict or admitted by the defendant." In other words, in a capital case, absent valid waiver, the defendant has a right to have a jury determine the facts regarding whether there are aggravating circumstances. Allowing the court to impose the death penalty based on facts not admitted by the defendant or found by the jury is a violation of the defendant's Sixth Amendment right to a jury trial.

[¶ 105.] Turning to South Dakota's capital sentencing scheme, one can see that the plain language of the statute dealing with nonjury trials violates the clear principles enunciated in *Apprendi, Ring* and *Blakely.*

[¶ 106.] SDCL 23A-27A-2 provides:

> In all cases in which the death penalty may be imposed and *which are tried by a jury,* upon a return of a verdict of guilty *by the jury,* the court shall resume the trial and conduct a presentence hearing before the jury. Such hearing shall be conducted to hear additional evidence in mitigation and aggravation of punishment. At such hearing *the jury shall receive all relevant evidence,* including:
>
> (1) Evidence supporting any of the aggravating circumstances listed under § 23A-27A-1;
>
> (2) Testimony regarding the impact of the crime on the victim's family;
>
> (3) Any prior criminal or juvenile record of the defendant and such information about the defendant's characteristics, the defendant's financial condition, and the circumstances of the defendant's behavior as may be helpful in imposing sentence;
>
> (4) All evidence concerning any mitigating circumstances.

(emphasis added).

[¶ 107.] SDCL 23A-27A-6 provides:

> In nonjury cases *the judge shall,* after conducting the presentence hearing as provided in § 23A-27A-2, *designate, in writing, the aggravating circumstance or circumstances, if any, which he found beyond a reasonable doubt.* Unless at least one of the statutory aggravating circumstances

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> enumerated in § 23A-27A-1 is so found, the death penalty shall not be imposed.

(emphasis added).

[¶ 108.] The majority opinion concludes that there is no "statutory impediment preventing a defendant who pleads guilty ***821** ... from exercising his right to a jury at the penalty phase." Supra ¶ 48. However, to come to this conclusion, it is necessary to ignore pivotal language in the pertinent statutes. First, SDCL 23A-27A-2 provides for a sentencing hearing before a jury: "[i]n all cases in which the death penalty may be imposed and *which are tried by a jury* [.]" (emphasis added). The jury hearing on aggravating circumstances is clearly inapplicable in nonjury cases. This interpretation is supported by the fact that the Legislature provided a different statute and procedure for sentencing in nonjury cases under SDCL 23A-27A-6. SDCL 23A-27A-6 unequivocally requires the *judge* to make the factual findings regarding aggravating circumstances in nonjury cases. *See* SDCL 23A-27A-6 (providing in part, "[i]n non-jury cases *the judge shall* [ ] designate, in writing, the aggravating circumstance or circumstances, if any, *which he found* beyond a reasonable doubt").

[¶ 109.] The majority opinion relies solely on the phrase, "presentence hearing as provided in § 23A-27A-2" to support its determination that a jury hearing is permitted by the statute. This reliance is appropriate only if the Court chooses to wholly ignore the plain language surrounding that phrase and the plain language of SDCL 23A-27A-2. That language makes clear that the Legislature intended that the court, not a jury, hear the evidence and make written findings regarding aggravating circumstances in nonjury cases. This is in direct contravention of the Supreme Court's holding in *Apprendi,* which this Court acknowledged in *State v. Hoadley,* that:

> it is unconstitutional for a [state] legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.

Apprendi, 530 U.S. at 490, 120 S.Ct. at 2363, 147 L.Ed.2d 435; *Hoadley,* 2002 SD 109, ¶ 32, 651 N.W.2d 249, 257.

[¶ 110.] I acknowledge and embrace the canon of statutory construction requiring this Court, whenever possible, to construe statutes so as to not violate the constitution. *Supra* ¶ 50. However, that canon of statutory construction cannot be used by the Court to simply ignore the operative language of two statutes

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in order to find them constitutional. This is especially so when the Court is considering statutes dealing with the most severe penalty under the law. We should not broaden our rules of construction to the point of absurdity in an effort to drive to a desired result. Instead, we should carefully consider the plain language of the statutes and follow our constitutional duty to strike down those statutes which violate our citizens' rights.

