

IN THE SUPREME COURT  
STATE OF SOUTH DAKOTA

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No. 27432

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STATE OF SOUTH DAKOTA,  
Plaintiff/Appellee

vs.

MARICELA NICOLASA DIAZ,  
Defendant/Appellant

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APPEAL FROM THE CIRCUIT COURT  
FIRST JUDICIAL CIRCUIT, HANSON COUNTY, SOUTH DAKOTA

THE HONORABLE SEAN M. O'BRIEN  
CIRCUIT COURT JUDGE  
&  
THE HONORABLE TIMOTHY W. BJORKMAN  
CIRCUIT COURT JUDGE

NOTICE OF APPEAL FILED ON APRIL 1, 2015

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**BRIEF OF APPELLANT**

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### **Preliminary Statement**

References to the settled record in 30CRI11-000018 as reflected by the Clerk's Index will be to the designation (R) and the applicable page. References to the Clerk's Index in 30Juv09-000005 will be to the designation (JR) followed by the applicable page. References to Appellant's Index will be to designation (App) and the applicable page; the transfer hearing will be referred to as "TH" followed by the applicable volume and page number; suppression hearing transcript will be to the designation of SH followed by the applicable page; jury trial transcripts will be referred to as (JT) followed by the applicable volume and page number; and references to the sentencing hearing will be to the designation (SH) and the applicable page.

### **Jurisdictional Statement**

Maricela Nicolasa Diaz respectfully appeals from transfer of her case from juvenile court to criminal court. (JR 136). Diaz also appeals the convictions and sentence entered against her on March 27, 2105. (R 2613). Diaz filed her Notice of Appeal on April 21, 2015. (R 2859). This Court has appellate jurisdiction pursuant to SDCL 15-26A-1(1), SDCL 23A-32-2, 9 & 5.

### **Request For Oral Argument**

Appellant, Maricela Diaz, and her counsel, Doug Dailey and Chris Nipe, respectfully request the privilege of appearing before this Court for oral argument.

### **Statement of the Issues**

1. **The Trial Court Abused Its Discretion in Ordering Diaz be Tried in Adult Court.**

The trial court in the juvenile case held that Diaz should be transferred from juvenile court to adult court. The most important cases are: *State v. Jensen*, 1998 S.D. 52; *State v. Harris*, 494 N.W.2d 691 (S.D. 1993); *State v. Rios*, 499 N.W.2d 906 (S.D. 1993); and *State v. Flying Horse*, 2002 S.D. 47. The most important statute is SDCL § 26-11-4.

2. **Trial court abused its discretion in denying a new hearing on the transfer of Diaz to adult Court despite newly discovered evidence following the hearing regarding the State’s expert witness Dr. Donald Dutton.**

The trial court denied defendants motion to grant a new hearing on the transfer of Diaz to adult court after new evidence was disclosed by the State in regard to its expert witness who testified on behalf of the State at the transfer hearing. The most important cases are: *Bridgewater Quality Meats, LLC v. Heim*, 2007 S.D. 233; and *Steele v. Steele*, 510 N.W.2d 661 (S.D. 1994). The most important statute is SDCL §15-6-59(b)

3. **The trial court erred in admitting the statements made by Diaz to law enforcement.**

This Court held the statements of Diaz were admissible as it found Diaz knowingly and intelligently waived her Miranda rights. The most important cases are: *State v. Maricela Nicolasa Diaz*, 2014 S.D. 27; *Miranda v. Arizona*, 384 U.S. 436; 86 S.Ct. 1602 (1966); *State v. Horse*, 2002 S.D. 57; and *People in the Interests of J.M.J.*, 2007 S.D. 1. The most important statutes are: SDCL §26-7A-12; SDCL §26-7A-13; SDCL §26-7A-15; and SDCL §26-7A-17.

4. **Trial Court failed to adequately instruct the jury with a full and correct statement of the law applicable to the effects of physical and sexual abuse on**

**a juvenile's perception of imminent fear, thereby, denying her right to present her Defense.**

The trial court denied the use of Defendant's proposed jury instructions which would have instructed the jury on the heightened sense of imminent danger felt by children who suffer from physical and sexual abuse. The most important cases are: *State v. Walton*, 600 N.W.2d 524 (S.D. 1999); *State v. Springer*, 2014 S.D. 80; and *Miller v. Alabama*, 132 S.Ct. 2455 (2012). The most important statutes are: NA.

**5. The Trial Court Abused its Discretion in Sentencing Diaz to 80 Years, with No Time Suspended.**

The trial court sentenced Diaz to 80 years in prison for first degree murder, and a 50 year sentence for aggravated kidnapping, to run concurrently with no time suspended. The most important cases are: *State v. McKinney*, 2005 S.D. 73; *State v. Hinger*, 1999 S.D. 91; *Bult v. Leaply*, 507 N.W.2d 325 (S.D. 1993). The most important statutes are: NA

**6. The Sentenced Imposed on Diaz Violated the Principle of Proportionality of Sentencing.**

The trial court sentenced Diaz to 80 years in prison for first degree murder, and a 50 year sentence for aggravated kidnapping, to run concurrently with no time suspended. The most important cases are: *Solem v. Helm*, 463 U.S. 277 (1983); *State v. Bonner*, 1998 S.D. 30; *State v. Rhines*, 1996 S.D. 55; 7 *State v. Blair*, 2005 S.D. 75. The most important statutes are: NA



7. **The Trial Court Erred by Sentencing Diaz to a De Facto Life Sentence.**

The trial court sentenced Diaz to 80 years in prison for first degree murder, and a 50 year sentence for aggravated kidnapping, to run concurrently with no time suspended. The most important cases are: *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d. 825 (2010); *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2010); *Miller v. Alabama*, 132 S.Ct. 2455 (2012); and *Montgomery v. Louisiana*, S.Ct. Docket 14-280. The most important statutes are: NA

**Statement of the Case**

Diaz was charged in juvenile court with First Degree Murder, First Degree Murder-Felony Murder: Arson, and First Degree Arson. (JR 5). The State moved to transfer Diaz to adult court. (JR 10). In juvenile court, Diaz moved to suppress her statements to law enforcement. (JR 157). The juvenile Court, presided over by Circuit Court Judge Sean O'Brien, denied the motion. (JR 1157). Following the transfer hearing the Court ordered Diaz be transferred to adult court. (JR 1366; R 1, 15; App 1). Diaz moved the Court to vacate the Order transferring her to adult court pursuant to SDCL § 15-6-59(b) (JR 1379, App 38) which was denied by the Court (R 516; App 39, 42).

Diaz was indicted for First Degree Murder; Conspiracy to Commit First Degree Murder; First Degree Felony Murder: Arson; First Degree Arson; First Degree Felony Murder: Aggravated Kidnapping; and Second Degree Aggravated Kidnapping. (R 22). Diaz plead not guilty to each of the charges. In adult Court Diaz was granted a change of judge and Circuit Judge Timothy Bjorkman was appointed to the case. (R 73). Diaz moved again to suppress her statements to law enforcement, asking the trial court to

reconsider the previous decision. (R 192). The court granted the motion to reconsider and subsequently granted the defendant's motion to suppress Diaz' statements to law enforcement. (R 789; 1026). The State filed a petition for intermediate appeal of the decision to suppress Diaz's statements, which was granted by this Court. (R 1400). This Court overturned the Trial Court's order suppressing Diaz' statements to law enforcement (R 1422; 1423) and entered Remittitur (R 174).

Jury trial commenced on December 29, 2014. At the close of the State's evidence, the Defendant made a detailed motion to dismiss the charges as a matter of law for the for State's failure to submit sufficient evidence to support a conviction and again renewed those motions at the close of all evidence. (JT Vol. XII 1066-1067, 1323). The Court granted the Defendant's motion with regard to Count 2 (Conspiracy to Commit Murder) but denied the motions with regard to the remaining counts (JT Vol. IX 1326-1327). On January 15, 2015 the jury returned its verdict convicting Diaz on Counts 1 (Murder), 3 (First Degree Felony Murder: Arson), 4 (First Degree Arson), 5 (Felony Murder: Aggravated Kidnapping) and 6 (Second Degree Aggravated Kidnapping). (R 2613, JT Vol. VIII 1149, App 62).

Following the jury verdict Defendant made a motion to dismiss the guilty verdicts to Counts 3 and 4 as a matter of law. (R 2600) which the trial court subsequently granted. (R 2611).

On March 31, 2015, Judge Bjorkman sentenced Diaz to Eighty (80) years in the South Dakota State Penitentiary. (R 2613, App 62).

### **Statement of Facts**

Diaz was born on September 10, 1994 in Mexico. (TH Vol. IV 567). Diaz relocated from Mexico to Fort Wayne, Indiana with her mother when she was 11 years old. (TH Vol. IV 658). In both Mexico and Fort Wayne, she was a well behaved, happy little girl. She attended school regularly and had decent grades. (TH Vol. IV 659-662). At the age of 13, she made the acquaintance of 19 year old Alexander Salgado. Salgado started a sexual relationship with Diaz shortly after they met. (TH Vol. II 248-249). Diaz is a sexual abuse victim and physical abuse victim of Salgado under the laws of South Dakota and Indiana. Diaz had a child by Salgado when Diaz was 14 years old. (TH Vol. II 279).

Salgado regularly used alcohol and drugs and would provide alcohol and drugs to Diaz. (TH Vol. II 298) She started skipping school to drink and do drugs with him. *Id.* Salgado was an officer of the Sureño 13 gang which is one of the largest gangs in the United States. (TH Vol. III 447; JT Vol. II 774-775). He had “soldiers” under his authority. (TH Vol III 481-482).

Salgado was verbally, physically and sexually abusive to Diaz during their relationship. (TH Vol III 525-536)(JT Vol. V, p 790). He admitted to striking Diaz in the face and pulling her hair on numerous occasions. (TH Vol. II 255-256, 283-284, 301) (JT Vol. V 791-792, 794, 796-797). He also cut her wrist on one occasion and left her to die. (TH Vol III 529-530)(JT Vol. V, p 792-793). As a result Diaz was committed to a mental health hospital as a result of the “suicide”. (TH Vol. V 1008-1009). Salgado has all of the traits of a sociopath.

Due to her association with Salgado, Diaz became a ward of Indiana, and in its legal custody at least as early as October 15, 2009. She was not in the custody of her

mother, Irma Gutierrez-Placencia, because the Indiana juvenile court explicitly found that her mother had an “inability to supervise and protect M.D.” Shortly before the Indiana juvenile court found her in need of protection and took custody of her, Salgado took her to South Dakota. (TH Vol. III 537-539).

Salgado had been kicked out of his mother’s home in September or October of 2009 because of his violence and drug use. (TH Vol. III 534-535). He informed Diaz that he was moving to another state. He then burglarized his mother’s home and stole her personal belongings to sell so he could purchase bus tickets from to Mitchell, South Dakota. (TH Vol. III 537-538)(JT Vol V 794). Diaz came with him, and was completely dependent on Salgado. (JT Vol. V 795). She spoke limited English, could not work, could not drive, and had no money of her own. (JT Vol III 583, Vol V 795). She had no identification and no way to get back to Fort Wayne. (JT Vol. V 795-796).

On November 10, 2009 firefighters and law enforcement responded to a vehicle fire in a wooded area in Hanson County, South Dakota. After they extinguished the fire, authorities discovered a badly burned body, later identified as Jasmine Guevera, in the trunk of the car. (JT Vol IV, pp 535-536; TH Vol 1, p 136).

The next morning Mitchell Police Department investigators Reinesch and Russell traveled to the residence of Jasmine’s friend, Steffany Molina (“Molina”). (JT Vol IV, pp 540-541). Molina let Reinesch inside, and Reinesch informed her that Jasmine’s car had been located and that law enforcement had been looking for her. (JT Vol. IV 543-544; JSH 58-61) Further facts regarding the preliminary investigation and subsequent interrogation of Diaz are set forth in *State of SD v. Maricela Nicolasa Diaz*, 2014 SD 27, and incorporated herein by reference. One fact that was not addressed in the facts set out

in that appeal were that the interrogating officers placed a can of lighter fluid in front of 15 year old Diaz during their interrogation of her. (JT Vol. VI 850).

Law enforcement also interviewed Alex Salgado after which time both Salgado and Diaz were arrested for Guevara's murder. Salgado placed all blame for the offense on Diaz, saying she essentially planned the crime and committed the major portion of it. (TH Vol II 363-425). Salgado eventually plead guilty to the offense of second degree murder pursuant to a plea agreement with the State of South Dakota. (TH Vol. II 237). Part of Salgado's plea agreement was that he agreed to debrief with law enforcement and testify against Diaz. (JT Vol. V 771). Salgado avoided the possibility of facing the death penalty as a result of his plea agreement. (JT Vol. V 771). Diaz has always maintained the crimes were initiated and committed by Salgado, and any limited involvement were as a result of the dominion and control Salgado had over her and the fear she had of him.

As Diaz was only 15 years old at the time of the murder she was petitioned into juvenile court on allegations of First Degree Murder, First Degree Murder-Felony Murder: Arson, and First Degree Arson. (JR 5). The State moved to transfer Diaz to adult court. (R 10).

At the transfer hearing Steve Allard, associate warden of the South Dakota Women's prison, testified regarding the security and programs at the South Dakota Women's prison. (TH Vol. I 44-67). With the exception of the medical and nutritional needs of particular inmates at the prison, the programs offered to inmates are based on need and release date, not age. (TH Vol. I 49). There are no separate areas in the prison to house juveniles apart from adults. (TH Vol. I 64). At the time of the hearing there were no juvenile prisoners in the prison. (TH Vol. I 64).

Doug Herman testified as to the capacities of the South Dakota Department of Corrections regarding juvenile offenders. (TH Vol. I 68-108). Juveniles committed to the DOC undergo a specific intake and classification to determine individual needs and risks, which allows the DOC to put together a plan for rehabilitation to lower the risk of juveniles reoffending when they are released from incarceration. (TH Vol. I 70-77). Each juvenile assessment focuses on the juvenile's needs as well as the safety of the public. (TH Vol. I 101). The programs offered by the DOC are age specific; the juveniles are offered medical and mental health services. (TH Vol. I 103). The DOC has contracts with three primary programs outside the state for juvenile inmates which contain secure facilities. (TH Vol. I 86). The State of South Dakota is required to be in compliance with the Juvenile Justice Delinquency Prevention Act which requires juvenile offenders not be incarcerated with adult. (TH Vol. I 104-105). All commitments of juveniles to the DOC are until the age of 21. (TH Vol. I 93). Diaz will be deported to Mexico as soon as she is released from the custody of the State.

Diaz was examined by four psychiatric professional who testified at the transfer hearing. Dr. Beverly Gunderson, an adolescent psychologist, testified that the psychological profiles suggested for Diaz are not unusual and can be considered common for a 15 year old in the juvenile system. (TH Vol. IV 728). Dr. Travis Hansen testified for the State. His initial opinion that Diaz could be rehabilitated by the SD juvenile system was later changed to conclude that there would be adequate programming available to rehabilitate Diaz and to provide for the public safety provided there was a secure facility. (TH Vol. III 617, 635-641). Hansen found Diaz had a diagnosis of conduct disorder, adolescent onset. Conduct disorder typically resolves itself by age 18.

(TH Vol. III 619-621). One of the possible reasons for the diagnosis was the sexual abuse suffered by Diaz. Conduct disorder is the most common diagnosis for children in the juvenile justice system in SD. (TH Vol. III 465-466). Dr. David Bean also testified with regard to his psychological examination of Diaz. Bean opined the juvenile system is set up to handle youth who have the diagnosis Diaz has. (TH Vol. V 1016-1018). He further opined that Diaz was in need of the psychiatric care offered in the juvenile system and that she would not receive appropriate psychiatric care if she were incarcerated in the SD Women's prison. (TH Vol. V 1017-1018). Drs. Gunderson, Hansen and Bean all diagnosed Diaz as a victim of sexual and physical abuse. Representatives of Reclaiming Youth International testified Diaz could be rehabilitated in the juvenile justice system and that there would be an increased risk that Diaz would be subject to physical and sexual abuse if she were incarcerated in an adult prison, along with an increased risk of suicide. (TH Vol. IV 973-874).

Dr. Don Dutton was also called by the State as an expert. Dutton opined that Diaz should not be dealt with in the juvenile system. Dutton refused to acknowledge Diaz was a sexual abuse victim. (TH Vol. V 979-985). Dutton formed his opinion initially by relying on the police reports and his interview with Diaz. (TH Vol. V 967-999). He wrongfully believed that Diaz had lied about Salgado cutting her own wrists. (TH Vol. V 975). He discounted any claim of physical abuse of Diaz and only partially recanted after Salgado testified he physically abused Diaz. He had not even interviewed Salgado at the time he initially formed his opinion. (TH Vol. V 939). He later interviewed Salgado but did nothing to verify Salgado's statements, despite Salgado having all the traits of a sociopath. (TH Vol. V 970-997). He believed that Diaz and Salgado were in a mutually

combative relationship, even though Diaz was a child and Salgado was an adult. He admitted his theory of mutual combatants was based on the relationship of two adults, however. (TH Vol. V 971-974).

Following a transfer hearing Diaz was transferred to adult court. (JR 1366, R 1).

Diaz then moved the Court for a new trial under SDCL § 15-6-59(b) as the State, after the transfer hearing, disclosed Dutton had been accused of sexually harassing a student of his, prior to the transfer hearing. (JR 1379, App 38). The motion for a new trial on the transfer issue was denied. (R 516; App 39, 42).

A jury trial commenced on December 29, 2014, and concluded on January 15, 2015.

The evidence presented to the Jury was that Diaz and Salgado had relocated to South Dakota and residing with Steffani Molina. (JT Vol. V 730-731). On November 10, 2009, Diaz called Guevara and asked for a ride to Walmart. Guevara picked up Diaz and Salgado from the Molina residence and drove to Walmart where they purchased lighter fluid. (JT Vol. V 725, 733). Upon leaving Walmart, Guevara drove Diaz and Salgado to rural Hanson County to a place they referred to as the "haunt house". (JT Vol. V 729, 735). It was while parked near the haunt house when Guevara was attacked and eventually killed. Once the attack ended, Guevara was placed in the truck of her vehicle which Salgado then drove into a grove of trees. (JT Vol. V 759). The lighter fluid was purchased at Walmart was poured in and on the vehicle which was then started on fire. (JT Vol. V 758). Salgado and Diaz left on foot and returned to the Molina residence. (JT Vol. V 766-767).



Salgado testified at the juvenile hearing on the motion to transfer Diaz to adult court. (TH Vol. II 236-433, Vol. III 439-560). He also testified at the jury trial in the adult proceedings. (JT Vol. V, p 680-800). His testimony at the jury trial was remarkably different than his testimony at the transfer hearing; Salgado's initial version of the offense, in which he placed all blame on Diaz, was relied on by Dutton and Hansen in their opinions that Diaz should be transferred to adult court, which was not what he testified to at trial.

Salgado testified at trial that he "murdered Jasmine Guevara". (JT Vol. V 681) that Diaz had nothing to do with it." (JT Vol. V 688). He testified that, despite testifying at the juvenile transfer hearing otherwise, Diaz did not tell him she had a plan to kill Guevara. (JT Vol. V 714-715). He also testified there was never a plan to kill Guevara as it was just his idea. (JT Vol. V 716, 726). Salgado went on to testify that Diaz didn't want to do any of this [referring to the murder], that he wanted to stab Guevara and that he told her to [stab Guevara]. (JT Vol. V 720). She never did anything. (JT Vol. V 723). He did indicated Diaz called Guevara to have her take them to Walmart but at the time she didn't have any knowledge of his intent to kill Guevara. (JT Vol. V 731, 733). Salgado testified that after the murder of Guevara, Diaz was extremely frightened and that she didn't want to leave the car. (JT Vol. V 765). He told her he would killer her too if she did. *Id.* Salgado testified he threatened to kill Diaz on the night of the murder. (JT Vol. V 766).

Salgado was an uncooperative witness during his testimony at trial and was ultimately declared unavailable due to his refusal to answer questions. ((JT Vol. V 789).

Thereafter, the parties read a number of excerpts from his testimony at the juvenile transfer hearing into the record. (JT Vol. V 790-800).

At trial, two experts testified that Diaz was a victim of physical and sexual abuse by Salgado. Dr. Bean diagnosed Diaz as being physically abused as a child (JT. Vol. and sexually abused as a child. (JT. Vol. VIII 1193, 1199-1204). Dr. Craig Rypma, a clinical and forensic psychologist, testified as a child abuse expert witness on behalf of Diaz (JT Vol. VIII 1264-1314). His diagnoses of Diaz included adjustment disorder with disturbance of conduct and emotion as she there was a “notable change in her behavior” subsequent to beginning her relationship with Salgado. JT Vol. VIII 1275-1276). He also diagnosed her as a victim of physical and sexual abuse as a child. (JT Vol. VIII 1277). Rypma testified as to the characteristics and symptoms of a battered woman which include: fear on the part of the victim; inability to place blame for the battering on their batterer; self-blame in that it the violence is as a result of their own behavior; and that violence is omnipresent. (JT Vol. VIII 1278-1280). He also testified to the concept of the “cycle of abuse” which is characterized by instances and repeated instances of domestic assault. (JT Vol. VIII 1281-1282). Battered women are typically individuals who are isolated emotionally and are dependent on their batterer and cut off from their family support network. (JT Vol. VIII 1282-1283). These individuals will stay in these abusive relationships due to fear of violent consequences to either themselves or their family members in the event they try to end the relationship and because they have no way of supporting themselves. (JT Vol. VIII 1283).

Rypma testified that, following his examinations and evaluations of Diaz, he found characteristics that fit all of these characteristics of a battered woman. (JT Vol.

VIII 1283-1286). He also noted the elements of the cycle of abuse were present in the relationship between Diaz and Salgado. (JT Vol. VIII 1286-1287).

Richard Valdemar testified as an expert with specialized knowledge of gangs and gang activities. (JT Vol. VIII 1239). Salgado was clearly a member of the Sureño 13 gang which is an affiliate of the Mexican Mafia. (JT Vol. VIII 1245, 1252). In the Hispanic gang community, females are subservient to males and it is a very macho culture. (JT. Vol VIII 1246). It is not uncommon for a female or a minor to take the blame for something that a gang member does because by doing so they may prevent a gang member from being confined or prosecuted. (JT Vol. VIII 1247). It is also common for a gang member to place blame on a minor as a minor would typically be subject to lesser penalties. *Id.* The Hispanic gang culture are a “knife culture” as they commonly use knives when attacking people. (JT Vol. VIII 1248). Furthermore, Valdemar testified that the method used to try to cover up the murder of Guevara by burning the car and disposing of evidence indicated the crime was committed by a person of criminal sophistication. (JT Vol. VIII 1249).

At the conclusion of the jury trial, the jury returned its verdict of guilty. As previously set out, Dr. Bean opined that Diaz’s mental maturity is much less that one would expect from a 15 year old. Diaz had no criminal record and her only involvement in the court system prior to this was as a result of a CHINS proceeding in Indiana because of Salgado’s sexual abuse of her. She had already been incarcerated for five years at the time of trial (25% of her life). At sentencing, Sarah Drennan of Reclaiming Youth International, who had been familiar with Diaz since she was initially incarcerated, testified that Diaz had matured, was remorseful, had changed in the way she had made

decisions, that she had grown academically, that she had mentored other youths, and had cut her hair three times for Locks of Love. Bill Webb, the primary GED instructor in Minnehaha County, described Diaz as “a remarkable student” who had obtained her GED while incarcerated. Jeffrey LeMair, a case worker at the Minnehaha County Juvenile Detention Center, who had also overseen Diaz’s development over the three years that she was incarcerated there, maintained he was confident of her rehabilitation.

At the time of the offense, Diaz was 15 years old and had no prior criminal record. Her life expectancy at age 15 was 68.7 years (JR Diaz Exhibit U). At sentencing, she was 20 years old and had been incarcerated since her arrest. Her life expectancy at sentencing was 63.7 years. On March 27, 2015, Diaz was sentenced to serve eighty years in the South Dakota Women’s prison for murder, with a concurrent sentence of fifty years in the South Dakota Women’s prison for aggravated kidnapping.

## **ARGUMENTS**

### **1. The Trial Court Abused Its Discretion in Ordering Diaz be Tried in Adult Court.**

The trial court ruled that this matter should be transferred from juvenile to adult court.

This is not a case where there was a rebuttable presumption this matter should be tried in adult court (see *State v. Krebs*, 2006 SD 43.) Since Diaz was 15 at the time of the alleged offense, this matter was commenced in juvenile court. The State filed a petition to have the matter transferred to adult court pursuant to SDCL §26-11-4. This Court has stated that a juvenile transfer hearing, "is a "critically important" action determining vitally important statutory rights of the juvenile[.]' "*In re L.V.A.*, 248 N.W.2d 864, 867

(S.D.1977).

SDCL §26-11-4 provides, in pertinent part:

[T]he circuit court may, in its discretion, in any case of a delinquent child, after transfer hearing, permit such child to be proceeded against in accordance with the laws that may be in force in this state governing the commission of crimes, petty offenses or violation of municipal ordinances. In such cases the petition filed under chapter 26-8 shall be dismissed. The hearing shall be conducted as provided by this section.

At the transfer hearing, the court shall consider only whether it would be contrary to the best interest of the child or of the public to retain jurisdiction over the child.

The following factors may be considered by the court in determining whether a child should be transferred:

- (1) The seriousness of the alleged offense to the community and whether protection of the community requires waiver;
- (2) Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner;
- (3) Whether the alleged offense was against persons or property with greater weight being given to offenses against persons;
- (4) The prosecutive merit of the complaint. The state shall not be required to establish probable cause to show prosecutive merit;
- (5) The desirability of trial and disposition of the entire offense in one proceeding when the child's associates in the alleged offense are adults;
- (6) The record and previous history of the juvenile;
- (7) The prospect for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile, if he is found to have committed the alleged offense, by the use of procedures, services and facilities currently available to the juvenile court.

SDCL §26-11-4.

Neither the interests of the child nor the interests of the State are controlling

considerations. *State v. Jensen*, 1998 S.D. 52, ¶ 21, and the trial court is not required to consider both of these interests. *Id.* “[T]here must be substantial evidence in the record to support the juvenile court’s finding that it would be contrary to the best interests of the child OR of the public to retain jurisdiction over the child.” *State v. Harris*, 494 N.W.2d 691, 624 (SD 1993). These factors are not intended to create a rigid or cumbersome procedure to be followed by the trial court in all cases,” they serve as guidance. *Jensen*, *supra*, at ¶ 22.

Therefore, the decision to transfer is within the discretion of the court. See *State v. Rios*, 499 N.W.2d 906, 907 (S.D.1993) (citing *Harris*, 494 N.W.2d at 624) (“[I]t is within the discretion of the trial court to determine whether to transfer juvenile proceedings to adult court.”). “An abuse of discretion ‘refers to a discretion exercised to an end or purpose not justified by and clearly against, reason and evidence.’” *Flying Horse*, 455 N.W.2d at 608 (quoting *State v. Bartlett*, 411 N.W.2d 411, 413 (S.D.1987)).

Diaz was barely 15 years old at the time of the alleged offense. She was a happy, joyful little girl when residing in Mexico, and in the US prior to becoming involved with Salgado. She was doing well in school (TH Vol IV 661-662; 723; 747; Defendant’s Exhibit E1). Diaz was not a member of a gang (TH Vol III 491-493).

Salgado was 19 when he met Diaz through her brothers. (TH Vol II 242; Vol IV 662-663). Diaz was 13 when she met Salgado. (TH Vol IV 722; 849). Salgado started a romantic relationship with Diaz shortly after they met. (TH Vol II 242; Vol IV 850). Diaz was a 13 year old virgin at the time Salgado started having sexual intercourse with her. (TH Vol II 248-249; Vol III 510; 515-516). Salgado was verbally, physically and sexually abusive to Diaz during their relationship. Salgado admitted to being physically

abusive to Diaz on numerous occasions. (TH Vol II 256). Salgado would provide Diaz with alcohol, marijuana and cocaine. After the relationship started Diaz began skipping school to be with Salgado during which times they would consume alcohol and marijuana. (TH Vol II 298; Vol III 514; Vol IV 665-666, Defendant's Exhibit E1). In January 2009, at the age of 14, Diaz learned she was pregnant with Salgado's baby. (TH Vol II 250; Vol III 518; Vol IV 668-669; Defendant's Exhibit Z). Diaz's attendance at school and her grades began to decline when she became pregnant and her behavior became more difficult. (TH Vol IV 752-768).

Following the discovery of Diaz's pregnancy, Indiana Child Services became involved through a CHINS action and informed Salgado he was not to have contact with Diaz. Salgado disregarded these instructions and continued to see Diaz. (TH Vol II 267-268; Vol IV 673). On one occasion, after it was discovered that Diaz was pregnant, and during a time when Salgado was verbally and physically abusing her, Diaz indicated that she wanted to die and that she wanted to kill herself. (TH Vol III 528-529). Salgado then encouraged Diaz to commit suicide and accompanied her home to watch her attempt suicide. (TH Vol III 528-529). When Diaz indicated she could not go through with harming herself, Salgado cut her wrist deeply with a razor blade and left her to die. (TH Vol III 529-530). Diaz was committed to a mental health hospital as a result of the incident. (TH Vol II 265). Diaz gave birth to a baby girl on July 8, 2009, when she was 14. (TH Vol II 279; Vol III 497; Vol IV 674-675; JR Exhibit Y).

Diaz and Salgado traveled to South Dakota, where Diaz was completely dependent on Salgado as she had no money, no papers to get a job, and no way to get home. (TH Vol III 538-540; Vol IV 741).

Diaz had no prior experience in the criminal system. She had only been involved in CHINS actions in Indiana as a result of Salgado's attentions.

The trial court did weigh the factors listed in SDCL §26-11-4. According to the various mental professionals evaluating Diaz, she presented only a "conduct disorder" diagnosis, which is not uncommon for juveniles. Both Reclaiming Youth International (RYI) (who had spent the most time evaluating and interviewing Diaz) and Dr. Bean testified that Diaz could be rehabilitated within the juvenile justice system. Although the South Dakota Women's prison does not have separate areas to house juveniles apart from adults, and the South Dakota Department of Corrections express function is to provide public safety while serving youth that are committed to the DOC, the trial court found that Diaz would receive appropriate services in either juvenile facilities or in SDWP. (JR 1298).

The trial court found transfer of Diaz's case to adult court was warranted, however, its finding was based largely on three interrelated premises, all of which proved fallacious. First, the trial court relied somewhat on the testimony of Salgado (Dr. Dutton and Dr. Hansen, who testified for the state, also relied on Salgado's statements to law enforcement and his testimony at the transfer hearing). As noted elsewhere in this brief, Salgado then testified at trial that Diaz had no part in the offense. The trial court relied on Dutton's testimony and conclusions<sup>1</sup>, and Dr. Hansen relied on Dutton's opinions, in part, in reaching his conclusions. After the transfer hearing, the State disclosed to the

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<sup>1</sup>The trial court relied, remarkably, in part, on Dr. Dutton's assertion that Diaz had suffered no trauma from her sexual abuse, because her statutory rape was consensual, and not forcible rape, which Diaz argues is in contravention to South Dakota law.



defense that Dr. Dutton had been found to have engaged in sexual harassment himself,<sup>2</sup> a factor which not only could have influenced the trial court but also the opinion of Hansen. Because he was discredited, Dr. Dutton did not further testify at the jury trial. Certainly, Salgado's changed testimony could have affected not only the opinions of Dutton but also Hansen. The trial court discounted the expert testimony of Dr. Bean and RYI, and relied on the opinions of Dutton and Hansen.<sup>3</sup> This is important because Hansen's initial opinion was that Diaz's needs would be adequately served in juvenile court. However, after reviewing Salgado's statement to law enforcement and Dutton's report, Hansen changed his opinion. Because Hansen changed his opinion after reviewing Salgado's statements (which changed) and Dutton's report (then discredited), the trial court's decision should be further reviewed.

Further, the trial court based its decision, in part, upon a finding that if Diaz were convicted of murder, she would receive a mandatory life sentence. That, as this Court is aware, is not now the law of the land. *Miller v. Alabama*, 132 S.Ct. 2455 (2012). Based on all of the foregoing, it is clear the trial court abused its discretion in transferring this matter to adult court, and this Court should remand this matter to juvenile court for further consideration.

**2. Trial court abused its discretion in denying a new hearing on the transfer of Diaz to adult Court despite newly discovered evidence following the hearing regarding the State's expert witness Dr. Donald Dutton.**

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<sup>2</sup>The defense does not imply the State had this information prior to the transfer hearing, although the harassment finding occurred prior to the transfer hearing.

<sup>3</sup>It should be noted that, although Diaz was subject to intensive psychological testing, neither Hansen nor Dutton conducted the same kind of testing to verify the mental status of Salgado, and whether he was suffering from any mental delusion.

Following the entry of the Order transferring the case to adult court, the State informed defense counsel that Dutton, the State's expert, which the court relied heavily upon in forming its decision to transfer Diaz to adult court, had been found to have sexually harassed a student of his. As a result, Diaz moved the Court to vacate the order transferring Diaz to adult court pursuant to SDCL §15-6-59(b) on the grounds of surprise and newly discovered evidence. (JR 1379, App 38).

The newly discovered evidence was in the form of a 1999 decision of the British Columbia Human Rights Tribunal which found that Dutton, while a professor at the University of British Columbia, sexually harassed a female student. (See App 39). Dutton testified as to the male-female relationships and the nature of the sexual/dominant relationship between Diaz and Salgado. (TH Vol V 949-950) More specifically, he testified that he found no evidence Diaz was either traumatized or controlled by Salgado at the time of the murder which led the Court to find that Diaz' involvement in the murder was willful and not coerced. (TH Vol V 496, 950-954, 966). Dutton also criticized the report of the defense expert, RYI, by testifying their opinion was based on the stereotype that abusive relationships are primarily toward the female which he testified had been proven as untrue. (TH Vol 960-966). He also testified he could not opine that Diaz was sexually abused by Salgado despite her being 14 when 19 year old Salgado impregnated her. (TH Vol V 979, 985).

The test is whether "there is a reasonable probability that the newly discovered evidence would probably produce a different result at a new trial." *Bridgewater Quality Meats, LLC v. Heim*, 2007 SD 233 (Citing *State v. Steele*, 510 N.W.2d 661, 664 (S.D.1994) Diaz contends the Court's denial of a new trial upon finding that Dutton's

testimony was credible despite his unbelievable testimony and the bias evidenced by newly discovered evidence clearly supports a finding the Court abused its discretion warranting a new hearing on the transfer issue.

**3. The trial court held, pursuant to this Court's previous decision, that the statements made by Diaz to law enforcement were admissible.**

This Court, in *State of SD v. Maricela Nicolasa Diaz*, 2014 SD 27, held the statements of Diaz to law enforcement were admissible in evidence at trial. Diaz renewed her objection to the introduction of that evidence at trial. Now, Diaz asks the court to reconsider its decision reached in that case, on three grounds. In *Miller v. Alabama*, 132 S.Ct. 2455 (2012), the United States Supreme Court ruled that mandatory life sentences without parole for juveniles constituted cruel and unusual punishment. In *Montgomery v. Louisiana*, S.Ct. Docket No. 14-280, decided on January 25, 2016, the US Supreme Court reiterated that a mandatory sentence of life without parole for juveniles is unconstitutional and applied that doctrine retroactively to juveniles sentenced prior to the holding in *Miller v. Alabama*. Although the decision in *Montgomery*, supra, does not directly affect this Court's prior ruling, it does illustrate the United States Supreme Court's commitment to the principle that juveniles are different than adults, and Diaz asks this Court to reconsider its previous ruling in light of that continuing concern over the rights of juveniles in criminal court. Secondly, the suppression of Diaz's statements to law enforcement was further highlighted in importance because Salgado, the other participant charged in this crime, testified it was all his idea, and that Diaz didn't do anything, contrary to his prior statements to law enforcement and prior testimony. ("There was never a plan. It was just me." (JT Vol V 716). "She didn't want to do any of

this...I told her to.” (JT Vol V 720). “She never did anything.” (JT Vol V 723) (*see* JT Vol V 698 et. seq.)). Finally, an additional factor not presented to this Court in its previous consideration of the facts, which emerged at the jury trial, was that, when questioning Diaz, law enforcement placed a can of lighter fluid on the table in front of her (the victim was placed in the trunk of the car and the car was lit on fire with lighter fluid), an abominable practice with a 15 year old defendant, clearly designed to intimidate her. (JT Vol VI 850). The purpose of Miranda warnings is to “safeguard the privilege against self-incrimination during incommunicado interrogation of individuals in a police-dominated atmosphere.” This Court has stated “these concerns are only heightened when juveniles are interrogated.” *State v. Horse*, 2002 S.D. 47, ¶ 12. Certainly, the nature of a police-dominated atmosphere was overwhelming to this 15 year old when a can of lighter fluid was placed before her during her interrogation. Our Court has directed trial courts, in situations in which counsel was not present (as in this case), when an admission was obtained, to take great care to assure the juvenile’s confession was voluntary “in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright, or despair.” *State v. Caffrey*, 332 N.W.2d 269, 272 (S.D. 1983) (quoting *Re Gault*, 387 U.S. 1, (1967)). How could this 15 year old not be frightened when a can of lighter fluid is placed in front of her by law enforcement? Diaz asks this Court to reconsider its prior decision.

**4. Trial Court failed to adequately instruct the jury with a full and correct statement of the law applicable to the effects of physical and sexual abuse on a juvenile’s perception of imminent fear.**

This case deals with a juvenile defendant who was physically and sexually abused by an adult.<sup>1</sup> Appellant's asserted the affirmative defense of duress of a minor, however, argue that the "reasonable person" standard as set out in the duress instruction did not offer an explanation of the heightened sense of imminent danger to be felt by an abused minor. Therefore, the Court failed to instruct the jury on Appellant's defense theory.

While trial courts have broad discretion in instructing the jury, it is the court's duty to instruct the jury on the law applicable to the case. *State v. Walton*, 600 N.W.2d 524, 528 (S.D. 1999). Furthermore, upon proper request, defendants are entitled to instructions on their defense theories if evidence supports them. *Id.* Jury instructions are adequate when, "considered as a whole, they give the full and correct statement of the law applicable to the case." *Id.* quoting *State v. Rhines*, 1996 SD 55, ¶ 111.

The Court instructed the jury on duress which states:

A person may not be convicted of a crime based upon conduct engaged in because of the use or threatened use of unlawful force upon the defendant or upon another person which force or threatened use thereof a *reasonable person* in his situation would have been unable to resist (Emphasis Added).

Instruction 44 (App 43); SD Crim Pattern Jury Instruction 2-3-1. The Court also instructed the jury in regard to the Battered Woman's Syndrome in Jury Instruction 45, which states:

If you find that the defendant was suffering from Battered Woman Syndrome, you may then use that evidence in evaluating any claim that the defendant feared imminent serious bodily injury if she did not carry out the criminal acts for which she is charged. (App 43).

However, the trial court erred when it failed to instruct the jury as to the heightened sense of imminent danger felt by children who suffer from physical and mental abuse, thereby,

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<sup>1</sup> Dr. Bean testified that she suffered from physical abuse as a child (JT. Vol. VIII, p 1193, 1199-1203 and from sexual abuse as a child (1193, 1203-1204).

denying her of being instructed on her defense.

The defense that a juvenile would suffer from a heightened sense of imminent fear of her abuser is supported by the shift in the nation's moral tolerance when it comes to dealing with juvenile offenders in adult court. See *State v. Springer*, 2014 S.D. 80, ¶ 6; (Discussing *Roper v. Simmons*, 125 S.Ct. 1183 (2005); *Graham v. Florida*, 130 S.Ct. 2011(2010); and *Miller v. Alabama*, 132 S.Ct. 2455 (2012)). Juveniles are more vulnerable to negative influences and outside pressures than adults because of their “lack of maturity and an underdeveloped sense of responsibility” *Id.* at ¶ 9.

As Appellant was just 15 at the time of the offense, and was victim of physical and sexual abuse, she requested instructions of a heightened sense of imminent danger. Defendant’s Proposed Instructions 99 & 100 (which were rejected by the Court as Defendant’s proposed Instructions B & A, respectively), state as follows:

Proposed Instruction 99 (rejected B)

You may consider whether or not the defendant was battered or abused by Alexander Salgado. If you decide that the defendant was battered or abused by Alexander Salgado, you may consider that in determining reasonableness of the defendant’s perception of the immediacy of the harm in light of the defendant’s experience of abuse.

Proposed Instruction 100 (rejected A)

The imminent danger element may be satisfied when a child believes she is in imminent danger of death or serious bodily harm even though her abuser is not physically abusing her at the time. This is because an abused child can experience a heightened sense of imminent danger arising from perpetual physical and mental abuse.

(R 1847, 2536; App 45, 48, 49).

To reverse a trial court's refusal to give an instruction, the defendant must be unfairly prejudiced by the refusal and show the jury probably would have returned a

different verdict if requested instructions had been given. *Walton*, 600 N.W.2d 524, 528.

The fundamental differences in ability to perceive danger between an adult and a child is not clear to the general public as it is only recently gaining acceptance in the highest courts in our country. See *Springer*, 2014 S.D. 80. Without a specific instruction bringing attention to the fact that a child perceives danger is a different light than an adult, the defendant was unfairly prejudiced in her inability argue that the law supports a different standard for a child than for an adult. Had the jury been instructed as requested the jury would likely have given more consideration to the defense of duress and would probably have returned a not-guilty verdict.

**5. The Trial Court Abused its Discretion in Sentencing Diaz to 80 Years, with No Time Suspended.**

The trial court imposed a sentence of 80 years, with no time suspended, with a concurrent sentence of 50 years. (R 2613, App 62).

Diaz argues the trial court abused its discretion in sentencing her to 80 years, with no time suspended, along with a concurrent sentence of 50 years.

Generally, a sentence within the statutory maximum is reviewed by this Court under the abuse of discretion standard. *State v. McKinney*, 2005 SD 73, ¶ 10, (McKinney I). "We give 'great deference to sentencing decisions made by trial courts.'" *State v. Garber*, 2004 SD 2, 13, 674 N.W.2d 320, 323; *State v. Blair*, 2006 SD 75.

In this case, however, as previously set forth, In this case, Diaz was just 15 at the time of the murder. She was the mother of an infant who was born just four months earlier when Diaz was 14. She was a runaway, accompanied by Salagado, who was the subject of a protection order to keep him away from Diaz. Diaz was a victim of physical

and sexual abuse by Salgado, who was the father of her child, an adult, and gang member. According to expert psychiatric testimony, she was much less mature than an average 15 year old. She had already been incarcerated for five years. Defense witnesses at sentencing testified she had matured, she was remorseful and she had grown academically as she obtained her GED. Jeff LeMair, a case worker at the Minnehaha County Juvenile Detention Center maintained he was confident of her rehabilitation.

This Court has stated that “We encourage, and have often required, the consideration of the potential for rehabilitation. See *State v. Hinger*, 1999 SD 91, ¶¶ 24-25; *Bult v. Leapley*, 507 N.W.2d 325 (S.D.1993); *McKinney*, 2005 SD 73.

Nonetheless, the trial court stated “So, there’s room for healing in your life, for growth, for even finding the strength to move forward and make a productive life. You are a very young person. But that healing and that growth, that reformation, for the most part, is going to need to take place behind the walls of an institution.” The court then sentenced Diaz to 80 years in prison. What prospect is there for this 15 year old (now 20) defendant to rehabilitate herself with such a sentence? What prospect for life, for employment, for paying restitution will be available to her? This is a defendant who expressed remorse, who matured, who improved herself while incarcerated, who people believed had changed, and the sentence of the court gives no hope to her to continue that process outside of a penal facility. The trial court abused its discretion in handing down such a sentence.

#### **6. The Sentenced Imposed on Diaz Violated the Principle of Proportionality of Sentencing.**

The trial court imposed a sentence of 80 years for first degree murder, and a 50



year sentence for aggravated kidnapping, to run concurrently, with no time suspended. (R 2613, App 62).

Diaz argues her sentence is grossly disproportionate to the conduct for which she was convicted and, therefore, constitutes cruel and unusual punishment under the Eighth Amendment to the United States Constitution. The Eighth Amendment, which was extended to the states through the Fourteenth Amendment, prohibits the infliction of "cruel and unusual punishments[.]" U.S. Const. Amend. VIII. When the question presented is whether a challenged sentence is cruel and unusual in violation of the Eighth Amendment, the Court conducts a de novo review. See *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424 (2001).

This court's standard of review for such challenges is as follows: "[To] assess a challenge to proportionality we first determine whether the sentence appears grossly disproportionate. To accomplish this, we consider the conduct involved, and any relevant past conduct, with utmost deference to the Legislature and the sentencing court." *State v. Pugh*, 2002 SD 16. If the sentence does not appear grossly disproportionate, no further review is necessary. *Hinger*, 1999 SD 91. If the sentence does appear grossly disproportionate, an intra- and inter-jurisdictional analysis shall be conducted. *Id.* We also consider "the gravity of the offense and the harshness of the penalty;" *Solem v. Helm*, 463 U.S. 277 (1983); and other relevant factors, such as the effect this type of offense has on society. *Hinger*, 1999 SD 91, 16.

The circumstances of the offense are examined to determine the gravity of the offense. However, in addition, in judging the gravity of an offense, a court may also consider certain past conduct of the defendant. Additionally, if the sentence is enhanced

because of the offender's recidivism, then the gravity of his past offenses also contributes to the gravity of the present offense. See *Ewing v. California*, 538 U.S. 11, 28, (2003). The reason for this is the State's interest is not merely punishing the offense of conviction, or the "triggering" offense: "It is in addition the interest in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law." *Id.* at 29.

In *State v. Pasek*, 2004 SD 132, Pasek had received a life sentence. He challenged the proportionality of his sentence. The court noted his plan for rehabilitation was to figure out how to get out of prison, and he had escaped while in custody for a bank robbery, stole two cars, announced his intent to rob another bank, and then did. He also conceded that he "got off on the rush" of committing crimes. His criminal record reflected that that in 1997, at the age of 18, he was convicted of felony shoplifting. In 1998, he violated probation and his sentence was reimposed. In 2002, he was convicted of seven offenses. Then, while in jail in Wyoming as a federal prisoner, he escaped and fled to Montana, where he robbed another bank. Pasek then escaped from jail in Montana, stole a vehicle, and committed the South Dakota offenses. Finally, there was evidence he considered an even more dangerous escape attempt before his South Dakota trial. This court held his life sentence was not disproportionate.

Compare also *State v. Chipps*, 2016 SD 8, where the State filed a habitual information, and Chipps admitted to two prior felony convictions. This Court held his criminal history was relevant to an Eighth Amendment analysis of the sentence. Criminal history is relevant to an Eighth Amendment analysis of this sentence, noting a state is

justified in punishing a recidivist more severely than it punishes a first offender.

"We have previously stated that in order to impose a sentence that is proportionate to the particulars of the offense and the offender, the circuit court must "acquire a thorough acquaintance with the character and history of the [person] before it." *State v. Bonner*, 1998 SD 30. The Hinger/Bonner factors are the appropriate factors for the circuit court to consider when determining sentencing, which include the defendant's "general moral character, mentality, habits, social environment, tendencies, age, aversion or inclination to commit crime, life, family, occupation, and previous criminal record." *Id.* Additionally, the trial court considers the rehabilitation prospects of the particular defendant. Finally, the impact of the crime on the victim or victims, including "evidence relating to personal characteristics of the victim and the emotional impact of the crime," also may be examined and considered by the trial court. *Rhines*, 1996 SD 55; *State v. Blair*, 2006 SD 75.

If the penalty imposed appears to be grossly disproportionate to the gravity of the offense, then we will compare the sentence to those "imposed on other criminals in the same jurisdiction" as well as those "imposed for commission of the same crime in other jurisdictions." *Helm*, 463 U.S. at 291.

In this case, Diaz was just fifteen at the time of the murder. She was the mother of an infant born just four months earlier when Diaz was 14. She was a runaway, accompanied by Salgado, who was the subject of a protection order to keep him away from Diaz. Diaz was a victim of physical and sexual abuse by Salgado, who was the father of her child, an adult, and gang member.

Dr. Bean opined that Diaz's mental maturity is much less than one would expect

from a 15 year old in our society. Diaz had no criminal record and her only involvement in the court system prior to this was as a result of a CHINS proceeding in Indiana because of Salgado's sexual abuse of her. She had already been incarcerated for five years at the time of trial (25% of her life). At sentencing, Sarah Drennan of RYI, who had been familiar with Diaz since she was initially incarcerated, testified Diaz had matured, was remorseful, had changed in the way she had made decisions, she had grown academically, she had mentored other youths, and had cut her hair three times for Locks of Love. Bill Webb, the primary GED instructor in Minnehaha County, described Diaz as "a remarkable student" who had obtained her GED while incarcerated. Jeffrey LeMair, a case worker at the Minnehaha County Juvenile Detention Center, who had also overseen Diaz's development over the three years she was incarcerated there, maintained that he was confident of her rehabilitation.

The defense provided to the trial court a sentencing memorandum which contained numerous examples of sentences for adults convicted of either murder, vehicular homicide, or manslaughter. (App 50). Only one of the defendants received a comparable sentence to Diaz of 80 years, however, 40 years were suspended. The other sentences ranged from 51 months incarceration to 30 years incarceration (all suspended) to 60 years. None of the defendants were as young as Diaz, and, presumably, none could have had a cleaner criminal history than Diaz, who had none at all. It is also noteworthy that two teenagers that were sentenced (as contained in the Defendant's sentencing memorandum), both of whom were older than Diaz, received sentences of 48 years (21 suspended) and 25 years (15 suspended; sentence to run concurrently with a 10 year

sentence for aggravated assault concerning a victim other than the person killed).<sup>2</sup> In spite of this information, and in spite of Diaz's age at the time of the offense, her lack of criminal record, and the obvious overbearing, negative influence by Salgado, the court disregarded all of that information, and stated "the public needs to know that a horrendous crime needs to be met with a very serious punishment, and imposed the 80 year sentence (and fifty year concurrent sentence), with no amount of that time suspended. It was obvious from that statement that the court completely based the sentence handed down on the nature of the offense, and did not give any weight to the defendant's age, circumstances, family background or prospect for rehabilitation.

Certainly an 80 year sentence given to a 15 year old girl with no prior criminal history is grossly disproportionate on its face; further, that with an examination of the lack of criminal history, the poor family life of the defendant, the status of the defendant as a physical and sexual abuse victim (which resulted in her involvement in this crime) and the prospect for her rehabilitation, the trial court did in fact impose a disproportionate sentence which violates the 8th Amendment's prohibition against cruel and unusual punishment, and for that reason, this matter should be remanded for a further sentencing hearing.

**7. THE TRIAL COURT ERRED BY SENTENCING DIAZ TO A DE FACTO LIFE SENTENCE.**

The trial court sentenced Diaz to 80 years in prison, without any suspended

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<sup>2</sup> On January 5, 2016, Michael R. Martinez received a 20 year sentence for committing the death of his girlfriend (manslaughter), who he had stabbed 14 times. *State of SD v. Martinez* (Minnehaha County, Case No. 49CRI14-004251).

portion of the prison term (and a concurrent sentence of 50 years in prison). (R 2613).

Diaz argues that the 80 year prison sentence imposed by the court is a de facto life sentence and violates the spirit, if not the law, established by the United States Supreme Court in *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010); *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005); *Miller v. Alabama*, 132 S.Ct. 2455 (2012), and *Montgomery v. Louisiana*, S.Ct. Docket No. 14-280, decided on January 25, 2016, and the Eighth Amendment to the United States, and is therefore an illegal sentence.

Diaz acknowledges that this Court addressed this issue in *Springer*, 2014 S.D. 80,. Diaz argues, that her case is different legally and factually from *Springer, supra*.

This Court, in *Springer*, correctly noted that “The United States Supreme Court has held that juveniles are categorically “less deserving of the most severe punishments.” *Miller, supra*, (quoting *Graham*, 560 U.S. at 68, 130 S.Ct. at 2026). The United States Supreme Court does not view the Eighth Amendment “through a historical prism[,]”, but rather the Court interprets the Eighth Amendment through the “evolving standards of decency that mark the progress of a maturing society[,]” *id.* (quoting *Estelle v. Gamble*, 429 U.S. 97, 102. ... *Roper* held that the Eighth and Fourteenth Amendments forbid the imposition of the death penalty on offenders under the age of 18 at the time of their crime. 543 U.S. at 568, 125 S.Ct. at 1194. *Graham* held that the Eighth and Fourteenth Amendments forbid the imposition of life imprisonment without parole on juveniles for nonhomicide crimes. 560 U.S. at 75, 130 S.Ct. at 2030. *Miller* merged the two cases and held that the Eighth and Fourteenth Amendments forbid sentencing schemes that mandate life in prison without parole for juvenile offenders; see also *State of South Dakota v.*

*Berget*, 2013 S.D. 1, ¶ 90, ... *Roper*, *Graham*, and *Miller* evidence “a shift in the nation's moral tolerance” when it comes to sentencing juvenile offenders in adult court. *Berget*, 2013 S.D. 1, ¶ 90. While the United States Supreme Court did not altogether prohibit life sentences without parole in *Miller*, states may no longer impose mandatory life sentences on juvenile homicide offenders. .... Courts around the country must now individually sentence juvenile offenders facing the harshest penalties and consider certain mitigating factors. ... Juvenile offenders warrant special consideration because “children have a lack of maturity and an underdeveloped sense of responsibility ..., are more vulnerable to negative influences and outside pressures ..., [and] a child's character is not as well formed as an adult's [.]” *Id.*, quoting *Roper*, 543 U.S. at 569–70, 125 S.Ct. at 1183) (internal quotation marks omitted). The United States Supreme Court rested the *Roper*, *Graham*, and *Miller* decisions on science and social science, quoting neurological, psychological, and sociological studies pertaining to children, their culpability, and their decision-making processes.” *Id.* This Court noted in 2013, the South Dakota Legislature passed legislation in an effort to comply with *Roper*, *Graham*, and *Miller*. 2013 S.D. Sess. Laws ch. 105, §§ 1–5. Specifically, the Legislature changed SDCL §22–6–1 to authorize, but not mandate, a life sentence without parole for a juvenile offender if he was convicted of a Class A or B felony. *Id.* The Legislature also amended SDCL §23A–27–1 to allow a juvenile to “present any information in mitigation of punishment” at their sentencing hearings. The factors the trial court should consider are: (1) the chronological age of the juvenile, (2) the juvenile's immaturity, impetuosity, irresponsibility, and recklessness, (3) family and home environment, (4) incompetency in dealing with law enforcement and the adult criminal justice system, (5) the circumstances of the crime,

and, most importantly, (6) the possibility for rehabilitation. (*Springer*, 2014 SD 80).

In spite of the young age of Diaz, her immaturity, her circumstances as a sexual abuse victim and physical abuse victim, the testimony at trial of Alexander Salgado that it was his idea and she didn't have anything to do with it, and her excellent chances for rehabilitation, the trial court sentenced her to 80 years in prison.

In *Springer, supra* there was no evidence of Springer's life expectancy. However, Diaz introduced during these proceedings evidence that her remaining life expectancy at the age of 15 was 68.7 years (Diaz Exhibit U, Transfer Hearing). At the time of sentencing, then, her remaining life expectancy would have been 63.7 years. The imposition of the 80 year prison sentence, then, constituted a de facto life sentence and is violative of the Eighth Amendment. See *People v. Caballero*, 282 P.3d 291 (2012); *State v. Ragland*, 836 N.W.2d 107 (Iowa, 2013); *Gridine v. State of Florida*, No. SC12-1223, (2015); *Henry v. State of Florida*, No. SC 12-578 (2015).

*Graham* requires that juvenile offenders have a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." 560 U.S. at 75, 130 S.Ct. at 2030. The United States Supreme Court concluded in *Graham*, "A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term." 560 U.S. at 82, 130 S.Ct. at 2034 (emphasis added). Thus, a meaningful opportunity is a realistic one. *Id.* The opportunity afforded this young girl was not a meaningful one.

At the time that *Springer* was decided by this Court, it was not determined whether *Roper*, *Graham*, or *Miller*, applied retroactively. However, that has now been determined that those decisions do apply retroactively, and those decisions reaffirm the



United States Supreme Court continuing commitment to the principle that young offenders can be saved and not just locked up for life. *Montgomery v. Louisiana*, S.Ct. Docket No. 14-280, January 25, 2016. The trial court imposed what amounts to a de facto life sentence on this young girl, which is violate of the spirit and letter of *Roper*, *Graham*, and *Miller*, supra, and this matter should be remanded to the trial court for a reconsideration of sentencing.

### **CONCLUSION**

Wherefore, Appellant Maricela Diaz respectfully requests that this Court for the relief requested herein.

Respectfully submitted this 22<sup>nd</sup> day of February, 2016.



---

Doug Dailey  
Chris A. Nipe

**Attorneys for Appellant  
Maricela Diaz**

## CERTIFICATE OF COMPLIANCE

Pursuant to SDCL §15-26A-66, counsel for the Appellee does hereby submit the following:

The foregoing brief is 30 pages in length. It is typed in proportionally spaced typeface in Times New Roman 12 point. The word processor used to prepare this brief indicates that there are a total of 9,992 words in the body of the brief.



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Doug Dailey

## CERTIFICATE OF MAILING AND PROOF OF SERVICE

Doug Dailey states that he is an attorney for Appellant, Maricela Nicolasa Diaz, and that on the 23<sup>rd</sup> day of February, 2016, he caused to be sent a true and correct copy of the Brief of Appellant and this Certificate of Mailing and Proof of Service in the above-entitled matter by electronic service, to:

Marty Jackley  
SD Attorney General  
[atgservice@state.sd.us](mailto:atgservice@state.sd.us)

Paul Swedlund  
Deputy Attorney General  
[paul.swedlund@state.sd.us](mailto:paul.swedlund@state.sd.us)

and that he mailed the original and two copies of the Brief of Appellant and this Certificate of Mailing and Proof of Service to the Clerk of the Supreme Court of South Dakota, 500 East Capitol, Pierre, SD 57501-5070, by depositing the original and two copies of the same in the United State's Mail, postage prepaid first class mail, on the 23<sup>rd</sup> day of February, 2016.



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Doug Dailey

**APPENDIX**

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STATE OF SOUTH DAKOTA and recorded in Vol. \_\_\_\_\_ IN CIRCUIT COURT  
 of \_\_\_\_\_ Page \_\_\_\_\_ JUVENILE DIVISION  
 COUNTY OF HANSON ) JUL. 27 2011 FIRST JUDICIAL CIRCUIT

RAMONA SCHROEDER Clerk of Circuit Court JUV. #09-05

THE PEOPLE OF THE STATE OF )  
 SOUTH DAKOTA, IN THE INTEREST )  
 OF MARICELA DIAZ, MINOR CHILD ) ORDER GRANTING MOTION TO  
 AND CONCERNING IRMA GUITEREZ ) TRANSFER TO ADULT COURT  
 PLACENCIA, (Mother) )  
 Respondents. )

The above matter having come before this Court on January 31 through February 4, 2011, and the Court having heard the evidence, read the file and considered the arguments of the parties, and the Court having made and entered its Findings of Fact and Conclusions of Law, it is hereby

ORDERED, ADJUDGED AND DECREED that Maricela Diaz is transferred to be proceeded against as an adult in accordance with the laws in force in this state governing the commission of crimes.

IT IS FURTHER ORDERED that the juvenile petition is dismissed.

Dated this 27<sup>th</sup> day of July, 2011.

BY THE COURT:

*Sean M. O'Brien*  
 Sean M. O'Brien  
 Circuit Court Judge

ATTEST:  
*Ramona Schroeder*  
 Clerk of Courts

SEAL

STATE OF SOUTH DAKOTA  
 First Judicial Circuit Court  
 I hereby certify that the foregoing instrument is a true and correct copy of the original as the same appears on file in my office and the same is still in full force and effect.

JUL. 27 2011

Ramona Schroeder  
 Hanson County Clerk of Courts  
*Ramona Schroeder*

STATE OF SOUTH DAKOTA ) IN CIRCUIT COURT  
 ) SS. JUVENILE DIVISION  
 COUNTY OF HANSON ) FIRST JUDICIAL CIRCUIT

Filed in Circuit Court  
 THE PEOPLE OF THE STATE OF SOUTH DAKOTA and recorded in Vol. \_\_\_\_\_ Page \_\_\_\_\_ JUV. #09-05

IN THE INTEREST OF MARICELA DIAZ, MINOR  
 CHILD AND CONCERNED IRMA GUTIEREZ-PLACENCIA (Mother)  
 Respondents.

JUL 27 2011

FINDINGS OF FACT AND  
 CONCLUSIONS OF LAW  
 TRANSFER HEARING  
 ORDERED BY THE COURT

MONA SCHROEDER  
 Clerk of Circuit Court

A transfer hearing in the above-captioned matter was held in the Hanson County Courthouse from January 31, 2011 through February 4, 2011. The State appeared through Hanson County State's Attorney James R. Davies, Deputy Attorney General Robert Mayer, and Assistant Attorney General Douglas P. Barnett. Respondent M.D., was represented by Douglas M. Dailey and Chris A. Nipe. Irma Gutierrez-Placencia, mother of M.D., and a party to this action was also present.

Interpreter Carmen Callies Garcia was present during all testimony to translate testimony from English to Spanish. Interpreter Garcia stated that M.D. understood the translation. Interpreter Garcia's translations were also for the benefit of M.D.'s mother.

Based on the evidence presented at the transfer hearing (as well as the evidence stipulated to by the parties and this Court's prior determinations), the Court enters the following Finding of Facts and Conclusions of Law:

FINDINGS OF FACT

**FACTUAL BACKGROUND**

1. The parties stipulated to a number of evidentiary matters for the purposes of this Transfer Hearing and the Court hereby takes judicial notice and incorporates the same by reference. Exh. 361.
2. The findings and conclusions contained in the previous memorandum opinions regarding M.D.'s Motion to Suppress and the Daubert hearing are incorporated by reference. In addition, the parties have stipulated that judicial notice may be taken of the transcripts, testimony and certain exhibits admitted in the suppression hearings and the Daubert hearing. On the basis of this

stipulation, judicial notice is proper and is taken pursuant to SDCL ch. 19-10.

3. The Court's Memorandum Decision dated June 15, 2011 is hereby incorporated by reference in these Findings of Fact and Conclusions of Law.
4. M.D. was born in Mexico on September 10, 1994. She was 15 years and two months old on November 10, 2009, the date of the alleged offenses. She lived in Mexico until her family came to the United States illegally when M.D. was eleven years old. M.D. resided in Fort Wayne, Indiana.
5. Alexander Salgado was friends with M.D.'s brothers in Fort Wayne. He first met M.D. when she was thirteen years old. Salgado was nineteen years old at that time. He testified that he did not know how old M.D. was. According to Salgado, the first conversation between the two was in either August or September of 2008 when M.D. called Salgado to tell him he left his school identification card at her house. After Salgado picked up the card, M.D. called him again and told him to come back to the house. When he returned, M.D. told him that she liked him. Salgado testified that their relationship started shortly after that. Salgado also testified that M.D. told him she was sixteen years old.
6. Salgado testified that M.D.'s brothers were involved in the Latin Kings gang and that he was a member of the Sureño 13 gang. Salgado testified that M.D. liked the fact that he was in a gang. Carolyn Bookmeyer was M.D.'s teacher in her English as a Second Language program in Ft. Wayne, Indiana. Ms. Bookmeyer testified that M.D. was caught putting gang graffiti in an art project for school.
7. M.D.'s family eventually discovered the couple's relationship and was initially upset. M.D.'s mother [Irma] told M.D. and Salgado that she was upset that they hid the relationship from her and that it would be up to M.D.'s father to decide whether the two could stay together. Salgado testified that the two families then met with each other, which Salgado said is a Mexican tradition. At the family meeting, Salgado spoke to M.D.'s father on the phone and her father blessed the relationship. At the time of the family meeting, Salgado was nineteen and M.D. was fourteen. Salgado testified that their sexual relationship started shortly before this family meeting. Although Salgado claims that the families blessed his relationship with M.D., M.D. told representatives of Reclaiming Youth

International (RYI) that her mother repeatedly and consistently discouraged and attempted to forbid the relationship with Salgado.<sup>1</sup>

8. In late 2008, M.D. discovered she was pregnant. She told Salgado about the pregnancy on New Year's Eve. Salgado testified that he was happy about the pregnancy and was excited to be a father. M.D. told Dr. Hansen that she and Salgado planned the pregnancy because they were in love and wanted a family.<sup>2</sup> Dr. Hansen stated in his report that M.D. listed her justification for the pregnancy as being forbidden by her mother to have a relationship with Salgado and the fact that the age difference between M.D. and Salgado was legally considered statutory rape.
  
9. About a week and a half after M.D. told Salgado she was pregnant, Salgado ended their relationship after M.D. told him she had cheated on him with an older man. Salgado testified that while the two were arguing, M.D. threatened to commit suicide numerous times. She even jumped into the middle of the street in front of an oncoming vehicle. It was also during this argument that Salgado first hit M.D. He testified that he slapped her and pulled her hair. The two continued to argue as they walked to M.D.'s house. Salgado testified that upon entering the home, M.D. went to the bathroom and broke a razor to get the blades. Salgado testified that M.D. asked for his help in cutting one of her wrists and he obliged. After cutting one of M.D.'s wrists, Salgado left. On his way home he stopped at a store to call her. Salgado stated that M.D. declined his offer to call the cops but asked him to forgive her, which he refused to do. According to Salgado, M.D. then stated "I'm going to die then." Salgado told her to "go for it" and that it was her choice and not his. Later that day, M.D.'s family brought M.D. to Salgado's house to show him her wrists and to tell him that they were going to the hospital. Salgado testified that her family was not mad at him. Salgado and his family also went to the hospital. While at the hospital, M.D. again asked Salgado for forgiveness and for Salgado to "take her back." Salgado testified that he agreed to take her back. M.D. was then transferred to a mental health hospital where she stayed for approximately two weeks.

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<sup>1</sup> Reclaiming Youth International (RYI) is a team of three professionals whose mission is to rehabilitate troubled youth. They evaluated M.D. at her counsels' request. RYI made a recommendation to the court about whether M.D.'s interests would be best served in the juvenile or adult system. They compiled their findings in what they term the Developmental Audit.

<sup>2</sup> Dr. Hansen is a psychiatrist at the Human Services Center in Yankton, SD. He was asked by the State to evaluate M.D. and, in doing so, he generated a report that contains certain psychiatric findings. Dr. Hansen met with M.D. on five occasions for a total of ten hours.

10. M.D.'s version of the events that led up to this wrist-cutting incident differs from Salgado's version. M.D. told RYI that Salgado had accused M.D. of cheating on him and told her she should prove her love to him by cutting her wrists. According to M.D., Salgado also required M.D. to cut her wrists to prove that the baby was his. M.D. told Dr. Dutton, however, that Salgado told her to cut her wrists as a sign that she was willing to die for love.<sup>3</sup> M.D. told RYI that Salgado wanted her to do it immediately, but she could not follow through and said she would do it the next day. The following day, Salgado insisted that she follow through. According to RYI, M.D. said that Salgado hit and berated M.D. while they were walking from his house to M.D.'s and he insisted that she cut her wrists. Once they were in M.D.'s home, M.D. told Salgado that she loved him but she could not do it. M.D. told Salgado that he would have to do it. M.D. told RYI that Salgado then cut both her wrists and left her bleeding at the house. M.D. told Dr. Bean, however, that after she started bleeding, Salgado called emergency services and she was taken to the hospital. M.D. told the emergency room physicians that she was the one who cut her wrists. When asked why she told that to the doctors, M.D. told RYI it was because Salgado told her to. M.D. told Dr. Dutton, however, that she said that because she loved Salgado and she did not want to get him in trouble.
11. While Salgado and M.D. have different versions of what precipitated M.D.'s wrists being cut in January of 2009, Salgado admits that he cut one of M.D.'s wrists.
12. Sometime after M.D.'s alleged suicide attempt, Indiana Child Services became aware of her pregnancy. M.D. lied to the investigator about Salgado's age and also refused to talk to law enforcement about her relationship with him. Once Child Services discovered Salgado's age, Salgado, his mother, and M.D.'s family met with a case worker at Child Services who informed both families that Salgado and M.D. should not be allowed to have contact with each other. After the meeting, Salgado said that he and M.D. continued to see each other with Irma's blessing. Irma testified that she gave the couple permission to see each other because of the baby. At some point, however, Irma stopped allowing them to see each other. Salgado testified that M.D. was upset about this and said she wanted to kill her mother. When Salgado asked her how she would do it, M.D. replied that she would put a bag over her head and hit her with a twenty pound weight.

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<sup>3</sup> Dr. Dutton is a psychologist who specializes in domestic violence. He evaluated M.D. and reviewed RYI's Developmental Audit at the State's request.



13. Later, in April of 2009, after the meeting with Indiana Child Services, Irma allowed Salgado to move into M.D.'s family's home. Salgado had been kicked out of his mother's home because he did not have a job. Irma testified that she allowed Salgado to move in because she felt bad for him. Salgado said the reason Irma allowed him to move in was because she wanted him to provide financial support. Irma testified that eventually she told Salgado he needed to return to his mother's home because he had a job. The couple's baby, Maria, was born in early July 2009. Shortly after Maria's birth, Salgado moved back into his mother's home.
14. The timeframe is unclear, but prior to the closing of M.D.'s Indiana Child Services case, Salgado said the two families had another meeting during which M.D.'s father told Salgado that whenever the "legal stuff" was cleared M.D. could move in with Salgado. On July 28, 2009, M.D. and Maria moved into Salgado's mother's home. Irma testified that she did not agree with this, but allowed it nonetheless because Salgado's mother insisted that Salgado and M.D. should be together.
15. While M.D. was living in Salgado's family's home, there was another incident in which she cut her wrists. Salgado testified that he had been working long hours and decided to take a day off. M.D. asked him to go to a doctor's appointment with her. Salgado refused, claiming he was too tired to attend. M.D. became upset and Salgado left. When he returned, cop cars were parked outside his home. A neighbor told him that M.D. had tried to kill herself. After M.D. returned from the hospital, she told Salgado that she cut her wrists because she thought he was cheating on her. M.D. told Dr. Hansen that the reason she cut her wrists the second time was because she was bored and wanted people to think she was crazy. Later in the interview, M.D. told Dr. Hansen that she cut herself because Salgado did not attend a doctor's appointment with her and she was afraid he had left her. M.D. told RYI, however, that she drank some beer on that day and was feeling depressed. After this incident, M.D. was treated at a local hospital but was not admitted to a mental health facility. Shortly after leaving the hospital, M.D. and Maria moved back into Irma's home. According to Salgado, this move was against M.D.'s wishes.
16. In August or September of 2009, Salgado quit his job and was kicked out of his mother's home again. Salgado testified that M.D. would skip school to spend time with him. During these times they would often smoke marijuana or drink alcohol. Around September or October of 2009, Salgado and M.D. started discussing Salgado's plan to move to another state to find a job. Salgado's plan was for

M.D. to stay in Indiana with Maria and he would work in Pennsylvania and send her money. However, Salgado testified that M.D. threatened that if he left her she was going to kill herself and he would never see Maria again. Salgado then agreed that she could move with him.

17. Salgado testified that the nature of the job in Pennsylvania would not be conducive to M.D. being there so they decided to move to Arizona. However, Salgado's friend's mother, Monica Molina, suggested they move to Mitchell, South Dakota. Monica said that her daughter, Steffany Molina, was living in Mitchell and she could help them find jobs.
18. In order to obtain enough money for two bus tickets, Salgado said he and M.D. broke into Salgado's mother's home and stole various items. On October 13 or 14 of 2009, Salgado and M.D., using fake I.D.s, purchased bus tickets to travel to Mitchell. Maria was left behind at Irma's house.
19. Again, M.D.'s version of the events that led up to them leaving Indiana differs from Salgado's version. M.D. told RYI that the day before she and Salgado left Indiana, Salgado beat her and she was fearful that her family or teachers would see her bruises. RYI states in its report that Salgado then "convinced" M.D. to leave Indiana with him. M.D. said the plan was to go to Mexico, get married, and then return for Maria. Instead, according to RYI, Salgado led them to Mitchell. The version M.D. told Dr. Hansen differs from that which was relayed by RYI in their report. M.D. told Dr. Hansen that Salgado beat her for cheating on him and they then went to Monica's home. M.D. also told Dr. Hansen that Monica suggested they move to Mitchell to stay with Steffany. Dr. Bean noted in his report that M.D. told him she left Indiana because she feared that Salgado would go to jail because of the bruises he left on her. Dr. Bean also noted that M.D. implied she was coerced into leaving with Salgado. During M.D.'s interview at the Mitchell Police Department, however, she told Officers Reinesch and Soto that she voluntarily left Indiana with Salgado.
20. According to Salgado, M.D. acted jealous of other females from the time they arrived in South Dakota. Steffany met Salgado and M.D. at the bus station in Mitchell. Because they had not met Steffany prior to coming to South Dakota, Salgado testified that he was looking around the crowd at the station to find someone who might be her. Salgado testified that when he looked at someone who he thought might be Steffany, M.D. became angry with him and said "What the fuck you looking at?"

21. They eventually found Steffany. She took them to her home where she had arranged a welcoming party. That was the first time M.D. and Salgado met Jasmine Guevara. When Steffany introduced them to Jasmine, Jasmine took Salgado's hand and welcomed him and then she did the same with M.D. Salgado testified that M.D. appeared jealous after they met Jasmine.
22. Later that night, while Salgado and M.D. were in a bedroom, Jasmine and her boyfriend [Ivan] came through the room and into the bathroom that was attached to the room. While Jasmine and Ivan were together in the bathroom, M.D. tried to cover Salgado's eyes and wanted him to switch places with her so he could not see Jasmine.
23. Salgado and M.D.'s short stay in Mitchell consisted mainly of job hunting and partying. Throughout this time, M.D.'s jealousy over Jasmine steadily increased. Salgado testified that he never visited with Jasmine alone because he was not trying to "flirt with her or be with her." In her interview with Dr. Dutton, M.D. said that Jasmine was nice but that Jasmine and Salgado would flirt, laugh together, and talk to each other a lot. On a couple occasions M.D. became extremely upset when Salgado was prompted by either Steffany or Jasmine to dance with Jasmine in order to teach M.D. how to dance or to make Jasmine's boyfriend jealous.
24. The first time M.D. threatened Jasmine occurred a few days before Jasmine's murder. M.D., Salgado, Jasmine, and Steffany were drinking with Ivan at his house. Salgado testified that he and M.D. happened to be facing Ivan when Jasmine bent over Ivan and started kissing him. M.D. accused Salgado of "checking out" Jasmine and M.D. became very angry. M.D. started punching and nudging Salgado. After Salgado told M.D. to calm down, M.D. stood up and started yelling at Salgado. When Jasmine asked what was going on, M.D. called her a bitch and said she was going to "fight this bitch." After M.D. and Jasmine left the room, Steffany told Salgado that M.D. was trying to fight Jasmine. Eventually, the fight de-escalated and they all returned to Steffany's home in Mitchell.
25. The next morning, the day before Jasmine's murder, M.D. claimed she did not remember any of the events from the previous night. Later that day, Salgado decided to pawn his laptop because he and M.D. did not have any money. M.D. wanted to come with him but Salgado said he did not want them to be seen together because of their age difference. M.D. told Dr. Hansen that this made her mad so she left the house after Salgado left. When Salgado arrived at the

pawn shop, the employee would not buy the computer because Salgado did not have a state identification. Salgado testified that after he left the pawn shop he was approached by an "Asian girl with gold teeth" who said her brother might be interested in buying the computer. While Salgado was talking with this girl, he heard M.D. scream his name. He testified that M.D. then dropped to her knees and started crying. M.D. told Dr. Hansen that she saw Salgado with Jasmine and called out Salgado's name. M.D. indicated to Dr. Hansen that she was really mad at Salgado. M.D. believed the girl was Jasmine and accused Salgado of lying when he tried to assure M.D. that it was not Jasmine. Salgado testified that M.D. said she wanted to "kick that bitch ass." M.D. tried to chase her but did not catch her. Salgado and M.D. walked back to Steffany's. About ten minutes after they arrived, Jasmine stopped over to check on them. Salgado testified that this was a frequent occurrence and was not unusual. M.D. would not talk to Jasmine for the ten minutes that Jasmine was at the house. After Jasmine left, M.D. told Salgado that she was going to kill Jasmine. Salgado said that he did not believe M.D. and teased her about her threat. Salgado testified that he did not believe that M.D. was serious about her threat because she had previously threatened to fight Jasmine but had not done so.

26. Salgado testified that on the day of Jasmine's murder, M.D. again told him that she was going to kill Jasmine. Salgado testified that the first plan was to kill Jasmine and then throw her body on the railroad tracks near Steffany's house. After determining that too many people would see Jasmine's body, Salgado testified that M.D. then suggested that they throw Jasmine over a bridge and into some water. Again, that plan was abandoned because there were too many houses near the bridge. Salgado testified that during this conversation M.D. "looked kind of calm," she was "mad but calm." According to Salgado, throughout that day M.D. made various comments about killing Jasmine and getting rid of her.
27. Later that day, M.D. and Salgado were watching a television show called A Thousand Ways to Die. The particular episode they watched discussed how Mexican drug cartels dispose of bodies by putting them in the trunk of a vehicle and lighting it on fire. After that show, M.D. told Salgado that they were going to kill Jasmine this way. M.D. told Salgado that they would grab knives from Steffany's house and then call Jasmine to give them a ride to the store where they would buy lighter fluid. Salgado testified that M.D. was "really relaxed" during these discussions. Salgado agreed to help M.D., stating that if he did not, M.D. would be really mad and would think that he was "sticking up" for Jasmine.

28. M.D. claims the plan to kill Jasmine originated with Salgado. M.D. told Dr. Dutton that Salgado agreed to kill Jasmine to prove she meant nothing to Salgado and M.D. went along with it because she was mad. She told RYI that Salgado said he would kill Jasmine to demonstrate his love for M.D. M.D. told Dr. Dutton that Salgado's original plan was to throw Jasmine under a train, but after the couple visited the railroad yard they decided the train moved too slowly. M.D. then told Dr. Dutton that it was Salgado's idea to stab Jasmine. She told RYI that Salgado obtained the knives from Steffany's house and thought of the plan to ask Jasmine for a ride to Wal-Mart and then to a house in the country. M.D. told law enforcement, however, that she was the one who grabbed the knives from a container near a window in Steffany's kitchen.
29. Salgado could not remember whether he or M.D. obtained the knives but Salgado carried them in his jacket when they went to Wal-Mart. Salgado testified that M.D. grabbed two pairs of gloves and a garbage bag and then called Jasmine and asked her to take them to the store. M.D. admitted to law enforcement and to Dr. Bean that she was the one who called Jasmine. When they entered Jasmine's car, they told her they wanted to get lighter fluid for a cookout. At some point on the drive to or after they arrived at Wal-Mart, Salgado slid one of the knives on the vehicle's floorboard to M.D.
30. Upon entering Wal-Mart, Salgado used the restroom and the girls visited with a friend of Jasmine's. Salgado then overheard Jasmine and M.D. trying to describe what they called "charcoal fluid" to a Wal-Mart employee. Salgado told the employee it was lighter fluid and the employee directed Salgado to where he could find it. At the checkout Jasmine offered to buy the lighter fluid because she knew M.D. and Salgado did not have money. Salgado testified that he and M.D. "were happy because Jasmine pay for [sic] her own money."
31. Salgado testified that after they returned to Jasmine's car, M.D. suggested they go to the "Haunted House," which is a home located in rural Hanson County. M.D. told RYI, however, that it was Salgado's idea to go to the "Haunted House."
32. When they arrived at the "Haunted House," Salgado told Jasmine to get out of the car. Jasmine said she was too scared. Salgado then suggested that Jasmine and M.D. get out of the car together. Jasmine said no and she told Salgado that he would have to get out first. Salgado exited the vehicle and walked toward the house.

33. After Salgado walked around the house and stood outside for a while, he heard a scream. He started walking toward the car and heard another scream. When Salgado returned to the vehicle, he saw M.D. stab Jasmine in the stomach. He also saw them struggling with the knife. M.D. held the knife by the handle and Jasmine was trying to grab it from her by the blade. Salgado testified that Jasmine's hands were bleeding from her attempts to grab the knife by the blade. The car doors were locked and Salgado was unable to enter the vehicle. Someone unlocked the doors and Salgado got in the backseat. Salgado testified that when he got into the backseat, he did not know at that point if he was going to help Jasmine or M.D. After M.D. said "help me," Salgado held Jasmine's arms down so M.D. could stab her. Salgado testified that M.D. was "stabbing Jasmine, stabbing her up, like going really nuts on Jasmine and just kept on stabbing and stabbing and stabbing and stabbing and stabbing and stabbing her in the stomach and legs." Salgado also testified that Jasmine struggled with him "but there was nothing that she could do." During this time, Jasmine asked them why they were doing this to her and what they wanted. Eventually, M.D. stopped stabbing Jasmine because the knife blade was bent. Jasmine then tried to get out of the car, but Salgado grabbed his knife and stabbed her in the stomach and leg as M.D. pulled Jasmine back into the car. Salgado stabbed Jasmine five or six times before M.D. either grabbed his knife or he gave it to her. Salgado then pulled Jasmine's hair back as M.D. stabbed her in the neck. Jasmine's body started shaking so Salgado pushed the knife deeper into her neck, at which time Jasmine stopped moving.
34. Again, M.D.'s version differs from Salgado's. She told RYI that Salgado told her that he would exit the vehicle and then M.D. would start the murder and Salgado would finish it. She also told RYI that after Salgado exited the vehicle she could not go through with the murder. When M.D. saw Salgado returning to the vehicle, M.D. made a pretend stabbing motion so as not to anger Salgado. She then told RYI that Salgado entered the backseat of the vehicle and finished the murder. M.D. told Dr. Dutton, however, that after Salgado exited the vehicle she tried to stab Jasmine in the back of her head but Jasmine grabbed the knife. M.D. then told Dr. Dutton that Salgado saw this, entered the vehicle and finished the murder. M.D. told law enforcement that she thought she had stabbed Jasmine when she attempted to stab her in the head but when she pulled the knife away it did not have blood on it. She also told law enforcement that even though Salgado had his own knife, he grabbed the one in M.D.'s hand and started stabbing Jasmine. After what M.D. said was approximately two stabs, M.D. tried to grab the knife from Salgado to get him to stop stabbing Jasmine.

M.D. said the knife handle broke off and Salgado finished the murder with his knife.

35. Salgado testified that the remainder of the crime was carried out as follows. Salgado gave the lighter fluid to M.D. who started pouring it on Jasmine. When they saw a car on the road, they decided to put Jasmine in the trunk. With the knife still in her neck, M.D. and Salgado carried Jasmine to the trunk of the vehicle. Salgado said that he carried Jasmine's upper body and M.D. carried her by the legs. Salgado drove the car into some trees where it got stuck. Both M.D. and Salgado exited the vehicle and M.D. poured lighter fluid in the car. Salgado testified that M.D. was "wasting" the lighter fluid so he grabbed it from her and poured it over the exterior of the car. M.D. lit the car on fire but it quickly went out. Salgado attempted to light it but his glove caught on fire. He dropped his burning glove on the ground and the car went up in flames.
36. M.D.'s version of the remainder of the crime differs from Salgado's. M.D. told RYI that Salgado, alone, moved Jasmine's body to the trunk. She said that she stood "frozen" at a distance and could not always see what was happening. M.D. also told RYI that that she did not handle the lighter fluid and it was Salgado who poured it on Jasmine and the car and lit the fire. M.D. said that after they walked away from the burning car, Salgado threatened to kill her if she did not take the blame. M.D. told Dr. Dutton, however, that they drove the vehicle into a field to burn it. She said that Salgado opened the trunk where "they" had put Jasmine and discovered that she was still alive. M.D. said that Salgado punched and kicked Jasmine while she was in the trunk and closed it again. M.D. also told Dr. Dutton that Salgado put a cloth in the gas tank and started the car on fire. M.D. told law enforcement, however, that Salgado put the lighter fluid on Jasmine and started the fire with a lighter. She also said that she could not really see what he was doing because she was walking away.
37. After the car was on fire, Salgado and M.D. started walking back toward Mitchell. They had taken Jasmine's car keys, cell phone, and iPod. When Jasmine's phone started ringing Salgado threw it in some water. M.D. also threw her gloves in the ditch next to the road. When they arrived back in Mitchell, she threw her sweatshirt on the railroad tracks. They arrived back at Steffany's house between 10:00 p.m. and 11:00 p.m. They changed clothes and put bleach on their hands to remove the blood stains. Salgado and M.D. went into the living room where Steffany was watching television. Steffany stated that she was worried about Jasmine because no one could find her. Salgado testified that they talked with Steffany for a

while and, during this time, M.D. was laughing and joking around with Steffany.

38. Salgado testified that he did not sleep the entire night, but that M.D. appeared to sleep through the night. He had to wake her up the next morning when the cops arrived.<sup>4</sup> M.D. told Dr. Hansen that during this encounter with law enforcement she felt "normal" but Salgado seemed very nervous. Salgado testified that after the cops left, M.D. made breakfast for Salgado and "she was really happy" and "pretending like nothing happened."
39. Even after the murder, M.D.'s jealousy had not subsided. Later that day, Salgado told M.D. that he was going to pawn his rosary. M.D. said she wanted to come with him but Salgado said he did not want her to go. M.D. started crying. She put on her jacket and waited by the door. Salgado told her he did not feel good and just wanted to clear his head. While he was out, Salgado called M.D. and told her to meet him at the pawn shop with the laptop computer. While he was waiting for her, Salgado found either a debit card or a credit card on the ground. When M.D. arrived he showed her the card and said they should use it. M.D. looked at the card and accused Salgado of cheating on her, saying that he met up with a girl who gave him the card.
40. While M.D. and Salgado were walking back to Steffany's house, they discussed the events of the prior evening. Salgado told M.D. that he was scared and nervous. He testified that M.D. said "I hope that - that bitch is really cook [sic]. Otherwise we're fucked." When they returned to Steffany's, they found her crying. She told them that messages on Facebook and MySpace said that Jasmine was found dead in her car. Salgado testified that Steffany was crying really hard so he told M.D. to hug her, which she did. Salgado then went over to Steffany and hugged her as well. Salgado testified that M.D. was mad at Salgado for hugging Steffany. They spent the rest of that evening watching television. Salgado testified that he did not sleep well that night either because he was really nervous.
41. The next day, Salgado called Complete Career Center to inquire about a job. They told him to go to Toshiba where he could work for the day. Around 10:00 a.m. that morning, he called M.D. and reminded her to burn their clothes. Later that day, Salgado's boss picked him up from Toshiba and took him back to the Career

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<sup>4</sup> M.D. and Salgado's interactions with law enforcement are detailed in this court's memorandum opinion regarding M.D.'s motion to suppress.



Center. Law enforcement officers were there and told him they were not with Immigration, but that they wanted to speak with him. Salgado testified he knew then that it was about his involvement in Jasmine's murder. In the mean time, officers had picked up M.D. and taken her to the police department. After they were interviewed, both M.D. and Salgado were arrested for Jasmine's murder. Since her arrest, M.D. has been held in detention at the Juvenile Detention Center (JDC) in Sioux Falls, South Dakota.

42. Salgado was charged with First Degree Murder, First Degree Murder - Felony Murder, and First Degree Arson. He pled guilty to Second Degree Murder pursuant to a plea agreement and was sentenced to serve a mandatory life sentence. Salgado's testimony at M.D.'s transfer hearing is part of his plea agreement wherein he agreed to cooperate with law enforcement officials.
43. M.D. was charged by juvenile petition with First Degree Murder, First Degree Murder - Felony Murder, and First Degree Arson. The state later moved the court to transfer M.D. to circuit (adult) court.

#### Analysis and Decision

44. The factors the court may consider in determining whether to transfer the child to adult court are:
  - (1) The seriousness of the alleged felony offense to the community and whether protection of the community requires waiver;
  - (2) Whether the alleged felony offense was committed in an aggressive, violent, premeditated, or willful manner;
  - (3) Whether the alleged felony offense was against persons or property with greater weight being given to offenses against persons;
  - (4) The prosecutive merit of the complaint. The state is not required to establish probable cause to show prosecutive merit;
  - (5) The desirability of trial and disposition of the entire felony offense in one proceeding if the child's associates in the alleged felony offense are adults;
  - (6) The record and previous history of the juvenile;
  - (7) The prospect for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile, if the juvenile is found to have committed the alleged felony offense, by the use of procedures, services, and facilities currently available to the juvenile court.

**Seriousness of the Alleged Felony Offense to the Community and Whether Protection of the Community Requires Waiver**

45. M.D. is charged by juvenile petition with: First Degree Murder (Class A Felony), First Degree Murder Felony Murder (Class A Felony), and First Degree Arson (Class 2 Felony) in the death of Jasmine Geuvara.
46. These offenses were premeditated events resulting in arson and homicide. All of these offenses are the most serious of crimes that may be committed within the community. Two of the offenses consist of Class A Felonies which carry a minimum mandatory life sentence.
47. There is substantial evidence to support these charges.
48. The murder charges are the most serious offenses with which one can be charged. They are both Class A felonies and, if convicted in adult court, M.D. would receive a mandatory life sentence.
49. The arson charge is a Class 2 felony and, if convicted in adult court, M.D. could receive up to twenty-five years imprisonment and a fine of fifty thousand dollars.

**Whether the Alleged Felony Offense was Committed in an Aggressive, Violent, Premeditated, or Willful Manner**

50. The arson and homicide were committed in an aggressive, violent, pre-meditated and willful manner. As detailed below in the "prosecutive merit" section, the evidence indicates that the victim, Jasmine Guevara, was stabbed and placed in the trunk of her car while still alive on the evening hours of November 10, 2009. The car was intentionally set on fire and Jasmine was subsequently burned alive in the car trunk resulting in her death.
51. Dr. Donald Habbe, a forensic pathologist with the Clinical Laboratories of the Black Hills, performed the autopsy on Jasmine's body.
52. The autopsy was difficult to perform because of the charred condition of the body.
53. Jasmine's body was burned so badly that Dr. Habbe was unable to determine gender based on an external examination.

54. Jasmine's hair, scalp, eyes, nose and mouth were burned away. Her arms and legs were largely burned away.
55. There was a black, smoky-type material in Jasmine's airways. This material was present in her airways as the result of her breathing in smoky air, which indicates that she was alive during the fire.
56. Jasmine's cause of death was smoke inhalation.
57. Jasmine had a carbon monoxide level of seventy-five percent saturation, as compared to a non-smoking individual whose carbon monoxide saturation would be zero.
58. With saturation of just twenty to thirty percent from carbon monoxide inhalation, via smoke like in this case, is considered the cause of death.
59. There was also an area of possible defect in the front of Jasmine's neck but, due to the extensive charring, sharp force trauma could not be conclusively determined.
60. Despite conflicting testimony as to who initiated the plan to kill Jasmine, it is undisputed that there was a premeditated plan. M.D. admitted to law enforcement that she grabbed the knives from the kitchen. M.D. knew the purpose for purchasing the lighter fluid was to use it to ignite a fire to burn Jasmine. These specific facts as well as those facts detailed above demonstrate the level of premeditation involved in this murder.
61. M.D. argued that she did not act willfully because of the alleged abuse and control she suffered at the hands of Salgado. To support her contention, M.D. presented the testimony of Mark Freado of Reclaiming Youth International (RYI).
62. RYI's Developmental Audit Team consisted of three individuals, Mark Freado, Dr. Steve Van Bockern, and Sarah Drennan.
63. The RYI team testified at the *Daubert* hearing and their credentials are outlined in the court's *Daubert* opinion.
64. Together, the three individuals generated a report in connection with M.D.'s case. They term the report the "Developmental Audit."
65. Freado testified at the transfer hearing that from the outset of Salgado and M.D.'s relationship, Salgado "groomed" M.D. and

engaged her in an inappropriate relationship which eventually turned sexual and then controlling.