[¶ 111.] Lacking any statutory support for its conclusions, the majority opinion goes on to hold that the defendants waived their constitutional right to have a jury determine whether they would receive death or life in prison. This conclusion is based on the erroneous premise that the "circuit court properly presented Page [and Piper] with the option of exercising [the] right to sentencing by a jury as provided by South Dakota's capital punishment statutory scheme." There is no such right for defendants who plead guilty to capital crimes under the sentencing scheme. Therefore, this holding has no anchor in the law. As Page notes, "the waiver of a substantive right presupposes the existence of the right in the first place. The language of the statute expressly limits the fact-finding role to the judge in non-jury cases ... the judge ... had no authority to offer jury sentencing once [the defendants] pleaded guilty." That the circuit court made an illusory offer of jury ***822** sentencing is no justification for upholding an unconstitutionally imposed death sentence. Therefore, under these circumstances, the aggravating factors had to be admitted by the defendant or found by a jury, not the judge, and the penalty of death was unconstitutionally imposed.

[¶ 112.] The United States Supreme Court could not have been more clear on this issue than when it stated that the right to a jury determination of the facts essential to imposition of sentencing:

> is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the peoples' ultimate control in the legislative and executive branches, jury trial is meant to ensure their control of the judiciary.

Blakely, 542 U.S. at 306, 124 S.Ct. at 2538-39, 159 L.Ed.2d 403. The defendants' unconstitutionally imposed sentences should be reversed and the cases remanded for re-sentencing in accordance with SDCL 23A-27A-14.

[¶ 113.] In foresight, the South Dakota State Legislature has specifically provided the appropriate remedy.

[¶ 114.] SDCL 23A-27A-14 provides:

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> In the event the death penalty for a Class A felony is held to be unconstitutional by the South Dakota Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a Class A felony shall have such person brought before the court, and the court shall sentence such person to life imprisonment.

[¶ 115.] **2. Piper and Page's death sentences were grossly disproportionate in comparison to Hoadley's life sentence.** [26]

[¶ 116.] Based primarily on untested, un-cross-examined and self-serving statements by Hoadley, Piper and Page, the circuit court and the majority opinion comes to the conclusion that Piper and Page were more culpable and less remorseful than Hoadley, and therefore more deserving of death. In a stunning reversal from its argument in the Hoadley case, the State now argues that Hoadley is less culpable in this horrendous crime than Piper and Page. The majority opinion relies on the tenuous reasoning that Hoadley did not confess to being as violent or proactive as Piper and Page. Hoadley's penchant for self-preservation is a shifting foundation that is utterly insufficient to support the gross disparity in sentencing of death for Piper and Page, and life for Hoadley. We should reverse the circuit court's determination that the sentences were not grossly disproportionate.

[¶ 117.] Sifting through thousands of pages of trial transcripts, defendant statements, and investigative reports, one could write reams detailing the atrocities committed by Hoadley, Piper and Page. In the end, their individual behavior is so despicable as to be indistinguishable. Yet, the circuit court and the majority opinion parse selected facts, microanalyzing the events of the night to determine whether Piper and Page were worse than Hoadley.

[¶ 118.] The problem with this analysis is that it places this Court and the circuit court in a position of picking and choosing which untested facts to believe and then using those facts to sentence one defendant to a life sentence and two others to death. [27] Certainly, this type of fact finding ***823** is always done in determining whether there are sufficient aggravating factors to warrant imposition of the death sentence. However, the fact finders in all of these cases have already determined that the defendants had the same aggravating factors. Yet only one received mercy. All of the defendants have been found guilty of

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the same crimes, yet two will be put to death for those crimes. This is not a case where one defendant acted as a lookout or drove the getaway car. As the State consistently argued below, all three defendants actively engaged in the crimes that occurred on the evening Poage was murdered.