66. The basis of RYI's belief that Salgado controlled M.D. was that Salgado told M.D. where she could go and with whom as well as M.D.'s claim that he forced her to have sex with him.
67. M.D. told RYI that the physical abuse began in the fall of 2008 and increased in frequency and severity throughout their relationship.
68. RYI's report states that Salgado isolated M.D. from her family and friends and that isolation allowed him to control her even more.
69. RYI also states in its report that M.D. experienced "trauma" as a result of the abuse in her relationship with Salgado.
70. RYI maintains Salgado's domination, control and power over M.D. culminated in her involvement in Jasmine's murder at Salgado's direction.
71. RYI also claims that M.D.'s involvement in the murder was under duress.
72. The State offered the testimony and report of Dr. Dutton at the transfer hearing.
73. Dr. Dutton has a Ph.D. in Experimental Social Psychology and specializes in domestic violence.
74. Dr. Dutton has conducted extensive research in the field of domestic violence and has authored numerous peer reviewed, published articles that pertain to psychological issues associated with domestic violence.
75. In his report, Dr. Dutton found that Salgado and M.D.'s relationship was marked by jealousy-fueled outbursts by both M.D. and Salgado. The jealousy would then be followed by anger, violence and sex (the latter as a way of making up).
76. Based on Salgado's testimony and the statement given by Salgado's mother, M.D.'s outbursts were sometimes triggered by seemingly innocuous circumstances. For example, M.D. became upset with Salgado because she felt he was "checking out" Steffany Molina when he was trying to figure out if she was the person who was meeting them at the train station. Also, M.D. became angry when

Salgado put his arm around Steffany in an attempt to console her after she found out Jasmine was dead.

77. In law enforcement's interview with Salgado's mother, Cecilia Galindo, she stated that M.D. was very jealous. For example, if Salgado and M.D. were watching television and a girl in a bathing suit would appear on the screen, M.D. would either cover Salgado's eyes or storm off to the bedroom.
78. Furthermore, by M.D.'s own admission, she felt Salgado and Jasmine flirted with each other and she went along with the plan to kill Jasmine because she was "mad" about seeing Salgado and Jasmine together the day before Jasmine's murder.
79. With regard to the alleged physical abuse inflicted on M.D. by Salgado, Salgado readily admitted in his testimony that he became violent with M.D. on a few occasions.
80. Salgado testified that the physical violence consisted of "smacking" M.D. with an open hand and pulling her hair.
81. Salgado also testified that M.D. would fight back when he would hit her.
82. Sometimes, the physical aspect of the fight would start because M.D. would hit him.
83. Notably, when M.D. was asked by Dr. Bean whether she had ever suffered any physical abuse, M.D. responded "no."<sup>3</sup>
84. Salgado's testimony supports Dr. Dutton's finding that M.D. and Salgado's relationship was a jealousy-based, bilaterally violent relationship in which both M.D. and Salgado would become violent with each other.
85. In his research, Dr. Dutton found that nearly half of all domestically violent relationships involve bilateral violence in which the severity of the violence inflicted by both persons is equal.
86. Although M.D. told RYI that the frequency and severity of the physical abuse increased over time, she told Dr. Dutton that she

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<sup>3</sup> Dr. Bean is a psychiatrist with the Avera Behavioral Health Center. He was asked by M.D.'s counsel to evaluate M.D. and, in doing so, he generated a report that contains certain psychiatric findings. Dr. Bean met with M.D. on one occasion for a period of two hours.

was never injured during physical altercations and that the extent of any injury was that one time she suffered one bruise.

87. Dr. Dutton found that the type of domestic violence between M.D. and Salgado did not rise to a level of either injury or life-threatening. Dr. Dutton based this finding on the fact that there were no 911 calls reporting the abuse and that there were no injuries except for the one bruise and the wrist cut discussed previously. Also, M.D. made no disclosures to medical professionals or family members.
88. Dr. Dutton concluded that although Salgado was capable of intimate violence, M.D.'s predominant psychological pattern shows anger, not fear.
89. With regard to any alleged sexual abuse, it is important to note that although M.D. told RYI and Dr. Hansen that Salgado forced her to have sex with him, she told her case worker with Indiana Child Services that the sexual relationship was consensual. State's Exhibit 314, page 02638.<sup>6</sup>
90. Dr. Bean also testified that M.D. told him the sex was consensual. Additionally, when Dr. Bean asked M.D. if she had ever been sexually abused, she responded no. It is clear that M.D. was subjected to sexual abuse by the very nature of her sexual relationship with an adult male. However, based on the conflicting reports M.D. gave various individuals, this court is unable to find that Salgado forcibly raped M.D.
91. RYI claims that M.D. was traumatized by her relationship with Salgado and this trauma further contributed to Salgado's ability to control M.D.
92. Dr. Dutton, however, found no evidence that M.D. was traumatized by Salgado.
93. Dr. Bean and Dr. Hansen testified that M.D. did not exhibit any of the symptoms for Post-Traumatic Stress Disorder (PTSD), which is an anxiety disorder resulting from a traumatic event.
94. There are four criteria for a diagnosis of PTSD:

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<sup>6</sup> State's Exhibit 314 was received into evidence at the Suppression Hearing held on September 15, 2010. The parties stipulated to the court taking judicial notice of the exhibit for purposes of the transfer hearing.

- a) The first is experiencing a traumatic event in which one feared for one's life or that one could be seriously injured, and, in response to that event, one responds with intense fear, helplessness, and hopelessness.
  - b) The second criterion is re-experiencing that event through flashbacks or nightmares or increased arousal when someone discusses the subject. Increased arousal includes hypervigilance, difficulty concentrating, difficulty going to sleep at night, and having a startled response.
  - c) The third criterion is avoidance of stimuli. If a particular sight, sound, or smell reminds the person of the trauma, then the person does whatever it takes to avoid those stimuli.
  - d) The fourth criterion is a general increased arousal exhibited by the person.
95. In order to be diagnosed with PTSD, the person must meet all four criteria.
96. In his evaluation of M.D., Dr. Hansen found that she did not meet the criteria for PTSD with regard to any of the physical or sexual abuse she described. Specifically, Dr. Hansen testified that M.D. did not describe any flashbacks or increased arousal and, when she was discussing any purported physical and sexual abuse, she sat back in the chair with her hands on her head and was "rather cool, calm, and collected and did not appear distressed at all."
97. With regard to RYI's claim that Salgado controlled M.D., Dr. Dutton found that this case presents one of two scenarios, neither of which supports RYI's contention that Salgado controlled M.D. The first scenario, the one M.D. offers as a defense, is that M.D. indicated to Salgado that she was jealous about Jasmine and Salgado decided to kill Jasmine to show his affection for M.D. or to prove that Jasmine meant nothing to him. If that scenario were true, it would indicate that Salgado did not have much power in the relationship. If he did have all the power and if he was a unilaterally violent partner, as RYI claims, Dr. Dutton stated that Salgado would have disregarded M.D.'s concerns or asserted his "male privilege" to have two girlfriends. The second scenario, the State's version of the events, is that M.D. was jealous of Jasmine and initiated the plan to kill Jasmine. This second scenario is supported by Salgado's testimony where he states that he agreed to go along with the killing because he did not want M.D. to think he was "sticking up" for Jasmine.
98. In either scenario, two things stand out for Dr. Dutton: (1) The main motive to kill Jasmine was jealousy and that jealousy originated with M.D., and (2) whether Salgado cooperated with or

initiated the plan, he clearly was not in a position of power over M.D.

99. Based on Dr. Dutton and Dr. Hansen's testimony as well as M.D.'s inconsistent statements regarding Salgado's alleged abuse and control over her, the court finds that M.D. was not under Salgado's control at the time of the murder. The court finds significant evidence to support this finding in M.D.'s own admissions to law enforcement as well as her statements to the various mental health professionals. Notably, M.D. only told Dr. Bean and the RYI team that Salgado forced her to help with the murder. In her interviews with Dr. Hansen, Dr. Dutton, and law enforcement, M.D. said that the plan originated with Salgado. She did not state, however, that he forced her to assist him. Salgado's acknowledged responsibility for Jasmine's murder does not obviate the fact that M.D., at the very least, aided Salgado in the planning and was an active participant in the murder itself.
100. There is substantial evidence to find that the murder was committed in an aggressive, violent, and premeditated fashion and M.D.'s involvement was willful, not coerced nor was she under duress.

**Whether the Alleged Felony Offense was Against Persons or Property with Greater Weight being given to Offenses against Persons**

101. The alleged felonies were against both a person and property.
102. As indicated above, the victim was Jasmine Guevara, a 16 year old girl from Mitchell, South Dakota.
103. The property was a 1999 green 4 door Chevrolet Malibu which Jasmine obtained approximately two weeks before her death.

**Prosecutive Merit of the Complaint**

104. The prosecutive merit is substantial.
105. Alexander Salgado testified in detail at the transfer hearing concerning his relationship with M.D., the events that led to the plan to kill Jasmine and M.D.'s involvement in Jasmine's murder.
106. During interviews with law enforcement on November 12, 2009, M.D. confessed to there being a plan to stab and burn Jasmine and confessed to direct involvement in Jasmine's disappearance and death. These statements are consistent with the physical evidence



gathered by law enforcement, the statements of other witnesses concerning the timing and circumstances of Jasmine Guevara's disappearance and death, and the actions of M.D. and Salgado on the day in question. This evidence includes the gloves M.D. had been wearing and threw in a ditch while walking back to Mitchell as well as the sweatshirt M.D. was wearing on the night of Jasmine's murder. Blood was found on both M.D.'s gloves and her sweatshirt. That blood was tested and determined to be Jasmine's.

107. Kevin Winer is the chief criminologist for the Kansas City Police Department. He is one of sixty people in the world who is certified by the International Association of Identification as a Bloodstain Pattern Examiner. Mr. Winer generated a report and testified at the transfer hearing about the nature of the bloodstains on M.D.'s sweatshirt. Mr. Winer's report was admitted into evidence as State's Exhibit 330. The report provides a detailed description of the different types of bloodstains and explains which types are present on M.D.'s sweatshirt. Mr. Winer concluded that the person who was wearing that sweatshirt was "near to liquid blood when force was applied producing spatter stains." He further stated that spatter stains are produced when force causes liquid blood to break apart into droplets and disperses those droplets in the air. Mr. Winer also found transfer stains on the front and back sides of the sleeves. His report states that this indicates the sweatshirt was "worn during the manipulation or handling of an object with Jasmine Guevara's liquid blood on its surface."
108. Specifically, the right sleeve of M.D.'s sweatshirt had three patterns consisting of transfer stains, swipes, and wipes. The front of M.D.'s sweatshirt (Exh. 373—lab number 39) consisted of seven different stain areas, including transfer stains, spatter stains, or impact stain. The upper left sleeve had transfer stains or spatter with some wiping and swiping movements. The edge of the left sleeve of M.D.'s sweatshirt contained a transfer stain. Id. The cuff area on the back of the left sleeve represents a combination of both transfer stains and spatter stains. On the back of the left sleeve there is a combination of transfer stains and also wipe and swipe stains. Id. On the back of M.D.'s sweatshirt there were numerous areas of transfer stain.
109. Additionally, the Wal-Mart surveillance video from the night of Jasmine's murder shows Jasmine walking into and exiting the store with two individuals that Salgado identified as himself and M.D.

**Desirability of Trial and Disposition of the Entire Felony Offense in  
One Proceeding if the Child's Associates in the Alleged Felony  
Offense are Adults**

110. No joint proceeding will be held. Alexander Salgado, M.D.'s associate in the murder of Jasmine Guevara, previously pled guilty to Second Degree Murder and was sentenced to serve life in prison. Therefore, this factor does not apply.

**Record and Previous History of the Juvenile**

111. As was discussed in this court's opinion on M.D.'s motion to suppress, M.D. was the subject of two CHINS adjudications in Indiana, but was present for only one. Her second adjudication occurred after she came to South Dakota with Salgado. Additional incidents of M.D.'s involvement with the legal system that were not discussed in the suppression opinion involve M.D.'s truancy from school. M.D. informed Dr. Bean that she had been arrested and incarcerated in the Fort Wayne, Indiana, City Juvenile Detention Center on at least two occasions because she skipped school or ran away from home to be with Salgado.

112. Jeff LeMair is a case worker at the Minnehaha County Juvenile Detention Center (JDC). He considers himself an advocate for the youth. LeMair gave mitigating testimony regarding M.D. He testified that M.D. has never tried to escape from JDC. He also testified that M.D. is generally respectful to staff and that she volunteers to assist staff with projects. He also noted that M.D.'s coping skills were very limited when she arrived at JDC but they have improved.

113. Although LeMair's testimony was largely complimentary of M.D., he also testified that M.D. is not immune to losing her temper. She is proud. She'll stand her ground. While she's never thrown a fist at JDC, she's put her face in someone else's face.

114. While at JDC, M.D. inflicted two tattoos onto her hand. One was a small tattoo on her finger consisting of a six-pointed star. Such a six-pointed star has been attributed to gang activity, evil, anarchy, opposition, or anger.

115. While at JDC, M.D. was manipulative, sneaky, untrustworthy, rude, mean-spirited, disrespectful, threatening, attempting to act like a sheep but more of a wolf in personality, becoming the Alpha female, sarcastic and sassy, stating loud enough for the entire class to hear "This place is so fucking stupid."

**Prospect for Adequate Protection of the Public and the Likelihood of Reasonable Rehabilitation of the Juvenile**

116. M.D. maintains that she is amenable to rehabilitation and, without Salgado's influence, she will be able to function safely in the community. The State argues that M.D.'s psychological test results and the behaviors she has exhibited show she is not capable of reasonable rehabilitation and that the best interests of M.D. and the public require that the case be transferred to adult court.
117. If M.D.'s case remains in juvenile court and she is adjudicated a delinquent child, the court may put her on probation or place her with the Department of Corrections (DOC), the latter being more likely. In either case, M.D. will be released from the court's jurisdiction or discharged from DOC at the age of 21 at the latest.
118. Douglas Herrmann is the juvenile services director for the Department of Corrections.
119. Herrmann testified that the function of juvenile services is to provide rehabilitative and other appropriate services to ensure public safety while serving youth that are committed to the DOC. When a youth is committed to the DOC, Herrmann stated that the DOC conducts a seven-day information gathering process to assess the criminogenic needs and risks for that youth. The criminogenic needs and risks are analyzed through eight specific domains to determine whether the youth is at risk for reoffending. The domains include the offense history of the juvenile, family circumstances, substance abuse, the presence of antisocial attitudes, peer relations or the types of peers the juvenile associates with, educational achievement, the juvenile's choice of leisure and recreational activities, and personality traits such as coping abilities or whether the juvenile has a temper. The DOC then compiles this information and scores the juvenile to determine her likelihood of reoffending. With this information as well as that gathered from other assessment tools, the DOC determines the appropriate placement option for the juvenile.
120. Herrmann described the in-state placement options for female juveniles.
121. The Excel program is for lower risk youth and is a short term program with a typical stay of four to six months.

122. The Quest program is a longer program with a typical stay of six to ten months.
123. Both Quest and Excel are non-secure facilities, meaning the doors are not locked and there are no secure fences around the facilities.
124. Herrmann also described the option of placing a juvenile with a privately-run facility with which the DOC contracts. There are three levels of care available in private facilities: group care, psychiatric residential treatment facility (PRTF), and intensive residential treatment (IRT). Group care beds are non-secure. PRTF and IRT can be secure but Herrmann testified that most programs choose not to operate as a secure program. Herrmann also testified that the average duration of placement in group care is four to eight months and the average duration for PRTF is six to fourteen months. He stated that the average duration for IRT varies greatly and can be up to two years and, rarely, three or four years.
125. If M.D.'s case is transferred to adult court and she is charged with and convicted of the same offenses in her juvenile petition, then she would receive a mandatory life sentence. In RYT's report they claim that Dr. Van Bockern's discussion with Steve Allard, the warden of the South Dakota Women's Prison (SDWP), indicates M.D. would not receive adequate or appropriate care and support in the adult prison system. RYT's report states that Allard informed Dr. Van Bockern that SDWP does not have programs designed for adolescents and there is not any special counseling or academic programs designed solely for juveniles. However, Allard testified that his comments were taken out of context. When Dr. Van Bockern called Allard, Van Bockern identified himself as a professor with Augustana College and asked what programs the South Dakota Women's Prison had available for inmates under the age of eighteen. Based on this general question, Allard testified that he gave a very general answer about programs at SDWP such as chemical dependency and GED programs. Allard ended the conversation shortly after Dr. Van Bockern finally revealed that he was working for the defense of a juvenile. Had this information been reported to Allard at the onset of the conversation, Allard said he would have been able to give specific answers regarding this juvenile's specific circumstances and needs. Allard also testified that it seemed his statements to Dr. Van Bockern were restated in RYT's report so as to imply that SDWP does not have any programming for any inmate under the age of eighteen. Allard testified that the programs available to inmates at SDWP are based on need, not on the inmate's age.

126. Allard testified about various programs offered by SDWP for its inmates. Even if M.D. receives a life sentence, she may not benefit from programs that help inmates with reintroduction into the community, but she would certainly benefit from other programs. Such programs deal with life skills such as anger and stress management, health and fitness, educational programs, and mental health counseling. These programs provide opportunities for people to improve their lives whether within or without the prison walls.
127. Allard testified that SDWP provides a classic school setting designed to fill gaps in the inmate's education. SDWP's intent is to bring the inmates up to at least a high school level of education. Inmates are assessed for any special education needs and arrangements can be made to place that inmate on an individual education plan (IEP). Inmates can also continue their education and receive up to six college credits while at SDWP. SDWP also facilitates the receipt of mental health services by the inmates. Allard testified that the South Dakota Department of Human Services provides mental health professionals who assess inmates and organize individual and group treatment in several broad treatment categories. The treatment categories include anxiety, depression, bipolar, trauma, and individual counseling. SDWP also provides services for five major religious denominations; specifically, Protestant, Catholic, Native American, Mormon, and Jehovah's Witness. Assistance is also provided by the cultural activities coordinator at SDWP for inmates who practice other forms of worship. Allard also testified that the programs described in his testimony are not an exhaustive list of all SDWP programs; rather, the specific requirements of an individual inmate may result in the development of a new program.
128. RYI's report discusses in detail the reasons RYI does not think M.D.'s interest would be best served in adult court or adult prison. RYI cites a study that indicates five times as many youths in prison report sexual assaults as do youths in juvenile facilities. RYI further states that adult prison disrupts the development of adolescents and undermines the adolescent's ability for future employment, successful family life, and engaged citizenship.
129. Based on Allard's testimony with regard to the services available at SDWP as well as his testimony that SDWP would be willing to develop additional services to meet an inmate's specific needs, the court finds that M.D. would receive appropriate services in either juvenile facilities or in SDWP.
130. With regard to her prospects of rehabilitation, RYI points out various negative circumstances in M.D.'s life. These circumstances

include the absence of her father, her adjudication as a CHINS because of the condition of her mother's home, her mother's inability to keep M.D. from seeing Salgado, and M.D.'s illegal relationship with Salgado. The report also states that since M.D.'s incarceration in the juvenile detention center, she has had no incidents of aggression and, thus, she is not a threat to others. RYI also stated that M.D. has genuine remorse for not being able to stop Jasmine's murder. In addition to the above-stated circumstances, RYI also claims that M.D.'s status as an adolescent means that her developing brain lacks the full capacity for reasoning, understanding, and mature judgment. RYI maintains that these circumstances all support a finding that M.D. is amenable to rehabilitation.

131. RYI offered no testimony with regard to the prospects for adequate protection of the public if M.D. was to remain in juvenile court.
132. The court questions RYI's bias in reaching their conclusions about M.D.'s amenability to rehabilitation. Neither Mark Freado nor Dr. Van Bockern has ever recommended that a juvenile be transferred to adult court. Freado testified at the Daubert hearing that the reason for that is because of the scope of RYI's work, which is to rehabilitate youth. RYI's bias is underscored by Dr. Van Bockern's acknowledgment that he previously testified it is his personal and professional bias that no sixteen-year-old belongs in adult court and he would never testify that a sixteen-year-old should be transferred to adult court. While RYI's mission and work to attempt to rehabilitate youth is a noble venture, their admitted inability to give an unbiased recommendation as to a juvenile's ability to be rehabilitated colors their opinion that M.D. is amenable to rehabilitation. Dr. Van Bockern's acknowledgement that he would never recommend a sixteen-year-old be transferred to adult court places in doubt RYI's opinion that this sixteen-year-old in this case should not be transferred.
133. RYI's report and Freado's testimony relies for its factual foundation upon interviews with M.D., her family and friends, as well as a review of records.
134. The team stated in their testimony that they verified M.D.'s statements by checking outside sources as well as conducting veracity testing in which the team purposefully switched facts around to see if M.D. would change her story. Because M.D.'s story remained consistent throughout all of her interviews, the team believed it to be true and used her statements as the main source of their facts for the Developmental Audit.

135. Dr. Dutton specifically criticized RYI's approach in this regard. He testified that discussion in the Developmental Audit about corroboration was vague and that RYI seemed to take what M.D. told them at face value.
136. Dr. Dutton stated that the problem with this is someone in M.D.'s position is motivated to make self-serving statements and thus sufficient corroboration of her statements is vital. As highlighted in the preceding sections, while M.D. may have remained consistent with her story to RYI, her version of the events varies depending on the individual with whom she is speaking. For example, she told RYI that Salgado forced her to have sex with him from the time of their first sexual encounter. However, she told officials with Indiana Child Services and Dr. Bean that the sex was consensual. Additionally, she told Dr. Hansen that she and Salgado planned her pregnancy so they could stay together and have a family. M.D. also told RYI that Salgado convinced her to go to South Dakota and that she wanted to stay in Indiana. However, she told law enforcement that she was in South Dakota willingly. With regard to Jasmine's murder, M.D. told RYI that she stood "frozen" at a distance and did not participate in moving Jasmine's body or burning the car. She told law enforcement, however, that she did not see how Salgado started the car on fire because she had "left walking." Also, she told Dr. Dutton that Salgado opened the trunk where "they" had put Jasmine.
137. Considering RYI's admitted biases and M.D.'s inconsistent versions of the events, the court dismisses RYI's contention that M.D. has been truthful throughout this process and, therefore, she is capable of reasonable rehabilitation.
138. Since being incarcerated in November of 2009, M.D. has undergone various psychological and psychiatric evaluations.
139. Dr. Bean and Dr. Hansen evaluated M.D. for the purpose of determining whether she was fit to assist in her defense.
140. In conjunction with Dr. Bean's evaluation, he referred M.D. to Dr. Beverly Gunderson, a psychologist with Avera Behavioral Health Center.
141. Dr. Gunderson's findings were addressed by both Dr. Bean and Dr. Hansen in their reports.

142. Dr. Gunderson conducted various psychological tests and interpreted the results of those tests. In addition to finding that M.D.'s cognitive abilities and I.Q. fall in the average range, Dr. Gunderson also found that M.D. has various serious acting-out problems and neurotic clinging behaviors.
143. Dr. Gunderson determined that aggressive loss of control is apparent and M.D. has considerable problems controlling her anger.
144. M.D. tends to be oppositional, resistant, sneaky and underhanded.
145. Dr. Gunderson further found that M.D. becomes over-emotional when things do not go her way, sometimes losing control and lashing out verbally or physically.
146. M.D. can also be very dependent on adults at times and can externalize blame.
147. M.D. can be quite provocative and flirtatious and may act out sexually.
148. Dr. Gunderson also found that M.D. may display physical and emotional symptoms exhibitionistically to gain attention and support.
149. Dr. Bean and Dr. Hansen concluded that M.D. was fit to assist in her defense.
150. Both Dr. Bean and Dr. Hansen diagnosed M.D. with conduct disorder, adolescent onset-type.
151. Dr. Hansen testified that conduct disorder is a group of symptoms that pertain to violating social norms, violating rules, destruction of property, aggressiveness towards people, theft, and deceitfulness. To support this finding, Dr. Hansen testified that M.D. was truant from school, she violated her mother's rules by continuing to see Salgado and running away from home, and, according to a JDC report, M.D. exhibited threatening behavior toward peers.
152. Under the diagnostic manual used by mental health professionals (the DSM-IV), M.D. cannot be diagnosed with a personality disorder because she is under the age of eighteen.
153. However, in addition to conduct disorder, Dr. Hansen diagnosed M.D. with borderline and antisocial personality "traits."



154. With regard to borderline personality traits, Dr. Hansen reported that M.D. described an intense fear of abandonment as evidenced by cutting her wrists when Salgado did not accompany her to a doctor's appointment. Another trait M.D. described that falls under borderline is unstable interpersonal relationships characterized by idealization and devaluation or, in other words, of all good versus all bad. In that regard, M.D. described her relationship with Salgado as a "love him, hate him" relationship. M.D. also described instances of self-harm. In addition to the cutting incidents, she told Dr. Hansen that she had a bad day at JDC and impulsively cut up rags to hang herself.
155. Of the nine traits associated with borderline personality disorder, one needs to exhibit five in order to receive a diagnosis. Dr. Hansen testified that M.D. exhibited six of the nine traits. Dr. Bean disagreed with Dr. Hansen's diagnosis of borderline and antisocial traits in M.D. because of her age. Even though Dr. Hansen did not diagnose her with the actual disorder, Dr. Bean testified that she cannot be diagnosed with the traits until she reaches the age of eighteen. Regardless of Dr. Bean's disagreement with Dr. Hansen's diagnosis, Dr. Bean, in his diagnosis of conduct disorder, found similar characteristics in M.D. The court finds that Dr. Hansen's findings of M.D.'s impulsivity, intense fear of abandonment, and acts of self-harm are supported by the record.
156. Dr. Hansen also found that M.D. was not suffering from a psychotic, affective, or anxiety-related disorder that would have impaired her judgment at the time of Jasmine's murder.
157. Dr. Hansen concluded that, in his opinion, M.D. has the cognitive ability and executive functioning such that she would be competent to proceed in adult court and, further, M.D. is capable of understanding the nature and consequences of her actions and the charges against her.
158. Dr. Bean opined that the juvenile system would provide M.D. with the programs she needs in order to become rehabilitated. Dr. Bean testified that M.D. needs psychiatric care in a properly setup system that takes care of individuals with conduct disorder. With regard to the adult system, however, Dr. Bean testified that he does not know what services SDWP offers inmates. He did testify that the men's prison does not have any adolescent programs. Dr. Bean testified that the basis of his knowledge about the programs at SDWP is Dr. Van Bockern's call to Steve Allard, which the court discussed earlier.

159. Dr. Hansen's initial opinion was that M.D.'s needs would be adequately served in juvenile court. However, after reviewing Salgado's statement to law enforcement and Dr. Dutton's report, Dr. Hansen changed his opinion. After reading the report and statement, Dr. Hansen determined that the descriptions contained in those documents fit his evaluation. Based on the consistencies in his evaluation and that of Dr. Dutton's as well as Salgado's statement, Dr. Hansen found that the severity and enduring pattern of M.D.'s behaviors were much more pronounced. Based on that, Dr. Hansen testified that he has a lot of concerns about whether the juvenile system can reasonably rehabilitate M.D.
160. With regard to adequate protection of the public, Dr. Hansen testified that he is concerned that M.D. will run away if she is placed in either Quest or Excel as they are non-secure facilities. That same concern would likely be present if M.D. were placed in a non-secure, out-of-state facility.
161. The court finds that the opinions of Dr. Hansen and Dr. Dutton should be accepted over contrary opinions.
162. In addition to RYI's bias discussed above, the team admitted at the *Daubert* hearing that their primary focus was what was in M.D.'s best interests. Also at the *Daubert* hearing, Dr. Van Bockern testified that "reclaiming a youth" is synonymous with "rehabilitating a youth." He also testified that the Developmental Audit is as objective as it can be, "understanding all of us have biases." RYI came to believe that M.D. was truthful and honest through their process of validating her story. However, Dr. Van Bockern admitted at the *Daubert* hearing that the version M.D. told law enforcement seems different than what she told RYI and that he noticed inconsistencies between the version M.D. relayed to Dr. Dutton and what she told RYI.
163. RYI's reliance on their belief that M.D. was truthful affects the weight the court will give their opinion. Although the RYI team has spent more time with M.D. than any other professional throughout this process, their bias affects their ability to give an objective opinion.
164. Dr. Hansen, on the other hand, completed his fellowship in child adolescent psychiatry at the University of Kentucky. He was awarded an outstanding Child and Adolescent Psychiatry Resident Award while in his residency at the University of Kentucky.

165. Dr. Hansen testified that his opinion is unbiased and is simply his conclusion based on his forensic psychiatric evaluation of M.D. over a period of approximately ten hours.
166. Although Dr. Bean believes the juvenile system would be sufficient to rehabilitate M.D., he only spent one, two-hour session with M.D.
167. Dr. Dutton's credentials are described above. He found that RYT's Developmental Audit is essentially a forensic psychological evaluation.
168. He explained that in order to conduct such an evaluation one needs to be as neutral as possible and employ the competing theories of the case.
169. Dr. Dutton found that RYI focused only on M.D.'s version of the events and did not address the State's theory.
170. Also, Dr. Dutton perceived that RYI relied upon the gender paradigm stereotype. That is the notion that in relationships with abuse, it is primarily always male toward female, which Dr. Dutton explained has been proven untrue by psychological studies on domestic abuse.
171. Perhaps the most concerning and alarming psychological trait exhibited by M.D. is her reaction to the murder itself. By all accounts, except RYT's, M.D. displayed a rather casual attitude toward her involvement in Jasmine's murder. As stated above, RYI claims that M.D. has genuine remorse for not being able to stop Jasmine's murder, but they gave no facts or instances to support that claim, except to say that M.D. is willing to write a letter to Jasmine's family.
172. However, Salgado's testimony that M.D. was happy the day after the murder and even after law enforcement talked to them at Steffany's house is supported by Dr. Hansen's and Dr. Dutton's testimony.
173. In retelling the events following Jasmine's murder, M.D. told Dr. Hansen that when the cops arrived the day after the murder M.D. felt normal but Salgado appeared quite nervous.
174. She also told Dr. Hansen that when the cops took her to the police station it felt like when she was questioned for skipping school. She also stated that she felt calm and that she planned to lie to the police. She did not feel like she was in trouble. Dr. Hansen testified that this reaction by M.D. indicates she feels the rules do not apply

to her and also indicates to what lengths M.D. would go to fit her agenda.

175. Dr. Hansen also testified that when she was discussing the murder, her reaction to it was similar to her demeanor while discussing the physical and sexual abuse. Again, she was "leaning back on the chair, hands on her head, cool, calm, collected, did not appear nervous." When Dr. Dutton asked M.D. how she felt after the murder, M.D. replied "nothing, I was normal."
176. As with the physical and sexual abuse, Dr. Hansen found that Jasmine's murder was not a traumatic experience for M.D. and she does not suffer from PTSD with respect to the murder.
177. Dr. Dutton found it noteworthy that M.D. did not exhibit symptoms of trauma with regard to what he characterized as an "intimate" homicide. He cited a study that found fifty-two percent of homicide perpetrators met the criteria for PTSD from the act of committing homicide.
178. Based on this testimony by Dr. Hansen and Dr. Dutton and the fact that M.D. reacted to something as inconsequential as flirtatious behavior in the most violent way possible, the court firmly believes that M.D. would not be able to be reasonably rehabilitated by the time she reaches age twenty-one.
179. Although M.D. urges that it is in her best interests to remain in the juvenile system, M.D.'s best interests are not the only consideration.
180. This court must also consider the best interests of the public. Coupled with that consideration is a concern about public safety, which, in turn, is attendant to M.D.'s prospects of rehabilitation. Based on Dr. Hansen's and Dr. Dutton's testimony about M.D.'s demeanor while discussing the murder as well as M.D.'s statements about her feelings after the murder, the court does not believe the public would be adequately protected if M.D.'s case remains in juvenile court.
181. Neither RYT's developmental audit nor any of its testimony or evidence offered at the transfer hearing spoke to the prospects for adequate protection of the public. The underlying findings follow.
182. M.D. is a danger to the public based on the record.
183. Based upon the foregoing and balancing all of the considerations, this Court finds that it is contrary to the best interest of M.D. and the public to retain jurisdiction in juvenile court.

184. The headings noted above are for the convenience of the Court and the placement of any particular Finding of Fact under one heading is not an indication that the Finding does not also apply to other headings.
185. To the extent any of the foregoing are improperly designated and are instead Conclusions of Law they are redesignated and incorporated herein as such.

#### CONCLUSIONS OF LAW

1. The Court has personal as well as subject matter jurisdiction herein.
2. Hanson County, South Dakota, is the proper county for venue in these proceedings.
3. The State seeks a transfer under SDCL 26-11-4. The state has the burden of proof by substantial evidence.
4. The parties have stipulated that, for purposes of this proceeding, judicial notice may be taken of the transcripts, testimony and certain exhibits admitted in the suppression hearings held on September 15, 2010 (Exhs. 307 through 320) and October 15, 2010 (Exhs. 321, 322, and 323) and the Daubert hearings on December 21, 2010 and January 14, 2011. On the basis of the stipulation, judicial notice is proper and is taken pursuant to SDCL ch. 19-10.
5. The transfer motion should be granted where the juvenile court finds that it is contrary to the best interests of the child or the public to retain jurisdiction over the child. *In the Interests of Y.C.* 1998 S.D. 76, ¶ 7, 581 N.W.2d 483. On the other hand, in order to deny the motion, this Court would be required to find that a transfer would be both contrary to the best interests of the child and also contrary to best interest of the public. *Id.*
6. Neither South Dakota cases nor the transfer statute give controlling consideration to the interests of the child over the interest of the public or conversely the interest of the public over the child. Rather, this Court has considered both interests.
7. SDCL 26-11-3.1 provides that: Any delinquent child sixteen years of age or older against whom Class A, Class B, Class C, Class 1,

or Class 2 felony charges have been filed shall be tried in circuit court as an adult.

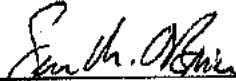
8. Under that statute, the child may request a transfer hearing and, in that transfer hearing, there is a rebuttable presumption that it is in the best interest of the public that any child, sixteen years of age or older, who is charged with a felony of the classes listed above, shall be tried as an adult. SDCL 26-11-3.1.
9. In this case, M.D. was fifteen years old when the Class A and Class 2 felonies with which she is charged were committed.
10. SDCL 26-11-4 governs the transfer of juvenile cases to circuit (adult) court, whether the transfer hearing is pursuant to SDCL 26-11-3.1 or by motion of the State. Before a juvenile case can be transferred to adult court, the court must conduct a hearing in which it can consider "only whether it is contrary to the best interest of the child and of the public to retain jurisdiction over the child." SDCL 26-11-4.
11. "However, neither the interests of the child nor the interests of the State are controlling considerations." *State v. Jensen*, 1998 S.D. 52, ¶ 21, 579 N.W.2d 613, 617 (quoting *State v. Harris*, 494 N.W.2d 619, 624 (S.D. 1993)).
12. "Nor, by the plain language of the statute, is the trial court required to consider both of these interests at the transfer hearing." *Id.*
13. "[T]here must be substantial evidence in the record to support the juvenile court's finding that it would be contrary to the best interests of the child OR of the public to retain jurisdiction over the child." *Harris*, 494 N.W.2d at 624 (emphasis in original).
14. Although the factors in SDCL 26-11-4 were not intended "to create a rigid or cumbersome procedure to be followed by the trial courts in all cases," they serve as guidance. This court has addressed and relied upon those factors that pertain to the present case. *Jensen*, 1998 S.D. 52, ¶ 22, 579 N.W.2d at 617.
15. "The state is not required to establish probable cause to show prosecutive merit." SDCL 26-11-4.
16. The Court has also considered the rehabilitation criteria in SDCL 26-11-4(7). The State met its burden in this regard. This Court

further finds that regardless of whether the juvenile system is sufficient to rehabilitate this juvenile, the protection of the public warrants transfer. Further, all the other facts, circumstances and factors of this unusually serious case require a transfer to adult court.

17. In considering all the factors and considerations, this Court has considered each charge individually although all are related and stem from the same incident.
18. The State has met its "substantial evidence" burden.
19. Based on all the Findings, this Court concludes that it is contrary to the best interests of the child and of the public to retain jurisdiction in juvenile court. An Order Transferring this matter to adult court will be entered accordingly.
20. To the extent any of the foregoing are improperly designated and are instead Findings of Fact they are redesignated and incorporated herein as such.

Dated this <sup>27<sup>th</sup></sup> day of July, 2011.

BY THE COURT:

  
Sean O'Brien  
Circuit Court Judge

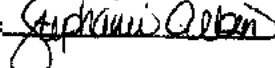
ATTEST:

  
Clerk of Courts

STATE OF SOUTH DAKOTA  
First Judicial Circuit Court  
I hereby certify that the foregoing instrument is a true and correct copy of the original as the same appears on file in my office and the same is attested in ink hereon and effect.

JUL 27 2011

Ramona Schroeder  
Hanson County Clerk of Courts

By: 

STATE OF SOUTH DAKOTA ) IN CIRCUIT COURT  
 ) :SS JUVENILE DIVISION  
 COUNTY OF HANSON ) FIRST JUDICIAL CIRCUIT

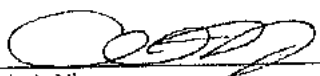
\*\*\*\*\*  
 THE PEOPLE OF THE STATE OF )  
 SOUTH DAKOTA, IN THE ) JUV. 09-05  
 INTEREST OF M.D., )  
 MINOR CHILD, AND CONCERNING ) MOTION TO VACATE ORDER  
 IRMA GUTTEREZ-PLACENCIA )  
 (MOTHER), )  
 Respondent. )  
 \*\*\*\*\*

Comes now M.D., by and through her attorneys at law, and moves the court to vacate its order of July 27<sup>th</sup>, 2011 transferring this matter to adult court pursuant to SDCL 15-6-60(b), on the grounds of:  
 (1) Surprise; and  
 (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under § 15-6-59(b);

That the psychological expert that the State produced at trial to testify about male-female relationships and the nature of the sexual/dominant relationship between M.D. and Alex Salgado, which expert the court placed great trust in, and relied heavily on in its opinion, was determined to have sexually harassed a student of his. This evidence is crucial because the credibility of Dr. Dutton, the State's expert witness is crucial. This evidence was just produced by the State, and so this motion is timely within the meaning of a "reasonable time", and in any event, this motion is made not more than one year after the court's order was entered or taken. A copy of the decision involving Dr. Don Dutton is attached and incorporated into this motion.

Wherefore, M.D. prays that the court have a hearing on this motion, and after such hearing, that the court vacate its previous order.

Dated this 14<sup>th</sup> day of October, 2011.

  
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NOTICE OF MOTION  
 TO: STATE OF SOUTH DAKOTA:





Circuit Administrator  
Kim L. Allison  
Chief Court Services Officer  
Charles R. Frisberg  
Circuit Assistant  
Joan Novak

## First Judicial Circuit Court

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Presiding Judge  
Steven R. Jensen  
Circuit Judges  
Glen W. Eng  
Bruce V. Anderson  
Timothy W. Bjorkman  
Sean M. O'Brien  
Cheryl Gering  
Magistrate Judges  
Patrick W. Kiner  
Tami A. Bern

November 22, 2011

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In re: In the Interests of M.D.  
Hanson Co. Juv. No. 09-05

Dear Counsel:

The matter before this Court<sup>1</sup> in the juvenile file described above is M.D.'s motion to vacate order. A hearing was held on November 2, 2011, in the Hanson County Courthouse. After considering the evidence<sup>2</sup> and arguments presented, the Court reaches the following decision:

The basis for this motion relates to a 1999 decision of the British Columbia Human Rights Tribunal (Tribunal) in a case involving Dr. Donald G. Dutton (Dutton), one of the State's expert witnesses. In that case, a student alleged that in December of 1994 and

<sup>1</sup> This Court issued the memorandum opinion and signed findings of fact, conclusions of law and order transferring M.D. to adult court. Thereafter M.D.'s counsel requested and was assigned a different judge in the criminal file. M.D. scheduled this hearing before this judge. All counsel agreed that this judge could decide this motion.

<sup>2</sup> At the hearing the State offered into evidence Exhibit 390, which is an updated curriculum vitae of Dr. Donald Dutton, one of the State's expert witnesses. M.D. objected. The Court reserved ruling until this decision was rendered. The Court is not receiving Exhibit 390 into evidence.

AURORA, BON HOMME, BRULE, BUFFALO, CHARLES MIX, CLAY, DAVISON,<sup>1</sup>  
DOUGLAS, HANSON, HUTCHINSON, MCCOOK, TURNER, UNION & YANKTON COUNTIES

January of 1995, she was sexually harassed by Dutton. The allegations were that: 1) Dutton created a sexualized environment when they met twice at his home; and 2) that during the second meeting, he kissed and fondled her. In a 93-page decision, the Tribunal found the first allegation to be true, but not the second. See p. 65 of the decision.

At the time of the transfer hearing, no counsel was aware of this proceeding and decision. Having been advised by the State's counsel of its existence, M.D. moved to vacate the order which transferred her case to criminal court.

M.D. argues that the Tribunal's finding of sexual harassment by Dutton bears on his credibility as a witness because he testified "about male-female relationships and the nature of the sexual/dominant relationship between M.D. and Alex Salgado, which expert the Court placed great trust in and relied heavily on in its opinion...." See Motion to Vacate Order. M.D. was unable to cross-examine Dutton about this incident. She wants this Court to either: 1) open the juvenile proceeding for further testimony; or 2) vacate the order and reconsider its decision.

In its memorandum opinion, this Court found that "Dr. Dutton has a Ph.D. in Experimental Social Psychology and specializes in domestic violence." See p. 13 of the Court's opinion. He testified as to his opinions of Salgado and M.D.'s relationship and the alleged physical and sexual abuse inflicted on M.D. by Salgado. He found no evidence that M.D. was either traumatized or controlled by Salgado at the time of the murder. Based in part on those findings, the Court found and concluded that M.D.'s involvement in the murder was willful, not coerced.

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Dutton also criticized M.D.'s expert, Reclaiming Youth International, in its reliance on the gender paradigm stereotype. That is the notion that in relationships with abuse, it is primarily always male toward female. Dutton testified this stereotype has been proven untrue by psychological studies on domestic abuse.

Basically, M.D. is attempting to impeach or attack the credibility of a witness. SDCL 19-14-10 provides that specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of a crime, may not be proved by extrinsic evidence. They may, however, in the discretion of the Court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness:

- 1) Concerning his character for truthfulness or untruthfulness; or
- 2) Concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

After reviewing the Tribunal's decision, this Court finds that Dutton's testimony in M.D.'s case is credible notwithstanding the finding of sexual harassment as described above. The matters he testified to at the transfer hearing involved opinions as to whether Salgado abused or controlled M.D. and providing a psychological profile of her. The

finding of sexual harassment was limited to one occasion when it was determined that Dutton created a sexualized environment when he met with a student at his home in 1995. This determination is not sufficiently related to the matters he testified to in M.D.'s case. The 1995 incident is not probative of Dutton's character for truthfulness or untruthfulness.

The Court finds that Dutton qualifies as an expert witness by his knowledge, experience, and education and that his testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and that he has applied the principles and methods reliably to the facts of this case. SDCL 19-15-2.

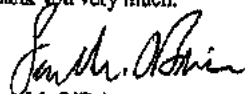
Assuming, arguendo, that these findings were to the contrary, the Court would reach the same decision to transfer M.D. to adult court based upon the testimony of all of the other witnesses, including expert witnesses, and based upon a consideration of all the factors the Court considered in reaching its decision, none of which bear on Dutton's credibility.

To summarize, the Court treats M.D.'s motion to vacate as a motion for reconsideration. The Court denies the request to open up the juvenile proceeding to allow for further testimony, except to the extent of it has received into evidence the transcript of the Tribunal's decision. The court has reconsidered its decision, and based upon a review of the Tribunal's decision, the Court finds Dutton's testimony to be credible, despite the Tribunal's finding that Dutton sexually harassed a student in 1995.

One of the State's counsel should prepare an appropriate order.

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Thank you very much.



Sean M. O'Brien  
Circuit Court Judge

STATE OF SOUTH DAKOTA  
COUNTY OF HANSON  
STATE OF SOUTH DAKOTA,

FILED

JUN 29 2012

IN CIRCUIT COURT  
JUVENILE DIVISION  
FIRST JUDICIAL CIRCUIT

Juv. 09-05

ORDER ON MOTION TO  
VACATE ORDER

Plaintiff,

*Ramona Schroeder*  
Hanson County Clerk of Courts  
First Judicial Circuit Court of SD

v.

MARICELA NICOLASA DIAZ,

Defendant.

The Defendant in the above-captioned action having filed a Motion to Vacate Order regarding the Court's transfer of Defendant to adult court, and the Court, having held a hearing on Defendant's Motion to Vacate Order on November 2, 2011, in the Hanson County Courthouse, and the Defendant, having appeared personally and through defense counsel Douglas M. Dailey and Chris A. Nipc and the State, having appeared through James R. Davis, Hanson County State's Attorney, Robert Mayer, Deputy Attorney General and Douglas P. Barnett, Assistant Attorney General, and the Court, having heard the evidence and arguments presented, being duly advised in the premises, and having found the 1995 Canadian incident not probative of Dr. Donald Dutton's character for truthfulness or untruthfulness, but rather that Dr. Dutton's testimony herein is credible, and good cause appearing therefore, it is hereby

ORDERED that the Defendant's Motion to Vacate Order is hereby hereby

DENIED.

Dated this 28<sup>th</sup> day of June, 2012.

BY THE COURT:

*Sean M. O'Brien*  
Honorable Sean M. O'Brien  
Circuit Court Judge

ATTEST:

*Ramona Schroeder*  
Clerk of Court

By: \_\_\_\_\_  
Deputy

(SEAL)

pid\_RM\_State v Maricela Diaz - Order (b7)

337

STATE OF SOUTH DAKOTA )  
 )  
COUNTY OF HANSON )

IN CIRCUIT COURT  
FIRST JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,  
v.  
MARICELA DIAZ,  
Defendant.

Cr. 11-18  
FINAL  
JURY INSTRUCTIONS

The following instructions, numbered 1 through 50, including verdict form, constitute the final instructions of the law in the above action.

Dated this 15<sup>th</sup> day of January, 2015.

  
Timothy W. Bjorkman  
First Circuit Court Judge

Instruction No. 1

In this action, the Defendant, Maricela Nicolasa Diaz, is accused by the State of South Dakota in an indictment charging as follows:

Count 1: First Degree Murder;

Count 2 is no longer before you and you shall not hear it.

Count 3: First Degree Murder - Arson;

Count 4: First Degree Arson

Count 5: First Degree Murder - Aggravated Kidnapping

Count 6: <sup>2nd</sup> First Degree Aggravated Kidnapping

To each count of the indictment, the defendant has pled not guilty.

The words 'intent' or 'intentionally' as used in these instructions means a specific design to cause a certain result.

The intent with which an act is done is shown by the circumstances surrounding the act, the manner in which it is done, and the means used.

Instruction No. 43

When a defendant is charged with a crime which requires that a certain specific intent be established in order to constitute the crime or degree of crime, you must take all the evidence into consideration and determine if, at the time when the crime was allegedly committed, the defendant was suffering from some abnormal mental or physical condition, however caused, which prevented the defendant from forming the specific intent or mental state essential to constitute the crime or degree of crime which is charged.

Instruction No. 44

A person may not be convicted of a crime based upon conduct engaged in because of the use or threatened use of unlawful force upon the defendant which force or threatened use thereof a reasonable person in his situation would have been unable to resist.

This use or threatened use of force must be present and immediate and of such a nature as to induce in the defendant's mind the well-grounded apprehension of imminent death or serious bodily injury if the act is not done. Threat or fear of future injury is not sufficient. There must be no reasonable opportunity for the defendant to escape the danger without committing the crime. If you have a reasonable doubt whether the defendant committed the act with which the defendant is charged under the use or threatened use of force as it has been defined, you must return a verdict of not guilty.

Instruction No. 45

Evidence has been presented concerning the characteristics of a condition known as Battered Woman Syndrome. It is for you to determine if the defendant was suffering from Battered Woman Syndrome at the time of the alleged offense. If you find that the defendant was suffering from Battered Woman Syndrome, you may then use that evidence in evaluating any claim that the defendant feared imminent death or serious bodily injury if she did not carry out the criminal acts for which she is charged.

Instruction No. 46

In arriving at a verdict, you shall not discuss or consider the subject of what any penalty or punishment might be if the defendant is convicted. Matters of sentencing are the court's responsibility.

STATE OF SOUTH DAKOTA )  
  :SS  
COUNTY OF HANSON      )

IN CIRCUIT COURT  
FIRST JUDICIAL CIRCUIT

THE STATE OF SOUTH DAKOTA, Plaintiff,  vs.  MARICELA NICOLASA DIAZ,	30CRI11-000018  <b>DEFENDANT'S SUPPLEMENTAL PROPOSED JURY INSTRUCTIONS</b>
--	--

COMES NOW, the Defendant, Maricela Nicolasa Diaz, by and through her attorneys, Doug Dailey of MorganTheeler LLP and Chris A. Nipe of Larson and Nipe, both of Mitchell, South Dakota, and submits her supplemental proposed jury instructions as required by SDCL 15-6-51(a).

Respectfully submitted this 5<sup>th</sup> day of January, 2015.

/s/ Doug Dailey  
of MORGANTHEELER LLP  
P.O. Box 1025 / 1718 N. Sanborn Blvd.  
Mitchell, SD 57301-1025  
(605) 996-5588

&

Chris A. Nipe  
P.O. Box 396 / 200 E. 5th Avenue  
Mitchell, SD 57301  
(605) 996-5588

**ATTORNEYS FOR DEFENDANT  
MARICELA NICOLASA DIAZ**

e-filed on Jan 5, 2015

WPIC 18.01

**DURESS — DEFENSE**

Instruction No. 99

You may consider whether or not the defendant was battered or abused by Alexander Salgado. If you decide that the defendant was battered or abused by Alexander Salgado, you may consider that in determining the reasonableness of the defendant's perception of the immediacy of the harm in light of the defendant's experience of abuse.

Reference:

Washington Pattern Jury Instructions -- Criminal, WPIC 18.01 [Duress-Defense]  
State v. Williams 937 P.2d 1052, 1058 (Wash. 1997)



HEIGHTENED SENSE OF IMMINENT DANGER

Instruction No. 100

The imminent danger element may be satisfied when a child believes she is in imminent danger of death or serious bodily harm even though her abuser is not physically abusing her at the time. This is because an abused child can experience a heightened sense of imminent danger arising from perpetual physical and mental abuse.

Reference:

Robinson v. State 417 SE2d 88, 91 (SC 1991)

HEIGHTENED SENSE OF IMMINENT DANGER

*Refused*  
*Tina Brothman*  
*Circuit Judge 1-14-2015*

*Defendants* Instruction No. A

The imminent danger element may be satisfied when a child believes she is in imminent danger of death or serious bodily harm even though her abuser is not physically abusing her at the time. This is because an abused child can experience a heightened sense of imminent danger arising from perpetual physical and mental abuse.

Reference:  
Robinson v. State 417 SE2d 88, 91 (SC 1991)

**FILED**  
JAN 22 2015  
*Pam Koussal*  
Hanson County Clerk of Court  
First Judicial Circuit Court of SD

HEIGHTENED SENSE OF IMMINENT DANGER

*Refused*  
*Tina Byrdman*  
*Circuit Judge 1-14-2015*

*Defendant's* Instruction No. A

The imminent danger element may be satisfied when a child believes she is in imminent danger of death or serious bodily harm even though her abuser is not physically abusing her at the time. This is because an abused child can experience a heightened sense of imminent danger arising from perpetual physical and mental abuse.

Reference:  
Robinson v. State 417 SE2d 88, 91 (SC 1991)

**FILED**

JAN 22 2015

*Pam Kowal*  
Pam Kowal  
Morton County Clerk of Court  
First Judicial Circuit Court of SD

STATE OF SOUTH DAKOTA )  
  : SS  
COUNTY OF HANSON )

IN CIRCUIT COURT  
FIRST JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA, Plaintiff,  vs.  MARICELA NICOLASA DIAZ, Defendant.	30CRI11-000018  <b>DEFENDANT'S SENTENCING MEMORANDUM</b>
--	--

COMES NOW, the Defendant, by and through her attorneys Doug Dailey of MorganTheeler LLP, and Chris Nipe of Larson & Nipe and file this memorandum regarding the Defendant's sentencing scheduled for hearing on Friday, March 27, 2015 at 10 am at the Hanson County Courthouse in Alexandria, South Dakota.

For purposes of efficiency, and as this court is well-versed in the facts, we will not summarize them herein. The issue before the Court is what is an appropriate sentence for Maricela Nicolasa Diaz as a result of her convictions for the offenses of First Degree Murder (Class A felony), First Degree Felony Murder (Class A felony) and Second Degree Aggravated Kidnapping (Class 1 felony).

*Miller v. Alabama* was the third case issued by the United State Supreme Court reforming sentencing decisions in regard to criminal offenses committed by juveniles. 132 S.Ct. 2455, 183 L.Ed.2d. 407. It built on previous rulings that banned the death penalty for juveniles and that banned the life sentences without the possibility of parole for non-homicide offenses. The Court ruled that, while sentences of life without parole are permissible, they cannot be mandatory and can only be imposed after judicial

consideration of the individual circumstances of in a case and that the Court must consider the offender's maturity.

Based on the specific circumstances of this case and upon the Defendant's age and lack of maturity at the time of the commission of the offenses the Defense recommends a sentence of twenty-five (25) years in the South Dakota State Penitentiary with fifteen (15) years suspended with credit for time served. In the event the Court would determine that a longer penitentiary sentence is necessary the Defense is recommending the Court suggest that the South Dakota Department of Corrections attempt to transfer Maricela to the State of Indiana to permit her to be closer in proximity to her five year old daughter who lives in Ft. Wayne, Indiana.

Maricela was just fifteen years old at the time of the murder. She was the mother of an infant, Maria Diaz, who was born just four months earlier when Maricela was 14 years old. She was also a run away from Ft Wayne, Indiana who's whereabouts were unknown by her family. She was the victim of physical and sexual abuse at the hands of the co-defendant Alexander Salgado who was an adult and the father of Maricela's child.

Dr. David Bean opined that Maricela's "mental maturity' is much less than one would expect from a 15-year old child in our society". This opinion is based on his findings that Maricela's testing indicated her educational maturity in the English language was "seriously impaired". He also indicated that her immaturity that was evident in her relationship problems with Salgado which began at the age of 13 and resulted in her pregnancy at the age of 14. Finally, Dr. Bean as well as the other experts that have examined Maricela are all in agreement she was a victim of physical and sexual

abuse at the hands of Salgado.

The individual circumstances of the case do not support the assertion by the State that Maricela's role in the murder of Jasmine Guevara was predominant. It is clear that she participated in the murder, however, her ability to control the Defendant is completely without merit. Maricela was also Salgado's victim. If not for Salgado she would not have even been in the State of South Dakota. Maricela was completely dependent on Salgado. She had no money, no paperwork or identification to get a job and no family here to turn to for help. Salgado told her what to do, how to do it and when. Salgado found and brought the knives, located and purchased the lighter fluid, completed the murder, drove the car into the trees and burned the car. He also told Maricela what to do to cover up the crime and that if she didn't he'd kill her too.

While Maricela maintained her innocence at the jury trial, she had not denied her participation or her role in the murder. The Jury did not agree with her defense and found her guilty. Maricela accepts the finding of the Jury and will stand before the Court to accept the punishment the Court determines she deserves. Until now, Maricela has not had the opportunity to address the victim's family and friends or to show her remorse for the role she played.

The laws of the State of South Dakota and the United State's have long held that juveniles should be treated differently than adults. With the US Supreme Court's ruling in *Miller*, this Court was given the discretion to determine what sentence it feels is appropriate up to a life sentence. There is no mandatory minimum sentence that the Defendant must serve. SDCL § 24-15A-32, which establishes the initial parole

eligibility dates for all offender sentenced to the State Penitentiary, provides that any juvenile convicted of a Class A or B felony who was a juvenile at the time of the offense and receives a sentence of less than life shall serve fifty percent (50%) of their sentence (Class C violent offense). This is akin to treating juvenile offenders convicted of murder the same as adult offenders who are convicted of, or who have plead guilty to, 1<sup>st</sup> degree manslaughter. As such, the Defense has completed a proportionality study of recent second degree murder, 1<sup>st</sup> degree manslaughter and similar charges for purposes of to determine what range of sentencing would be acceptable under similar circumstances. Summaries of the cases reviewed are attached hereto as Exhibit A. The range of the cases contained in the attached summaries is from a suspended execution of sentence to sixty (60) years in prison. Based on a review of all of the cases reviewed we are of the opinion that the sentence being recommended by the Defense is reasonable in comparison and under the circumstances. Please note the Defendant's was the youngest of all the Defendants in the cases reviewed. It is also important to note that Maricela has been incarcerated for more than five years which is over 25% of her current lifetime.

In conclusion, the Defendant requests this Court sentence the Defendant to twenty-five years in the South Dakota State Penitentiary with fifteen (15) years suspended. We are also requesting that this court give credit for all of the time the Defendant has spent incarcerated in either Juvenile Detention facilities or in county jails since the time of her arrest.

Dated this 25<sup>th</sup> day of March, 2015.

/s/ Douglas M. Dailey  
Douglas M. Dailey, Esq.  
of MORGANTHEELER LLP  
P.O. Box 1025, 1718 N. Sanborn Blvd.  
Mitchell, SD 57301-1025  
(605) 996-5588

and

Chris A. Nipe  
Of Larson and Nipe  
PO Box 396  
Mitchell SD 57301  
(605) 996-6546

ATTORNEYS FOR DEFENDANT  
MARICELA NICOLASA DIAZ



**Brian Anderson**

**Facts:** A 2013 botched drug robbery in South Dakota in which Mr. Anderson, a Watertown teenager traveled to Sioux Falls to rob Justin LeBeau after hearing he had \$100,000 in his house. Anderson brought a loaded gun into the home. The result was the death of teenager Justin LeBeau and the assault of LeBeau's father. Others were also convicted with regard this incident. (Kevin Rice/Trevor Kruthoff/ Douglas Scholten )

**Sentence:** 50 years - 1<sup>st</sup> Degree Manslaughter charge

**Mario Contreras**

**Facts:** United States of America charged Mario Contreras, age 35, with second degree murder in violation of 18 U.S.C. 111, voluntary manslaughter in violation of 18 U.S.C. 113 and assault resulting in serious bodily injury in violation of 18 U.S.C. 13-9999 in conjunction with the death of his 2-year-old daughter by punching her in the head. Aleeyah Cook, who lived with her mother in Sisseton, South Dakota, died in a Fargo hospital on January 11, 2012, two days after she was injured at her father's home. The Defendant claimed that his daughter fell from a chair while eating at the kitchen table. Dr. Victor Froloff expressed the opinion that the cause of death of a blow to the head caused by fist. Medical evidence presented at trial showed the girl had 18 contusions to her head. Contreras was convicted of Second Degree Murder and Assault Resulting in Serious Bodily Injury as a result of a federal jury trial held in Sioux Falls, South Dakota in August 2013.

**Sentence:** 30 years.

**Ronald Ray Fischer**

**Facts:** Mr. Fischer failed to stop at a stop sign while driving drunk in Pickstown on July 8, 2013 and killed 2 U.S. Fish and Wildlife workers. His vehicle then directly entered a parking lot at highway speed and struck two U.S. Fish and Wildlife employees who were working in the Pickstown area. Fischer's blood alcohol was three times the legal limit.

**Sentence:** 15 years for each vehicular homicide - 30 years total  
Also received 1 year and 180 days for other charges.

### **Russ Hollow Horn**

**Facts:** Hollow Horn - age 47, of Wounded Knee was indicted for involuntary manslaughter by a federal grand jury on June 15, 2010. On January 25, 2010, Hollow Horn was driving his pickup truck on BIA Road 27, and prior to operating his vehicle had consumed alcohol. His blood alcohol content (BAC) was approximately .227 (three times the legal limit). Hollow Horn's intoxication caused him to drive his pickup truck in an unsafe manner, resulting in him crossing over the center-of-the-road dividing line and colliding with another vehicle. Four individuals occupied the other vehicle, and three were killed as a result of injuries sustained in the collision. Hollow Horn pled guilty to the charge of involuntary manslaughter on December 6, 2010

**Sentence:** 51 months' incarceration, three years of supervised release, and was ordered to pay \$100 to the Victim Assistance Fund. The issue of restitution will be determined in the near future.

### **Patrick W. Hopkins**

**Facts:** Hopkins was involved in a fatal stabbing in Roberts County. Authorities said that Hopkins stabbed Adam LaFramboise at a Peever home on Jan. 4, 2013 during an altercation.

**Sentence:** 20 years in prison. He pled guilty to manslaughter. In exchange for Hopkins' guilty plea, a murder charge was dismissed. He must also pay \$104 in court costs and make restitution for any of the victim's medical and funeral bills, according to court documents. It was recommended that, while in prison, he complete chemical dependency treatment.

### **Trevor Kruthoff**

**Facts:** Trevor Kruthoff, 17, of Watertown was charged with first degree murder for killing 20-year-old Jordan LeBeau. Court documents filed said Kruthoff and Brian Anderson traveled to Sioux Falls to rob LeBeau after hearing he had \$100,000 in his house on North Alaska Avenue. A police affidavit says Anderson told Kruthoff to shoot both Jordan and his father, 48-year-old Jason LeBeau, after the four got into a scuffle. When police arrived at the home, they found Jason had been shot in the arm and his son Jordan was found dead in the basement laundry room; police say before being shot, he'd been beaten and duct taped.

**Sentence:** 80 years with 40 years suspended - 1<sup>st</sup> Degree Manslaughter charge. Also sentenced to 15 years for aggravated assault to be served concurrently with other sentence.

### John LeGrand

**Facts:** LeGrand fatally shot Ricardo Hein 4 times in April of 2009 in Beadle County. Court papers said the two had a dispute over money. LeGrand drove over Hein's leg, sending him to the hospital. When the hospital released Hein, he went to LeGrand's home and entered it. That's when investigators say LeGrand shot him in the leg, stomach and two more times in the back as Hein was retreating. LeGrand was charged with second degree murder and first degree manslaughter and later plead guilty to manslaughter.

**Sentence:** 40 years

### Matthew Libby

**Facts:** March 2015. He was 17 when indicated on first degree murder, robbery and burglary. The court rejected a request to move the matter to juvenile court. When he was twenty, he plead guilty to second degree murder in the death of a 48 year old. The teen drove the victim out of town where he hit and kicked him. The victim died of blunt force trauma to his head.

**Sentence:** He was sentenced in March 2015 to 48 years, with 21 years suspended.

### Braiden McCahren

**Facts:** A teen was killed in December 2012 after an argument about a paintball incident in Pierre, SD. Jurors in adult court convicted McCahren of second degree murder and aggravated assault (at another person). McCahren was 16 at the time of the slaying but tried as an adult.

**Sentence:** 25 years with 15 years suspended - 2<sup>nd</sup> Degree Murder charge  
Also received 10 years for aggravated assault charge (at another person) - sentences served concurrently

### Lucas New Holy

**Facts:** New Holy was indicted for 1<sup>st</sup> degree murder in death of Steven Janis. Janis was brutally beaten with a baseball bat on the Pine Ridge Indian Reservation in (2010??). The beating resulted in Janis's death several days later.

**Sentence:** New Holy plead guilty to 2<sup>nd</sup> degree murder and was sentenced to 20 years.

**Kevin Rice**

**Facts:** Rice played a role in the December 2013 homicide of Jordan LeBeau. The case involved marijuana dealing, drug money and a botched robbery that ended with LeBeau being shot to death in his northwest Sioux Falls home in December. Rice wasn't in the home when it happened but he was the one who recruited the two Watertown High School teens who carried out the crime. Rice is the one who recruited 18-year-old Brian Anderson and 17-year-old Trevor Kruthoff of Watertown to perform what's called a 'rip' on Jordan LeBeau and rob him of the \$100,000 in cash they believed was stashed away in shoe boxes in the closet.

**Sentence:** 60 years - 1<sup>st</sup> Degree Manslaughter charge

**Douglas Scholten**

**Facts:** A 2013 botched drug robbery in Sioux Falls in which Mr. Scholten loaded the gun and also provided a change of clothes for 2 others that were involved in incident.

**Sentence:** 30 years - All Suspended - must pay \$69,000 in restitution, court costs and preform 500 hours of community service annually for 10 years and drug rehab - 1<sup>st</sup> Degree Manslaughter charge

**Exhibit A**

STATE OF SOUTH DAKOTA  
:SS  
COUNTY OF HANSON

STATE OF SOUTH DAKOTA,  
PLAINTIFF,

VS

MARICELA DIAZ,  
DEFENDANT.

IN CIRCUIT COURT

FIRST JUDICIAL CIRCUIT  
File #: 30CI1000018A0

JUDGMENT OF  
CONVICTION  
TRIAL

**FILED**

MAR 27 2015

*Pam Koppel*  
Hanson County Clerk of Courts  
First Judicial Circuit Court of SD

An Indictment was filed with this Court on August 10, 2011, charging that on or about November 10, 2009, Maricela Diaz, the Defendant committed the crimes of Count I: First Degree Murder (SDCL 22-16-1(1); 22-16-4 (1); Count II: Conspiracy To Commit First Degree Murder (SDCL 22-3-8; 22-16-1(1);22-16-4(1); 22-16-12; 22-3-3; Count III: First Degree Murder Felony Murder (SDCL 22-16-1 (1); 22-16-4 (2); 22-16-12; 22-3-3; 22-33-9.1) Count IV: First Degree Arson (SDCL 22-33-9.1; 22-3-3; Count V: First Degree Murder Felony Murder (SDCL 22-16-1 (1); 22-16-4 (2); 22-16-12; 22-3-3; 22-19-1.1 (3) Count VI: Second Degree Aggravated Kidnapping (SDCL 22-19-1.1 (3); 22-3-3.

Defendant was arraigned on \_\_\_\_\_ Defendant and Defendant's attorneys, Doug Dailey and Chris Nipe and J. R. Davies, Robert Mayer, and Doug Barnett prosecuting attorneys, appeared at the Defendant's arraignment. The Court advised Defendant of all constitutional and statutory rights pertaining to the charges. The Defendant entered a "NOT GUILTY " plea to the charges of Count I: First Degree Murder (SDCL 22-16-1(1); 22-16-4 (1); Count II: Conspiracy To Commit First Degree Murder (SDCL 22-3-8; 22-16-1(1);22-16-4(1); 22-16-12; 22-3-3; Count III: First Degree Murder Felony Murder (SDCL 22-16-1 (1); 22-16-4 (2); 22-16-12; 22-3-3; 22-33-9.1) Count IV: First Degree Arson (SDCL 22-33-9.1; 22-3-3; Count V: First Degree Murder Felony Murder (SDCL 22-16-1 (1); 22-16-4 (2); 22-16-12; 22-3-3; 22-19-1.1 (3) Count VI: Second Degree Aggravated Kidnapping (SDCL 22-19-1.1 (3); 22-3-3.

The Defendant requested a jury trial. At a trial held in Minnehaha County, South Dakota on December 29, 2014, the jury returned a verdict of "Guilty" to the charges of : Count I: First Degree Murder (SDCL 22-16-1(1); 22-16-4 (1); Count V: First Degree Murder Felony Murder (SDCL 22-16-1 (1); 22-16-4 (2); 22-16-12; 22-3-3; 22-19-1.1 (3) Count VI: Second Degree Aggravated Kidnapping (SDCL 22-19-1.1 (3); 22-3-3.

Sentencing was held before this Court on March 27, 2015

**SENTENCE**

On March 27, 2015, the Court asked the Defendant if any legal cause existed to show why judgment should not be pronounced. No cause being offered, the Court then pronounced the following sentence:

**ORDERED AND DECREED** that the Defendant, Maricela Diaz, be sentenced as follows:

**On Count I: First Degree Murder (SDCL 22-16-1(1); 22-16-4 (1))**

It is **ORDERED, ADJUDGED AND DECREED** that you Maricela Diaz be imprisoned in the South Dakota State Penitentiary for a term of eighty (80) years, there to be kept, fed and clothed according to the rules and discipline governing the institution; and

**IT IS FURTHER ORDERED** That Defendant pay a fine in the amount of \$25,000.00 and court costs in the amount of \$104.00 ;

**IT IS FURTHER ORDERED** That Defendant pay Restitution to the victims in amounts to be determined within 30 days as submitted by the state. In the event of a dispute as to such amount, court will schedule a hearing thereon.

**IT IS FURTHER ORDERED** that the defendant should be given credit for time served since November 9, 2009.

**IT IS FURTHER ORDERED** that all fines, costs and restitution shall be repaid pursuant to a plan adopted by and through the South Dakota Board of Pardons and Paroles.

**On Count V: First Degree Murder Felony Murder (SDCL 22-16-1 (1))**

[a] This sentence was disposed of with the court's sentence at Count I above.

**On Count VI: Second Degree Aggravated Kidnapping (SDCL 22-19-1.1 (3); 22-3-3)**

It is **ORDERED, ADJUDGED AND DECREED** that you Maricela Diaz be imprisoned in the South Dakota State Penitentiary for a term of fifty (50) years, there



to be kept, fed and clothed according to the rules and discipline governing the institution; and

IT IS FURTHER ORDERED That Defendant pay court costs in the amount of \$104.00.

It is FURTHER ORDERED, ADJUDGED AND DECREED that this sentence shall be served concurrently with the sentence imposed on Count I herein.

IT IS FURTHER ORDERED THAT the defendant is immediately remanded into the custody of the sheriff of Hanson County, South Dakota for transportation to the South Dakota State Penitentiary.

Dated March 27, 2015.

BY THE COURT:

Tim Bjorkman  
Timothy W. Bjorkman  
Circuit Court Judge

ATTEST:

Pam Koupal  
Pam Koupal, Clerk of Courts



By: Brenda Weber, Deputy

(SEAL)

**NOTICE OF RIGHT TO APPEAL**

You are hereby notified that a Judgment of Conviction has been signed, attested and filed with the Hanson County Clerk of Courts and that you have a right to appeal from the judgment as provided by SDCL 23A-32-15, which you must exercise by serving a written notice of appeal upon the Attorney General of SD and the State's Attorney of Hanson County and by filing a copy of the same together with proof of such service with the Clerk within thirty (30) days from the date the Judgment is filed with the Clerk.

I hereby certify that the foregoing instrument is a true and correct copy of the original as the same appears on file in my office on this date:

MAR 27 2015

Pam Koupal  
Hanson County Clerk of Courts

By: Pam Koupal





SDCL § 15-6-59(b)

**15-6-59(b). Time for motion for new trial--Rulings thereon--Extension of time**

The motion for a new trial stating the grounds thereof shall be served and filed not later than ten days after the notice of entry of the judgment.

The court shall make and file the order granting or denying such new trial within twenty days after the service and filing of such motion, unless for good cause shown, the court files an order within said twenty days extending the time for entering such order. If a motion for new trial has not been determined by the court and no order has been entered by the court extending the time for such ruling within twenty days from the date of service and filing of such motion, it shall be deemed denied.

**Credits**

**Source:** SDC 1939 & Supp 1960, §§ 33.1606, 33.1608, 33.1610; SD RCP, Rule 59 (b), as adopted by Sup. Ct. Order March 29, 1966, effective July 1, 1966; Supreme Court Rule 76-3, § 16; Supreme Court Rule 82-32.

**23A-27-1. (Rule 32(a)(1)) Time of imposition of sentence--Hearing in mitigation or aggravation of punishment--Presentence hearing for juvenile--Restitution**

Sentences shall be imposed without unreasonable delay, but not within forty-eight hours after determination of guilt. A defendant may waive the forty-eight hour delay. Before imposing a sentence, a court may order a hearing in mitigation or aggravation of punishment. If the defendant is a juvenile convicted as an adult of a Class A or Class B felony, prior to imposing a sentence, the court shall conduct a presentence hearing. At such hearing, the court shall allow the defense counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment. The prosecuting attorney shall have an equivalent opportunity to speak to the court. The circumstances must be presented by the testimony of witnesses examined in open court, except that a witness' deposition may be taken by a magistrate in accordance with chapter 23A-12. In imposing a sentence, the court shall enter an order of restitution in accordance with chapter 23A-28.

## **Credits**

**Source:** Supreme Court Rule 410, 1939; SDC 1939 & Supp 1960, §§ 34.3701, 34.3703, 34.3704; SL 1966, ch 120; SDCL §§ 23-48-5, 23-48-11, 23-48-16; SL 1978, ch 178, § 332; SL 1985, ch 192, § 1; SL 2013, ch 105, § 2.

**26-11-4. Criminal proceedings against child charged with a felony permitted by circuit court--Transfer hearing--Factors considered--Order holding child--Retention of jurisdiction by court**

Except as provided in § 26-11-3.1, the circuit court may, in any case of a delinquent child against whom criminal felony charges have been filed, after transfer hearing, permit such child to be proceeded against in accordance with the laws that may be in force in this state governing the commission of crimes. In such cases the petition filed under chapter 26-7A shall be dismissed. The hearing shall be conducted as provided by this section. At the transfer hearing, the court shall consider only whether it is contrary to the best interest of the child and of the public to retain jurisdiction over the child.

The following factors may be considered by the court in determining whether a child should be transferred:

- (1) The seriousness of the alleged felony offense to the community and whether protection of the community requires waiver;
- (2) Whether the alleged felony offense was committed in an aggressive, violent, premeditated, or willful manner;
- (3) Whether the alleged felony offense was against persons or property with greater weight being given to offenses against persons;
- (4) The prosecutive merit of the complaint. The state is not required to establish probable cause to show prosecutive merit;
- (5) The desirability of trial and disposition of the entire felony offense in one proceeding if the child's associates in the alleged felony offense are adults;
- (6) The record and previous history of the juvenile;
- (7) The prospect for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile, if the juvenile is found to have committed the alleged felony offense, by the use of procedures, services, and facilities currently available to the juvenile court.

Written reports and other materials relating to the child's mental, physical, and social history may be considered by the court, if the person who prepared the report and other material appears and is subject to both direct and cross-examination.

If the court finds that a child should be held for criminal proceedings in a court of competent jurisdiction, the court shall enter an order certifying to that effect. The order shall contain findings of fact upon which the court's decision is based. The findings may not be set aside upon review unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. If an order of certification is made, the jurisdiction of the original court as to the child concerned is terminated. However, the court to which the proceedings are transferred may require the original court to hold the child in detention pending proceedings in that court.

If the court finds that it is in the best interest of the child and of the public for the court to retain jurisdiction, it shall proceed with the adjudicatory hearing. If the court to which

any proceeding regarding a delinquent child is transferred finds that it is in the best interest of the child and of the public for the court to retain jurisdiction, the finding is definitive, during the balance of the child's minority, as to the subsequent commission of any crime, petty offense, or municipal ordinance violation, and the child may no longer be considered a child for the purposes of this chapter. However, the finding is not definitive, if the delinquent child has been found not guilty of the offense for which the original transfer was ordered.

## **Credits**

**Source:** SDC 1939, § 43.0313; SL 1968, ch 164, § 10; SL 1971, ch 166, § 6; SL 1977, ch 210; SL 1994, ch 219, § 9; SL 1994, ch 221; SL 1997, ch 163, § 2.

IN THE SUPREME COURT  
STATE OF SOUTH DAKOTA

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No. 27432

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STATE OF SOUTH DAKOTA,

Plaintiff/Appellee

vs.

MARICELA NICOLASA DIAZ,

Defendant/Appellant

---

APPEAL FROM THE CIRCUIT COURT  
FIRST JUDICIAL CIRCUIT, HANSON COUNTY, SOUTH DAKOTA

THE HONORABLE TIMOTHY W. BJORKMAN  
CIRCUIT COURT JUDGE

APPEAL FILED APRIL 1, 2015

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**BRIEF OF *AMICUS CURIAE***  
**CONSULATE OF MEXICO**

---

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## PRELIMINARY STATEMENT

References to the settled record as reflected by the Clerk's Index will be designated (R) and the applicable page; references to the Pre-Sentence Report in 30CRI11-000018 which is recorded at (R 2613) will be designated as PSR and the applicable page; references to the Reclaiming Youth International Juvenile Audit Report (amended) dated January 25, 2011 which is referenced as Defendant's Exhibit D1 in the Clerk's Index in Juv 09-05 and included as Attachment H to the PRS, will be to the designation (JAR) followed by the applicable page; and references to the sentencing hearing will be to the designation (SH) and the applicable page.

## STATEMENT OF ISSUE

Counsel for amicus curiae the Consulate of Mexico submits this brief in support of a reduction of the sentence appellant Maricela Diaz received in this case.

The district court sentenced appellant Maricela Diaz on March 27, 2015, to 80 years in prison for aiding and abetting first-degree murder in the November 10, 2009 killing of Jasmine Guevara. (R 2613). The district court heard statements from defense witnesses and from the victim's family, as well as arguments from the prosecution and defense counsel. In explaining the rationale for the 80-year sentence, the court relied on *Miller v. Alabama*, 132 S.Ct. 2455 (2012). But the court, despite recognizing the *Miller* mandate to consider the juvenile offender's family and home environment, indicated that that environment had no "significant impact" on the proper sentence for Maricela. (SH 96). Thus, the court failed to



acknowledge the poverty and dislocation experienced by appellant as a child brought by a single parent to the United States from Mexico at the age of eleven.

The Consulate of Mexico believes that a proper sentence for Maricela must take into account the stress she experienced as an undocumented child immigrant brought to this country in poverty by a single parent only a few years before the crime – committed at the age of 14 – for which she has been sentenced.

#### STATEMENT OF FACTS

In a report prepared for the adult-certification hearing, the Reclaiming Youth Institute (RYI) presented a comprehensive assessment of appellant Diaz, based on interviews with appellant and family members, and a review of Fort Wayne, Indiana school and social-service records. (JAR 1-2). The RYI report described appellant as an “undocumented Mexican girl” who was brought to the United States by her mother in 2006, when appellant was 11 years old. (JAR 4).

Before emigrating to America, appellant lived with her mother and father and other family members in the state of Guanajuato, Mexico. (JAR). For the presentence report, appellant wrote, “We were poor but happy. Everything changed when I got to [the] USA.” (PSR 5). In 2011, appellant had not seen her father in five years, i.e., before she was brought to America. (JAR 4). She wrote for the presentence report, “I missed my father. I missed not having my family together.” (PSR 6).

At first, appellant did well in the Fort Wayne, Indiana schools; but she began a “downward spiral” in 2008, at the start of her abusive relationship with Alexander

Salgado, her co-defendant in this case and the father of her child. (JAR 4-5).

Salgado is six years older than Maricela. (JAR. 4-5).

In Fort Wayne, appellant lived in a deprived environment, with no gas or hot water in the home. (JAR 5). She was the subject of a Child in Need of Services (CHINS) adjudication in March 2009, after she had been hospitalized in January 2009 for an apparent suicide attempt, and after she had been the victim of sexual misconduct with a minor committed by Salgado in February 2009. (JAR 5). Appellant was then pregnant with Salgado's child, and gave birth to a baby girl, Maria, on July 8, 2009, when she was fourteen years old. (JAR 6).

The RYI report recounts social-services findings that Salgado began having sex with appellant in April 2008, and described this as being "coerced" intercourse. (JAR 6). Appellant herself reported that Salgado physically, sexually, and verbally abused her. (PSR 6-7). After Salgado was banished from his family home in September or October of 2009, he enlisted appellant to accompany him to South Dakota in October of that year. (JAR 7). The following month, on November 10, 2009, Salgado and appellant met up with Jasmine Guevara at a Wal-Mart store, and Guevara was murdered shortly after.

At sentencing, the district court heard statements from defense witnesses and from the victim's family, as well as arguments from the prosecution and defense counsel. The court rejected defense counsel's plea for a sentence of 25 years, as well as the prosecutor's request for either life imprisonment or a 100-year sentence, and sentenced appellant to 80 years. (SH 77, 99; R 2613).

## ARGUMENT

The Mexican Consulate is grateful for the opportunity to speak on behalf of Maricela Diaz, a Mexican national, in this appeal and to challenge her 80-year sentence.

“The protection of nationals . . . in foreign countries is arguably one of the foremost purposes of consular representatives.” Victor M. Uribe, “Consuls at Work: Universal Instruments of Human Rights and Consular Protection in the Context of Criminal Justice,” 19 Hous. J. Int’l L. 375, 379 (1997). Mexico has historically considered it a duty, not merely an option, to provide assistance to its nationals abroad, including those in detention. *Id.* at 379-80.

The Mexican Consulate would like to put the proportionality of Maricela’s 80-year sentence in the context of her immigration from Mexico with her mother less than four years before the crime for which she has been sentenced. That undocumented-immigrant experience fits squarely within the *Miller v. Alabama* family-and-home-environment factor that the district court acknowledged as applicable but then dismissed as not being a significant factor.

The district court in explaining its rationale for sentencing appellant to 80 years began by reciting the four considerations that govern sentencing: (1) punishment, (2) deterrence, (3) restitution, and (4) rehabilitation. (SH 90). The court then acknowledged that in sentencing a juvenile it was required to consider the range of mitigating factors recognized in *Miller v. Alabama*, 132 S. Ct. 2455, 2468 (2012): (1) chronological age and its characteristics; (2) *family and home*

*environment*; (3) the circumstances of the crime, including the juvenile’s culpability and any peer pressure; and (4) the possibility of rehabilitation. (SH 91).

The district court only briefly addressed the second *Miller* factor – the offender’s family and home environment, acknowledging that appellant had been brought to the U.S. by her mother, which forced her to “learn[] a new culture and [live] in poverty.” (SH 95). But the court then dismissed this factor, expressing doubt “that any of those facts of that growing up have a significant impact on this case.” (SH 96). Thus, the court minimized entirely the impact of Maricela’s status as an undocumented child whose home environment had been thoroughly disrupted by her mother’s transporting her from Mexico to the United States.

Although immigrant families differ, Maricela’s impoverished family situation is not atypical:

Immigration experiences vary depending on country of origin, type of migration, and individual motivations; however, the decision to migrate is often driven by financial necessity or dangerous political climates that pose a risk of exposure to robbery, violence, physical persecution and sexual assault. *Many challenges that immigrants face* – financial distress, personal dissatisfaction, depression, social isolation, and stressful life events – *are factors associated with child maltreatment.*

Megan Finno-Velasquez, “Child Maltreatment and Immigration Enforcement: Considerations for Child Welfare and Legal Systems Working with Immigrant Families,” 33 *Child. Legal Rts. J.* 37, 40 (2013) (emphasis added).

Maricela arrived in the United States in January of 2006, brought here by her mother. (JAR 4). At the time of the January 2011 RYI report, she had not seen her father in five years, (JAR 4), or, in other words, since her emigration to the U.S. Sarah Drennan, the psychologist who worked on the RYI developmental audit of

Maricela, testified that “[s]he had been abused and experienced trauma even in the move from Mexico to the United States.” (SH 12-13).<sup>1</sup> Maricela’s “downward spiral” began in 2008, only two years after what she remembered as a happy family life in Guanajuato, Mexico ended and her fragmented family migrated to the U.S. *See* JAR at 4. The family knew poverty in Mexico<sup>2</sup>, but in Fort Wayne they were without even gas or hot water when they came to the attention of social services. *See* JAR at 5.

Amicus Mexican Consulate believes that Maricela’s immigration experience and its aftermath was discounted entirely her immigration experience. *See* SH at 96 (stating the court didn’t know “that any of those facts of that growing-up have a significant impact on this case”). Disregarding appellant’s status as an undocumented child immigrant from an impoverished Mexican family also indirectly negated the third *Miller v. Alabama* mitigating factor – appellant’s relative culpability in the commission of the crime.

Marcela’s impoverished home environment made her especially vulnerable to the domination and evidence that Salgado dominated appellant and forced her into sexual intercourse, the district court stated that it was “not so concerned” with apportioning fault between the two for Guevara’s murder. (SH 92, 97). But appellant’s impoverished and freshly uprooted family gave her no healthy alternative to Salgado’s domination.

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<sup>1</sup> Maricela wrote to the presentence investigator, “The whole experience[] [of emigration] was scary and really dangerous.” (PSR 5).

<sup>2</sup> Maricela’s brother-in-law Jose Jesus Ramirez Alvarez wrote to the court: “After a year the economic crisis grew and we had the necessity [sic] to migrate to this country leaving the little things we had but leaving our hearts with our family.” Alvarez letter, at 2. Maricela followed with her mother the following year.

See JAR at 7-8. And appellant's culpability relative to Salgado's cannot be judged without reference to the nature of their relationship.

Mexican families exhibit a "traditional cultural value that emphasizes family obligation, unity, and obedience and respect their elders." *Id.* Mexican adolescents value family as much as their elders do. Martica L. Bacallao and Paul R. Smokowski, "The Costs of Getting Ahead: Mexican Family Changes After Immigration," 56 *Family Relations* 52, 62 (2007).

But Maricela's family was uprooted by single-parent emigration. Adolescents in Mexican migrant families often complain of the loss of their ties to extended family members. *Id.* at 58. Maricela lost daily contact with many family members, including her father, and was faced with a new culture in which her family was experiencing significant stress.

A culturally sensitive view of Maricela's family and home environment would have recognized that, through no fault of her own, Maricela had lost much of the traditional family support that would have helped her to resist the negative influence of Alexander Salgado.

The district court only briefly mentioned the fourth *Miller v. Alabama* mitigating factor when it conceded Maricela's potential for rehabilitation before sentencing her to 80 years. (SH 98-99).<sup>3</sup> The sentencing-hearing testimony and letters submitted to the court on Maricela's behalf amply supported the court's concession, and even established that she had already demonstrated significant

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<sup>3</sup> The potential for rehabilitation is not only recognized as a mandatory consideration in *Miller v. Alabama*, but also in the American Convention on Human Rights. See Amer. Convention on Human Rights, art. 5(6) ("punishment consisting of deprivation of liberty shall have as an essential aim the reform and social adaptation of the prisoners").

rehabilitation while in juvenile detention and adult jail. (SH 14 - Sarah Drennan testimony describing Maricela's positive development in safe environment), (SH 16 -Drennan testimony about Maricela's generosity and contributions while incarcerated), (SH 26 - Bill Webb testimony describing Maricela as a very good student in GED program). Had the district court not ignored the impact of the family background from which Maricela came, including her emigration to a new culture, it would not have given so little apparent weight to the overwhelming evidence of her rehabilitative potential.

Amicus is not arguing that a sentencing court must *always* consider a foreign national's immigration experience in determining the appropriate sentence. But on the facts of this case, given how recently Maricela had been brought to America and how impoverished her family was in Fort Wayne, Indiana, Maricela's "family and home environment" cannot be understood without reference to her traumatic emigration. The district court's sentencing rationale virtually removed Maricela's Mexican background and emigration experience from her life story, producing a grossly distorted picture of the offender before the court, and, therefore, a grossly disproportionate sentence.<sup>4</sup>

It is puzzling why the district court felt that Maricela's "family and home environment" should have no "significant impact" on the appropriate sentence. But if the court was counting Maricela's undocumented-immigrant status against her, it

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<sup>4</sup> See generally *State v. Blair*, 721 N.W.2d 55 (S.D. 2006) (applying standard for Eighth Amendment proportionality review); cf. *State v. Thorsby*, 757 N.W.2d 300, 302 (S.D. 2008) (applying abuse of discretion standard to review of sentence within statutory limits).

erred in the face of ample case law, as she was no more responsible for that status than for her parents' separation.

Maricela's status as an undocumented child immigrant should have no *negative* impact on her sentencing. Children brought to the United States by undocumented-immigrant parents have little control over "[either] their parents' conduct [or] their own status." *Plyler v. Doe*, 457 U.S. 202, 220, 102 S. Ct. 2382, 2396 (1982); *cf. United States v. Loaiza-Sanchez*, 622 F.3d 939, 942 (8<sup>th</sup> Cir. 2010) (holding that adult offenders' illegal entries were voluntary acts and criminal misconduct, to be considered as part of their personal history and characteristics under the federal sentencing guidelines). As the Supreme Court has recognized generally, "juveniles have less control, or less experience with control, over their own environment." *Roper v. Simmons*, 543 U.S. 551, 569, 125 S. Ct. 1183, 1195 (2005). That is certainly true of juveniles like Maricela who are uprooted from an extended family and brought to this country by a single parent.

## CONCLUSION

The district court erred in discounting the impact of Maricela's "family and home environment" young life (apart from her relationship with Salgado), the sentencing court greatly distorted the factors relevant to sentencing. This court should correct that error by reducing Maricela's sentence to a more proportionate one under the *Miller v. Alabama* factors.

Respectfully submitted



*Stan Keillor*

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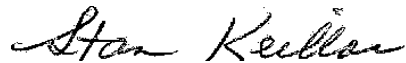
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CERTIFICATE OF COMPLIANCE

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I hereby certify that this amicus brief conforms to the requirements of South Dakota Codified Laws § 15-26A-66(b). The length of this amicus brief is less than 2,600 words. The brief uses a proportionally spaced typeface, Times New Roman size 13.

Dated: February 4, 2016



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## **CERTIFICATE OF MAILING AND PROOF OF SERVICE**

Doug Dailey states that he is an attorney for Appellant, Maricela Nicolasa Diaz, and that on the 23<sup>rd</sup> day of February, 2016, he caused to be sent a true and correct copy of the Brief of Amicus Curiae Consulate of Mexico and this Certificate of Mailing and Proof of Service in the above-entitled matter by electronic service, to:

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and that he mailed the original and two copies of the Brief of Appellant and this Certificate of Mailing and Proof of Service to the Clerk of the Supreme Court of South Dakota, 500 East Capitol, Pierre, SD 57501-5070, by depositing the original and two copies of the same in the United State's Mail, postage prepaid first class mail, on the 23<sup>rd</sup> day of February, 2016.



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Doug Dailey

IN THE SUPREME COURT  
STATE OF SOUTH DAKOTA

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No. 27432

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STATE OF SOUTH DAKOTA,  
  
Plaintiff/Appellant

vs.

MARICELA NICOLASA DIAZ,  
  
Defendant/Appellee

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Notice of Appeal Filed February 8, 2016

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APPEAL FROM THE CIRCUIT COURT  
FIRST JUDICIAL CIRCUIT, HANSON COUNTY, SOUTH DAKOTA

THE HONORABLE TIMOTHY W. BJORKMAN  
CIRCUIT COURT JUDGE

---

**BRIEF OF *AMICI CURIAE***  
**CENTER ON WRONGFUL CONVICTIONS OF YOUTH**  
**AND JUVENILE LAW CENTER**

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## **Center on Wrongful Convictions of Youth**

The Center on Wrongful Convictions of Youth (“CWCY”) operates under the auspices of the Bluhm Legal Clinic at Northwestern University School of Law. A joint project of the Clinic’s Center on Wrongful Convictions and Children and Family Justice Center, the CWCY was founded in 2009 with a unique mission: to uncover and remedy wrongful convictions of youth and promote public awareness and support for nationwide initiatives aimed at preventing wrongful convictions in the juvenile justice system. Since its founding, the CWCY has filed amicus briefs in jurisdictions across the country, ranging from state trial courts to the U.S. Supreme Court.

## **Juvenile Law Center**

Founded in 1975, Juvenile Law Center is the oldest public interest law firm for children in the United States. Juvenile Law Center advocates on behalf of youth in the child welfare, criminal, and juvenile justice systems to promote fairness, prevent harm, and ensure access to appropriate services. Juvenile Law Center works to ensure that children’s rights to due process are protected at all stages of juvenile court proceedings, from arrest through disposition, from post-disposition through appeal, and; that the juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in enforcing these rights. Juvenile Law Center participates as *amicus curiae* in state and federal courts throughout the country, including the United States Supreme Court, in cases addressing the rights and interests of children.

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## I. SUMMARY OF THE ARGUMENT

At the age of fifteen, Maricela Diaz participated in the murder of Jasmine Guevara with her then twenty-one-year-old boyfriend Alexander Salgado. Maricela was transferred to criminal court, tried as an adult, convicted, and sentenced to eighty years in prison on the murder and fifty years on the kidnaping charge. She will not be eligible for parole for at least forty years.

Maricela deserves a new trial and sentencing hearing because the trial court failed to meaningfully consider and adequately account for Maricela's youth in several critical decisions during proceedings. First, the trial court transferred Maricela to adult court based on its erroneous finding that her conduct was willful. Second, the trial court denied a defense-proffered jury instruction that would have required the jury to consider Maricela's youth when determining whether her fear of imminent harm was reasonable and thus supported her duress defense. Third, the trial court treated her youth as an aggravating, rather than mitigating factor, at sentencing and ultimately sentenced her to an unconstitutional de facto life sentence.

Although the trial court acknowledged Maricela's age and even noted that Maricela's "mental maturity was much less than one would expect from a 15-year-old in society," the judge blamed Maricela for "seeking out" the dangerous Salgado at the age of twelve or thirteen, for being drawn to him by "adolescent desire" and for "looking for a reason to have contact with him." S. Tr. 97. These "impetuous and ill-considered" actions are the hallmark traits of youth that the United States Supreme Court has held render juveniles less culpable than adults. *Roper v. Simmons*, 543 U.S. 551, 570 (2005).