[¶ 119.] In fact, the State charged Hoadley, Piper and Page with identical acts, conduct and charges, all resulting in identical convictions. The same aggravating factors were alleged and found against all three: Hoadley, Piper and Page. There are no meaningful differences to justify life for Hoadley and death for Piper and Page. The real substantial difference was that the jury gave life to Hoadley, and the judge gave death to Piper and Page.

[¶ 120.] I respectfully submit all three, Hoadley, Piper and Page, should receive life in prison without the possibility of parole for their substantially identical acts of murder. *See* SDCL 23A-27A-14, *supra* ¶ 114.

[¶ 121.] MEIERHENRY, Justice, joins this dissent.

All Citations

709 N.W.2d 783, 2006 SD 1

Footnotes

1 Poage's mother and sister were on vacation in Florida at this time.

2 Testimony as to the origin of the plot to kill Poage and steal his property varies. It is unclear whether all three of the assailants planned on stealing items in the house so they could buy LSD, or whether Piper pulled Page outside to inform him he was going to steal stereo equipment from Poage's vehicle. It is also unclear whether they initially planned to kill Poage, or just beat him up. However, it is clear that the initial discussions as to killing Poage were limited to Piper and Page, and only after it was decided to kill him was Hoadley informed of the plan.

3 Records from Poage's bank show the ATM card was used six times in various locations in South Dakota and Nebraska. Some of Poage's property was later found at pawnshops in Wyoming and Missouri.

4 When the trio returned to Spearfish, C.R., Hoadley's juvenile girlfriend, testified that she saw the three unpack the stolen PlayStation, video games and many other items from Poage's house. C.R. also testified that Piper confessed the murder to her in detail. She said Piper laughed about the killing as he told her about it, “and thought it was just like a really cool neat thing.” Another friend of Piper's, Jeff Deux, testified that Piper confessed to him as well and confirmed the nonchalant attitude, stating, Piper acted “a bit cocky” while telling the story of the beatings.

5 The same circuit judge also presided over the Hoadley trial. Well experienced in capital cases, the circuit judge previously sat with this Court by designation in *State v. Moeller,* 1996 SD 60, 548 N.W.2d 465 (*Moeller I*); *State v. Moeller,* 2000 SD 122, 616 N.W.2d 424 (*Moeller II*); and *State v. Rhines,* 1996 SD 55, 548 N.W.2d 415 (*Rhines I*).

6 Tingley testified first regarding conversations he had with Piper while the two were on the same jail block. Although the two were not cell mates, Tingley testified that they spent a lot of time together, and that Piper confessed to taking part in Poage's murder. Tingley also testified that he had plotted an escape from jail with Piper and Givens. He testified that he was to kill one of the guards. Givens was to kill another and grab the keys. Then, Piper was going to grab Hoadley and escape out the back door where they would meet C.R. and “run for it.” Tingley also claimed Piper offered him $10,000 to help out with the escape. Prior to

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divulging information about Piper's confession and escape plan, the State asked Tingley if he had made a plea agreement, and he replied that he had not.

Next, Curtis testified that Piper had confessed to murdering Poage, and gave a fairly detailed rendition of the facts Piper allegedly presented to him. He also testified that Piper wanted to escape from jail by going to the library, taking two women guards hostage, and killing them by either breaking their necks or sticking pencils in their necks. Curtis' role in the escape was to go after one of the male guards. Curtis, too, stated that Piper offered to pay him for his help, and that they would have to get Hoadley out of prison. Curtis' testimony indicated that Piper wanted to get Page out of jail and kill him for being a "narc." Curtis also stated that Piper had found a paper clip, which he planned to use to take off his shackles and handcuffs while in the recreation yard. Curtis was released from jail based on a plea agreement with the State. Piper gave him his clothes and $68 upon his release. This, Curtis testified, was supposed to be in exchange for Curtis clipping the wires on the fence surrounding the jail once Curtis had been released in order to help Piper escape. At Piper's sentencing hearing, Curtis testified that he reported these escape plans to law enforcement through his attorney because he did not want anyone else to get hurt. On direct examination, he did say that he had entered a plea bargain with the State, and was granted credit for time served, a fine, and had to stay "in contact" with the Piper case. On cross-examination he stated that he was not receiving any benefit by testifying against Piper; rather, he felt it was his civic duty. On further cross-examination, however, he disclosed that he pleaded guilty to one simple assault charge, receiving a sentence of time served and fines, in exchange for dismissal of two aggravated assault charges, a first degree burglary charge, a felony hit and run, a simple assault and an obstructing justice charge.