The consequences of Maricela’s youth were exacerbated by the traumatic abuse she endured at the hands of Salgado. *See* Appellant’s Brief for details for the abuse. Similar to its treatment of Maricela’s youth, the trial court appeared to blame Maricela for her physical and sexual abuse, suggesting she was at fault for staying with Salgado even though numerous adults had tried to keep them apart. S. Tr. 97. But again, the dynamics of Maricela’s abusive relationship with Salgado also reflect hallmark characteristics of youth, including vulnerability to pressure, underdeveloped decision-making skills, and an inability to escape a criminogenic environment. *Miller v. Alabama*, 132 S. Ct. 2455, 2458, 2464 (2012).

In short, the trial court’s multiple errors stem from the same failure – he did not recognize that the very same facts he, and through him the jury, relied upon to punish Maricela were readily explainable through the lens of her status as a teenager trapped in a cycle of physical and sexual abuse.<sup>1</sup> In light of the U.S. Supreme Court’s recent proclamation that youth are “constitutionally different” in ways that our criminal justice must account for, there is no excuse for lower courts to ignore the impact of these differences on juveniles’ behavior and decision-making. It was an abuse of discretion to do so and a new trial and sentence is warranted.

**II. THE U.S. SUPREME COURT HAS RECOGNIZED THAT KIDS ARE CONSTITUTIONALLY DIFFERENT IN FUNDAMENTAL WAYS THAT ARE LEGALLY RELEVANT TO THE ADJUDICATION OF THEIR GUILT AND DETERMINATION OF THEIR SENTENCE**

“Children are different,” announced the U.S. Supreme Court in *Miller v. Alabama* in 2012, the latest in a series of decisions acknowledging that fundamental characteristics of youth render them less culpable and more capable of rehabilitation than adults. 132 S.

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<sup>1</sup> *Amici* adopts the facts as described in Appellant’s Brief and recites them here only where necessary.

Ct. at 2470. The Court has relied upon an increasingly settled body of neuroscience and social science supporting these categorical differences between youth and adults. *Graham v. Florida*, 560 U.S. 48, 68 (2010) (“developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds”); *see also Miller*, 132 S. Ct. at 2464 n. 5 (“[T]he science and social science supporting *Roper* and *Graham*’s conclusions have become even stronger”). This research establishes three primary differences between youth and adults relevant to culpability. *See Miller*, 132 S. Ct. at 2464; *Graham*, 560 U.S. at 68; *Roper v. Simmons*, 543 U.S. 551, 569 (2005).

“First, children have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking.” *Miller*, 132 S. Ct. at 2464 (internal citations omitted). Leading psychological researchers have concluded that, “even when adolescent cognitive abilities approximate those of adults, youthful decision making may still differ due to immature judgment.”<sup>2</sup> Neuroscientific research has similarly confirmed that adolescents have limited ability to coordinate the different brain regions needed for reasoning and problem solving.<sup>3</sup> In particular, the human brain’s prefrontal cortex—which controls risk assessment, the ability to evaluate future consequences, and impulse control—does not fully develop until a person reaches

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<sup>2</sup> *See, e.g.*, Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 *Tex. L. Rev.* 799, 813 (2003).

<sup>3</sup> K. King, *Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children from Unknowing, Unintelligent, and Involuntary Waivers of Miranda Rights*, 2006 *Wis. L. Rev.* 431, 461 (2006).

his or her early 20s.<sup>4</sup> Adolescents, thus, frequently “underestimate the risks in front of them and focus on short-term gains rather than long-term consequences.”<sup>5</sup>

“Second,” the *Miller* Court stated, “children are more vulnerable . . . to negative influences and outside pressures, including from their family and peers; they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings.” *Miller*, 132 S. Ct. at 2464; *Accord Graham*, 560 U.S. at 68; *Roper*, 543 U.S. at 569. That adolescents are developmentally less capable than adults of making sound decisions when peer pressure is strong is widely accepted.<sup>6</sup> Researchers have also noted that environmental factors can also pressure children to break the law: “[A]s legal minors, [adolescents] lack the freedom that adults have to extricate themselves from a criminogenic setting.”<sup>7</sup>

“And third,” the *Miller* Court found, “a child’s character is not as well formed as an adult’s; his traits are less fixed and his actions less likely to be evidence of irretrievable depravity.” *Miller*, 132 S. Ct. at 2464; *see also Roper*, 543 U.S. at 569-70; *Graham*, 560 U.S. at 68. The elasticity of human development, particularly during the years of maturation from childhood into adulthood, is again well-supported by research. “As juveniles . . . transition into early adulthood, there is a strengthening of self-regulation in the brain that is coupled with a change . . . in the way the brain responds to

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<sup>4</sup> Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 *Annals N.Y. Acad. Sci.* 77, 77 (2006).

<sup>5</sup> Barry Feld, *The Youth Discount: Old Enough to Do the Crime, Too Young to Do the Time*, 11 *Ohio St. J. Crim.* 107, 116-17 (2013).

<sup>6</sup> *See, e.g.*, Jay D. Aronson, *Brain Imaging, Culpability and the Juvenile Death Penalty*, 13 *Psychol. Pub. Pol’y & L.* 115, 119 (2007).

<sup>7</sup> Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 *Am. Psychologist* 1009, 1014 (2003).

rewards. . . consistent with the aggregate peak and eventual precipitous decline in delinquency and crime observed in very early adulthood.”<sup>8</sup>

### **III. THE TRIAL COURT FAILED TO ADEQUATELY ACCOUNT FOR MARICELA’S YOUTH AT SEVERAL CRITICAL STAGES OF PROCEEDINGS AS REQUIRED BY THE U.S. SUPREME COURT**

Courts must give more than just lip service to a defendant’s youth when it is a relevant factor to the analysis. Here, Maricela’s youth was relevant and significant to the court’s analysis of willfulness at the transfer hearing, the determination of jury instructions, and sentencing. But the record reveals that the court’s consideration of her youth was perfunctory at best, and potentially punitive. In other words, the judge appeared to punish Maricela for her youth rather than weigh it as a mitigating factor at these four critical points in the proceedings. *See also Roper*, 543 U.S. at 572 (evinced concern that a “defendant’s youth might be counted against him” by a jury in a case involving a particularly brutal crime and criticizing the prosecutor for “overreaching” in arguing to jury that Simmons’ youth be counted as aggravation, rather than mitigation, in urging jury to impose death sentence).

#### **A. The Trial Court Abused Its Discretion in Concluding that the Offense was Committed in a Willful Manner**

The trial court abused its discretion in concluding that the offense was committed in a willful manner. *People In Interest of Y.C.*, 1998 S.D. 76, ¶ 7, 581 N.W.2d 483, 485 (citing *State v. Jones*, 521 N.W.2d 662, 673 (S.D.1994) (citation omitted)). The evidence was uncontroverted at the transfer hearing that Maricela was a child, smaller than and physically overpowered by adult Salgado, and that Salgado physically isolated and

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<sup>8</sup> *See, e.g.*, Alex R. Piquero, *Youth Matters: The Meaning of Miller for Theory, Research, and Policy Regarding Developmental/Life-Course Criminology*, 39 *New Eng. J. on Crim. & Civ. Confinement* 347, 349 (2013).

repeatedly abused Maricela. Salgado could have been convicted of both statutory rape and abuse or cruelty to a minor for his treatment of Maricela. Under these circumstances, the court abused its discretion in concluding that Maricela's involvement was "willful, not coerced."

As explained in section II, the Supreme Court has repeatedly recognized that teenagers are uniquely susceptible to pressure, particularly pressure from adults, and that their ability to resist coercive influences is less than adults. *See, e.g., Roper*, 543 U.S. at 569 ("[J]uveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure."); *accord Graham*, 560 U.S. at 68. *See also Miller*, 132 S. Ct. at 2458. (Teenagers 'are more vulnerable ... to negative influences and outside pressures").<sup>9</sup> The Court's conclusions are amply supported by social science<sup>10</sup> and neuroscientific research on brain development that explain this deficit in youth.<sup>11</sup>

Moreover, youths are less able to extricate themselves from coercive situations and are often uniquely captive to their environment. *Miller*, 132 S. Ct. at 2458 (youth have "limited 'contro[l] over their own environment' and lack the ability to extricate themselves from horrific, crime-producing settings."). This was the case for Maricela, particularly after Salgado took her from her home and family and moved her to South

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<sup>9</sup> Reid Griffith Fontaine, *Social Information Processing, Subtypes of Violence, and a Progressive Construction of Culpability and Punishment in Juvenile Justice*, 31 Int'l J. L. & Psychiatry 136, 137 (2008) ("the ability of adolescents to resist coercive influences is lesser than that of adults.").

<sup>10</sup> *See, e.g.,* Nina Chernoff & Marsha Levick, *Beyond the Death Penalty: Implications of Adolescent Development Research for the Prosecution, Defense and Sanctioning of Youthful Offenders*, Clearinghouse Rev. J. of Poverty L. & Pol'y 209, 210 (2005); Franklin Zimring, *American Juvenile Justice* 60 (Oxford University Press, 2005); Elizabeth Cauffman & Laurence Steinberg, *Emerging Findings from Research on Adolescent Development and Juvenile Justice*, 7 Victims & Offenders 428, 434-37 (2012).

<sup>11</sup> Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 Developmental Review 78, 83-84 (2008).



Dakota, where she knew no one. She was not old enough to buy a bus ticket to return home or to hold a full-time job to support herself.

Salgado testified to repeatedly physically abusing Maricela.<sup>12</sup> His treatment of Maricela was criminal, in violation of laws specifically designed to protect children in recognition of their inherent vulnerabilities. S.D. Codified Laws § 26-10-1 (felony statute re: cruelty to a minor); S.D. Codified Laws § 22-22-1(5) (statutory rape statute). As one legislator explained, “our children, the most innocent among us, deserve to have extended protection on child abuse....”<sup>13</sup> Similarly, this Court has made clear that the age of consent for statutory rape “has been established by our legislature as a matter of public policy for the obvious protection of young and immature females.” *State v. Fulks*, 83 S.D. 433, 436, 160 N.W.2d 418, 420 (1968) *overruled on other grounds by State v. Ree*, 331 N.W.2d 557 (S.D. 1983). This Court has emphasized that a young girl is not capable of consenting to sexual relations with an adult man: “The fact that a fourteen-year-old gives “consent” to sexual intercourse is of no relevant consideration. The very premise underlying statutory rape is that children are incapable of consenting’ to voluntary sexual relations.” *State v. Bonner*, 1998 S.D. 30, ¶¶ 27-28, 577 N.W.2d 575, 582-83. And the very purpose of these laws is to prevent older men from preying upon adolescents and coercing them into sexual activity before they are capable of consent. The trial court’s finding that Maricela “willfully” engaged in sexual relations with Salgado subverts these very purposes of the statutory rape laws.

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<sup>12</sup> See, e.g., 2/2/14 Tr. at 526-539; 2/1/14 Tr. at 294, 330.

<sup>13</sup> Debate on H.B. 1238 Before the H.R., 2008 Leg., 91<sup>st</sup> Sess. (SD 2008) (Statement of Rep. Margaret Gillespie, Member, H.R), available at <http://sdpb.sd.gov/SDPBPodcast/2008/hou18.rm> beginning at 1:41:35) (in hearings on a proposal, which passed into law, to extend the statute of limitations for S.D. Codified Laws § 26-10-1).

Given the significant evidence in the record detailing Salgado’s repeated rape, beating, and terrorizing of Maricela and the above precedent from the U.S. Supreme Court and this Court highlighting the vulnerability of a 15-year-old in such a situation, the trial court abused its discretion in failing to recognize the inherent coerciveness of their relationship.

**B. The Trial Court Abused its Discretion in Denying Defense Counsel’s Requested Jury Instruction Directing the Jury to Consider Maricela’s Youth When Determining Whether Her Fear of Imminent Harm Was Reasonable**

The trial court erred when it precluded the jury from accounting for Maricela’s youth when evaluating the reasonableness of her fear of imminent harm, a critical element of the defense theory. Tr. 1341-42. At trial, Maricela’s counsel presented an affirmative defense of duress, or justification.<sup>14</sup> To prove duress, a defendant must show that she engaged in criminal conduct “because of the use or threatened use of force a reasonable person in that situation would have been lawfully unable to resist.” SDCL § 22-5-1. The essential element of this defense “is a *reasonable fear* of death or bodily harm imminent or emergent.” *State v. Boettcher*, 443 N.W. 2d 1, 2 (S.D. 1989) (emphasis added).

The duress analysis begins with an examination of “the circumstances surrounding the crime.” *State v. Miller*, 313 N.W.2d 460, 462 (S.D. 1981). As explained below, the circumstance of Maricela’s youth was highly relevant to the reasonableness of her belief that she faced imminent death or bodily harm. But the trial court denied defense counsel’s request for jury instructions that would have permitted the jury to

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<sup>14</sup> Though the South Dakota criminal code references this defense as one of “justification,” *amici*, consistent with counsel and the court, use the term “duress” in reference to the justification defense.

evaluate the reasonableness of her fear from the perspective of a youth. Supp. Req. Insts. 99, 100.<sup>15</sup> A new trial is required where a defendant was unfairly prejudiced by the trial court's refusal to give a requested instruction. *State v. Walton*, 600 N.W.2d 524, 528. Here, it is likely that the jury would have concluded that Maricela acted under duress had they been permitted to consider her youth.

### **1. Duress Should Be Evaluated from the Perspective of a Reasonable Juvenile**

U.S. Supreme Court precedent supports the instruction requested by Maricela's counsel at trial. To establish a duress defense, a defendant need not prove actual imminent harm; the only question is whether the defendant's belief that she was in imminent danger was *reasonable*. Because the defense requires an individual to weigh the costs and benefits of a certain act, it rests entirely on her judgment and decision-making capabilities. In *J.D.B. v. North Carolina*, the Court created a "reasonable child" standard based on case law, commonsense observations, and scientific data showing that juveniles are categorically ill-equipped to make decisions in the same manner as adults. 131 S. Ct. 2394 (2011). In reaching its decision, the Court recognized that there are tangible differences between the cognitive and emotional capacities of juveniles and adults, which amount to differences in what is viewed as "reasonable." *See Roper*, 543

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<sup>15</sup> Defense-proffered instruction Supp. Req. Inst. 99 provided ". . . If you decide that the defendant was battered or abused by Alexander Salgado, *you may consider that in determining the reasonableness of the defendant's perception of the immediacy of the harm* in light of the defendant's experience of abuse." (emphasis added). Supp. Req. Inst. 100 provided that "[t]he imminent danger element *may be satisfied when a child believes she is in imminent danger of death or serious bodily harm* even though her abuser is not physically abusing her at the time." Supp. Req. Instr. 100 (emphasis added). Together, these defense-proffered instructions would have enabled the jury to evaluate the reasonableness of Maricela's fear of imminent harm and to do so from the perspective of child.

U.S. at 569-70; *Graham*, 560 U.S. at 68-69.<sup>16</sup> Similarly here, because Marciela’s defense rested on the juvenile’s “reasonable belief” about the necessity of her actions to prevent imminent harm to herself, *J.D.B.* compels the adoption of a reasonable child standard to evaluate her belief.

In *J.D.B.*, the Supreme Court held that courts must apply a reasonable juvenile standard when determining whether a juvenile suspect would “have felt he or she was at liberty to terminate the interrogation and leave” for purposes of *Miranda v. Arizona*. 131 S. Ct. 2394, 2404 (2011). “*J.D.B.* was groundbreaking, distinguishing for the first time in the criminal context the oft-cited ‘reasonable person’ from the reasonable juvenile.”<sup>17</sup> The broad applicability of the holding, however, is supported by the Court’s reliance on common law and state practice, as well as previous Supreme Court law distinguishing youth from adults. “The qualities that characterize the reasonable juvenile throughout the common law—attention, prudence, knowledge, intelligence, and judgment—are precisely those that society fails to ascribe to minors.”<sup>18</sup> The ruling in *J.D.B.* makes this explicit by requiring a “reasonable child” standard in the context of *Miranda* analysis: to ignore the defendant’s age would not only be unconstitutional, but also frequently “nonsensical.” *J.D.B.*, 131 S. Ct. at 2405.

The same is true with the duress defense, which involves exactly the type of decision-making most challenging to adolescents; it applies when the accused reasonably believed her conduct was necessary to avoid imminent bodily harm or death. *Boettcher*,

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<sup>16</sup> Marsha Levick and Elizabeth Tierney, *The United States Supreme Court Adopts a Reasonable Juvenile Standard in J.D.B. v. North Carolina for Purposes of the Miranda Custody Analysis: Can a More Reasoned System for Juveniles be Far Behind?*, 47 *Harvard Civil Rights-Civil Liberties Law Review*, No. 2 (2012) at 519.

<sup>17</sup> *Id.* at 517.

<sup>18</sup> *Id.* at 506.

443 N.W. 2d at 2. While an adult might identify additional options in such a stressful situation, a young person, acting in the moment, particularly when under stress, may not have the capacity to do so. In this case, Maricela – a battered and traumatized 15 year old – could have reasonably believed that her only option to keep herself safe was to help Salgado commit this crime.

## **2. Youth is a Highly Relevant Factor to Consider When Evaluating a Duress Defense**

Indeed, as discussed in sections II and III.a., although adults may perceive multiple options in a coercive situation, adolescents may perceive only one, further limiting their understanding of how to escape.<sup>19</sup> Moreover, “because adolescents are less likely than adults to think through the future consequences of their actions, *the same level of duress may have a more disruptive impact on juveniles’ decision making* than on that of adults.”<sup>20</sup> Also, as discussed above, as a youth, Maricela was particularly susceptible to pressure and more suggestible. She also had “limited control over their own environment,” and was less able to “to extricate [herself] from [this] horrific, crime-producing setting[.]” *Miller*, 132 S. Ct. at 2458. These developmentally-based impairments in decision-making are exacerbated when adolescents are under stress. For adolescents, “[f]actors such as emotion and physiological arousal may lead to hasty decision-making or the bypassing of important decision-making domains altogether.”<sup>21</sup> It

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<sup>19</sup> Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, 15 *Crim. Just.* 27, 27 (2000); Marty Beyer, *Recognizing the Child in the Delinquent*, 7 *Ky. Child Rts. J.* 16, 17-18 (1999).

<sup>20</sup> Steinberg and Scott, 58 *Am. Psychol.* at 6 (emphasis added). *See also* Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 *Future of Children* 15, 23-24 (2008).

<sup>21</sup> Fontaine, 31 *Int’l J. L. & Psychiatry* at 145. *See also* Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court in Youth on Trial: A Developmental Perspective on Juvenile Justice* 9, 26 (Thomas Grisso & Robert G. Schwartz eds., 2000)

is thus unsurprising that youth “who do not know how to deal with such pressure lack effective control of the situations that place them most at risk of crime in their teens.”<sup>22</sup>

For all of these reasons, it was critical that the jury be allowed to consider Maricela’s youth when evaluating the reasonableness of her fear of imminent harm, her behavior, and ultimately of her culpability and guilt. Consideration of youth was particularly appropriate here where a fifteen-year-old abused and traumatized girl committed a crime with her much older boyfriend. By virtue of her age and development alone, and particularly when exacerbated by the enduring stress of ongoing abuse and trauma, Maricela was less able to reject the coercive control of her abusive boyfriend, less able to assess her alternative options, less able to foresee the consequences of her actions, and less able to extricate herself from the horrific situation once it became clear that she was expected to participate in a murder. Here, if the jury had been instructed to account for her youth, it is likely that they would have concluded that she acted under duress and the verdict would have been different.

### **C. The Court Violated the Eighth Amendment in Sentencing 15-Year-Old Maricela Diaz to an 80-Year Sentence**

Maricela’s eighty-year sentence, which requires her to serve forty years before becoming parole eligible, is unconstitutional. The sentence is the functional equivalent of life without parole as it fails to provide a meaningful opportunity for release. *See Graham*, 560 U.S. at 75 (holding that States must provide juvenile nonhomicide offenders “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation”). *Miller* establishes a presumption against imposing life

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(explaining that even when older adolescents have intellectual abilities comparable to adults, their relative lack of experience may impede their decision-making capacity).

<sup>22</sup> Zimring, *American Juvenile Justice* at 61.

without parole sentences (or their functional equivalent) on juveniles, finding that “appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.” *Miller*, 132 S. Ct. at 2469.<sup>23</sup> See also *Montgomery v. Louisiana*, No. 14-280, 2016 WL 280758, at \*13 (U.S. Jan. 25, 2016). *Miller* requires the sentencer “to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” *Id.*

### **1. The Trial Court Improperly Weighted The Facts of The Homicide**

U.S. Supreme Court precedent requires sentencers to separate the nature of the crime from the culpability of the offender. In *Roper*, the Court found that “[a]n unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender’s objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death.” 543 U.S. at 573. The same “unacceptable likelihood” exists whenever a juvenile convicted of homicide is sentenced; if the violent nature of the crime outweighs evidence of mitigation based on youth, the extreme sentences disfavored by *Miller* will be common. Therefore, even when a homicide is especially brutal, the sentencer must consider how the youth’s age and developmental immaturity counsel against a sentence that deprives a juvenile offender a meaningful opportunity to obtain release. See *Miller*, 132 S. Ct. at 2469.

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<sup>23</sup> Several state supreme courts have found that *Miller* creates a presumption against juvenile life without parole. See *State v. Riley*, 110 A.3d 1205, 1214 (Conn. 2015); *State v. Seats*, 865 N.W.2d 545, 555 (Iowa 2015); *State v. Hart*, 404 S.W.3d 232, 241 (Mo. 2013) (en banc). This Court found that life sentences for juvenile homicide offenders “would be the exception, not the rule.” *State v. Springer*, 856 N.W.2d 460, 465 n.5 (2014).

Here, the trial court improperly allowed the facts of the crime itself to outweigh the youth-related mitigation. He noted that “this crime in particular, in ways that few others have in my own memory, crossed the bounds of all decency and simply shredded the dignity of human life that this community holds dear, and it treated it with a disrespect borne of depravity.” S. Tr. 94-95. After discussing mitigating evidence, he stated, “the public needs to know that a horrendous crime needs to be met with a very serious punishment, a very serious sanction.” *Id.* at 99. Because the trial court assigned too much weight to the crime itself and too little weight to the mitigating attributes of youth, Maricela’s sentence should be vacated.

## **2. The Trial Court Failed To Give Sufficient Weight To Maricela’s Age And The Hallmark Features Of Youth**

*Miller* requires a sentencer to consider the offender’s “chronological age and its hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences.” 132 S. Ct. at 2468. An expert concluded that Maricela’s “mental maturity was much less than one would expect from a 15-year-old in our society.” S. Tr. 96. This finding alone suggests that a sentence that deprives Maricela a meaningful opportunity to obtain release is inappropriate because her culpability is vastly diminished compared to an adult offender. *See Miller*, 132 S. Ct. at 2464.

Because, for all the reasons set forth in sections II and III.a. and b., Maricela lacked the skills and maturity necessary to appropriately weigh risks and assess future consequences, she was less culpable than an adult making a similar decision. *See Roper*, 543 U.S. at 570 (“The susceptibility of juveniles to immature and irresponsible behavior means ‘their irresponsible conduct is not as morally reprehensible as that of an adult.’”)



(quoting *Thompson*, 87 U.S. at 835). Yet the trial court did not state how, if at all, he factored Maricela’s age and immaturity into the sentence imposed.

**3. The Trial Court Improperly Disregarded Mitigating Evidence of Maricela’s Vulnerability to Pressure, Particularly as a Victim of Physical and Sexual Abuse**

*Miller* requires that the sentencer consider “the circumstances of the homicide offense, including . . . the way familial and peer pressures may have affected him.” 132 S. Ct. at 2455. The trial court wrongly concluded that peer pressure was not a factor because Maricela “sought out” a relationship with Alexander Salgado, knowing “he was a dangerous person.” S. Tr. 97. *See also* S. Tr. 97 (“[I]t’s interesting to me that you sought out the relationship at that age of 12 or 13, that you looked to have contact with him.”). The implication that Maricela made a mature, considered decision to seek out and remain in this violent “relationship” does not comport with research on abuse or adolescent development, as described in Section II and III.a. and b. Her diminished culpability is compounded by the facts that she was raped at age thirteen, impregnated at age fourteen, and was repeatedly physically and sexually abused. Maricela’s relationship with Mr. Salgado was abusive and coercive. Even absent abuse and explicit coercion, a teenager’s decision-making is highly influenced by her peers.<sup>24</sup> This developmental attribute must not be confused with actively seeking out and welcoming negative peer pressure.

The trial court, however, found no connection between this coercive and abusive relationship and Maricela’s culpability. The judge stated that “[t]his crime . . . is not explained by [Mr. Salgado’s] violence upon you,” noting that “abuse victims don’t respond by harming other people. So in the end, that abuse in no way explains the

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<sup>24</sup> Brief for American Psychological Association et al. as *Amici Curiae* Supporting Petitioners at 18, *Miller v. Alabama*, 132 S. Ct. 2455 (2012), (Nos. 10-9646, 10-9647) (internal quotation and citation omitted).

depravity of the crime.” S. Tr. 97-98. This misses the point. The U.S. Supreme Court has found that a history of abuse is a strong mitigating factor for juvenile defendants. *See, e.g., Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982); *Miller*, 132 S. Ct. at 2469 (noting history of physical abuse to be a mitigating factor). The trial court’s failure to consider Maricela’s particular vulnerability in light of her young age and history of abuse was improper.

#### **4. Maricela’s Sentence Provides No Meaningful Opportunity for Release**

Whether a sentence provides a meaningful opportunity for release should not depend on anticipated dates of death. *See, e.g., State v. Null*, 836 N.W.2d 41, 71-72 (Iowa 2013). First, incarceration generally increases the risk of poor health outcomes, and juveniles sometimes have shorter life expectancies than adults serving the same sentence.<sup>25</sup> Second, a meaningful opportunity for release must mean more than release on a gurney. Providing parole eligibility after four decades in prison denies Maricela an opportunity to live a meaningful life in the community and contribute to society. *See, e.g., State v. Pearson*, 836 N.W.2d 88, 96 (Iowa 2013).

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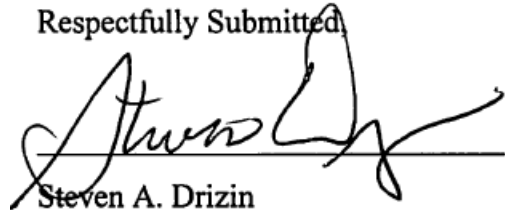
#### **IV. CONCLUSION**

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<sup>25</sup> Jason Schnittker et al., *Incarceration and the Health of the African American Community*, 8 DU BOIS REV. 133, 138 (2011); *See* ACLU of Michigan, *Juvenile Life without Parole Initiative, Michigan Life Expectancy Data for Youth Serving Natural Life Sentences*.

Throughout pretrial proceedings, trial, and sentencing, the trial court exhibited a lack of understanding of and appreciation for the relevance and significance of Maricela's youth and its impact on her culpability. The court abused its discretion at several critical junctures when it failed to meaningfully account of her youth in its decision-making. In fact, it appears that the Court – perhaps blinded by the horrific nature of the crime – counted Maricela's youth against her in deciding to transfer her to criminal court, denying her requested duress instruction and in meting out her sentence. For the foregoing reasons, *Amici* ask the Court to grant the relief requested by Appellant.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Steven A. Drizin", written over a horizontal line.

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**CERTIFICATE OF COMPLIANCE**

Pursuant to SDCL 15-26A-66(b), counsel for Amici Curiae does hereby submit the following:

The foregoing brief is typed in proportionally spaced typeface in Times New Roman 12 point. The word processor used to prepare this brief indicates that there are a total of 4,996 and 27,078 characters in the body of the brief.



Steven A. Drizin

## CERTIFICATE OF MAILING AND PROOF OF SERVICE

Doug Dailey states that he is an attorney for Appellant, Maricela Nicolasa Diaz, and that on the 23<sup>rd</sup> day of February, 2016, he caused to be sent a true and correct copy of the Brief of Amicus Curiae Center on Wrongful Conviction of Youth and Juvenile Law Center and this Certificate of Mailing and Proof of Service in the above-entitled matter by electronic service, to:

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and that he mailed the original and two copies of the Brief of Appellant and this Certificate of Mailing and Proof of Service to the Clerk of the Supreme Court of South Dakota, 500 East Capitol, Pierre, SD 57501-5070, by depositing the original and two copies of the same in the United State's Mail, postage prepaid first class mail, on the 23<sup>rd</sup> day of February, 2016.



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Doug Dailey

IN THE SUPREME COURT  
STATE OF SOUTH DAKOTA

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No. 27432

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STATE OF SOUTH DAKOTA,

*Plaintiff and Appellee,*

v.

MARICELA NICOLASA DIAZ,

*Defendant and Appellant.*

---

APPEAL FROM THE CIRCUIT COURT  
1<sup>st</sup> JUDICIAL CIRCUIT  
HANSON COUNTY, SOUTH DAKOTA

---

THE HONORABLE SEAN M. O'BRIEN &  
THE HONORABLE TIMOTHY J. BJORKMAN  
Circuit Court Judges

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**APPELLEE'S BRIEF**

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## **JURISDICTIONAL STATEMENT**

This court has jurisdiction pursuant to SDCL 15-26A-1(1) and SDCL 23A-32-2, -5 and -9.

## **STATEMENT OF LEGAL ISSUES**

WAS IT APPROPRIATE TO TRY DIAZ AS AN ADULT?

SDCL 26-11-4

The trial court transferred Diaz's case from juvenile to adult court.

SHOULD THE TRIAL COURT HAVE RECONSIDERED AND REVERSED ITS ORDER TRANSFERRING DIAZ TO ADULT COURT IN LIGHT OF NEW DEFENSE ATTACKS ON THE CREDIBILITY OF THE STATE'S EXPERT?

SDCL 26-11-4

The trial judge did not rehear the transfer ruling.

SHOULD THIS COURT RECONSIDER AND REVERSE ITS RULING IN *STATE v. DIAZ*, 2014 SD 27, 847 N.W.2d 144, ADMITTING DIAZ'S CONFESSION IN LIGHT OF FACTS DEVELOPED AT TRIAL AND A SUBSEQUENT UNITED STATES SUPREME COURT DECISION?

*Fare v. Michael C.*, 99 S.Ct. 2560 (1979)

*Montgomery v. Louisiana*, 136 S.Ct. 718 (2016)

*Rhines v. Weber*, 2000 SD 19, 608 N.W.2d 303

The facts developed at trial and *dicta* in a subsequent United States Supreme Court decision do not warrant reversal of this court's ruling admitting Diaz's confession.

DID THE TRIAL COURT PROPERLY REJECT DIAZ'S PROPOSED BATTERED WOMAN DEFENSE INSTRUCTION?

*State v. Burtzlaff*, 493 N.W.2d 1 (S.D. 1992)

*State v. Leidholm*, 334 N.W.2d 811 (N.D. 1983)

*State v. Thomas*, 673 N.E.2d 1339 (Ohio 2002)

The trial judge utilized a standard battered woman instruction in lieu of Diaz's proposed instruction.

DID THE TRIAL COURT ABUSE ITS DISCRETION IN SENTENCING DIAZ TO 80 YEARS FOR FIRST DEGREE MURDER?

*State v. Rice*, 2016 SD 18, --- NW2d ---

The trial judge sentenced Diaz to 80 years.

IS DIAZ'S 80-YEAR SENTENCE DISPROPORTIONATE TO SIMILAR SENTENCES FOR SIMILAR CRIMES COMMITTED BY JUVENILE OFFENDERS?

*State v. Charles*, 2001 SD 67, 628 N.W.2d 734

*State v. Chipps*, 2016 SD 8, 874 N.W.2d 475

*State v. Springer*, 2014 SD 80, 856 N.W.2d 460

*State v. Traversie*, 2016 SD 16, --- NW2d ---

The trial judge sentenced Diaz to 80 years.

IS DIAZ'S 80-YEAR SENTENCE A PROHIBITED MANDATORY LIFE SENTENCE?

*State v. Springer*, 2014 SD 80, 856 N.W.2d 460

The trial judge sentenced Diaz to a term of years.

## **PRELIMINARY STATEMENT**

The trial transcript will be cited as TRIAL followed by a reference to the corresponding page/line. Trial exhibits will be cited as EXHIBIT followed by reference to its assigned number in the record. The suppression hearing transcripts will be cited as SUPPRESSION followed by the date and a reference to the corresponding page/line. The official record will be cited as RECORD. The trial court's findings of fact in regards to the transfer determination will be cited as FOF followed by a reference to the pertinent paragraph. The transcripts of Diaz's police interviews (Exhibits 69b, 70 and 71b) will be cited as INTERVIEWS 1, 2 and 3

followed by a reference to the corresponding page. INTERVIEW excerpts are attached hereto in the APPENDIX for the court's ease of reference.

## **STATEMENT OF THE CASE AND FACTS**

### **A. Factual History**

Fifteen-year-old Maricela Diaz ran away from her home in Indiana with her twenty-year-old boyfriend, Alexander Salgado, to escape the supervision of her estranged mother, Irma Guttierrez-Placencia.

INTERVIEW 1 at 33. Irma was trying to keep Diaz and Salgado apart. In defiance of her mother's concerns for her welfare, Diaz abandoned her and Salgado's newborn baby with her mother to head to Mexico with Salgado. The first leg of their journey took them to Mitchell, South Dakota, where they stayed with a friend. Salgado and Diaz soon befriended sixteen-year-old Jasmine Guevara. Jasmine helped her new friends adjust to the community by giving them food, money, clothes, rides to the store and job interviews, and tips for finding jobs.

INTERVIEW 1 at 39.

After three weeks in Mitchell, Diaz became jealous of Jasmine because she wrongly believed Jasmine had romantic designs on Salgado. Diaz was extremely possessive of Salgado and prone to frequent fits of jealousy when she believed he was eyeing another female, or that another female had designs on him. TRIAL at 699/10, 700/23, 701/2, 703/18, 704/13, 706/13-23, 707/7, 708/6, 713/1, 714/2. Diaz demanded

Salgado prove his love for her by helping her kill Jasmine. TRIAL at 715/11, 716/21, 717/20, 718/18, 729/13; INTERVIEW 3 at 107.

Diaz first considered throwing Jasmine under a train but, after visiting the railyard, decided the trains moved too slowly; throwing Jasmine off a bridge was also considered but Diaz felt there were too many residences near the bridge. Eventually, Diaz formed a plan to murder Jasmine by stabbing and burning her to death out in the country. INTERVIEW 3 at 95; TRIAL at 720/24, 725/7, 729/2; TRANSFER at 366/10-20, 367/23, 369/14, 372/25.

Diaz was “mad but calm” as she put the plan in motion by calling Jasmine to ask for a ride to WalMart. TRIAL at 719/18; TRANSFER at 368/12; FOF 26, 27. She told Jasmine she needed charcoal lighter fluid for a barbecue she and Salgado were headed to. TRIAL at 725/17-22, 731/12, 734/4. She invited Jasmine to attend with them. Jasmine was game for a barbecue with her new friends. On their way out the door, Diaz and Salgado pocketed two kitchen knives. TRIAL 725/6. As the realization of what they were preparing to do started to sink in, Salgado “was starting to get really nervous . . . starting feeling, like really cold in [his] stomach.” TRIAL at 727/2, 730/13. Diaz “didn’t look nervous at all.” TRIAL at 727/5, 733/4.

Jasmine picked up Diaz and Salgado and drove them to WalMart to purchase the lighter fluid. TRIAL at 735/13. Diaz was “happy because Jasmine pay [for the lighter fluid with] her own money, because

she – [Diaz] knew that we didn't have no money.” TRANSFER at 392; INTERVIEW 3 at 96. From WalMart, Diaz and Salgado had Jasmine drive to a “haunted house” outside of town. TRIAL at 735/21.

Once Jasmine stopped the car, Salgado stepped out. The plan was for Diaz to start the murder and for Salgado to finish it. INTERVIEW 3 at 95. Diaz started “stabbing and stabbing and stabbing and stabbing and stabbing and stabbing [Jasmine] in the stomach and legs.” TRIAL at 743/7, 746/8. Salgado got back in the car when he heard Jasmine screaming. TRIAL at 738/16. Jasmine grabbed the knife by the blade trying to wrest the knife from Diaz's hand. TRIAL at 739/12, 740/1, 742/11.

Salgado got back in the car and held Jasmine's arms and hair from the back seat while Diaz continued stabbing Jasmine. TRIAL at 743/20, 744/12. Jasmine fought back, asking “Why are you guys doing this to me?” TRIAL at 744/22. Salgado “wasn't brave enough to say” that he was “just doing it for Maricela.” TRIAL at 745/19. Diaz, screamed back “Die, bitch. Die, bitch.” TRIAL at 746/24. With Jasmine restrained by Salgado, Diaz was “stabbing her up, like going really nuts on Jasmine.” TRIAL at 746/6. Diaz stabbed Jasmine with such force that she bent the blade of her knife and then threw it onto the passenger side floorboard. TRIAL at 747/23. Salgado picked up the slack and stabbed Jasmine five or six times in the stomach and leg with his own knife. TRIAL at

748/12. Diaz then took Salgado's knife and made "one deep cut in Jasmine's leg." TRIAL at 750/4.

Jasmine's "whole body was shaking." TRIAL at 751/15. Salgado pulled Jasmine's hair back to allow Diaz to embed the knife in Jasmine's throat. TRIAL at 751/5. Salgado "pushed the knife deep inside [Jasmine's throat] as far as [he] could." TRIAL at 751/17. Jasmine stopped struggling and went limp. TRIAL at 751/17, 752/10.

Diaz started dousing Jasmine with lighter fluid. TRIAL at 752/13, 753/4; INTERVIEW 3 at 84. Diaz and Salgado then stuffed their dying victim into the trunk, the knife still protruding from her throat. TRIAL at 753/24, 755/14. Salgado then drove to a more secluded area. TRIAL at 758/4.

Taking a cue from an execution method used by Mexican drug cartels that they had seen on the reality TV show *1,000 Ways To Die*, Diaz and Salgado doused Jasmine and her car with more lighter fluid, and set Jasmine and the car ablaze while she yet lived. TRIAL at 721/24, 722/5-20, 759/2, 908/24; INTERVIEW 3 at 84. Diaz and Salgado then walked back to the house where they were staying. Along the way, Diaz discarded her bloody hoodie and gloves. TRIAL at 767/2; EXHIBITS 74, 95, 110.

Back home, Salgado was nervous and sweating. TRIAL at 767/13, 768/12. Diaz was "joking, laughing" with the woman she and Salgado were staying with, "having a regular conversation." TRIAL at 767/21.

Diaz pressed Salgado to have sex with her that night. TRANSFER at 556/24. The next day, Diaz was “acting really cool” as she made breakfast for Salgado. TRIAL 770/11. Diaz “was really happy.” TRIAL at 770/12. Later that day, Diaz told Salgado “I hope that bitch is really cook[ed]. Otherwise we’re fucked.” TRIAL at 763/16.

Diaz need not have worried. Firefighters who responded to the scene discovered Jasmine Guevara’s corpse in the trunk of her torched Chevrolet Malibu, charred beyond recognition. EXHIBITS 122, 123, 124. Officially, Jasmine died of smoke inhalation, though her stab wounds and burning alive also certainly contributed to her death. TRIAL at 905/13, 907/13, 908/24, 909/1; EXHIBITS 125, 126

### **B. Procedural History**

Diaz was charged by an amended juvenile petition with First Degree Murder, First Degree Murder – Felony Murder, and First Degree Arson. Diaz was transferred to adult court. She filed a motion to suppress her statements to law enforcement. The court found Diaz’s statements were voluntary based on her willingness to speak with law enforcement, but suppressed her confession, finding that she did not knowingly and intelligently waive her *Miranda* rights. The state took an intermediate appeal of the trial court’s suppression order.

On May 7, 2014, this court reversed the suppression order, finding that Diaz had knowingly and intelligently waived her *Miranda* rights.

*State v. Diaz*, 2014 S.D. 27, 847 N.W.2d 144.

Following a jury trial, on January 15, 2015, Diaz was convicted of murder and kidnapping. She was sentenced to 80 years in the South Dakota State Penitentiary on the murder charge. Diaz now appeals her conviction and sentence.

## **ARGUMENT**

Diaz raises seven issues which challenge four aspects of her trial proceedings: (1) her transfer to adult court, (2) admission of her confession per this court's intermediate ruling; (3) denial of an instruction re: her battered woman defense, and (4) the 80-year sentence imposed for the murder charge.

### **A. ISSUES 1, 2: Diaz Was Properly Tried As An Adult**

SDCL 26-11-4 vests juvenile courts with the discretion to transfer juvenile proceedings to adult court. A transfer determination will not be reversed absent an abuse of discretion. On review, "there must be substantial evidence in the record to support the juvenile court's finding that it would be contrary to the best interests of the child or of the public to retain jurisdiction over the child." *State v. Harris*, 494 N.W.2d 619, 624 (S.D. 1993). "However, neither the interests of the child nor the interests of the state are controlling considerations." *State v. Jensen*, 1998 SD 52, ¶ 21, 579 N.W.2d 613, 617. The factors the court considers in determining whether to transfer a juvenile to adult court are:

1. The seriousness of the offense and protection of the community;
2. Whether the offense was aggressive, violent, premeditated or willful;
3. Whether the offense was against a person or property;



4. The prosecutive merit of the state's case;
5. The benefit, if any, of joint proceedings with an adult co-defendant;
6. The juvenile's prior history and record; and,
7. Public safety and rehabilitative potential in the juvenile system.

SDCL 26-11-4. The findings of fact on which the juvenile court's transfer order is based "shall not be set aside upon review unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." SDCL 26-11-4.

In view of the applicable standards and the evidence presented at the transfer hearing, the juvenile court properly concluded that it was contrary to the best interests of Diaz and the public to retain jurisdiction in juvenile court.

**1.-3. Diaz Committed A Serious, Violent Offense Against A Person**

There is no disputing that Diaz's offense is the most serious of offenses against a person, that it was premeditated, and that it was carried out in a violent and horrifying manner. FOF 46, 50, 60. Even if one believes Salgado's revisionist trial testimony and Diaz's sanitized version of her involvement, the evidence still supports a finding that Diaz willfully participated in Jasmine's murder.

The plan to murder Jasmine originated with Diaz. TRANSFER at 364/3-12, 960/22, 993/7. Diaz made the call to Jasmine for the ride to WalMart to purchase the lighter fluid that she and Salgado intended to burn her with. INTERVIEW 3 at 94-95; INTERVIEW 2 at 1; FOF 29, 60.

Diaz grabbed *two* knives when they left the house. FOF 28, 60; TRANSFER at 376/15, 543/12.

Consistent with the plan to have Diaz start the murder and for Salgado to finish it, Diaz took the first stab at Jasmine's neck in order to signal to Salgado that she was "serious" about going through with the murder. INTERVIEW 3 at 95; TRIAL at 670/4. Diaz's opening stab allegedly missed her target so she tried to stab her again but Jasmine blocked the thrust. INTERVIEW 3 at 82, 85, 95, 98; INTERVIEW 2 at 15-16; FOF 34; TRANSFER at 947/16. According to Diaz, Salgado took over from there. FOF 34.

Diaz was close enough to Jasmine as Salgado was stabbing her for Jasmine's blood to spatter on her clothing. EXHIBIT 137. According to Diaz, she stood by and allowed Salgado to murder Jasmine "to prove his love" for her, just as she had earlier "proved it" to him by cutting her wrists. INTERVIEW 3 at 99, 107. Diaz helped load Jasmine into the trunk and doused her with lighter fluid so Salgado could immolate her alive. INTERVIEW 3 at 84; FOF 36.

Based on even Diaz's self-serving version of the facts, the trial court did not abuse its discretion in determining that Diaz's conduct was willful and not committed under duress. First, when she initially confessed (and later when she was interviewed by Dr. David Bean and other mental health experts), Diaz did not say anything about Salgado forcing her to participate in Jasmine's murder. EXHIBITS 69b, 70, 71b;

TRIAL at 1311/24, 1312/20. Salgado also testified that he did not threaten to kill or harm Diaz the night of the murder. TRANSFER at 426/14, 555/21. Diaz's initial description of the murder was of a joint enterprise which she encouraged and actively participated in.

Second, Diaz's later account of having participated under fear and duress is undermined by her own psychiatric evidence. Diaz's claim that Salgado forcibly sexually abused her is contradicted by statements she made to Indiana Child Services and her own psychiatric expert, Dr. David Bean, in which she described her sexual relations with Salgado as consensual. TRANSFER EXHIBIT 314, RECORD at 2709; FOF 89, 90; TRANSFER at 250/2, 1010/15.

The state's expert, Dr. Don Dutton, found that Diaz's and Salgado's relationship was bilaterally physically and emotionally abusive. Diaz's jealousy triggered much of the tension and violence in the relationship. FOF 75, 85; TRANSFER at 283/18. Arguments and physical altercations often ensued from Diaz's belief that Salgado was "checking out" or walking too close to another female. FOF 20, 23, 24, 25, 39, 40, 76, 77; TRANSFER at 294/10, 315/8, 337/13, 346/18, 458/7, 949/5, 1308/11. Diaz would "go crazy" and hit Salgado, Salgado would hit back, or *vice versa*. FOF 82; TRANSFER at 301/12, 331/11, 558/16, 944/14, 949/6, 957/4, 957/22. Salgado described Diaz as "a scrapper" and "a fighter," as a "very violent" person who, though outclassed in weight by Salgado, was "not the type of person that you

just take a beating.” TRANSFER at 332/24, 333/2, 505/19, 526/14, 558/12, 957/22. Diaz once kicked Salgado in the testicles when she suspected he was flirting with Jasmine. TRANSFER at 984/19, 997/1. At times, Salgado himself was fearful of Diaz. TRANSFER at 958/22. A cyclical ritual of anger and fighting followed by make-up sex became the central feature of the relationship, with both partners contributing to the abuse. FOF 75; TRANSFER at 949/7, 949/12, 961/16.

According to Diaz, she was never injured in any of the physical altercations between her and Salgado, except for a bruise on one occasion. FOF 86. Salgado forthrightly testified that, though he knew it was wrong to hit a woman, he did slap Diaz with an open hand and pull her hair when they fought; Salgado, however, did not hit Diaz with his fists or often devolve to violence with her. TRANSFER at 284/1, 534/4-20. Dr. Dutton found no evidence of Diaz reporting fear of Salgado until after the murder. TRANSFER at 950/13; TRIAL at 1312/20. Diaz herself reported that she had not suffered any physical abuse at Salgado’s hand. FOF 83; TRIAL at 1218/21. Dr. Dutton concluded that the predominant psychological pattern of the relationship, and catalyst for violence, was Diaz’s jealous anger toward Salgado, not fear of him. FOF 88; TRANSFER at 958/16, 950/17-25, 951/1, 956/5; 960/14, 962/1.

Diaz’s efforts to convince psychiatric experts that she was dominated and controlled by Salgado fell short in ways that corroborate

Dr. Dutton's findings. Despite Diaz's alleged incidents of "traumatizing" abuse at Salgado's hands, she did not exhibit any characteristics of post-traumatic distress when examined by Dr. Bean or Dr. Travis Hansen. FOF 91, 93, 96; TRANSFER at 580/5, 607/22, 608/22, 615/15, 946/24, 953/1, 1013/11. Diaz did not tell Dr. Bean or Dr. Hansen (or law enforcement) that she feared Salgado or that he forced her to participate in the murder. TRIAL at 653/10, 835/8-18, 854/8, 1222/21, 1223/17, 1312/20.

Once in custody, Diaz did not seek police protection from Salgado despite the officers' expressions of concern for her wellbeing. INTERVIEW 1 at 25. Instead, Diaz tried to steer suspicion away from herself and Salgado and toward Jasmine's boyfriend, Ivan Contreras. Diaz said that she had met Jasmine on the street the day of the murder around 4:00 p.m. INTERVIEW 1 at 41. According to Diaz, Jasmine was on her way to see Ivan. INTERVIEW 1 at 51. Diaz falsely told the detectives that Jasmine was "scared" of Ivan. INTERVIEW 1 at 80. Diaz said that was the last time she saw Jasmine.

As for herself and Salgado, Diaz told the police that they had spent the early evening together babysitting their host's children. INTERVIEW 1 at 44-45. Later that evening, Diaz said they were at a bookstore using the internet and out job hunting before returning home around 10:15 p.m. INTERVIEW 1 at 52-58. Diaz fed these lies to the police expecting

to walk out of the police station and back into Salgado's arms when the interview was over.

If Salgado had victimized Diaz, forced Diaz to participate in a grisly murder, and she really had nothing to do with it, all she had to do was tell this "truth" to the police and be rid of her alleged oppressor. Instead, Diaz lied to the police about her identity and circumstances because she did *not* want to be sent back to Indiana away from Salgado. INTERVIEW 1 at 32.

If Diaz feared and cowed to Salgado, one finds no evidence of it when the video monitor captured her conversing with him through the wall of their neighboring interview rooms while detectives were out of the room. Diaz, not Salgado, is calling the shots. She tells him how to square their stories. She tells him to take the blame and refuses to take any blame herself. She grills him about the information he had already given law enforcement. INTERVIEW 1 at 23; EXHIBIT 72, Appendix at 067-071. Displeased with the story Salgado is telling his interrogators, Diaz tells him to "shut up." INTERVIEW 3 at 110; EXHIBIT 72, Appendix at 067-071.

The absence of any outward indicia of Salgado's abuse or control of Diaz pre-dating the murder squares with a nagging contradiction at the heart of Diaz's defense theory – Salgado had no motive to kill Jasmine except to placate Diaz's jealousy. If Salgado was willing to commit murder to appease Diaz, Diaz *ipso facto* held more control over Salgado

than he over her. FOF 78, 97, 98; TRANSFER at 951/13, 955/3, 960/22, 961/6. The notion of killing Jasmine indisputably originated with Diaz. TRANSFER at 382/11, 960/22. The scenario of Salgado killing Jasmine at Diaz's behest reveals a man responsive to her demands to "prove" his love in ways dictated by her, and cowed into killing to escape her jealous wrath. FOF 27, 78, 98; TRANSFER at 375/20, 382/14, 382/14, 411/19, 660/5-16, 944/13, 954/14, 955/2, 961/1-12, 980/22.

Truth be told, Diaz had Salgado, figuratively and literally, by the testicles; when she was not manipulating him emotionally with suicidal threats and gestures, binding him to her with a pregnancy, or fighting with him as part of some histrionic foreplay ritual, she flaunted her dominion over him by grabbing his testicles in her hand (sometimes in front of Salgado's own mother) and screaming "These are mine . . . these are my nuts." TRANSFER at 256/25, 260/17, 302/10, 343/6, 348/19-349/2, 531/2, 985/25, 994/10, 995/5, 1008/12, 1013/19, 1309/23; RECORD at 2698 ("Sometimes 14-year-old kids cut themselves to manipulate the system"). To which Salgado would sheepishly respond "Yeah, these are yours." TRANSFER at 343/7.

Salgado tried to break up with Diaz two or three times but "she kept bugging him" so he kept going out with her even though there were times when he was "very leery." TRANSFER at 554/23-555/1. Logically, if Diaz could bend Salgado to her will, and goad him into helping her

murder Jasmine, she had the power to call it off. TRANSFER at 961/11. Thus, in light of the evidence of Diaz's autonomy, even dominance, in her relationship to Salgado, the trial court did not abuse its discretion in finding that Diaz's participation in Jasmine's murder was willful. FOF 99.

#### **4. The Prosecutive Merit Was Substantial**

The trial court correctly found that there was substantial merit to the prosecution's case. In addition to her confession, Diaz's participation in Jasmine's murder was corroborated by Salgado's transfer hearing testimony, Salgado's post-conviction interview with Dr. Dutton, the WalMart surveillance video showing Diaz and Salgado with Jasmine buying the lighter fluid, and blood spatter evidence on Diaz's clothing. FOF 106, 109; TRANSFER at 936-38, 942-45; EXHIBIT 137.

#### **5. No Benefit Of Joint Proceedings**

The trial court correctly found this factor not applicable since Diaz was not being tried jointly with Salgado. FOF 110.

#### **6. Diaz's Prior History And Record**

Diaz's prior encounters with the juvenile system in Indiana – for truancy, oppositional behavior, early sexual activity, theft, drug use – did not result in her rehabilitation. Despite the efforts of friends, family, school officials and state child welfare personnel, Diaz was resistant to conforming to societal norms. Dr. Bean reasoned that transfer was inappropriate because Diaz had no serious criminal violations prior to



Jasmine's murder, but that logic is facile in an "Other than that, Mrs. Lincoln, how was the play?" sort of way. TRANSFER at 1021/21.

At JDC, while Diaz was generally respectful and cooperative with staff, she was viewed as a wolf in a sheep's disguise; a sheep to staff but a wolf among her JDC peers. At JDC she acquired a six-pointed star tattoo associated with a gang that espouses doctrines of evil, anarchy, opposition and anger. FOF 114. Diaz was involved in six known fights while at JDC. SENTENCING at 46/8; RECORD at 2620. She admittedly *wanted* to resort to violence in her relationships with her JDC peers, but refrained from doing so only to avoid the inevitable consequences of such conduct in a controlled facility. TRANSFER at 610/7.

Separated from Salgado, Diaz's behavioral patterns have not changed remarkably. She has redirected her jealous and threatening tendencies to JDC peers who dare to befriend *her* friends, who "break into the dyad" of Diaz's possessive, singular connection to certain of her JDC peers. TRANSFER at 605/13. Diaz has displayed a "repetitive pattern" of being angry, temperamental, manipulative, sneaky, untrustworthy, rude, mean spirited, threatening, and sarcastic, resulting in numerous conduct and behavioral write-ups at JDC. FOF 115; TRANSFER at 571/20, 587/24, 950/24. On one occasion, Diaz falsely reported that a JDC peer had punched her in the arm, but was placed in disciplinary lockdown when video disproved her allegation. RECORD at 2682. On another occasion, Diaz engaged in sexual activity with a JDC

guard, leading to the guard's arrest for sexual exploitation of a minor. RECORD at 2621. On the whole, Diaz's juvenile record reflects a persistent and escalating disdain for societal norms.

### **7. Public Safety/Rehabilitative Prospects**

Diaz's diagnosis of conduct disorder, the juvenile euphemism for sociopathy, demonstrates that she is a continuing danger to other people. FOF 150, 151, 182; TRANSFER at 570/24, 571/24, 589/10-18, 1013/4. "Adolescents experiencing a diagnosis of 'conduct disorder' show 'a repetitive and persistent pattern in which the basic rights of others or major age-appropriate society norms are violated.'" RECORD at 2722.

Even before killing Jasmine, Diaz had amassed a significant record of anti-social conduct – truancy, drug use, early sexual activity, theft, disobedience to parental authority. Before running away to South Dakota, Diaz thought she might solve the problem of her mother's thwarting of her relationship with Salgado by putting a bag over her mother's head and bludgeoning her to death with a 20-pound weight. FOF 12; TRANSFER at 272/6, 506/11. Diaz spoke of killing other females whom she believed had designs on Salgado, or who may have caught Salgado's eye, including her host in Mitchell who had taken her into her home. TRANSFER at 507/19. Diaz's default response to people who trip her delicate trigger is to kill them. The DOC does not have adequately secure juvenile facilities for an offender with Diaz's risk

profile. TRANSFER at 602/13. She is an obvious risk to public safety if housed in an unsecure facility or prematurely released. FOF 123, 124.

Reclaiming Youth International (RYI) advocated against Diaz's transfer to adult court, but the trial court found their testimony unhelpful because of bias. FOF 132. RYI's focus was on Diaz's best interests rather than on the balance between Diaz's and the public's interests. RYI testified that it could never recommend transfer of any 16-year-old to adult court under any circumstances. FOF 132. RYI also accepted Diaz's version of events unquestioned, in disregard of conflicting information or the absence of objective corroboration, and despite a powerful motive to paint herself in the most positive light. FOF 135, 169; TRANSFER at 605/21, 948/16. RYI's report also rested on numerous implausible premises – such as Diaz having no innate inclinations toward aggression against others – that were contradicted by objective testing and witness reports. TRANSFER at 963/15-965/24, 614/15.

In actuality, Diaz scored high on anti-sociality, anger and aggression scales in testing, and witnesses reported her wanting to fight or threatening to kill any “bitch” whom she imagined had designs on Salgado, or to fight Salgado himself. TRANSFER at 347/12, 359/9, 573/6, 738/4, 944/16, 950/17-25, 951/2, 956/5, 957/4, 958/2, 960/14, 961/25, 962/1, 984/19. Based on Diaz's history and testing, Dr. Hansen believed Diaz was “very much capable of an aggressive

reaction” against those who provoke or displease her. TRANSFER at 614/23. Because of RYI’s blatant bias, and unquestioning acceptance of the version of the events supplied to them by Diaz, the trial court found their opinion that Diaz was capable of reasonable rehabilitation by the age of 21 lacking in credibility and an appropriate foundation. FOF 133, 137, 162, 163.

At the behest of Dr. Bean, Dr. Beverly Gunderson conducted various psychological tests. Dr. Gunderson found that Diaz’s cognitive abilities and IQ fall in the average range. FOF 142. In addition to conduct disorder, Dr. Gunderson noted neurotic clinging behaviors, anger management problems and aggressive loss of control when not getting her way. FOF 143, 145; TRANSFER at 735/12. Dr. Gunderson found that Diaz tends to be oppositional, resistant, sneaky, underhanded, and provocative and flirtatious as means of gaining attention or achieving her ends. FOF 144-148; TRANSFER at 732/12, 950/24. Diaz scored high on the “psychopathic deviant” scales significant of “anger and hostility which may result in an antisocial act.” TRANSFER at 729/24, 733/12, 738/4.

Diaz’s Battered Woman Syndrome expert, Dr. Craig Rypma, also conducted an MMPI and found that Diaz exhibited traits of anger, resentment, hypersensitivity to criticism, and projecting blame onto others. TRANSFER at 1274/25, 1293/4. Diaz scored in the average range on Dr. Rypma’s IQ testing. Diaz’s reasoning skills fell on the

border between average and moderately below average. TRANSFER at 1292/12.

While Dr. Bean testified that he felt that Diaz's psychiatric needs could be met in the juvenile system, Dr. Hansen disagreed in light of the severity and enduring pattern of Diaz's conduct disorder. FOF 159. In Dr. Hansen's view, Diaz's calm, cool and collected reaction to the murder, and tendency to glamorize it to her JDC peers, revealed a disturbing lack of empathy, a belief that the rules do not apply to her, renewed patterns of jealousy and threats toward those whom she feels invade her singular relationships to her JDC peers, and a willingness to go to extreme lengths to fulfill her own agenda. TRANSFER at 578/14, 583/8-21, 584/6, 587/23, 604/5, 605/6-21, 608/22, 610/6.

Like Dr. Hansen, Dr. Dutton was struck by Diaz's statement (corroborated by Salgado's testimony) that she felt "nothing, I was normal" after murdering Jasmine. FOF 37, 172-177; TRANSFER at 583/4, 946/9, 959/2. Diaz's "complete absence of emotional reaction to having committed a very intimate homicide" signified conduct disorder (sociopathy) of a severe nature. TRANSFER at 646/20, 946/14. Dr. Hansen testified that treating Diaz at JDC would not alleviate anti-social tendencies because "[c]onduct disorder type symptoms don't just respond to therapy." TRANSFER at 644/18. In light of the pronounced severity of Diaz's conduct disorder, the trial court concluded that it was not reasonably possible to rehabilitate Diaz by the time she reached age

21 sufficiently to protect the public. FOF 179-183; TRANSFER at 588/22, 646/22.

Because substantial psychiatric and other evidence favored trying Diaz as an adult, the trial court's findings of fact and credibility determinations in regards to its transfer order are not clearly erroneous. Nor did the trial court's determination that six of the seven statutory transfer factors favored trying Diaz as an adult constitute an abuse of discretion.

#### **8. "Newly-Discovered" "Impeachment" Evidence**

Diaz also argues that the trial court erred in failing to vacate its transfer order in light of "newly-discovered" evidence that one of the state's experts, Dr. Dutton, had been the subject of a sexual harassment complaint by a 35-year-old student in 1995. As a result of the complaint, the British Columbia Human Rights Tribunal found that Dr. Dutton was responsible for inappropriately meeting with the student in, as described by the complainant herself, a "romantic" environment at his apartment, but not guilty of her accusation that he made physical sexual advances toward her. APPENDIX at 077, 081. Before filing a formal complaint against Dr. Dutton, the student first tried to blackmail him; she wrote him a letter demanding that he procure her admission to graduate school or she would do "whatever it took" to "destroy [him] professionally." APPENDIX at 078-80.

The trial court did not err in finding no grounds to reverse its transfer ruling based on the complaint. First, evidence of the complaint was not “newly-discovered” in the sense that it was not discoverable prior to the transfer hearing. A simple Google search of Dr. Dutton’s name turns up numerous links to articles reporting on the complaint as well as the tribunal’s opinion itself. APPENDIX at 072-075. Second, as found by the trial court, this extrinsic “impeachment” evidence did not bear on Dr. Dutton’s reputation for truthfulness or untruthfulness per SDCL 19-14-10 (SDCL 19-19-608(b)).

Third, the trial court found that it would have reached the same conclusion on the transfer issue regardless of the complaint based on the testimony of the other witnesses. The trial court’s finding is fairly supported by the record. As discussed above, the complaint hardly decisively impeaches Dr. Dutton’s when his opinions and testimony were largely corroborated by Drs. Bean, Gunderson, Rypma and Hansen and other evidence in the case.

- a. Dr. Dutton’s finding that the Diaz-Salgado relationship was bilaterally abusive, anger- and not fear-based, and that RYI’s opinions were wrongly premised on a stereotype of unilateral, male abuse, is supported by (i) Salgado’s testimony that Diaz was assaultive toward him, (ii) Dr. Rypma’s testimony that battering studies have “been done assuming that women are the victims, and logically we know that not to be the case” given the growing

recognition “that battering can occur to both sexes,” and (iii) Diaz’s own report of “considerable problems controlling her anger.”

TRANSFER at 1279/13, 1296/5; RECORD at 2717.

- b. Dr. Dutton’s opinion that Diaz was not traumatized by the bilateral abuses of her relationship to Salgado was confirmed by Drs. Bean and Hansen. FOF 91, 93, 96; TRANSFER at 580/5, 607/22, 608/22, 946/24, 953/1, 1013/11.
- c. Like Dr. Dutton, Drs. Bean, Rypma and Hansen testified that Diaz did not report fear of Salgado or being forced by him to participate in Jasmine’s murder. TRIAL at 1222/21, 1223/17, 1311/24, 1312/22.
- d. Diaz’s capacity to act aggressively in her self-interest and resist domination is confirmed by her high scores on the antisocial scales of Dr. Gunderson’s testing. TRANSFER at 729/24, 733/12, 738/4. Dr. Bean also reported that aggressive loss of control is apparent” from testing and that Diaz herself reported “considerable problems controlling her anger.” RECORD at 2717.
- e. Like Dr. Bean, Dr. Dutton testified that Diaz had not reported forcible sexual abuse by Salgado, which was further corroborated by Diaz’s hospital records, in which she reported that she had never been abused by anyone, and her report to Indiana Child Services that she and Salgado got along good and did not fight.



TRANSFER EXHIBIT 314; FOF 89, 90; TRANSFER at 250/3,  
1010/15; RECORD at 2697, 2701, 2709 2745.

The sexual harassment complaint does little to “impeach” Dr. Dutton when his opinions and conclusions are shared by other experts in the case, including Diaz’s own.

Thus, even if the trial court had imputed some kind of misogynistic bias to Dr. Dutton’s testimony stemming from his experience as a (mostly vindicated) respondent in a 20-year-old sexual harassment complaint to discount his credibility, or excluded it altogether, there is not a reasonable probability that earlier discovery of the complaint would have produced a different outcome of the transfer determination.

Accordingly, the trial court did not err in denying Diaz’s motion to vacate its transfer order.

### **9. Conclusion Re: Transfer Determination**

The trial court correctly found that there was substantial evidence – from Drs. Bean, Gunderson, Rypma, Hansen and Dutton – that it would be contrary to the best interests of both Diaz and the public for her to be tried as a juvenile. Diaz is a proto-sociopath whose psychological testing, persistent anti-social behavioral patterns, deceitfulness, resentment toward the judicial system, and lack of remorse do not suggest a reasonable probability of rehabilitation by the time she is 21 years of age. In light of this fact, the trial court did not

abuse its discretion in concluding that both Diaz and society are better served by a lengthier sentence in the adult system.

**B. ISSUE 3: Diaz’s Challenge To The Admission Of Her Confession Is Not Preserved For Review, Nor Are There Grounds For Reconsidering And Reversing This Court’s Intermediate Ruling**

Diaz asks this court to *sua sponte* revisit and reverse its intermediate ruling in *Diaz* on three grounds: (1) *dicta* in the recent United States Supreme Court decision in *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016); (2) Salgado’s assuming all responsibility for the murder during his trial testimony; and (3) alleged intimidation stemming from law enforcement’s placing a can of lighter fluid on the table during Diaz’s interrogation.

At the outset of the trial, Diaz lodged a standing objection to admission of her confession based on arguments made during the suppression proceedings. Diaz’s arguments herein were not, however, made during the suppression hearings, nor did Diaz raise these arguments in the court below in a motion to reconsider its suppression ruling or for a mistrial.

To preserve issues for appellate review, litigants must make their arguments and objections to the trial court. SDCL 23A-44-13. Issues not brought to the trial court’s attention cannot ordinarily be raised for the first time on appeal. Where error has not been preserved by objection or otherwise, inquiry on review is limited to whether the trial court committed plain error. “Plain errors or defects affecting substantial

rights may be noticed although they were not brought to the attention of a court.” SDCL 23A-44-15. Plain error analysis requires the defendant to demonstrate prejudice, which is to say that the error must “seriously affect the fairness, integrity, or public reputation of judicial proceedings” to warrant reversal *State v. Nelson*, 1998 SD 124, ¶¶ 7, 8, 587 N.W.2d 439, 443. “The trial court's evidentiary rulings are presumed correct and will not be overturned absent a clear abuse of discretion.” *Kaiser v. University Physicians Clinic*, 2006 SD 95, ¶ 29, 724 N.W.2d 186, 194.

### **1. *Montgomery v. Louisiana***

Diaz argues that this court should *sua sponte* reverse its ruling admitting Diaz’s confession because of the United States Supreme Court’s recent *Montgomery* decision. Specifically, Diaz references *dicta* in *Montgomery*, where the court reaffirmed the generic “principle that juveniles are different than adults” previously articulated in *Miller*. *Montgomery*, 136 S.Ct. at 733. *Montgomery* did not expand on *Miller* beyond applying its principles retroactively. But since the principle that juveniles are different was fully appreciated and duly applied in this court’s decision affirming the admission of Diaz’s confession, *Montgomery* did not enunciate any new principle of law warranting this court’s re-examination of its suppression ruling. *Diaz*, 2014 S.D. 27 at ¶ 22, 847 N.W.2d at 154.

## 2. Salgado's Trial Testimony

Diaz argues that her confession was improperly introduced in light of Salgado's trial testimony in which he asserted – contrary to his pre-conviction confession, transfer testimony, and post-conviction interview with Dr. Dutton – that Diaz had nothing to do with the murder.

TRANSFER at 942-945.

A totality of the circumstances analysis applies in deciding whether a juvenile knowingly and intelligently waived her *Miranda* rights. *Fare v. Michael C.*, 499 S.Ct. 2560, 2571–72 (1979). When determining admissibility of a juvenile's confession, a court must “consider the juvenile's age, experience, education, background, intelligence,” level of maturity, “capacity to understand the warnings, the nature of [the] Fifth Amendment rights, and the consequences of waiving such rights . . . together with the gravity of [any] misrepresentations used by the interrogating officers.” *State v. Horse*, 2002 S.D. 47, ¶ 13, 644 N.W.2d 211, 218–19. Although not *per se* rules, other significant factors taken into consideration are whether the juvenile was warned “of the possibility of being tried as an adult,” whether notice was given to the juvenile's parent or guardian, and whether the juvenile had an opportunity to confer with the parent or guardian. *Diaz*, 2014 S.D. 27 at ¶ 23, 847 N.W.2d at 154.

The foregoing recitation of standards reflects that the admissibility of a juvenile's confession hinges on the defendant's state of mind at the

time the confession is made, and the circumstances which prompted the confession. Salgado's trial testimony from five years after Diaz's confession has no bearing on the analysis of whether her waiver was knowing and voluntary when made.

Nor does Salgado's trial recantation point to Diaz's actual innocence as might occasion a plain error reversal. *Nelson*, 1998 S.D 124 at ¶ 8, 587 N.W.2d at 443. As discussed above, Diaz herself admitted to planning and participating in the murder. Also, the version of the events described in Salgado's transfer testimony is better corroborated than Diaz's self-exculpatory version. For one, unlike Diaz, Salgado did not shift all responsibility for the stabbings from himself; his transfer testimony has a quality of verisimilitude because he realizes no benefit from implicating Diaz while admitting to stabbing Jasmine several times in the stomach and leg himself. TRANSFER at 413/22, 414/15.

For another, there is corroborating evidence of Diaz's motive to kill Jasmine from Ivan Contreras. Contreras had to protect Jasmine from being assaulted by Diaz at a party three days before the murder. Jasmine, who laughed when Diaz accused her of trying to steal Salgado from her, failed to appreciate how provocative this was to Diaz. Contreras understood; he warned her "You don't get it. They're fighting because of you." TRANSFER at 957/1-19. Thus, Diaz "had the greater motive for killing Jasmine." TRANSFER at 960/23.

Finally, Salgado's version is corroborated by the physical evidence. The elastic wrist cuff of the hoodie Diaz was wearing during the murder is saturated with blood consistent with contact and transfer stains imparted while Diaz was stabbing Jasmine. TRANSFER at 921/6, 928/1-7.

### **3. Lighter Fluid**

Diaz also argues that this court should reexamine its suppression ruling because law enforcement placed a can of lighter fluid on the table in front of her during her interview. The interview transcript, however, reflects that Diaz had already confessed, during the initial 58-minute gap in the transcript between Interview 1 and Interview 2, when the bottle of lighter fluid was placed before her simply to confirm it was what was used to burn Jasmine. INTERVIEW 2 at 1; TRIAL at 598/6-22.

Diaz was prompted to confess when she was confronted with the WalMart surveillance video, which exposed the elaborate false alibi she had just fed the detectives for the lie that it was. Believing the video meant that the police "knew what was going on," Diaz admitted "We did it. We did it." TRIAL at 595/4, 655/12, 660/20; INTERVIEW 1 at 40-42, 52-53, 55, 58. Diaz then confessed to a sanitized version of her involvement that shifted primary blame for the actual killing to Salgado. INTERVIEW 3 at 82-87, 94-101. When asked if there was anything the officers had said that "made" her confess, Diaz said only that she

confessed just to get it off her chest, but nothing about the can of lighter fluid. INTERVIEW 3 at 126.

Thus, contrary to Diaz's argument, the bottle of lighter fluid did not frighten or induce her to confess. *Rhines v. Weber*, 2000 SD 19, ¶ 23, 608 N.W.2d 303, 309 (alleged false promise that Rhines would not receive the death penalty did not warrant suppression of confession when "Rhines [had] made incriminating statements prior to [the detective] ever mentioning South Dakota's recent history with the death penalty"). In view of the fact that this court properly accounted for Diaz's juvenile status in its decision reversing the suppression of her confession, and the absence of any evidence of actual innocence or improper influence during her confession, there is no error here so plain as to impugn the integrity of the proceeding or warrant reversal of Diaz's conviction.

**C. ISSUE 4: The Trial Court Properly Instructed The Jury On Diaz's Battered Woman Defense**

Diaz argues that the trial court erred in failing to instruct the jury on the allegedly particular effects of Battered Woman Syndrome (BWS) on juvenile victims. According to Diaz, in addition to a standard BWS instruction, the trial court should have further instructed the jury that she, as a juvenile, "experience[d] a heightened sense of imminent danger" from Salgado as compared to an adult victim.

"Trial courts possess broad discretion in instructing the jury."  
*State v. Pellegrino*, 1998 SD 39, ¶ 9, 577 N.W.2d 590, 594. "Upon proper

request, defendants are entitled to instructions on their defense theories if evidence supports them.” *Pellegrino*, 1998 SD 39 at ¶ 9, 577 N.W.2d at 594. “[J]ury instructions are adequate when, considered as a whole, they give the full and correct statement of the law applicable to the case.” *State v. Rhines*, 1996 SD 55, ¶ 111, 548 N.W.2d 415, 443. To reverse a trial court's refusal to give an instruction, the defendant must be unfairly prejudiced by the refusal. *Rhines*, 1996 SD 55 at ¶ 111, 548 N.W.2d at 443. Moreover, the defendant must show that “the jury might and probably would have returned a different verdict if [the] instruction had been given.” *Rhines*, 1996 SD 55 at ¶ 111, 548 N.W.2d at 443.

At the outset, it is worth noting that BWS is not itself a defense or justification for murder independent of duress. *State v. Leidholm*, 334 N.W.2d 811, 820 (N.D. 1983); *State v. Thomas*, 673 N.E.2d 1339, 1345 (Ohio 2002). “In other words, [t]he existence of the syndrome in a [relationship] does not of itself establish the legal right of [a female] to kill [her boyfriend], the evidence must still be considered in the context” of duress. *State v. Burtzloff*, 493 N.W.2d 1, 8 (S.D. 1992); *Leidholm*, 334 N.W.2d at 820. A “court need not include a specific instruction on battered woman syndrome in its charge to the jury” if it gives appropriate instruction on the law of the defendant’s asserted defense, here duress. *Leidholm*, 334 N.W.2d at 820 (BWS instruction not required if jury properly instructed on self-defense).



Thus, BWS evidence is admissible only “to assist the trier of fact to determine whether the defendant acted out of an honest belief that she [wa]s in imminent danger of death or great bodily harm and that the use of such force was her only means of escape.” *Thomas*, 673 N.E.2d at 1345. Here, the court properly instructed the jury that it should view Diaz’s fear of “imminent serious bodily injury” from the perspective of a “person in [her] situation.” INSTRUCTIONS 44, 45, Appellant’s Appendix at 43. The instruction given, thus, directs the jury to view the events surrounding the murder from the situational perspective of a 15-year-old, illegal immigrant, runaway, in a mutually abusive relationship with an older male member of a Mexican gang.

Moreover, Diaz would be entitled to her proposed BWS instruction only if it was supported by the evidence, but it was not. At the risk of appearing to minimize Salgado’s abuse, Diaz herself never described being the victim of life-threatening abuse. RECORD at 2697 (prior to murder, Diaz “reported she has never been abused by her parents or anyone else”); TRANSFER at 615/14, 974/6 (Salgado’s “violence did not rise to a level that was either injurious or trauma-inducing”). Salgado slapped Diaz but did not strike her with a fist, never beat her bloody or unconscious or broke her bones, and never threatened to kill her. TRIAL at 797/16, 895/6-21. Dr. Bean himself describes the cuts to Diaz’s wrist as “superficial,” more a “suicidal gesture” than a life-threatening event. RECORD at 2708, 2745; TRANSFER at 1008/12-25. Diaz herself

reported that she had not tried to kill herself when she cut her wrists but rather to “prove” her love. TRANSFER at 985/25; RECORD at 2696.

The pre-murder record was so barren of evidence of abuse by Salgado that Dr. Bean even admitted to being “surprise[d]” to hear Diaz’s *post hoc* claim that Salgado had cut her wrists. TRANSFER at 1031/17. Since Diaz never described any incident of heightened, life-threatening abuse at Salgado’s hands, her evidence did not support an instruction of heightened fear. TRANSFER at 974/7, 966/8.

Also, there is no evidence in the record supporting Diaz’s theory that she, as a juvenile, experienced a “heightened sense of imminent danger” compared to the same sense of danger an adult person in her situation would feel. Dr. Rypma, Diaz’s BWS expert, did not testify that Diaz’s sense of imminent danger was “heightened” because she was a juvenile. Dr. Bean concluded that Diaz had *not* been traumatized by any act of abuse by Salgado such as would evidence a “heightened” fear of him. Dr. Bean’s observation is corroborated by Salgado’s mother, who stated that Diaz “never seemed afraid of Alex” and Salgado’s transfer testimony that Diaz was not afraid of him. TRANSFER at 554/14, 994/8. Also, according to Diaz’s host in Mitchell, Diaz and Salgado acted “like a normal couple,” “attached, like touchy, touchy” and “always by each other or sitting by each other, talking constantly.” TRIAL at 1123/24, 1140/5. Diaz is not entitled to an instruction on her theory of

heightened fear if she has not introduced appropriate evidence to support it. *Pellegrino*, 1998 SD 39 at ¶ 9, 577 N.W.2d at 594.

Finally, proof of duress required Diaz to show “no reasonable opportunity . . . to escape.” INSTRUCTION 44. According to Diaz, she did not stab at Jasmine until Salgado had exited the vehicle and walked toward the haunted house. INTERVIEW 2 at 16-18; INTERVIEW 3 at 98; TRANSFER at 402/15; TRIAL at 737/22, 740/25. With Salgado locked out of the car, Diaz could have easily warned Jasmine that she was in mortal danger and that they both needed to drive away from Salgado that instant. TRANSFER at 405/11, 409/21; TRIAL 741/8. If Salgado’s past abuse was any indication, the consequence of doing so for Diaz was being slapped and dragged by her hair, whereas the consequence for Jasmine was agonizingly fatal. TRANSFER at 966/5, 974/7. Thus, Diaz did not have a “well-grounded apprehension of imminent death or serious bodily injury” sufficient to establish duress at the time of Jasmine’s murder.

In view of the lack of actual evidence of life-threatening abuse, and the undisputed fact that Diaz and Jasmine could have readily escaped from Salgado when he was locked out of the car, it cannot be credibly asserted that Diaz was prejudiced in failing to receive the requested heightened fear instruction, or that the jury would have bought her duress defense if she had. Accordingly, the trial court did not abuse its discretion in refusing Diaz’s battered woman instruction.

#### **D. ISSUES 5, 6, 7: Diaz’s 80-Year Sentence Is Not Illegal, Disproportionate, Or Unconstitutional**

Finally, Diaz challenges her 80-year sentence on three grounds: (1) the alleged disproportionality of her sentence; (2) her young age and alleged potential for rehabilitation; and (3) because a term of 80 years is allegedly a *de facto* prohibited life sentence. As discussed below, Diaz’s sentence is neither unconstitutional nor an impermissible mandatory life sentence, nor did the trial court abuse its discretion in imposing an 80-year sentence under the circumstances of this case.

##### **1. 80-Year Sentence Not Disproportional**

When a defendant challenges a non-capital sentence on 8<sup>th</sup> Amendment grounds, this court conducts a *de novo* review to determine whether the sentence is grossly disproportional to the offense of conviction. *State v. Rice*, 2016 SD 18, ¶ 11, --- NW2d ---, citing *State v. Chipps*, 2016 SD 8, ¶ 31, 874 N.W.2d 475, 486. The standard for gross disproportionality is “relatively straightforward.” *Chipps*, 2016 SD 8 at ¶ 38, 874 N.W.2d at 488. The court looks at the gravity of the offense in comparison to the harshness of the penalty. *Chipps*, 2016 SD 8 at ¶ 38, 874 N.W.2d at 488-89.

The gravity component of the test “refers to the offense’s relative position on the spectrum of all criminality.” *Chipps*, 2016 SD 8 at ¶¶ 35, 36, 40, 874 N.W.2d at 487, 488, 490. Considerations when judging the gravity of the offense include the defendant’s conduct relative to the crime, whether the crime is one of violence to a person, the level of

intent, the defendant's motive, and (if the sentence is being enhanced for recidivism) the defendant's past record. *State v. Traversie*, 2016 SD 16, ¶ 16; *Chipps*, 2016 SD 8 at ¶¶ 35, 36, 40, 874 N.W.2d at 487, 488, 490.

The harshness component refers to “the penalty’s relative position on the spectrum of all criminality,” not the maximum sentence permitted by statute for the crime in question. *Rice*, 2016 SD 18 at ¶ 19. Since the harshness of penalties relative to the gravity of an offense rarely leads to an inference of gross disproportionality under contemporary sentencing schemes, the proportionality review typically ends with the comparison. *Chipps*, 2016 SD 8 at ¶ 38, 874 N.W.2d at 488-89.

If, from the initial comparative analysis, there is an appearance of gross disproportionality, the court will then compare the subject sentence to those imposed on other criminals for the same crime within, or if necessary, without the jurisdiction. *Chipps*, 2016 SD 8 at ¶ 38, 874 N.W.2d at 488-89. Only if this latter comparison confirms gross disproportionality may the sentence be said to violate the 8<sup>th</sup> Amendment’s prohibition on cruel and unusual punishment.

Applying the foregoing standards to Diaz’s challenge, the gravity of the offense of homicide militates in favor of a severe sentence. *Rice*, 2016 SD 18 at ¶ 14. Homicide the “highest crime” against a person and society. *Rice*, 2016 SD 18 at ¶ 14. In Diaz’s case, her premeditated participation in the highest form of the highest crime is grave in the extreme on the spectrum of criminality. *Rice*, 2016 SD 18 at ¶ 14.

The harshness factor also favors the sentence imposed in that Diaz's *de facto* sentence of 40 years (accounting for her parole eligibility) is lenient in comparison to the life and capital sentences typically imposed on defendants convicted of the same crime as Diaz. *Rice*, 2016 SD 18 at ¶ 15. Thus, Diaz's 40-year sentence gives no appearance of being grossly disproportionate to the crime of premeditated, first-degree murder.

Though comparison with the sentences imposed on others convicted of the same offense is not made when, as here, a sentence is not grossly disproportionate on its face, comparing Diaz's sentence to sentences imposed on other juvenile offenders convicted of homicides confirms that her sentence is not grossly disproportionate.

- a. Daniel Neil Charles was 14 when he shot his allegedly abusive stepfather in the head with a .25-06 rifle. *State v. Charles*, 2001 SD 67, ¶¶ 2-3, 628 N.W.2d 734, 736. Charles was tried as an adult, convicted of first degree murder and sentenced to 92 years in prison. CHARLES RE-SENTENCING ORDER, Appendix at 084.
- b. Shawn Cameron Springer was 16 when he participated in a felony-murder robbery of a Ft. Pierre cab driver. *State v. Springer*, 2014 SD 80, ¶¶ 1-2, 856 N.W.2d 460, 461. Springer was sentenced to 261 years, which, per the parole eligibility

table, equated to a *de facto* sentence of 33 years. *Springer*, 2014 SD 80 at ¶ 5, 856 N.W.2d at 462-63.

Like Charles, but unlike Springer, Diaz has never provided an honest account of the crime, taken full responsibility, and did not plead guilty. *Charles*, 2001 SD 67 at ¶ 7, 628 N.W.2d at 736; *Springer*, 2014 SD 80 at ¶ 3, 856 N.W.2d at 461. Unlike Charles, Diaz did not kill her alleged abuser, making her sentence significantly more lenient in comparison. Diaz's sentence is, thus, not grossly disproportionate to sentences imposed in other juvenile homicide cases.

Diaz's case is readily distinguishable from the proffered comparable juvenile offenses and offenders cited in her brief. While portions of Anderson's, Kruthoff's and Rice's 80-year sentences were suspended, the murder in that case was committed extemporaneously, incidental to a botched robbery, without the level of planning and premeditation found in this case. Also, unlike Diaz, all of the defendants pled guilty to a lesser offense of first-degree manslaughter and provided honest accounts of the events of the crime to authorities whereas Diaz did not plead and has not offered an honest account of the murder. Unlike Diaz, Scholten was a passive participant in the Anderson/Kruthoff/Rice robbery scheme and not the architect of the crime. *Rice*, 2016 SD 18 at ¶ 25. The homicides perpetrated by Contreras, Fischer and Horn were not premeditated and none were convicted of first degree murder. While the homicides in Hopkins, LeGrand, Libby, and New Holy

were more deliberate, these defendants all pled guilty and were convicted of no more than manslaughter or second-degree murder. The lenient sentence in McCahren is an aberration resulting from the trial judge's admitted misapplication of the parole eligibility table in calculating the gross sentence.

Since Diaz's sentence is not being enhanced as a repeat offender, her lack of prior criminal history does not mitigate the gravity of her offense of conviction. *Rice*, 2016 SD 18 at ¶ 18.

## **2. 80-Year Sentence Not An Abuse Of Discretion**

A sentence which fails the gross disproportionality test (which Diaz's does not) may be further challenged for an abuse of discretion. *Rice*, 2016 SD 18 at ¶ 23. "An abuse of discretion is a fundamental error of judgment, a choice outside the range of permissible choices." *Rice*, 2016 SD 18 at ¶ 23. Consequently, "a sentence within the statutory maximum [generally] will not be disturbed on appeal." *Rice*, 2016 SD 18 at ¶ 23. A "sentencing court should acquire a thorough acquaintance with the character and history" of the defendant, including the defendant's degree of culpability, "general moral character, mentality, habits, social environment, tendencies, age, aversion or inclination to commit crime, life, family, occupation, and previous criminal record." *Rice*, 2016 SD 18 at ¶ 27.

Over the course of the trial, the sentencing court became thoroughly familiar with Diaz's life and character, and the record reflects



that the sentencing court gave due consideration to all pertinent sentencing factors. First, the court noted the enormity of the crime and the need for a sentence that would satisfy society's interests in punishment, deterrence, restitution and rehabilitation. SENTENCING at 90/6-15. Next, the court acknowledged the particular sentencing considerations pertaining to juveniles. SENTENCING at 92/5.

Within this framework, the sentencing court justifiably found that the murder was "wanton" and "chilling." SENTENCING at 92/20. The court was disturbed that Diaz had repaid Jasmine's many kindnesses – the food, clothing, money and transportation she provided to Maricela – with "the worst kind of evil," and "for no reason." INTERVIEW 1 at 39; SENTENCING at 93/2. The court concluded Jasmine's murder was "a crime that calls out for harsh punishment." SENTENCING at 95/9.

In determining that punishment, the court noted that Diaz had been a decent child up to age 13. SENTENCING at 95/14. It observed that Diaz came from a caring home, though one beset by the hardships of poverty, displacement and acclimation to a new country and culture. SENTENCING at 96/16. The court was struck by the fact that Diaz, despite her young age, "sought out the relationship" with Salgado knowing "he was a dangerous person." SENTENCING at 97/10. Even as her family, school officials and state child welfare personnel tried to keep her from away from Salgado, Diaz resisted and ultimately

abandoned her own child in order to pursue an unfettered relationship with him. SENTENCING at 97/19.

The circumstances of the crime were a factor that certainly weighed against Diaz. As noted by the sentencing court, the murder was very deliberate and gruesome. SENTENCING at 98/4-11. The court also did not feel that Diaz's violence against Jasmine, or the "depravity" of the murder, could be explained by Salgado's abuse of Diaz. SENTENCING at 98/6.

Still, the court generously allowed that Diaz could still have some "decency" in her and might yet be rehabilitated. SENTENCING at 98/20. It felt that there was "room for healing" in Diaz's being, "for growth" and "to move forward and make a productive life." Balancing this perceived capacity for healing and growth against the public's safety and interest in imposing "serious punishment" for a horrendous crime, the court concluded that Diaz's reformation would "need to take place behind the walls of an institution." SENTENCING at 99/14.

The record reflects that the court took account of the appropriate standards and facts in arriving at its sentence. In spite of her youth, the trial court did not abuse its discretion in sentencing Diaz to a term of 80 years in light of the gravity of the offense, her failure to accept responsibility, the absence of any sincere expression of remorse, and the persistence of her anti-social behavioral patterns.

### **3. 80-Year Sentence Not A DeFacto Life Sentence**

Finally, Diaz argues that she has been sentenced to a *de facto* life sentence because her remaining life expectancy of 63.7 years is less than her 80-year sentence. First, *Miller v. Alabama*, 132 S.Ct. 2455 (2012), does not prohibit life sentences for juveniles, it merely prohibits life sentences imposed mandatorily, without consideration for the juvenile's prospects for rehabilitation.

Second, a *de facto* life sentence is one in which "the defendant's parole eligibility date falls outside of the defendant's life expectancy." *Springer*, 2014 SD 80 at ¶ 20, 856 N.W.2d at 468. The parole eligibility table codifies leniency for Class A juvenile offenders by affording them Class C eligibility status. SDCL 24-15A-32. Per the table, Diaz need only serve 50% of her sentence, which equates to a *de facto* 40-year sentence. She will be parole eligible at age 55. With a life expectancy of 83.7 years, Diaz will enjoy 28.7 years of freedom after her release. Time to marry, time to have a relationship with her daughter, time to be a grandmother, time to contribute to society – more time to experience life's various stations than Diaz allowed to Jasmine Guevara. There being no constitutional error or abuse of discretion in the court's imposition of an 80-year sentence, this court should affirm Diaz's sentence.

### **CONCLUSION**

For as long as Diaz continues to deny her active involvement in the murder – admitting only to the passive culpability of "failing to stop"

Salgado or “failing to help” Jasmine – her prospects for rehabilitation are zero. RECORD at 2713. Nor can she be trusted until she admits what she did. Her expressions of remorse cannot be trusted. Her ostensible commitment to rehabilitation cannot be trusted. Her promises to honor society’s norms and laws in the future cannot be trusted.

Diaz is now age 20. She is not presently rehabilitated, nor will she be in one short year’s time. Faced with this reality, transferring Diaz to adult court was not just a prudent exercise of judicial discretion, it was the sole means of protecting the public from her antisocial proclivities in the near future and fashioning a sentence commensurate with the horrific dimensions of her crime. Diaz’s conviction and sentence, accordingly, should be affirmed.

Dated this 26<sup>th</sup> day of April 2016.

Respectfully submitted,  
**MARTY J. JACKLEY**  
**ATTORNEY GENERAL**

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### **CERTIFICATE OF COMPLIANCE**

1. I certify that appellee's brief is within the typeface and volume limitations provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in proportional 12 point type. Appellee's brief contains 9,996 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2010.

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Paul S. Swedlund  
Assistant Attorney General

### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 26<sup>th</sup> day of April 2016 a true and correct copy of the foregoing brief was served on via e-mail on Doug Daily at [doug@dailey-law.com](mailto:doug@dailey-law.com) and Chris Nipe at [cnipe@mitchelltelecom.net](mailto:cnipe@mitchelltelecom.net).

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Paul S. Swedlund  
Assistant Attorney General

## **APPENDIX**

Interview 1/Exhibit 69b Excerpts	001
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**INTERVIEW WITH MARICELA DIAZ**

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**Q1=Officer Hector Soto, SFPD**

**Q2= Investigator Joel Reimesch, MPD**

**Q3=Lieutenant Don Everson, MPD**

**Q4=Special Agent Tyler Neuhardt, DCI**

**Q5=Special Agent Cameron Corey, DCI**

**Q6=Officer Russ Stevenson, MPD**

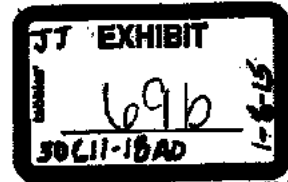
**PH=Sec. Polly Huber, MPD**

**A=Maricela Diaz**

**FILED**

**JAN 22 2015**

*Pam Kougal*  
Hanson County Clerk of Courts  
First Judicial Circuit Court of SD



Q:	Q: Hi, Maricela?
A:	A: Yeah.
Q:	Q: Can I get you to just slide over here for me? I'm left handed so it just works a little better for me when I'm -- when I'm talkin' with somebody.
A:	A: Okay.
Q:	Q: Maricela, my name is Toby Russell and this is -- I'll let you go ahead and introduce yourself.
Q1:	Q1: My name is Hector Soto with the Sioux Falls Police Department.
A:	A: Oh, okay, nice to meet you.
Q:	Q: We just, uh, we wanna visit with you a little bit if we can. I mean here's what -- what, uh, what's goin' on. I'm sure you're probably, you know maybe aware, maybe you've heard, seen on the news, um --
A:	A: Yeah.
Q:	Q: -- we're involved in an investigation looking for, uh, Jasmine Guevara. Understand that you know her at least?
A:	A: Yes, um, it's like --
Q:	Q: Okay.
A:	A: -- it's like -- like October 15 --



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**Q6=Officer Russ Stevenson, MPD**

**PH=Sec. Polly Huber, MPD**

**A=Maricela Diaz**

A:	A: Uh, reg -- regular.
Q3:	Q3: Regular cheeseburger?
A:	A: You know if I could use the bathroom? Because I really need to go.
Q3:	Q3: Okay, let me get a female, though, to take ya.
A:	A: Mm-hm.
Q3:	Q3: Okay and then a reg -- regular cheeseburger meal? That's good. Okay, hold on, I'll be right back. Hey, this --
PH:	PH: Use the restroom?
A:	A: Yeah.
Q3:	Q3: -- okay, this --
PH:	PH: What's your name?
A:	A: Maricela.
PH:	PH: Maricela.
A: --Me siento como si estuviera pinche presa. (Spanish FILE 1 - 1:05:25) Aqui, aqui, vena aca. (Spanish FILE 1 - 1:17:01)	A: I feel like a fucking prisoner.  Here, here, come here.
Q3:	Q3: Here you go.
A:	A: Uh --
Q3:	Q3: What's that?
A:	A: Can I ask you a question?
Q3:	Q3: Yeah.
A:	A: Uh, uh, you know how long it take?
Q3:	Q3: I -- I'm not sure. Hopefully they got ahold of your parents. I'm gonna go check now.
A:	A: It just --
Q3:	Q3: Yeah?
A:	A: It's just going to be until they call my parents?