7 The sentencing judge in Givens' case testified at the remand hearing for Piper. The sentencing judge testified it was his "common practice" to grant early release to persons convicted of a misdemeanor who originally received the maximum sentence. This early release was precipitated when the sentencing judge learned that Givens' behavior had improved in jail, that he had enrolled at Black Hills State University and he was willing to take anger management counseling. The sentencing judge testified at the remand hearing he was unaware when he reduced Givens' sentence that Givens had testified at Piper's sentencing hearing. The sentencing judge testified, "I did not let this man out of jail because he testified favorably in the matter of State of South Dakota, Plaintiff, versus Briley Piper, Defendant. That had nothing to do with it."

8 The four part test announced in *State v. Gonzalez,* 2001 SD 47, ¶ 11, 624 N.W.2d 836, 839, was abandoned by this Court in *Leisinger,* 2003 SD 118, ¶ 13, 670 N.W.2d at 374, after developments in the federal court system refined *Brady* suppression analysis to a three part test. *Leisinger,* 2003 SD 118, ¶ 13, 670 N.W.2d at 374 (citing *Strickler v. Greene,* 527 U.S. 263, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999); *United States v. Carman,* 314 F.3d 321 (8thCir.2002)).

9 For the full text of Piper's statement at his sentencing hearing, see note 25.

10 The facts supporting Anderson's death penalty sentence are reviewed in *Moeller II*, 2000 SD 122, ¶¶ 169-171, 616 N.W.2d at 464. However, due to Anderson's suicide in 2003, the full facts that resulted in his conviction for the kidnapping and murder of Larisa Dumansky, and the rape and murder of Piper Streyle are not contained in *Anderson II,* 2003 SD 65, 664 N.W.2d 48. Additional facts pertaining to his conviction for the kidnapping of Streyle are contained in *State v. Anderson I,* 2000 SD 45, 608 N.W.2d 644.

11 The only two sentencing options before the circuit court were life in prison without possibility of parole or death. In either case, barring executive clemency, Piper would not ever be released back into society. Thus, the issue of rehabilitation is not of major concern. "Clearly there are some acts of such a criminal magnitude that they justify a life sentence [or death] whether the perpetrator is capable of rehabilitation or not. In such instances the sentence is not disproportionate to the crime." *State v. Milk,* 2000 SD 28, ¶ 18, 607 N.W.2d 14, 20.

12 On June 22, 2000, the State filed a "Notice of Intent to Seek Death Penalty" in Piper's case for the murder of Poage. On September 5, 2000, the State provided "Notice of Aggravating Circumstances," which specified the death penalty was being sought based upon the aggravating factors found in SDCL 23A-27A-1(3), (6), and (9).

13 The analysis of this issue is based upon this Court's analysis of the same issue raised in *Moeller III,* 2004 SD 110, 689 N.W.2d 1. Given the seriousness of the penalty in this case, we re-state the *Moeller III* analysis as applicable herein. *See also Page,* 2006 SD 2, ¶¶ 69-91, 709 N.W.2d at 762-69.

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14 The Arizona statutes stated: "[t]he hearing shall be conducted *before the court alone. The court alone* shall make all factual determinations required by this section or the constitution of the United States or this state." *Ring,* 536 U.S. at 592, 122 S.Ct. at 2434, 153 L.Ed.2d 556 (emphasis added) (quoting Ariz.Rev.Stat. Ann. § 13-703(C)(2001), *amended by* 2002 Ariz. Sess. Laws, 5th Spec. Sess., ch. 1, § 1).