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**PH=Sec. Polly Huber, MPD**  
**A=Maricela Diaz**

<p>Q3:</p>	<p>Q3: Is the only thing and since we brought ya on down here and you haven't had a chance to eat, I thought I'd just get ya somethin'. Let me check on that, though, okay?</p>
<p>A:</p>	<p>A: Okay.</p>
<p>Q3:</p>	<p>Q3: You can go ahead and eat if you want.</p>
<p>A: Thank you. Putos. Man, la cagan. Mamamos un chingo. (1:25:07-1:25:48)</p> <p>¿Qué? ¿Qué? Si. ¿Qué? ¿Qué pedo? ¿Qué? De mi.</p> <p>Dile que estamos en vacaciones. Dile que estamos en vacaciones. Huh. Ay. <i>Afa-lefex</i> [translator's note: Coded Spanish for Alex] (1:36:11-1:37:54)</p> <p>¿Qué? ¿Qué? ¿Qué? ¿Qué que? Hey. Hey. Dile que estamos en vacaciones. ¿Si me escuchas? Dile que estamos en vacaciones. Dile Que estamos en vacaciones.</p> <p>¿Huh? ¿Ontas? [translator's note: short for ¿donde estas?] ¿En un cuarto? Yo estoy al lado tambien.</p> <p>Estoy por tu lado derecho. ¿Qué? Simon, estoy en el primero al entrar. (1:39:00-1:41:05) [translator's note: Simon is slang for yes]</p> <p>Ahorita dices que vas al baño. Ahorita que llegue alguien dile que vas al baño. Que ahorita que llegue alguien diles que vas al baño. ¿Eh? Estoy a la orilla. Wacha. Dile que tu papa is Fernando Diaz, mi pa. Y tu ma es la... se va a apellidar Dominguez. ¿Eh? ¿Qué les dijistes? ¿Qué traes? ¿Qué traes? ¿Qué les dijistes? ¿Y tu pa? ¿Y tu ma? ¿Y tu ma? ¿Cómo se llama? ¿Qué? ¿Cómo se llama tu ma? ¿Cómo? Ay, puta madre, tengo que ir al baño. (1:41:41-1:43:51)</p> <p>[translator's note: Wacha is slang for watch, listen, or look out]</p>	<p>A: Thank you. Sons of bitchas. Man, they're shitting on it. We suck a lot (expletive).</p> <p>What? What? Yes. What? What's wrong?(expletive) What? Mine. (or "Of me.") Tell them that we are on vacation. Tell them that we are on vacation. Huh? Hey. <i>Afa-lefex</i>.</p> <p>What? What? What? That what? Hey. Hey. Tell them that we are on vacation. You hear me?</p> <p>Tell them that we are on vacation. Tell them that we are on vacation.</p> <p>Huh? Where are you? In a room? I'm to the side too.</p> <p>I'm to your right side. What? Yeah, I'm in the first one as you enter.</p> <p>Right now, say that you're going to the bathroom. Right now when someone comes, tell them that you're going to the bathroom. That right now when someone comes, tell them that you're going to the bathroom. What? I'm to the side. Listen. Tell them that your father is Fernando Diaz, my dad. And your mom is...her last name is Dominguez. What? What did you tell them? What's wrong? What's wrong? What did you tell them? And your dad? And your dad? And your mom? What's her name? What? What's your mom's name? What? Oh, son of a bitch I have to go to the bathroom.</p>

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**A=Maricela Diaz**

Q3:	Q3: Yup. Okay. You can have a seat again if you would. Thank you.
A: ¿Qué-fe? ¿Qué-fe? Ay. ¿Qué? ¿Cómo? Te estoy escuchando. (2:20:09-2:20:47) [translator's note: que-fe is coded Spanish for que]  ¿Papi? Hey. Hey. Hey. Alex. Alex. Alex. Hey. Hey. Afa-lefex. Efa. Hey. (2:45:05-2:48:45)  (Spanish FILE 1 - 2:48:01 - 2:48:45) Hey.	A: What? What? Hey. What? What? I am listening to you.  Papi? Hey. Hey. Hey. Alex. Alex. Alex. Hey. Hey. Afa-lefex. Efa. Hey.
Q2:	Q2: Hi, how are you? We're gonna need one more chair. Maricela, can I have ya swap out with me here? You all done eatin'?
A:	A: Yeah.
Q2:	Q2: I'll get rid of that. You need a refill on your pop or your water or anything? You're good? Maricela -- is that how you pronounce it? Is it Maricela?
A:	A: Mm-hm.
Q2:	Q2: Okay. Maricela, I'm Joel Reinesch. I'm an Investigator here with the Police Department. You can call me Joel, call me whatever you wanna call me, okay? Uh, this is Hector. I believe you spoke with Hector today as well --
A:	A: Mm-hm.
Q2:	Q2: -- too so you've spoken with both of us. Um, Maricela, there's -- there -- there's a couple things that we'd like to talk about, um, you know, definitely first and foremost, I mean the -- the stuff I'm really concerned about your safety and you know we -- we

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**A=Maricela Diaz**

	there, that -- that's where it goes. But first and foremost, I'd like to sit down and talk with ya about the stuff that -- that's been goin' on and you know, and bein' missin' and everything else like that, 'cause I mean I -- I know that you've been in fear, you know as far as that goes, you know? I mean that's obvious from talkin' to mom and everything else. And that's -- you know, that's what I wanna start out talkin' to ya about. Okay? Do you -- do you wanna talk to me about that?
A:	A: About my mom?
Q2:	Q2: About you and being gone from Indiana and stuff like that.
A:	A: So -- I don't know.
Q2:	Q2: Hector, can you take a minute?
Q1: Well, it's Maricela. Maricela Nicolasa Díaz. (Spanish - FILE 1 - 2:59:29 - 2:59:29) Right?	Q1: Well, it's Maricela. Maricela Nicolasa Díaz. Right? See here -- here's the deal. We're gonna be honest with you. Okay we -- we know who you are. We spoke -- I spoke with your mom, Irma a little while ago and she said it was okay to talk to you. She also told me that you called her for help. She told me that this morning. And we're concerned for you, okay?
A:	A: Mm-hm.
Q1:	Q1: We're concerned that, you know, I mean what you told her really made her nervous. Okay? So we wanna talk to you about -- about

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	all those issues and about all those things. But before we do that, we gotta make sure like -- like Joel explained here that -- that you understand your rights and you said that you kinda did that -- and he read 'em again to ya. Okay? Is there any part of that that you don't understand, the rights that he -- that he read to ya?
A:	A: I don't understand anything.
Q2:	Q2: You don't understand anything that he said? Why is that?
A:	A: Because I know a -- a little -- I know how to speak, but some things I don't know how to speak English and something -- um, understand it really well. But I --
Q1:	Q1: Would it help if -- if I read you those same rights in Spanish? Would that help a lot?
A:	A: Mm-hm.
Q1:	Q1: Okay, 'cause -- is it -- is Spanish your first language then? You speak Spanish better than English?
A:	A: Mm-hm.
Q1: Ud. tiene el derecho de con-de permanecer silencio, ¿comprende? (Spanish - FILE 1 3:00:55 - 3:01:00)	Q1: Okay, I'll just read 'em right, right, just the way that they're written here in English, here. I'm just gonna translate, okay? You have the right to --to remain silent, you understand?
A:	A: Mm-hm.
Q1: Cualquier cosa que Ud. diga se puede usar contra Ud., ¿comprende? (Spanish FILE 1	Q1: Anything you say can be used as evidence against you, you understand?

**INTERVIEW WITH MARICELA DIAZ**

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**A=Maricela Diaz**

Q1:	Q1: She wants to speak Spanish so she doesn't get confused.
Q2:	Q2: That -- that's no problem.
Q1: Okay. De comenzar con este-- tú sí te llamas Maricela Nicolasa Díaz, ¿correcto? ¿Por qué nos diste otro nombre antes que no es verdadero? Y yo sé por qué lo hiciste. Spanish FILE 1 3:02:57 - 3:03:15	Q1: Okay. To begin with this—your name really is Maricela Nicolasa Díaz, right? Why did you give us another name before that isn't real? And I know why you did it.
A: Tenía miedo. (Spanish FILE 1 3:03:15)	A: I was afraid.
Q1: ¿Miedo de qué?(Spanish FILE 1 3:03:16)	Q1: Afraid of what?
A: De que me mandaron para atrás para Indiana. (Spanish FILE 1 3:03:18)	A: That they would send me to Indiana.
Q1: Con tu mama. (Spanish FILE 1 3:03:24)	Q1: With your mom. She says she lied about her name because she - - she was afraid that she'd get sent back home to her mother in Indiana.
Q2:	Q2: I understand.
Q1:	Q1: And I'll translate for ya just --
Q2:	Q2: Absolutely, yup.
Q1:	Q1: -- as we go.
Q2:	Q2: I think that's no problem.
Q1: Bueno, este--Cuando saliste en Indiana, este--¿saliste con Alexander? ¿Sí? ¿Y cuando fue eso? (Spanish FILE 1 3:03:35 -- 3:03:51)	Q1: Well, um—When you left Indiana, um—did you leave with Alexander? Yes? And when was that?
A: En octubre. (Spanish FILE 1 3:03:52)	A: In October.
Q1: ¿Octubre que? (Spanish FILE 1 3:03:53)	Q1: October what?
A: Como los mediados--como el quince, doce, trece, no sé.(Spanish	A: Like in the middle of the month, like the fifteenth, twelfth,

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File 1 3:03:54 - 3:03:56) --	thirteenth, I don't know.
Q1: Okay. ¿Y saliste voluntariamente?(Spanish File 1 3:03:56)	Q1: Okay. And you left voluntarily?
A: Sí.(Spanish File 1 3:03:56)	A: Yes.
Q1: ¿Solos? (Spanish File 1 3:04:10)	Q1: Alone?
A: Sí. (Spanish File 1 3:04:11)	A: Yes.
Q1: ¿Y adónde fueron? (Spanish File 1 3:04:23)	Q1: She said that on the 13th of October, she left she left voluntarily with Alexander from Indiana. And where did you go?
A: Aquí. (Spanish File 1 3:04:26)	A: Here.
Q1: ¿Directamente a South Dakota?(Spanish File 1 3:04:27)	Q1: Directly to South Dakota?
A: No, pasamos por (Spanish File 1 3:04:28) --	A: No, we went through--
Q1: ¿Por dónde? (Spanish File 1 3:04:30)	Q1: Where?
A: Pasamos por varios lugares. (Spanish File 1 3:04:30) --	A: We went through several places.
Q1: En rumbo a llegar aquí. Esta era la destinación, a venir a South Dakota. (Spanish File 1 3:04:34)	Q1: On the way here. This was the destination, to come to South Dakota.
A:	A: Mm-hm.
Q1: Y ¿qué manejó?(Spanish File 1 3:04:36)	Q1: And what did you drive?
A: Nos venimos en autobús.(Spanish File 1 3:04:39)	A: We came in a bus.
Q1: ¿En el camino?(Spanish File 1 3:04:40)	Q1: On the way?
A:	A: Mm-hm.
Q1:	Q1: They took the bus to South Dakota.
Q2:	Q2: Okay.
Q1: Y ¿ya sabían que venían a Mitchell? (Spanish File 1 3:04:51)	Q1: And did you already know you were coming to Mitchell?
A: Sí. (Spanish File 1 3:04:55)	A: Yes.

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**A=Maricela Diaz**

3:09:35)	
Q1: Okay. ¿Así es que te consideras amiga de Jasmine? (Spanish File 1 3:09:44)	Q1: OK. So then you consider yourself Jasmine's friend? I asked her, uh, if she considers Jasmine a friend. She said yeah, 'cause she initially started comin' over to visit with Stephanie and they became friends.
Q2:	Q2: Okay.
Q1:	Q1: So --
Q2:	Q2: Okay, okay.
A: Y era muy buena gente con nosotros. Y que resulta que de tal modo que llegamos aquí sin dinero- (Spanish File 1 3:09:59) --	A: And she was a good person to us. And since we arrived here without money-
Q1:	Q1: Mm-hm.
A: Ya nos agarraban, así cosas de pues, este, nos compran así como algunas cositas comida, cenas al restaurante. Eran buenas gentes con nosotros. (Spanish File 1 3:10:06)	A: And she would get us, things like that, so, um, they bought us some things like food, dinners at restaurants. They were good friends to us.
Q1: Te compraron comida o-. (Spanish File 1 3:10:16)	Q1: They bought you food or-.
A: Mm-hm. Y-(Spanish File 1 3:10:17)	A: Mm-hm. And-
Q1: Y es que-(Spanish File 1 3:10:18) --	Q1: And is-
A: Y por eso, uh, Stephanie, Jasmine, cualquiera de las dos, cada vez que salimos, salimos con las dos. (Spanish File 1 3:10:18)	A: And because of this, uh, Stephanie, Jasmine, either of them, every time we went out, we went out with them both.
Q1:	Q1: Okay.
A: Y--(Spanish File 1 3:10:22)	A: And--
Q1:	Q1: Okay she said that they -- they would occasionally go out with Stephanie and Jasmine and, uh, and they were good friends with them and they'd buy them supper and --



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**A=Maricela Diaz**

Q2:	Q2: Oh, okay.
Q1:	Q1: - pay for food at restaurants and such.
Q2:	Q2: Okay. And with, uh, Ivan as well too?
Q1: ¿También con Ivan?(Spanish File 1 3:10:39)	Q1: Also with Ivan?
A: Con Ivan no más salimos una vez. (Spanish File 1 3:10:41)	A: We only went out with Ivan once.
Q1: ¿Una vez? (Spanish File 1 3:10:44)	Q1: Once?
A: Y ni apenas no lo conozco muy bien. (Spanish File 1 3:10:45)	A: And I hardly know him very well.
Q1: ¿Cuándo fue que salieron con Ivan? (Spanish File 1 3:10:49)	Q1: When was it that you went out with Ivan?
A: Uh, no me acuerdo, como tres semanas y fuimos a Sioux Falls. No sé cómo se pronuncia. (Spanish File 1 3:10:52)	A: Uh, I don't remember, like three weeks ago and we went to Sioux Falls. I don't know how to pronounce it.
Q1:	Q1: Sioux Falls?
A: Fuimos allí para estar con Stephanie pero después de allí fuimos allá no más. (Spanish File 1 3:11:06)	A: Uh-huh. (Spanish) We went there to be with Stephanie but after we went there, nothing else.
Q1:	Q1: Okay, she said that they went to Sioux Falls to meet one of Stephanie's friends.
Q2:	Q2: Okay.
Q1:	Q1: And Ivan came along that day.
Q2:	Q2: Sure.
Q1: Este-¿cuándo fue la última vez que tú miraste a Jasmine?(Spanish File 1 3:11:28)	Q1: Um, when was the last time you saw Jasmine? (Spanish) When's the last time you saw Jasmine?
A: Um, el martes como a las cuatro. Entre las cuatro y media o cuatro. (Spanish File 1 3:11:39)	A: Um, Tuesday like at four o'clock. Between four-thirty and four.
Q1: ¿De la tarde? (Spanish File 1 3:11:46)	Q1: In the afternoon?

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**A=Maricela Diaz**

A:	A: Mm-hm.
Q1: ¿Dónde? (Spanish File 1 3:11:49)	Q1: Where?
A: Um, fue a la casa y si que si queríamos ir a--con ella a Flankinton[sic], algo así, no sé cómo se dice...(Spanish File 1 3:11:50)	A: Um, she went to the house and asked if we wanted to go to-with her to Flankinton[sic]. Something like that, I don't know how to say it.
Q1: ¿A la casa de Stephanie? Ella- (Spanish File 1 3:12:00)	Q1: To Stephanie's house? She--
A: Ella llegó a la casa y preguntó a nosotros que estamos bien y todo y dijimos que sí. (Spanish File 1 3:12:02) --	A: She arrived at the house and asked us if we were okay and all and we said yes.
Q1:	Q1: Mm-hm.
A: Y dijo o no quieren venir con-conmigo para Flankinton?[sic]- Y nosotros le dijimos que no. (Spanish File 1 3:12:09)	A: And she said, doyou want to go with me to Flankinton?[sic]-And we told her no.
Q1: ¿Para Plankinton? (Spanish File 1 3:12:13)	Q1: To Plankinton?
A: Uh-huh. Porque en ese tiem--en esa hora estábamos cuidando los niño de Stephanie.	A: Uh-huh. Because at that tim-at that time we were babysitting Stephanie's kids.
Q1: Stephanie-¿cuántos niños tiene?	Q1: Okay. (Spanish) Stephanie-How many kids does she have?
A: Dos. (Spanish File 1 3:12:16)	A: Two.
Q1: ¿Y tú se los estabas cuidando?(Spanish File 1 3:12:23)	Q1: And you were watching them for her?
A: Sí, los estábamos cuidando. (Spanish File 1 3:12:24)	A: Yes, we were watching them.
Q1: ¿Y Stephanie no estaba allí en esa hora? (Spanish File 1 3:12:25)	Q1: And Stephanie wasn't there at that time?
A: No. (Spanish File 1 3:12:26)	A: No.
Q1: ¿Dónde estaba? (Spanish File 1 3:12:27)	Q1: Where was she?
A: Había ido a trabajar, ella llega de trabajar como a las diez o las	A: She had gone to work, she comes back from work like at ten or nine

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nueve. (Spanish File 1 3:12:29)	o'clock.
Q1: Así es que no pudieron ir con-con Jasmine. (Spanish File 1 3:12:38)	Q1: Oh, okay (Spanish) So, you couldn't go with-with Jasmine.
A: Mm-hm. Porque estábamos con los niños.(Spanish File 1 3:12:43)	A: Mm-hm. Because we were with the kids.
Q1: Permíteme un momento. (Spanish File 1 3:12:45)	Q1: (Spanish) Give me a moment. She said that, uh, last time she saw Jasmine was at, um, on Tuesday --
Q2:	Q2: Okay.
Q1:	Q1: -- 4:00 to 4:30 PM.
Q2:	Q2: Okay.
Q1:	Q1: And, uh, she came over to invite them to come to Plankinton with her.
Q2:	Q2: Oh, okay.
Q1: ¿Tú no podías ir, tampoco Alejandro?(Spanish File 1 3:13:00)	Q1: But they couldn't go -- (Spanish) You couldn't go, and neither could Alejandro?
A: No, estábamos en casa con los niños. (Spanish File 1 3:13:03)	A: No, were were at the house with the kids.
Q1: ¿Solamente Uds. estaban con los niños? (Spanish File 1 3:13:05)	Q1: Only you were with the kids?
A:	A: Mm-hm.
Q1:	Q1: She and Alex were babysitting for Stephanie who was at work.
Q2:	Q2: Sure, yep.
Q1:	Q1: Stephanie wasn't due to get back until 10:00, correct?
A: Como a las diez, sí. (Spanish File 1 3:13:15)	A: Like around ten, yes.
Q1:	Q1: Okay, so they couldn't go.
Q2:	Q2: Oh, okay,
Q1:	Q1: They couldn't go with -- they couldn't go with Jasmine so they stayed.
Q1: ¿Y se quedaron allí en la casa?(Spanish File 1 3:13:21)	Q1: And you stayed there in the house?

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A: Sí. (Spanish File 1 3:13:23)	A: Yes.
Q1:	Q1: Okay.
A: Y después llegó su suegra, la suegra de Stephanie, la mamá de su novio. (Spanish File 1 3:13:24) –	A: And then her mother-in-law arrived, Stephanie's mother-in-law, her boyfriend's mom.
Q1:	Q1: Okay.
A: Y nos quedamos cuidandolos, y ya después ya. (Spanish File 1 3:13:31)	A: And we stayed babysitting them, and then that's all.
Q1: ¿Cómo se llama la mamá del novio de Stephanie? (Spanish File 1 3:13:34)	Q1: What is Stephanie's boyfriend's mom's name?
A: Darice, algo así, no lo sé. (Spanish File 1 3:13:38)	A: Darice, something like that, I don't know.
Q1:	Q1: Who?
A: Darice. (Spanish File 1 3:13:40)	A: Darice.
Q1:	Q1: Dorice? Darice?
A:	A: Darice.
Q2:	Q2: Darcie?
A:	A: Uh-huh.
Q2:	Q2: Darice Garcia?
Q1:	Q1: Mm-hm, yup.
A:	A: Uh-huh.
Q1: ¿A qué hora llegó ella? (Spanish File 1 3:13:48)	Q1: What time did she arrive?
A: Uh, llegó como las seis—seis o las siete. Por allí. (Spanish File 1 3:13:50)	A: Uh, like six-six or seven. Around there.
Q1: ¿De la tarde? (Spanish File 1 3:13:57)	Q1: In the evening?
A:	A: Uh-huh.
Q1: ¿Y se quedó allí toda la noche? (Spanish File 1 3:13:59)	Q1: And she stayed there all night?
A: Sí ella se quedó con nosotros allí. Y después, después llegó Stephanie. (Spanish File 1 3:14:01)	A: Yes, she stayed with us there. And then, then, Stephanie arrived.
Q1: ¿A qué horas llegó Stephanie?	Q1: What time did Stephanie arrive?

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(Spanish File 1 3:14:10)	
A: Como a las nueve y algo, nueve y cuarenta, nueve y media. (Spanish File 1 3:14:12)	A: Like nine something, nine forty, nine-thirty.
Q1: Del trabajo. (Spanish File 1 3:14:19)	Q1: From work.
A: Sí. (Spanish File 1 3:14:20)	A: Yes.
Q1: ¿Qué sucedió entonces? (Spanish File 1 3:14:35)	Q1: Okay, she said that Stephanie's, uh -- or boyfriend's mom, Darice arrived at about 6:00 to 7:00 PM and then Stephanie arrived at 9:30 PM from work. (Spanish) What happened then?
Q2:	Q2: Darice got there about 6:00 or 7:00?
Q1:	Q1: 6:00 or 7:00 PM.
Q2:	Q2: Okay. And then did they go out then when Darice came?
Q1: Se quedaron allí después de que llegó Darice, ¿verdad? (Spanish File 1 3:14:45)	Q1: No, they stayed there. (Spanish) You stayed there after Darice arrived, right?
A: Sí. (Spanish File 1 3:14:47)	A: Mm-hm. (Spanish) Yes.
Q1: ¿Y luego llegó Stephanie a las nueve y media?(Spanish File 1 3:14:48)	Q1: And then Stephanie arrived there at nine thirty?
A: Como nueve y media, sí. (Spanish File 1 3:14:51) --	A: Like nine-thirty, yes.
Q1:	Q1: About 9:30, then about 9:30 Stephanie showed up.
Q2:	Q2: Okay.
Q1: Y tú y Alejandro estaban allí todavía, ¿verdad?(Spanish File 1 3:14:57)	Q1: And you and Alejandro were still there, right?
A: Sí. (Spanish File 1 3:14:59)	A: Yes.
Q1:	Q1: Okay.
Q2:	Q2: So they were home all night then?
Q1:	Q1: We're getting to the home part here --

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Q2:	Q2: Oh, okay.
Q1: Y luego después de las nueve y media que llegó Stephanie, ¿luego qué pasó? (Spanish File 1 3:15:04)	Q1: - pretty soon. (Spanish)
A: Nos quedamos allí en la casa y ya. (Spanish File 1 3:15:09)	A: We stayed there in the house and that's all.
Q1: ¿Todos? (Spanish File 1 3:15:11)	Q1: Everyone?
A:	A: Mm-hm.
Q1: Tú-- (Spanish File 1 3:15:13)	Q1: You--
A: Menos-menos su suegra. Su suegra, sí. (Spanish File 1 3:15:13)	A: Except-except her mother-in-law. Her mother-in-law, no.
Q1:	Q1: Oh, Darice?
A: Su suegra se va. (Spanish File 1 3:15:16)	A: Her mother-in-law leaves.
Q1: ¿A qué hora se fue ella? (Spanish File 1 3:15:17)	Q1: What time did she leave?
A: Uh, se fue- Pues, llegando ella y luego se fue ella. (Spanish File 1 3:15:19)	A: Uh, she left, Well, she came and then she left.
Q1: ¿Cuánto tiempo se quedó? (Spanish File 1 3:15:22)	Q1: How much time did she stay?
A: No sé, se fue como a las, um, diez o algo así. (Spanish File 1 3:15:23)	A: I don't know, she left at like, um ten or something like that.
Q1: ¿Diez de la noche? (Spanish File 1 3:15:29)	Q1: Ten at night?
A:	A: Mm-hm.
Q1:	Q1: Darice left at 10:00.
Q2:	Q2: Okay.
Q1: Así es que quedaron solamente tú, Stephanie, los dos niños y Alejandro. (Spanish File 1 3:15:34)	Q1: So then only you, Stephanie, the two kids, and Alejandro remained.
A: Sí. (Spanish File 1 3:15:41)	A: Yes.
Q1: Nadie más en la casa. (Spanish File 1 3:15:42)	Q1: No one else in the house.
A: No. (Spanish File 1 3:15:43)	A: No.
Q1:	Q1: Okay so then at -- at 10:00 o'clock the only people at the

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	house were her, Alexander, Stephanie and the two kids.
Q2:	Q2: Okay.
Q1: Y luego, ¿qué pasó? (Spanish File 1 3:15:51)	Q1: And then, what happened?
A: Después, este, um, ella se empezó preocupada, no sé-- (Spanish File 1 3:15:54)	A: Then, um, um, she started to get worried, I don't know--
Q1: ¿Quién? (Spanish File 1 3:15:59)	Q1: Who?
A: Porque--Stephanie-- (Spanish File 1 3:16:00) --	A: Because--Stephanie--
Q1:	Q1: Mm-hm.
A: Porque no contestaba Jasmine el teléfono y no le contestaba sus textos para atrás ni nada. (Spanish File 1 3:16:01)	A: Because Jasmine didn't answer the phone and she didn't answer her text messages or anything.
Q1: ¿A qué horas, pués? (Spanish File 1 3:16:09)	Q1: Okay. (Spanish) At what time, then?
A: Ya así ya nochesita. (Spanish File 1 3:16:11)	A: Like kind of night time.
Q1: ¿Como a qué horas? (Spanish File 1 3:16:13)	Q1: Like at what time?
A: Como a las di- once. (Spanish File 1 3:16:14)	A: Like at te--eleven.
Q1:	Q1: At about 11:00 PM, Stephanie got worried because, uh, Jasmine wasn't answering her phone or --
Q2:	Q2: Okay.
Q1: ¿Y luego qué pasó? (Spanish File 1 3:16:24)	Q1: -- her text messages (Spanish) And then what happened?
A: Y luego después, pues ayer, llegaron a entrevistarnos. (Spanish File 1 3:16:26)	A: And then later, well yesterday, they arrived to interview us.
Q1: ¿Quién? (Spanish File 1 3:16:32)	Q1: Who?
A: Uh, él, creo. (Spanish File 1 3:16:33)	A: Uh, him, I think.
Q1: ¿Ayer en la tarde? (Spanish File 1	Q1: Yesterday in the afternoon?

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**A=Maricela Diaz**

(Spanish File 1 3:19:54) -	
Q1:	Q1: Mm-hm.
A: No duró tanto ni se metió en la casa, se quedó allí en el carro. (Spanish File 1 3:19:57)	A: She didn't stay long nor did she go in the house, she stayed in the car.
Q1: Oh, no más en el carro, en el driveway. (Spanish File 1 3:20:02)	Q1: Oh, just in the car, in the driveway.
A:	A: Uh-huh.
Q1: ¿A qué iba a Plankinton? ¿Qué iba a hacer en Plankinton? (Spanish File 1 3:20:09)	Q1: She said she never got outta the car. She just came out to ask if they wanted to go to Plankinton. (Spanish) Why was she going to go to Plankinton? What was she going to do in Plankinton?
A: Yo creo ver a su novio porque allá vive su novio. (Spanish File 1 3:20:12)	A: I think to see her boyfriend because her boyfriend lives there.
Q1: Ivan, ¿verdad? (Spanish File 1 3:20:18)	Q1: Okay. I asked her what she was gonna do in Plankinton. She said probably visit her -- her boyfriend. (Spanish) Ivan, right?
A: Sí. (Spanish File 1 3:20:19)	A: Yes.
Q1:	Q1: Ivan.
Q2:	Q2: Okay, okay.
Q1: Esa noche, este—tú y—o—Alex, ¿le llamas Alex o Alejandro, cómo le llamas? (Spanish File 1 3:20:41)	Q1: That night, um—you and—or—Alex, do you call him Alex or Alejandro, what do you call him?
A: Alex. (Spanish File 1 3:20:47)	A: Alex.
Q1: Alex. ¿Este, tú y él no salieron por ninguna razón? (Spanish File 1 3:20:49) -	Q1: Alex. Um, you and he didn't leave for any reason?
A:	A: No.
Q1: ¿No puede recorder? (Spanish File 1 3:20:54)	Q1: Can't you remember?



**INTERVIEW WITH MARICELA DIAZ**

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**Q4=Special Agent Tyler Neuharth, DCI**

**Q5=Special Agent Cameron Corey, DCI**

**Q6=Officer Russ Stevenson, MPD**

**PH=Sec. Polly Huber, MPD**

**A=Maricela Diaz**

A: (Spanish File 1 3:21:01)	A: No.
Q1: ¿Segura? (Spanish File 1 3:21:05)	Q1: Are you sure?
A: La mera verdad, no me acuerdo, muy bien pero yo creo que no. (Spanish File 1 3:21:09)	A: The truth is, I don't remember very well, but I don't think so.
Q1:	Q1: I asked her if she's sure that she or Alex didn't leave the house that day and she's not sure now.
Q2:	Q2: Okay.
A: Porque si digo si o que no, ¿si me entienden? (Spanish File 1 3:21:18)	A: Because, if I say yes or no, you know?
Q1:	Q1: Mm-hm.
A: No me acuerdo, la mera verdad. (Spanish File 1 3:21:22)	A: I don't remember, truly.
Q1: ¿Pero no recuerdas ninguna cosa significante de esa noche? (Spanish File 1 3:21:25)	Q1: But you don't remember any significant thing from that night?
A: Significante, como significante? (Spanish File 1 3:21:29)	A: Significant, what do you mean significant?
Q1: Algún detalle. (Spanish File 1 3:21:30)	Q1: Some detail.
A: Oh, sí. Fuimos a-a la librería. (Spanish File 1 3:21:50)	A: Oh, yes. We went to the bookstore.
Q1: ¿Quién? (Spanish File 1 3:21:54)	Q1: Who?
A: Yo y Alex. Después de—a—como a las—antes de las nueve. A las ocho y algo porque cierran la librería a las nueve. (Spanish File 1 3:21:55)	A: Alex and I. After—at—like at—before nine. At eight something because the bookstore closes at nine.
Q1: ¿Ocho y qué? (Spanish File 1 3:22:04)	Q1: Eight what?
A: Ocho, ocho y diez(Spanish File 1 3:22:05)	A: Eight, eight ten.
Q1: ¿A cuál librería fueron? (Spanish File 1 3:22:09)	Q1: Which bookstore did you go to?

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**PH=Sec. Polly Huber, MPD**

**A=Maricela Diaz**

A: A la que está cerca de la casa. (Spanish File 1 3:22:11)	A: To the one that's close to the house.
Q1:	Q1: She said that she and Alex went to the library (*translator's note: <i>librería</i> means bookstore, the officer says library) about 10 after 8:00. Uh, library near her house.
Q2:	Q2: Mm-hm, it -- oh, oh, just right up the street here?
A:	A: Mm-hm.
Q2:	Q2: Okay, how -- how'd you guys get there, then?
A: Caminando. (Spanish File 1 3:22:24)	A: Walking.
Q1:	Q1: Walking.
Q2:	Q2: Oh --
A:	A: Oh, walking.
Q2:	Q2: -- you walked? No, that's okay. He'll -- talk -- talk however is -- is more comfortable for you. Okay?
Q1: ¿Así es que tú y Alex caminaron a la librería? ¿Qué hicieron allí? (Spanish File 1 3:22:34)	Q1: So then you and Alex walked to the bookstore? What did you do there?
A: Um, meternos a MySpace, bajar la música. (Spanish File 1 3:22:37)	A: Um, go into MySpace, download music.
Q1: ¿Cuánto tiempo estuvieron allá? (Spanish File 1 3:22:48)	Q1: How long were you there?
A: Um, como media hora. Y después fuimos a un chino restaurante. (Spanish File 1 3:22:49)	A: Um, like half an hour. And after, we went to a Chinese restaurant.
Q1: ¿Así es que fueron a la librería por treinta minutos? (Spanish File 1 3:22:58)	Q1: So then you went to the bookstore for thirty minutes?
A: Uh-huh, como treinta minutos. (Spanish File 1 3:23:01)	A: Uh-huh, like thirty minutes.
Q1: ¿A qué bajaron la música? (Spanish File 1 3:23:03)	Q1: What did you download the music to?

**INTERVIEW WITH MARICELA DIAZ**

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**Q4=Special Agent Tyler Neuharth, DCI**  
**Q5=Special Agent Cameron Corey, DCI**  
**Q6=Officer Russ Stevenson, MPD**  
**PH=Sec. Polly Huber, MPD**  
**A=Maricela Diaz**

A: A un MP3 de nosotros. (Spanish File 1 3:23:06)	A: To an MP3 of ours.
Q1:	Q1: She said they downloaded music to an MP3.
Q2:	Q2: Okay.
Q1: Y ¿de quién es el MP3? (Spanish File 1 3:23:14)	Q2: And then -- (Spanish) And whose is the MP3?
A: Um, era de un hermano mío y luego de mi otro hermano y ahora se queda conmigo. (Spanish File 1 3:23:15)	A: Um, it was my brother's and then my other brother's and now it's mine.
Q1: ¿Y dónde está el MP3?(Spanish File 1 3:23:23)	Q1: And where is the MP3?
A: En mi cama-en la casa. (Spanish File 1 3:23:24)	A: In my bed-at home.
Q1:	Q1: She says -- she says the MP3 is at home.
Q2:	Q2: Okay.
Q1:	Q1: It belongs to her.
Q2:	Q2: Okay.
Q1: ¿A un restaurante chino, dijiste?(Spanish File 1 3:23:38)	Q1: And they did some, uh, MySpace and they were there for 30 minutes and then they went to, uh, uh -- (Spanish) a Chinese restaurant, you said?
A:	A: Uh-huh.
Q1: ¿Cómo se llama el restaurante? (Spanish File 1 3:23:41)	Q1: What's the name of the restaurant?
A: Está por el Burger King, es como un buffet, no sé, algo así. (Spanish File 1 3:23:42)	A: It's by Burger King, it's like a buffet, I don't know, or something like that.
Q1: No se llama (Spanish File 1 3:23:46)	Q1: (Spanish) It's not the Twin Dragon?
A: No, se llama (Spanish File 1 3:23:48)	A: (Spanish) No, it's New Chinese Buffet.
Q1: ¿Cómo?(Spanish File 1 3:23:51)	Q1: What?
A:	A: New Chinese Buffet.

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**Q6=Officer Russ Stevenson, MPD**

**PH=Sec. Polly Huber, MPD**

**A=Maricela Diaz**

Q1:	Q1: New Chinese Buffet?
A: Sí, está allí por el (Spanish File 1 3:23:54)	A: (Spanish) Yes, it's there by the Burger King and -- and McDonald's.
Q1:	Q1: She said then after that they went to the New Chinese Buffet.
Q2:	Q2: Right, up the street, yeah?
A:	A: Yeah.
Q2:	Q2: Okay.
Q1: ¿Y cómo fueron por ella? ¿Caminando otra vez? (Spanish File 1 3:24:03)	Q1: And how did you get there? Walking again?
A: Sí, caminamos. (Spanish File 1 3:24:04)	A: Yes, we walked.
Q1: Y ¿cuánto tiempo estuvieron allí? (Spanish File 1 3:24:07)	Q1: They walked over there. (Spanish) And how long were you there?
A: Um, pues, lo hicimos caminando. Pues yo- no sé cuanto hicimos caminando, la mera verdad, no sé a qué horas llegamos allí porque no traíamos reloj. (Spanish File 1 3:24:09)	A: Um, well, we did it walking. Well I-I don't know how long we were walking, to tell the truth, I don't know what time we arrived there because we didn't have a watch.
Q1:	Q1: Okay.
A: Ni nada. (Spanish File 1 3:24:18)	A: Or anything.
Q1: ¿Comieron allá?(Spanish File 1 3:24:19)	Q1: Did you eat there?
A: Sí, caminamos. (Spanish File 1 3:24:19)	A: Yes, we walked.
Q1: Pero ¿comieron? (Spanish File 1 3:24:20)	Q1: But, did you eat?
A: No, no más fuimos a preguntarle a alguien, a esa señora de-de trabajo. (Spanish File 1 3:24:22)	A: No, we only went there to ask someone, that lady about-about work.
Q1: ¿A quién?	Q1: Who?
A: A la dueña. (Spanish File 1 3:24:32)	A: The owner.

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**Q6=Officer Russ Stevenson, MPD**

**PH=Sec. Polly Huber, MPD**

**A=Maricela Diaz**

Q1: ¿La conoces tú? (Spanish File 1 3:24:34)	Q1: Do you know her?
A: No, a la chinita. (Spanish File 1 3:24:36)	A: No, the Chinese lady.
Q1: ¿Cómo se llama? (Spanish File 1 3:24:37)	Q1: What's her name?
A: No sé su nombre, pero sé la conozco porque-- (Spanish File 1 3:24:28)	A: I don't know her name, but I know that I know her because--
Q1: ¿Trabajo para quién?(Spanish File 1 3:24:42)	Q1: Work for who?
A: Para él. (Spanish File 1 3:24:45)	A: For him.
Q1: Buscaron trabajo para Alejandro. (Spanish File 1 3:24:46)	Q1: They were looking for work for Alejandro.
A:	A: Uh-huh.
Q1:	Q1: They went over there to ask for employment. They asked the owner for employment for Alex.
Q2:	Q2: At the New China Buffet?
A:	A: Mm-hm.
Q2:	Q2: Okay, do you remember who he spoke with?
A:	A: The, uh -- the -- Denise.
Q2:	Q2: Just the owner guy there?
A:	A: Yeah, um --
Q2:	Q2: Okay.
Q1: ¿Era hombre o mujer?(Spanish File 1 3:25:03)	Q1: Was it a man or woman?
A: Mujer. (Spanish File 1 3:25:04)	A: Woman.
Q1:	Q1: It was a female that they spoke with.
Q2:	Q2: Okay.
Q1: ¿Y eso fue como--después de caminar de la librería? Y solamente eso hicieron allí, no hicieron nada más allí? (Spanish File 1 3:25:11)	Q1: And this was like--after walking from the bookstore? And you only did that there, you didn't do anything else there?

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**A=Maricela Diaz**

A: No. (Spanish File 1 3:25:20)	A:
Q1: ¿y qué le dijeron?(Spanish File 1 3:25:31)	Q1: Okay, after that they walked home. She said that the time it took to walk from the library to the Chinese Buffet they asked about the job (Spanish)
A: Le, le dijimos que si no estaban ocupando gente, o asi. (Spanish File 1 3:25:32) --	A: We, we asked if they needed people, like that.
Q1: ¿Y necesitaban?--(Spanish File 1 3:25:37)	Q1: And did they need anyone?
A: y después, este, regresamos para casa atrás. (Spanish File 1 3:25:37)	A: And later, um, we returned back home.
Q1:	Q1: Okay, she said the female told her there was no work and then they walked back home.
Q2:	Q2: Okay, wasn't it cold out? You cold?
A:	A: Yeah.
Q1: ¿Estaba hacienda frío? (Spanish File 1 3:25:50)	Q1: Was it cold?
A:	A: Uh-huh.
Q2:	Q2: Yeah.
A: Porque como Nosotros, pues no tenemos ese carro, a veces vamos, nomas a la librería a caminar nomas asi. (Spanish File 1 3:25:56)	A: Because like we, well we don't have that car, sometimes we go, just to the library (bookstore) to walk, that's all like that.
Q1:	Q1: That's --
A: O no, no la pasamos. Siempre no las pasamos allí en la casa nomas. (Spanish File 1 3:26:06)	A: Or we, we hang out. We always hang out there at the house, that's all.
Q1: ¿Como a qué horas llegaron a la casa? (Spanish File 1: 3:26:09)	Q1: Like at what time did you arrive home?
A: Como a las diez, diez siete, diez	A: Like at ten, ten-oh-seven, ten and

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**A=Maricela Diaz**

y—diez y—diez--(Spanish File 1 3:26:11)	-ten and -ten--
Q1: ¿Como las diez diez o algo? (Spanish File 1 3:26:20)	Q1: She said that they returned home at about 10:00 (Spanish ) Like ten ten or something?
A: Sí, como las diez quince. (Spanish File 1 3:26:23)	A: yes, like ten fifteen.
Q1:	Q1: About 10:15 PM
Q2:	Q2: Okay.
Q1: ¿Y luego que hicieron? (Spanish File 1 3:26:32)	Q1: And then what did you do?
A: Estar con Stephanie, viendo televisión, y luego nos fuimos a dormir. (Spanish File 1 3:26:34)	A: Hung with Stephaine, watching TV, and then we went to sleep.
Q1: ¿Qué traían puesto de ropa? (Spanish File 1 3:26:48)	Q1: Talked to Stephanie and watched TV. (Spanish) What clothes were you wearing?
A: Uh, yo traía un pantalón azul. (Spanish File 1 3:26:50)	A: Uh, I was wearing blue pants.
Q1: ¿Qué, de mezclilla o qué? (Spanish File 1 3:26:57)	Q1: What, jeans or what?
A: Uh-huh, de mezclilla. (Spanish File 1 3:27:00)	A: Uh-huh, jeans.
Q1:	Q1: She was wearing blue jeans.
Q2:	Q2: Okay.
Q1: ¿Y qué más? (Spanish File 1 3:27:04)	Q1: And what else?
A: Y esta chamarra. (Spanish File 1 3:27:05)	A: And this coat.
Q1:	Q1: And that coat.
Q2:	Q2: Okay.
Q1: Y de zapatos, ¿que tenías puestos? (Spanish File 1 3:27:09)	Q1: And shoes, what did you have on?
A: Traía los Nikes. (Spanish File 1 3:27:11)	A: I wore Nikes.
Q1: ¿De qué color? (Spanish File 1	Q1: What color?

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**A=Maricela Diaz**

(Spanish File 1 3:59:10)	
A: ¿Nosotros? Hablando nosotros o hablando con su hermana. Su hermana de Ivan. Y luego después salieron ellos y se miraban medios enojados y eso. (Spanish File 1 3:59:13)	A: Us? Talking to each other or talking to his sister. Ivan's sister. And then they came out and They looked kind of mad.
Q1: ¿Quién estaba en la casa cuando estaban—cuando ustedes fueron? (Spanish File 1 3:59:27)	Q1: Who was in the house when you all were—when you all went ?
A: Sus padres. (Spanish File 1 3:59:29)	A: His parents.
Q1: ¿Quién? (Spanish File 1 3:59:30)	Q1: Who?
A: Los padres de Ivan y su hermanito. (Spanish File 1 3:59:31)	A: Ivan's parents and his little brother.
Q1: Y la hermana. (Spanish File 1 3:59:35)	Q1: And his sister.
A:	A: Mm-hm.
Q1: ¿Cómo se llama la hermana? ¿No sabes? (Spanish File 1 3:59:36)	Q1: What's the sister's name? Do you know?
A: Se llama Denia o algo así. Denia. (Spanish File 1 3:59:39)	A: Her name is Denia or something like that. Denia.
Q1:	Q1: Mm-hm.
A: No sé cómo se llama. (Spanish File 1 3:59:42)	A: I don't know what her name is.
Q1: ¿Y no sabes por qué se enojaron, este, Jasmine e Ivan? (Spanish File 1 3:59:44)	Q1: And you don't know why they got mad at each other, um, Jasmine and Ivan?
A: No. Pero la única vez que se enojaron fue eso del baile. (Spanish File 1 3:59:51)	A: No. But the only time they got mad was about the dance.
Q1: ¿Estaban peleando? ¿Se golpearon? (Spanish File 1 3:59:57)	Q1: Were they fighting? Did they hit each other?
Q1: ¿Qué estaba haciendo Jasmine?	Q1: What was Jasmine doing?
A: Nada, nomas se espanto y después nomas se quedo mirando, y después, el, fue cuando entro y ya.	A: Nothing, she just got scared and then she just stared, then, he, that's when he came in and that's it. And he said that



INTERVIEW WITH MARICELA DIAZ

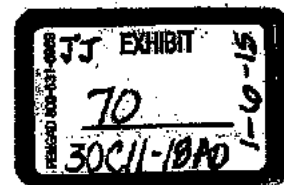
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First Judicial Circuit Court of SD

Q1=Officer Hector Soto, SFPD  
Q2= Investigator Joel Reinesch, MPD  
A=Maricela Diaz



	Q1: OK Maricela. This is Hector Soto, Sioux Falls P.D. back in the interview room with Maricela.
Q1: Maricela, vamos a aclarar unos detalles aquí. La botella que esta allí. ¿Eso es lo que compraron?	Q1: Maricela, we're going to clear up some details here. The bottle that is there. Is that what you all bought?
A: Si.	A: Yes.
Q1: Y sabes para que es eso, ¿Verdad? ¿Ya tenían planeado lo que iban a hacer con eso?	Q1: And do you know what that is for, right? Did you already have a plan for what you all were going to do with that?
A: El dijo que si.	A: He said yes.
Q1: El. ¿Qué te dijo?	Q1: Him. What did he tell you?
A: Que, el me dijo que le dijera que comprara una botella de eso para, para, para segun hacer una, fogata afuera, pero no, no era eso en realidad.	A: That, he told me to tell her to buy a bottle of that for, for, supposedly for a, bonfire (or campfire) outside, but it wasn't, it wasn't really for that.
Q1: ¿En realidad que iban a hacer con eso?	Q1: What were you all going to do with that?
A: Quemar a ella.	A: Burn her.
Q1: ¿La ivas a quemar? ¿La iban a quemar?	Q1: Were you going to burn her? Were you and him going to burn her?
A: Si.	A: Yes.
Q1: OK. Este, Y los cuchillos que llevaron. ¿De donde los agarraron?	Q1: OK. And the knives you took. Where did you get them from?
A: De la cocina de (inaudible).	A: From (inaudible) kitchen.
Q1: ¿En donde? ¿En, en, el buro de la cocina, o, en, arriba de el pretil, donde?	Q1: Where? In the, the kitchen cabinet, or, on, above the bench, where?