15 "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...." U.S. Const amend. VI.

16 *See Ring,* 536 U.S. at 609, 122 S.Ct. at 2443, 153 L.Ed.2d 556 (observing that "[t]he right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death.").

17 There is no dispute that the *Ring* right of sentencing by jury is a matter of procedure. The United States Supreme Court so held, explaining:

> A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes. *See Bousley* [*v. United States*], *supra,* [523 U.S. 614] at 620-621, 118 S.Ct. 1604[, 1609-1610, 140 L.Ed.2d 828] (rule "hold[s] that a ... statute does not reach certain conduct" or "make[s] conduct criminal"); *Saffle* [*v. Parks,* 494 U.S. 484, 495, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990)] (rule "decriminalize[s] a class of conduct [or] prohibit[s] the imposition of ... punishment on a particular class of persons"). In contrast, rules that regulate only the *manner of determining* the defendant's culpability are procedural. *See Bousley* at 620, 118 S.Ct. 1604 [140 L.Ed.2d 828].

Schriro v. Summerlin, 542 U.S. 348, 353, 124 S.Ct. 2519, 2523, 159 L.Ed.2d 442 (2004). *Schriro* went on to hold that "judged by this standard," the *Ring* right to have a jury determine aggravating circumstances in imposing the death penalty "is properly classified as procedural." *Id.*

18 *Colwell* described the Arizona sentencing scheme that was overturned in *Ring* as one in which, "following a jury adjudication of a defendant's guilt of first-degree murder, the trial judge, sitting alone, determines the presence or absence of the aggravating factors required by Arizona law for imposition of the death penalty." 59 P.3d at 469.

19 The Nevada statute provided "that when a defendant pleads guilty to first degree murder and the State seeks a death sentence, a panel of three district judges must 'conduct the required penalty hearing to determine the presence of aggravating and mitigating circumstances, and give sentence accordingly.' " *Id.* at 469 n. 60 (citing Nev.Rev.Stat. § 175.558, *repealed by* 2003 Nev. Laws, c. 366, § 8).

20 "At the time of the offense, the statute, Indiana Code § 35-50-2-9 (Supp. 1979), provided in relevant part, 'If the defendant was convicted of murder in a jury trial, the jury shall reconvene for the sentencing hearing; if the trial was to the court, or *the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing*.' " *Moore,* 771 N.E.2d at 49 (emphasis in original).

21 "A limited exception has been recognized for statutes that broadly prohibit speech protected by the First Amendment. This exception has been justified by the overriding interest in removing illegal deterrents to the exercise of the right of free speech." *Allen,* 442 U.S. at 155, 99 S.Ct. at 2223, 60 L.Ed.2d 777 (internal citation omitted).

22 In *Broadrick,* 413 U.S. at 610-611, 93 S.Ct. at 2915, 37 L.Ed.2d 830, the United States Supreme Court explained why hypothetical challenges are not allowed:

> Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court. A closely related principle is that constitutional rights are personal and may not be asserted vicariously. These principles rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws.
>
> (internal citations omitted.)

23 The circuit court found that five aggravating circumstances had been proven beyond a reasonable doubt by the State. Three aggravators were proven under SDCL 23A-27A-1(6), in that the offense included torture, depravity of mind and aggravated battery to the victim. The fourth aggravator was proven under SDCL 23A-27A-1(3), in that circuit court found beyond a reasonable doubt that the offense was committed for the

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pecuniary benefit of the defendant and co-defendants. The fifth aggravator was proven under 23A-27A-1(9), in that the offense was committed in order to eliminate Poage as a witness.

24 Because Piper pleaded guilty to murdering Poage amongst other charges, there is no dispute in this case that Piper either intended to murder the victim or acted with recklessly disregard for human life. Therefore, his culpability for Poage's murder is based upon his own actions rather than those of his co-defendants Page and Hoadley. *See* discussion *supra* ¶¶ 78-79, concerning the import of the Supreme Court's decisions in *Enmund* and *Tison.*

25 Piper told the Court:

> I participated in all of this, the beating, the torture, and the killing of someone's son. And I'm so sorry. I'm so sorry for what I did. And you lost your son, you've lost your brother, you've lost your grandson. Your whole family. There's nothing that I can say and there's nothing that I can do that will ever bring, your son back. If I thought that this judge can kill me and your son could take my place and be alive and you could have him back, I'd go right now. I'd run to the table, I'd sit down, and I would die so you could have your son back, so you could have your brother back, because I know if someone killed my brother or my sister, or any member of my family, I-I would want them dead. But then like Pat said, I would want them to live forever so that they would have to live with it and it would have to eat at them every day that they live. And there's not a day that goes by, there's not a night that I lay down to sleep, that I don't see your son's face, that I don't go over everything that happened in my mind and wish to God I could go back and I could stop it. That I could run for help. That he would be okay. I don't know what I can say. I don't know that I can say to you, Judge. I'm so sorry and so ashamed for what I took part in. I'll never be able to forgive myself, let alone expect any of your forgiveness, ever. I'll never be able to deal with all the pain that I've caused your family, as well as mine. And even families that aren't involved in this. Mr. Fitzgerald's family, the Judge's family, the law clerk's family over here. I'm-It's affected everybody in this whole state, and everybody I know in the state where I'm from, and the state where Elijah Page is from. I just don't know what else I can say but I'm sorry. I'm so sorry for what I did. And I hope now that-that this part-just of three parts is done, and maybe some ounce-some little part of healing-no forgiveness ever, because I know it's inexcusable, what happened, but I hope now that just one-third of this part can be over and that you can get on to seeking retribution for the other two-thirds. I don't know what this Judge is going to do. I don't. And I understand what you all want him to do. I understand. I helped take the son of a mother, the brother from a sister, I helped take a member of an undoubtedly loving family. But I don't know what he's going to do. But I'll accept responsibility for everything I've done, and I'll accept his punishment and I'll take it in full for every day of my life. There will never be a day that I'll forget about what's happened here in the past nine months, and past ten months, for the past year and a half. I'll never forget.
>
> I have two nieces and nephews that I don't even want them to know that they have an uncle like me. I don't want them to grow up to be like me. As much as I love them, I don't want them to ever know that I existed. I don't ever want them to know the horror that I took part in, all the pain that I've caused another family to feel. I don't want them to know that. I don't want them to have any part of it. Maybe I don't want them to deal with the pain when they get older. I don't know what else I can say. I'm sorry. I'm sorry, Judge.

26 Because the factors for consideration in all three cases (Piper, Page, and Hoadley) are exactly the same and the facts substantially similar, I respectfully submit the same writing, analysis and arguments in the Piper and Page cases.

27 This problem is exacerbated by the circuit court's performance on remand. For example, in Page's case, the circuit court did not engage in true comparative analysis of the actions of Hoadley and Page. Instead, the circuit court appears to have sifted through the record and reiterated all of the facts it could find in favor of its original sentence. The findings of fact and conclusions of law do not compare the culpability of Page and Hoadley, they merely restate facts regarding Page's culpability. The majority opinion supports this improper analysis by giving deference to those findings. However, without any significant findings with regard to Hoadley's actions before, during, and after the murder, it cannot be said that “Hoadley's ‘past records, demeanor, [and] degree of criminal involvement’ ” are dissimilar enough to warrant such disparity in sentencing.

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In fact, the majority opinion ignores those facts that show Hoadley's conduct to be equal or more heinous than that of Piper and Page. It does so despite the fact that the Hoadley trial and sentencing transcripts are part of the record in this appeal. Those transcripts show that Hoadley (1) wiped up the blood in the kitchen after the initial assault; (2) stabbed Poage in the throat; (3) stood on the back of Poage's head in an attempt to drown him; (4) dropped two massive rocks on Poage's head; (5) kept property used in the murder as souvenirs, including the dog leash used to bind Poage; (6) when a friend asked him about the murder, Hoadley replied, “shit happens, dude;” and (7) showed pictures of himself wearing Poage's clothes to his cellmates.

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