**INTERVIEW WITH MARICELA DIAZ**

From Audio Recording Only

Q1=Officer Hector Soto, SFPD

Q2= Investigator Joel Reinesch, MPD

A=Maricela Diaz

A: En donde estan las cucharas y los cuchillos.	A: Where the spoons and knives are.
Q1: ¿En, en donde esta especificamente, contra el refrigerador, o la estufa?	Q1: Where is it specifically, against the refrigerator, or the stove?
A: Por donde esta el deste, por donde esta la ventana. Para ir al (inaudible).	A: By where the, by where the window is. To go to (inaudible).
Q1: OK. ¿Y como se miraban los cuchillos? ¿De que color eran las? O primeramente. ¿Cómo de largos estaban los cuchillos?	Q1: OK. And what did the knives look like? What color were they? Or first of all, how long were the knives?
A: Mhmm.	A: Mhmm.
Q1: ¿Cómo unas seis siete pulgadas?	Q1: About six, seven inches?
A: Mhmm.	A: Mhmm.
Q1: ¿Con la navaja y la agarradera?	Q1: With the blade and handle?
A: Si.	A: Yes.
Q1: ¿Juntos? ¿De que color era, era la agarradera?	Q1: Together? What color was, was the handle?
A: Negro.	A: Black.
Q1: ¿Plastico o de madera?	Q1: Plastic or wood?
A: Plastico.	A: Plastic.
Q1: ¿Y la navaja era de filo fino o tenia como serruchitos? ¿Tenia dientes?	Q1: And was the blade smooth or serrated? Did it have teeth?
A: Uno tenia dientes y el otro tenia filo, creo.	A: One had teeth and the other was smooth, I think.
Q1: ¿Y el cuchillo que tu estabas, que tu tenias, era, tenia filo o tenia	Q1: And the knife that you were, that you had, was it, smooth or did it

**INTERVIEW WITH MARICELA DIAZ**

From Audio Recording Only

Q1=Officer Hector Soto, SFPD

Q2= Investigator Joel Reinesch, MPD

A=Maricela Diaz

dientitos?	have little teeth?
A: Dientitos.	A: Little teeth.
Q1: OK.	Q1: OK.
A: Pero al ultimo quedo, se quebro porque el me lo quito y se quebro.	A: But at the end it stayed, it broke because he took it away from me and it broke.
Q1: ¿Se quebro? ¿El tuyo? ¿Cómo se quebro?	Q1: It broke? Yours? How did it break?
A: La navaja se golpeo. Porque (inaudible) le dije, no yo no (inaudible), y lo jalo.	A: The blade got hit. Because (inaudible) I said, no I didn't (inaudible), and he pulled it.
Q1: ¿Cómo, pero... como?	Q1: How, but...how?
A: El lo jalo.	A: He pulled it.
Q1: ¿Te lo jalo, te lo quito a ti?	Q1: He pulled it from you, he took it away from you?
A: Mhmm.	A: Mhmm.
Q1: ¿Cómo?	Q1: How?
A: Asi, el me lo jalo.	A: Like this, he pulled it from me.
Q1: ¿Y entonces se quebro? Cuando le estaba...	Q1: And then it broke? When he was...
A: Se le salio la cosa esa de donde se agarran.	A: That thing you grip it by came off.
Q1: Mhmm.	Q1: Mhmm.
A: Se le salio.	A: It came off.
Q1: ¿Cuándo la estaba acuchillando? ¿O cuando? ¿Cuándo se quebro?	Q1: When he was stabbing her? Or when? When did it break?
A: Cuando la estaba acuchillando. Le dije ya. Se lo, se lo queria quitar, y	A: When he was stabbing her. I said that's it. I, I wanted to take it

**INTERVIEW WITH MARICELA DIAZ**

From Audio Recording Only

Q1=Officer Hector Soto, SFPD  
Q2= Investigator Joel Reinesch, MPD  
A=Maricela Diaz

	pero no, no se lo pude quitar. Se le callo esa cosa.		away, but no, I couldn't take it away. That thing came off.
Q1:	¿Cuántas veces la había acuchillado cuando se le callo?	Q1:	How many times had he stabbed when it came off?
A:	Como unas dos.	A:	About two.
Q1:	¿Y el segundo cuchillo, donde quedo? ¿El que el traia?	Q1:	And the second knife, where did it end up? The one he had?
A:	Yo creo alli, no se.	A:	I think right there, I don't know.
Q1:	El, el que se le quebro la, la agarradera.	Q1:	The, the one with the broken handle.
A:	Esta alli.	A:	It's there.
Q1:	¿En donde?	Q1:	Where?
A:	En el carro.	A:	In the car.
Q1:	¿En el piso?	Q1:	On the floor?
A:	Si en el piso.	A:	Yes on the floor.
Q1:	¿De el pasajero o en el de frente?	Q1:	The passenger or front?
A:	Esta en frente, pero lo unico es que no se si esta en que maneja o no se que.	A:	It's in the front, but I just don't know if it is on the driver or I don't know what.
Q1:	¿Y el cuchillo que el uso, que paso con ese cuchillo?	Q1:	And the knife that he used, what happened to that knife?
A:	No se, no sé que lo hizo.	A:	I don't know, I don't know what he did with it.
Q1:	¿No sabes? ¿Y solamente esos dos cuchillos?	Q1:	You don't know? And was it only those two knives?
A:	Si.	A:	Yes.
Q1:	¿Hay otros cuchillos en la casa que parecen iguales?	Q1:	Are there any other knives at the house that look the same.
A:	Creo que si.	A:	I think so.
Q1:	¿Hay, hay, um, un set de cuchillos en la casa?	Q1:	Is there, is there, um, a set of knives at the house?
A:	No mas un bote. Así, y alli estan todos los cuchillos y todas las (inaudible).	A:	Just a can. Like this, and that's where all the knives and all the (Inaudible) are.
Q1:	¿Cómo un bote de café?	Q1:	Like a coffee can?
A:	Um, no se de que color es, no me acuerdo.	A:	Um, I don't know what color it is, I don't remember.
Q1:	OK.	Q1:	Okay. (To Detective Reinesch) OK, just to cover with you on the knives. Uh, she said that the kithens came, uh the knives came

**INTERVIEW WITH MARICELA DIAZ**

From Audio Recording Only

Q1=Officer Hector Soto, SFPD

Q2= Investigator Joel Reinesch, MPD

A=Maricela Diaz

	<p>from the kitchen by the window, that are usually kept in a can. Uh they're about six to seven inches in length, total, handle and blade. Uh they have black plastic handles. One was serrated, one was smooth. Uh, during the attack after about two stabbings, two stabs, the handle broke off of the serrated one, which is the one that she was holding and he took away. Uhm and she doesn't know what happened to the second knife. She believed he used it to stab the victim with the second knife, but she doesn't know what happened to the smooth bladed one. OK.</p>
Q1: La ropa que traías puesta tu esa noche. ¿Cómo se miraba?	Q1: The clothes you were wearing that night. What did it look like?
A: Era un sueter gris.	A: It was a grey sweater.
Q1: ¿Sueter? Uh...	Q1: Sweater? Uh...
A: Asi tapado, no tenia esto.	A: Like this covered, it didn't have this.
Q1: ¿No tenia gorro?	Q1: It didn't have a hat?
A: Tenia gorro.	A: It had a hood.
Q1: ¿Tenia letras?	Q1: Did it have letters?
A: Uhm, uno de, creo que era de Winnie Pooh, pero no era de Winnie Pooh, era otro animalito.	A: Uhm, a, I think it was a Winnie Pooh, but it wasn't Winnie Pooh, it was another little animal.
Q1: ¿Tenia un animal en frente?	Q1: Did it have an animal on the front?
A: Mhmm.	A: Mhmm.
Q1: ¿Cómo caricatura?	Q1: Like a cartoon?
A: Es un de los animals que sale en Winnie Pooh, pero no se quien es.	A: It's one of the animals on Winnie Pooh, but I don't know who it is.
Q1: Ok. ¿Eso es lo que tu traías puesto?	Q1: OK. That's what you were wearing?
A: Aha.	A: Aha.
Q1: ¿Y que mas?	Q1: And what else?
A: Unos pantalones, y, unos pantalones	A: Some pants, and, some black

**INTERVIEW WITH MARICELA DIAZ**

From Audio Recording Only

Q1=Officer Hector Soto, SFPD

Q2= Investigator Joel Reinesch, MPD

A=Maricela Diaz

negros con unas botas negras.	pants with black boots.
Q1: ¿Pantalones de mezclilla?	Q1: Denim pants?
A: Si.	A: Yes.
Q1: ¿Y botas negras?	Q1: And black boots?
A: Si.	A: Yes.
Q1: ¿De cuero?	Q1: Leather?
A: De las de nieve.	A: Snow type.
Q1: OK. ¿No traías nada en la cabeza? ¿Chamarra tampoco?	Q1: OK. You weren't wearing anything on your head? Jacket either?
A: No, traiba nomas ese sueter y abajo traiba otro suetercito chiquito.	A: No, I was only wearing that sweater and another small sweater underneath.
Q1: ¿De que color era ese sueter?	Q1: What color was that sweater?
A: Negro.	A: Black..
Q1: ¿Ese no tenia cachucha verdad?	Q1: That one didn't have a hood right?
A: Si.	A: Yes.
Q1: ¿Si tenia cachucha, cachucha tambien? ¿Y todo eso esta en la bolsa color de rosa en el basement?	Q1: It did have a hood, a hood too? And that's all in the pink bag in the basement?
A: El sweter negro no.	A: Not the black sweater.
Q1: ¿Dónde esta el sweter negro?	Q1: Where is the black sweater?
A: Esta en, en el cuarto de nosotros. Por donde esta la, una puerta de (inaudible).	A: It's in, in our room. By where the, a door of (inaudible).
Q1: Bueno. ¿Qué traía puesto Alex?	Q1: Good. What was Alex wearing?
A: Un pantalon de mezclilla azul.	A: Blue demin pants.
Q1: ¿Y que mas?	Q1: And what else?
A: Y una chamarra de cuero negra.	A: And a black leather jacket.
Q1: ¿De cuero?	Q1: Leather?
A: Aha.	A: Aha.
Q1: ¿Y de camisa que traía?	Q1: What about a shirt?
A: Una camisa blanca con dorado.	A: A white and gold shirt.
Q1: ¿Camiseta o camisa?	Q1: T-shirt or shirt?
A: De la como que trae usted. Igual.	A: Like the one you are wearing. The same.
Q1: ¿Polo? ¿Blanca y dorada dijo? ¿Y zapatos?	Q1: Polo? You said white and gold? And shoes?
A: Los que estan quemados?	A: The ones that are burned.
Q1: ¿Cómo?	Q1: What?

**INTERVIEW WITH MARICELA DIAZ**

**From Audio Recording Only**

**Q1=Officer Hector Soto, SFPD**

**Q2= Investigator Joel Reinesch, MPD**

**A=Maricela Diaz**

A:	Los que estan quemados.	A:	The ones that are burned.
Q1:	¿Estan quemados? ¿Dónde estan quemados?	Q1:	They're burned? Where are they burned?
A:	Yo le dije que estaban en la bolsa de la basura.	A:	I told you they were in the garbage bag.
Q1:	¿Los quemó?	Q1:	You burned them?
A:	Mhmm.	A:	Mhmm.
Q1:	Dijo que no los quemó.	Q1:	You said you didn't burn them.
A:	¿Quién dijo?	A:	Who said that?
Q1:	Usted me dijo que, a mi me dijo que no los quemó.	Q1:	You told me, you told me that you didn't burn them.
A:	No. Se quemaron todos, de que, quedo en la basura de aqui. Esto no se quemó. Pero de aqui se quemaron todo.	A:	No. They're all burned, from, what's in the trash to here. This didn't burn. But from here they're all burned.
Q1:	¿Cómo se quemaron?	Q1:	How did they get burned?
A:	Se quemaron.	A:	They got burned.
Q1:	¿Pero como?	Q1:	But how?
A:	Con fuego.	A:	With fire.
Q1:	¿Quién los quemó?	Q1:	Who burned them?
A:	Yo.	A:	Me.
Q1:	Tu los quemaste. ¿Dónde los quemaste?	Q1:	You burned them. Where did you burn them?
A:	En el baño.	A:	In the bathroom.
Q1:	¿En el baño?	Q1:	In the bathroom?
Q1:		Q1:	(To Detective Reinesch) OK. Now she tells me that she did burn the shoes. She burned them in the bathroom. But they're not completely burned, the soles are there and they're in the garbage in the kitchen.
Q2:		Q2:	OK.
A:	En la bolsa que esta alla amarrado.	A:	In the bag that's over there tied up.
Q2:		Q2:	Has the garbage been taken out yet?
A:	Mhmm.	A:	Mhmm.
Q2:		Q2:	It's still there.
Q1:	OK. Cuando fueron a la Walmart. ¿Miraron a alguna persona alla? ¿Qué	Q1:	OK. When you went to Walmart. Did you see anyone there? That

## INTERVIEW WITH MARICELA DIAZ

From Audio Recording Only

Q1=Officer Hector Soto, SFPD

Q2= Investigator Joel Reinesch, MPD

A=Maricela Diaz

recuerdas?	you remember?
A: A, a una muchacha, pero no se quien es.	A: A girl, but I don't know who she is.
Q1: No sabes. ¿Y porque recuerdas a esa muchacha?	Q1: You don't know. And why do you remember that girl?
A: Porque, con esa se quedo a platicar Jasmine.	A: Because Jasmine stayed to talk to her.
Q1: ¿O es, es amiga de Jasmine? ¿No sabes quien era?	Q1: Oh, she's, she's Jasmine's friend? You don't know who she was?
A: No. Nomas se que es una espoza, o si creo que es espoza de un muchacho que tatio a Jasmine en su mano.	A: No. I just know she's the wife, or I think she's the wife of a guy that tattooed Jasmine's hand.
Q1: ¿Qué, que?	Q1: That what?
A: Le tatio su mano aqui. Las tres estrellas que tiene Jasmine.	A: He tattooed her hand here. The three stars that Jasmine has.
Q1: OK. ¿Y ella es la espoza de el que le hizo el trabajo?	Q1: OK. And she the wife of the guy that did the work?
A: Aha.	A: Aha.
Q2:	Q2: Three stars?
Q1:	Q1: No, she, uh, I asked her about uh, who they saw at Walmart and she said that Jasmine talked to a friend of hers who was married to a tattoo artist that, that had done some tattoo work on Jasmine.
Q2:	Q2: Sure. The, three stars on her hand?
A: Mhmm.	A: Mhmm.
Q2:	Q2: Where did that, where at in the store? Do you remember where that took place?
Q1: ¿En que parte de la tienda?	Q1: Where at in the store?
A: Al entrar al, ¿Sabe que hay dos, dos, uh, dos entradas, la primera y la segunda? Como entra una y una.	A: Coming into the, you know there are two, two entries, the first one and the second one? Like you come in one and one.
Q1: Si.	Q1: Yes.
A: Entramos por esta. Al entrar alli.	A: We went in through this one. Right there by the entry.



**INTERVIEW WITH MARICELA DIAZ**

**From Audio Recording Only**

**Q1=Officer Hector Soto, SFPD**

**Q2= Investigator Joel Reinesch, MPD**

**A=Maricela Diaz**

Q1:	Q1: (To Detective Reinesch) At the entry to the store.
Q2:	Q1: OK.
A: Adelantito, donde se paga a la cajera.	A: Just in front of where you pay the clerk.
Q1:	Q1: Near the clerk.
Q2:	Q2: OK.
Q1: ¿Hablo mucho tiempo con ella?	Q1: Did she talk with her a long time?
A: Si, le estaba preguntando de, de que si no tenia el numero de ella. Que para que tatuaran a Alex.	A: Yes, she was asking if she had her number. So that they could tattoo Alex.
Q1: OK.	Q1: OK.
A: Y fue lo unico. Y despues hablaron ya no se de mas de que. Y despues fuimos a comprar eso.	A: And that was all. Then they talked more, I don't know what about. Then we went to buy that.
Q1: ¿Por cuánto tiempo hablaron con ella?	Q1: How long did they talk with her?
A: Como unos diez o cinco minutos.	A: About ten or five minutes.
Q1:	Q1: (To Detective Reinesch) They talked for about five or ten minutes.
Q2:	Q2: With this?
Q1:	Q1: (To Detective Reinesch) The wife, the wife of the tattoo artist.
Q1: OK. ¿Y nadie mas?	Q1: No one else?
Q1:	Q1: (To Detective Reinesch) OK. Nobody else.
A: Yo no me acuerdo, la verdad. Yo creo si habian mas personas que la conocian a ella, pero yo no se.	A: I don't remember, honestly. I think there were other people who knew her, but I don't know.
Q1: OK. Y este, el telefono de Jasmine. ¿Qué paso con el?	Q1: OK. And Jasmine's telephone. What happened to it?
A: Lo avento a el lago.	A: He threw it in the lake.
Q1: ¿Cómo?	Q1: What?
A: Lo avento a el lago.	A: He threw it in the lake.
Q1: ¿A dónde?	Q1: Where?
A: A el lago.	A: In the lake.
Q1: ¿Cuál lago?	Q1: Which lake?
A: A el que esta sercita de alli.	A: The one that's near there.
Q1: ¿Sabes donde esta el lago? ¿O	Q1: Do you know where the lake is?

**INTERVIEW WITH MARICELA DIAZ**

From Audio Recording Only

Q1=Officer Hector Soto, SFPD

Q2= Investigator Joel Reinesch, MPD

A=Maricela Diaz

como se llama el lago?	Or the name of the lake?
A: No.	A: No.
Q1:	Q1: (To Detective Reinesch) Is there a lake nearby there? Or a pond?
Q2:	Q2: Could be.
Q1:	Q1: That's where the phone's at.
Q1: ¿Quien lo avento?	Q1: Who threw it?
A: El.	A: Him.
Q1: ¿Alex?	Q: Alex?
Q2:	Q2: Is it? They threw it in there?
Q1:	Q1: Alex threw it into a lake or a pond nearby.
Q2:	Q2: Um, is it near a garbage dump?
Q1: ¿Junto a el dompe de basura?	Q1: Near a garbage dump?
A: No se. Era noche.	A: I don't know. It was night time.
Q1: ¿Por cual, por cual calle esta el lago?	Q: On which, on which street is the lake?
A: En la misma calle.	A: On the same street.
Q1:	Q1: It's on the same street she said.
A: Pero es a este lado.	A: But it's on this side.
Q1:	Q1: On the right hand side.
Q2:	Q2: The right hand side.
Q1: ¿Cuándo venian de alla, a la mano derecha?	Q1: When you were coming from there, on the right hand side?
A: Mhmm.	A: Mhmm.
Q1:	Q1: Returning from the scene.
Q2:	Q2: Would you be able to, would it be something if you saw, you'd be able to tell us if that's about where it was thrown?
Q1: ¿Nos puedes enseñar donde esta?	Q1: Can you show us where it is? Yes.
Q1:	Q1: OK. So that's what happened to the phone.
Q1: Ah, Y cuando le llamaste a Jasmine, a preguntarle que sit e puede dar raite a la Walmart, con intenciones de hacer todo esto, ¿De que telefono le llamaste?	Q1: Ah, and when you called Jasmine to ask her for a ride to Walmart, with the intentions of doing all this to her, which telephone did you call her from?
A: De la casa.	A: From the house.
Q1: ¿De la casa de quien?	Q1: From who's house?

**INTERVIEW WITH MARICELA DIAZ**

**From Audio Recording Only**

**Q1=Officer Hector Soto, SFPD**

**Q2= Investigator Joel Reinesch, MPD**

**A=Maricela Diaz**

A: De nosotros. Bueno pues de...	A: From ours. Well from...
Q1: ¿De Stefani?	Q1: Stephanie's?
A: Aha, de Stefani.	A: Aha, Stephanie's.
Q1:	Q1: The call was made from Stephanie's house phone.
Q2:	Q2: Around seven O'clock?
Q1: ¿Cómo a las siete de la tarde?	Q1: At about seven in the afternoon?
A: No me acuerdo. Pero pues era como unas...	A: I don't remember. But it was like...
Q1:	Q1: Close.
Q2:	Q2: OK. Was it just a really quick phone call?
Q1: ¿Era rapida la llamada?	Q1: Was it a quick call?
A: Duro como, unos tres o cuatro minutos.	A: It lasted about three or four minutes.
Q1:	Q1: (To Detective Reinesch) Three or four minutes.
Q2:	Q2: OK.
Q1:	Q1: (To Detective Reinesch) OK, I think I got everything started. Are there other details?
Q2:	Q2: Who started it? Who started the fire?
Q1:	Q1: Uh, she told me Alex.
Q1: ¿Quién, quien prendio el, el, la lumbre?	Q1: Who, who started the fire?
A: El.	A: Him.
Q1: ¿Y quien le hecho el liquido?	Q1: And who put the liquid on her?
A: El. El hizo todo. (inaudible)	A: Him. He did everything. (inaudible)
Q1: OK, ¿Y dijiste con el encendedor?	Q1: OK, and you said with the lighter?
A: Yo pienso.	A: I think so.
Q1: ¿Lo miraste?	Q1: Did you see him?
A: No, no tiro el ensendedor. No creo.	A: No, he did'nt throw the lighter. I don't think so.
Q1: ¿Pero lo estavas mirando, lo que estaba haciendo verdad?	Q1: But you were watching him, what he was doing right?
A: No muy bien porque me fui caminando yo.	A: Not very well because I left walking.
Q1:	Q1: (To Detective Reinesch) She

**INTERVIEW WITH MARICELA DIAZ**

From Audio Recording Only

Q1=Officer Hector Soto, SFPD  
Q2= Investigator Joel Reinesch, MPD  
A=Maricela Diaz

	walked away when he started the fire, she doesn't know how he started the fire. She thinks it was with a lighter.
Q2:	Q2: OK. Does he, does he smoke?
Q1: ¿Fuma el?	Q1: Does he smoke?
Q2:	Q2: He does? So he carries a lighter on him?
Q1: ¿Carga el encendedor?	Q1: Does he carry the lighter?
A: Mhmm.	A: Mhmm.
Q1: ¿O cerillos?	Q1: Or matches?
A: No se. Por la mayoría del tiempo es encendedor.	A: I don't know. Most of the time it's a lighter.
Q1:	Q1: He usually carries a lighter.
Q2:	Q2: Ok. Do you know what the lighter looks like that he usually carries?
Q1: ¿Como se mira el encendedor que carga el?	Q1: What does the lighter look like that he carries?
A: Verde.	A: Green.
Q1: ¿Verde? ¿De plástico o de fierro?	Q: Green? Plastic or steel?
A: De fierro.	A: Steel.
Q1: ¿De, de fierro?	Q: Steel?
A: No, de plástico.	A: No, plastic.
Q1:	Q1: A plastic green lighter.
Q2:	Q2: And, do you know if he, did he throw it in the fire? Or did you...
Q1: ¿Lo avento a la lumbre el? ¿O que hizo con el encendedor?	Q1: Did he throw it in the fire? Or what did he do with the lighter?
A: No creo, porque esta en, esta en la casa.	A: I don't think so, because it's at the house.
Q1: ¿El encendedor?	Q1: The lighter?
Q1: ¿Dónde?	Q1: (To Detective Reinesch)The lighter is in the house. (To Diaz)Where?
A: En el cuarto de nosotros.	A: In our room.
Q1: ¿Dónde? ¿En el buro o en la cama en...?	Q1: (To Detective Reinesch )In their room. (To Diaz) Where? On the dresser or the bed...?

**INTERVIEW WITH MARICELA DIAZ**

From Audio Recording Only

Q1=Officer Hector Soto, SFPD  
 Q2= Investigator Joel Reinesch, MPD  
 A=Maricela Diaz

A: En donde esta el tocador.	A: Where the dresser is.
Q1: ¿El que?	Q1: The what?
A: Tocador.	A: The dresser.
Q1:	Q1: On the dresser. (To Detective Reinesch)
Q2:	Q2: OK.
Q1:	Q1: On or near the dresser.
Q2:	Q2: Um, the knife that was left in her throat, when she was put in the trunk. Did you cover that? No. There was a knife left in her throat when she was placed in the trunk. Do you remember that? (To Diaz)
Q1: ¿Recuerdas que tenia el cuchillo todavía ensartado en el cuello? Cuando la metieron a la cajuela.	Q1: Do you remember that she had a knife stuck in her throat? When she was put in the trunk.
A: Creo que si. Ese fue el cuchillo de el.	A: I think so. That was his knife.
Q1:	Q1: That was Alex's knife she said.
Q2:	Q2: Which one was that?
Q1: ¿Cuál era? ¿El de la navaja con dientes o sin dientes?	Q1: Which one? The one with teeth or the one without teeth?
A: Sin dientes.	A: Without teeth.
Q1:	Q1: (To Detective Reinesch) That was the smooth bladed knife stuck by the neck.
Q2:	Q2: OK.
A: Porque no era con esa cosa que, raspa.	A: Because it didn't have that thing that scrapes.
Q1:	Q1: Cause one had a serrated edge.
A: Y tenia dientitos.	A: And it had little teeth.
Q1:	Q1: It's got little teeth.
Q2:	Q2: OK. And you dropped yours, you said?
A: Mhmm.	A: Mhmm.
Q1: Dijiste que tu lo...	Q1: You said that you...
A: Estaba tirado.	A: It was dropped.
Q1: ¿Estaba tirado? ¿Quién lo tiro?	Q1: It was dropped? Who dropped it?
A: Se me, lo tire yo, despues yo.	A: It, I dropped it, then I. Because

**INTERVIEW WITH MARICELA DIAZ**

**From Audio Recording Only**

**Q1=Officer Hector Soto, SFPD  
Q2= Investigator Joel Reinesch, MPD  
A=Maricela Diaz**

Porque ya no tenia cosa esa.	then it didn't have that thing.
Q1: Me dijiste que el te lo quito.	Q1: You told me that he took it away from you.
A: Pore eso.	A: That's why.
Q1: ¿Lo tiraste tu? ¿O Alex te lo quito?	Q1: Did you drop it? Or did Alex take it away from you?
A: No, yo se lo trate de quitar pero despues lo tire.	A: No, I tried to take it away from him but then I threw it.
Q1:	Q1: (To Detective Reinesch) I tried to take it away but then I threw it.
Q2:	Q2: The, the handle broke off after two stabs right?
Q1: Mhmm. Mira el problema de, de todo esto es que tu me dices que Alex la acuchillo y tu no la acuchillaste.	Q1: Mhmm. Look the problem with, with all of this is that you are telling me that Alex stabbed her and that you did not stab her.
A: Mhmm.	A: Mhmm.
Q1: Pero hay dos cuchillos que se usaron.	Q1: But there are two knives that you all used.
A: Mhmm.	A: Mhmm.
Q1: Y el que tu traias tienia la agarradera quebrada.	Q1: And the one that you brought had the handle broken.
A: Mhmm.	A: Mhmm.
Q1: Dijiste que Alex te lo habia quitado y luego dijiste que tu lo tiraste.	Q: You said that Alex had taken it away from you and then you said that you threw it.
A: Mhmm.	A: Mhmm.
Q1: ¿Te acuerdas cuando hablamos al principio me dijiste que agarraste el cuchillo asi...?	Q1: Do you remember when we first talked, you told me that you grabbed the knife like this ?
A: Aha.	A: Aha.
Q1: Y ella te dijo "¿Qué estas haciendo?"	Q1: And she said "What are you doing?"
A: Si.	A: Yes.
Q1: ¿Verdad?	Q1: Right?
A: Si.	A: Yes.
Q1: Y no pudiste.	Q1: And you couldn't.
A: Mhmm.	A: Mhmm.
Q1: Y luego me dijiste que Alex saco el cuchillo de el, y el la acuchillo.	Q1: And then you told me that Alex took out his knife, and he

**INTERVIEW WITH MARICELA DIAZ**

From Audio Recording Only

Q1=Officer Hector Soto, SFPD

Q2= Investigator Joel Reinesch, MPD

A=Maricela Diaz

	stabbed her.
A: Si, y es, pero, no mas...	A: Yes, and it's, but, that's all...
Q1: No me dijiste, no me dijiste que el te quito el cuchillo.	Q1: You didn't tell me, you didn't tell me that he took the knife away from you.
A: Entonces porque todavia no le habia dicho del otro cuchillo, este despues que le sace a decirle de el cuchillo. ¿Se acuerda?	A: That's when because I hadn't told you about the other knife, then I brought it out to tell you about the knife. Do you remember?
Q1: ¿Cómo?	Q1: What?
A: Hasta despues de que le dije lo del cuch... del otro cuchillo que habia alli.	A: Until later that I told you about the kni...about the other knife that was there.
Q1: Si, pero ¿Por qué, porque va el a usar el cuchillo de el y luego quitarte el cuchillo tuyo? ¿Por cual razon?	Q1: Yes, but why, why would he use his knife and then take your knife away? For what reason?
A: No se.	A: I don't know.
Q1: ¿Cuántas veces le, la acuchillaste tu a ella? Deveras.	Q1: How many times did you stab her? Really.
A: Yo la verdad, pense que si la habia acuchillado, pero no, no le meti...	A: Me, truthfully, I thought that I had stabbed her, but no, I didn't stick it in...
Q1: ¿Cuántas veces? ¿Cuántas, cuantas veces le metiste el cuchillo?	Q1: How many times? How many, how many times did stick the knife in?
A: No, no se lo meti. Porque cuando se lo sace no tenia sangre.	A: No, no I didn't stick it in. Because when I pulled it out it didn't have blood on it.
Q1: ¿No se lo metiste?	Q1: You didn't stick it in?
A: No se lo meti. Yo pienso que ella lo agarro, o no se.	A: No I didn't stick it in. I think she grabbed it, or I don't know.
Q1: ¿Le hiciste así?	Q1: Did you do like this?
A: Aha. Y ya ella dijo "¿Ay que haces?" entonces yo lo sace para atrás pero no tenia sangre ni nada.	A: Aha. And then she said "Ay what are you doing?" then I took it back out but it didn't have blood or anything.
Q1:	Q1: OK.
A: Solo pienso que se lo meti como por aca y no le pego a ella. Porque no tenia sangre ni nada.	A: I just think that I stuck it in about here and I didn't hit her. Because it didn't have blood or

**INTERVIEW WITH MARICELA DIAZ**

From Audio Recording Only

**Q1=Officer Hector Soto, SFPD  
Q2= Investigator Joel Reinesch, MPD  
A=Maricela Diaz**

	anything.
Q1:	Q1: (To Detective Reinesch) I asked her how many times she stabbed Jasmine and she said that she didn't. She tried to stab her. She thinks that Jasmine might have held the knife or grabbed and went behind her neck, cause when she pulled the knife out it didn't have any blood on it.
Q1: ¿Y después que le hiciste eso a Jasmine, sacaste el cuchillo y no tenia sangre?	Q1: And after you did that to Jasmine, you took out the knife and it had no blood?
A: Aha, no tenia sangre.	A: Aha, it didn't have any blood.
Q1: ¿Qué hiciste entonces?	Q1: What did you do then?
A: Entonces yo me quede allí, entonces Alex en eso entro para atras del carro y fue cuando dijo que si ya.	A: And then I stayed there, then Alex got back in the car and that was when he said that was it.
Q1: ¿Como que entro para atrás del carro?	Q1: What do you mean he got back into the car?
A: Porque ya se habia bajado.	A: Because he had already gotten out.
Q1: No me dijiste antes que el se habia bajado del carro. Nunca me dijiste que el se bajo del carro. Tu me dijiste que se, que el estaba atrás de ti.	Q1: You hadn't told me that he had gotten out of the car. You never told me that he got out of the car. You told me that, that he was behind you.
A: Por eso.	A: That's why.
Q1:	Q1: Now she tells me that Alex now got back in the car. She never mentioned that before.
A: Porque, ¿Se acuerda que le dije, que le habia dicho que ivamos a ver si nos, nos espantavan en esa casa?	A: Because, do you remember that I told you, that I had told you that we were going to see if we'd get spooked at that house?
Q1: Mhmm.	Q1: Mhmm.
A: El se habia bajado alli. Pero entonces,	A: He had gotten out there. But then...
Q1: ¿Con cual pretexto?	Q1: With what pretext?
A: Con, para que yo hiciera lo, lo que iba a hacer yo. Pero yo no lo pude hacer.	A: With, for me to do, do what I was going to do. But I couldn't



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	do it.
Q1: ¿Así es que Alex se salio del carro para que tu la acuchillaras?	Q1: So then Alex got out of the car so that you could stab her?
A: Aha. Pero no lo hice yo, yo segun usted que si la hice, pero no la hice. Porque le estoy diciendo que cuando sace el cachillo no tenia sangre, ni nada. Y no, no, ni si quiera le pego a nada. Yo siento que ella lo agarro asi y como estaba apagado el carro y todo, no habia luz, no creo que la habria de ver acuchillado porque se, se salio sin sangre.	A: Aha. But I didn't do it, I according to you I did, but I didn't do it. Because I'm telling you that when I pulled the knife out it didn't have blood or anything. And it didn't, it didn't even hit anything. I feel that she grabbed it like this, and how the car was turned off and all, there was no light, I don't think that I would have stabbed her because it, it came out without blood.
Q1: ¿Y le hiciste otro intento?	Q1: And did you try again?
A: No. Fue cando despues el me lo quito.	A: No. That was when later he took it away from me.
Q1: ¿El te lo quito el cuchillo?	Q1: Did he take the knife away from you?
A: Aha, Y la empezo a acuchillar el y despues yo se lo trate de quitar. Cuando se lo trate de quitar fue cuando se le callo la esa cosa.	A: Aha, and he started to stab her and I tried to take it away. When I tried to take it away is when that thing fell off.
Q1: ¿Por qué le querias quitar el cuchillo?	Q1: Why did you want to take the knife away?
A: Pues para que ya parara el, y ya no estuviera hacienda eso. Despues se me callo el cuchillo.	A: So that he would stop already, and he wouldn't be doing that to her anymore. Then I dropped the knife.
Q1: ¿Por qué? ¿Por qué? Si, si fueron con la, la intencion de matarla.	Q1: Why? Why? If, if you went with the, the intention of killing her.
A: Por eso, por, Alex, ya cuando iba a hacer eso no le estaba diciendo que si, no queria hacerlo, que ya no lo queria hacer. Me habia arrepentido.	A: That's why, that, Alex, when he (or I) was going to do it I wasn't saying yes, I didn't want to do it, that I no longer wanted to do it. I repented (felt sorry, felt bad).
Q1: ¿Hasta después que le, que le trataste de cortarla?	Q1: Until after you, you tried to cut her?
A: No, cuando la trate de cortar, y tambien cuando despues de que, despues	A: No, when I tried to cut her, and also after when I, after I,

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A=Maricela Diaz

de que la, segun la habia cortado. Pero no la corte.	supposedly I had cut her. But I didn't cut her.
Q1: OK, un momento, dejeme, que se alcance el.	Q1: OK, one moment, let me, get him caught up.
Q1:	Q1: (To Detective Reinesch) OK Joel, what she's telling me now is that they pulled up, Alex got out of the car to allow her to stab Jasmine. She tried to stab Jasmine once, and thinks that she missed because when she pulled out the knife, it didn't have any blood on it. Then,
Q2:	Q2: Go ahead.
Q1:	Q1: Then she says that at that point Alex got back in the car and asked if it was done, and saw that it wasn't and then he took the knife away from her.
Q1:	Q1: (To Diaz) Right?
A: Mhmm.	A: Mhmm.
Q1:	Q1: And stabbed Jasmine with that knife, until the handle broke, and that's where we're at right now. And then she says that she's trying to take the knife away from Alex because now she's changed her mind.
Q2:	Q2: And you want to do the stabbing, change your mind? Or you don't want her to die, change your mind?
A: ¿Qué dijo?	A: What did he say?
Q1: Que cuando te arrepentiste, no querias que, ¿No querias cortarla ya?	Q1: That when you repented, you didn't want, you didn't want to cut her?
A: No, ya no.	A: No, not anymore.
Q1:	Q1: (To Detective Reinesch) No, she didn't want to stab her.
Q2:	Q2: OK. So you attempted to stab her one time?
A: Mhmm.	A: Mhmm.
Q2:	Q2: Which part of her body?
A: ¿Cómo?	A: What?

**INTERVIEW WITH MARICELA DIAZ**

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**A=Maricela Diaz**

Q1: ¿En que parte del cuerpo de ella, trataste de acuchillarla?	Q1: What part of her body did you try to stab her at?
Q2:	Q2: Point to it.
A: Aquí. Le hice así. ¿Si me entiende? Estaba así, y yo le trate de hacer así, pero se vino para atrás, no se si aquí o aquí.	A: Here. I did like this. Do you understand? She was like this, and I tried to do like this, but she went back, I don't know if here or here.
Q1: ¿En donde? ¿En el cuillo?	Q1: Where? On the neck?
A: No.	A: No.
Q1: ¿Dónde, donde trataste de, de acuchillarla?	Q1: Where, where did you try to stab her?
A: Aquí. Pero no pude porque ella lo, creo lo agarro.	A: Here. But I couldn't because she, I think she grabbed it.
Q1:	Q1: (To Detective Reinesch) I asked her where she tried to cut her. She pointed to her neck.
Q2:	Q2: So about right, about right here. She grabbed the knife?
A: Aha.	A: Aha.
Q2:	Q2: How long then after that then when Alex got back in the car?
A: Como, luego luego, un minuto.	A: Like, quick, quick, one minute.
Q1:	Q1: About a minute, less than a minute.
Q2:	Q2: Less than a minute? So then, what was Jasmine doing then?
	<b>*Video system re-starts at this point*</b>

**INTERVIEW WITH MARICELA DIAZ**

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**Q5=Special Agent Cameron Corey, DCI**

**Q6=Officer Russ Stevenson, MPD**

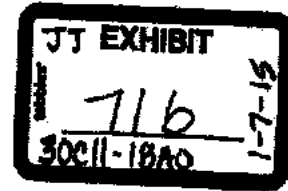
**PH=Sec. Polly Huber, MPD**

**A=Maricela Diaz**

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Y el dijo que si ya. Y entonces que ya despues se (inaudible --arrunto?) y entonces el empezo. (Spanish File 2 0:00:00)	if that was it. And then after she (inaudible) and then he started.
Q1:	Q1: And then he started to stab, okay. Problem. Okay? First you told us that you pulled out the knife and couldn't do it. You remember that?
A:	A: Mm-hm.
Q1: Okay. ¿Comprendes lo que te estoy diciendo? (Spanish File 2 0:00:30)	Q1: Okay (Spanish)
A: Si. (Spanish File 2 0:00:31)	A: Yes.
Q1:	Q1: Okay, just tell me if you don't understand so I can say it in Spanish, okay?
A: ¿Lo puede en español? (Spanish File 2 0:00:35)	A: Can you say it in Spanish?
Q1: Okay. Primeramente nos dijiste que sacaste el cuchillo y no pudiste. Ahora nos dices que sí la intentaste de acuchillar una vez. (Spanish File 2 0:00:38) --	Q1: Okay. First you told us that you took out the knife and you couldn't. Now you tell us that you did try to stab her once.
A: Por eso, fueron dos cosas--(Spanish File 2 0:00:47) --	A: That's why, there were two things--
Q1: Son dos historias. (Spanish File 2 0:00:48)	Q1: They are two stories.
A: Pero como estoy diciendo lo que paso--(Spanish File 2 0:00:48) --	A: But like I'm saying what happened--
Q1: Eso--(Spanish File 2 0:00:50) --	Q1: That's--
A: Uh--(Spanish File 2 0:00:50)	A: Uh--
Q1: Eso no--(Spanish File 2 0:00:51)	Q1: That's not--
A: Ah, porque ya le dije un pedazo. (Spanish File 2 0:00:51)	A: Ah, because I already told you one part.
Q1: Eso no nos dijiste antes. (Spanish File 2 0:00:53)	Q1: That's not what you told us before.
A: Por eso. Pero orita me estoy	A: That's why. But now I'm

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**A=Maricela Diaz**

acordando bien de todo como paso. ¿Si me entiende? (Spanish File 2 0:00 55)	remembering about how everything happened. Do you understand me?
Q1: ¿Cuántas veces de veras la acuchillaste? (Spanish File 2 0:01:10)	Q1: Okay, I just pointed out the fact that she got two stories and she says that she forgot. Now she's remembering she says. Well how many times did you really stab her? (Spanish) How many times did you really stab her?
A: No sé—esa ves, la que le digo que pensé que la acuchilla pero no la acuchillé. Fue la única vez. (Spanish File 2 0:01:12)	A: I don't know—that time, that I told you that I thought that I stabbed her, but I didn't stab her. That was the only time.
Q1: ¿Única vez? (Spanish File 2 0:01:19)	Q1: The only time?
Q2:	Q2: Only once?
A:	A: Mm-hm.
Q2:	Q2: And where was that at?
A: Fue allí cuando le traté de hacer, allí, pero no la acuchillé. (Spanish File 2 0:01:24)	A: It was there when I tried to do it, there, but I didn't stab her.
Q1:	Q1: Right there in the neck.
Q2:	Q2: Right here in the neck, right here?
A:	A: Uh-huh.
Q2:	Q2: So you did --
A: No la—no la acuchillé. (Spanish File 2 0:01:29)	A: I didn't—I didn't stab her.
Q1:	Q1: I didn't do it. Okay, lighter fluid.
A: Mm-hm ¿Eso qué? (Spanish File 2 0:01:36)	A: Mm-hm What about that? (Spanish)
Q2:	Q2: Is this the stuff?
Q1: ¿Dónde estaba esto cuando ustedes estaban acuchillando? ¿Dónde estaba? (Spanish File 2 0:01:39)	Q1: Where was this when you all were stabbing? Where was it?
A: Uh, creo que atrás. (Spanish File 2 0:01:45)	A: Uh, I think in the back.

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**A=Maricela Diaz**

Q1: ¿Atrás dónde? ¿En la cajuela o el asiento? (Spanish File 2 0:01:47)	Q1: In the back where? In the trunk or the seat?
A: ¿Después de cuando lo prendieron o cuando lo acabamos de comprar? (Spanish File 2 0:01:51)	A: After when they lit it, or when we had just bought it?
Q1: Después de que lo compraron, ¿dónde lo pusieron? (Spanish File 2 0:01:54)	Q1: After you bought it, where did you put it?
A: Uh, creo que lo traiba el. (Spanish File 2 0:01:57)	A: Uh, I think that he had it.
Q1: ¿Atrás? (Spanish File 2 0:01:59)	Q1: In back?
A:	A: Uh-huh.
Q1: ¿Y cuándo, a qué punto, salió la botella? (Spanish File 2 0:02:03)	Q1: She says that that stuff was in the backseat with Alex. (Spanish) And when, at what point, did the bottle come out?
A: ¿Cómo qué punto? Cuando llegamos allí al, donde esta el carro. (Spanish File 2 0:02:07)	A: Like at what point? When we arrived there, to where the car is.
Q1: Donde lo dejaron, lo abandonaron. (Spanish File 2 0:02:13)	Q1: Where you all left it, where you abandoned it.
A:	A: Mm-hm.
Q1:	Q1: I asked her at what point did the bottle come outta the back seat and she says when the -- when we got to where the trees are, where the car was abandoned.
Q2:	Q2: Where's the bottle at now?
Q1: Y la botella, ¿dónde está ahora? (Spanish File 2 0:02:28)	Q1: And the bottle, where is it now?
A: No sé dónde la tiró. (Spanish File 2 0:02:31)	A: I don't know where he threw it.
Q1:	Q1: I don't know where he threw it.
A: Yo creo la dejo allí dentro en el carro, no sé. (Spanish File 2 0:02:34)	A: I think he left it there in the car, I don't know.
Q1:	Q1: I think he mighta left it in the car,

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**A=Maricela Diaz**

	I don't know.
Q2:	Q2: Okay. So the -- the lighter fluid was sprayed on her when she was already in the trunk of the car?
Q1: ¿El líquido se lo echaron después de que estaba en la cajuela? (Spanish File 2 0:02:47)	Q1: Did you put the liquid on her after she was in the trunk?
A: Creo que sí. (Spanish File 2 0:02:52)	A: I think so.
Q1:	Q1: I think so.
A: Porque él fue él que lo hizo, yo no. (Spanish File 2 0:02:56)	A: Because he was the one that did it, not me.
Q1:	Q1: He's the one that did it.
A: Yo no—yo ni me llene de eso ni nada. (Spanish File 2 0:02:59)	A: I didn't—I didn't even get covered with that or anything.
Q1: A ver las manos. El otro lado. ¿Eres zurda o mano derecha? (Spanish File 2 0:03:07)	Q1: I didn't touch the -- (Spanish) Lets see your hands. The other side. Are you left- or right-handed?
A: Derecha. (Spanish File 2 0:03:16)	A: Right.
Q1:	Q1: She's right-handed.
Q2:	Q2: Okay. I -- I've got a couple questions, okay, concerning, uh, the actual stabbing and cutting that was done, okay?
A:	A: Mm-hm.
Q2:	Q2: You said that you tried to stab her once in the neck --
A:	A: Mm-hm.
Q2:	Q2: -- with what hand?
Q1: ¿Con cuál mano? (Spanish File 2 0:03:37)	Q1: With which hand?
A: Con ésta. (Spanish File 2 0:03:38)	A: With this one.
Q1:	Q1: Right hand.
A: Soy con derecha, no soy zurda. (Spanish File 2 0:03:39)	A: I'm right-handed, I'm not left-handed.
Q2:	Q2: Okay and you're sitting in the

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**PH=Sec. Polly Huber, MPD**

**A=Maricela Diaz**

	front passenger side?
A:	A: Mm-hm.
Q1:	Q1: Passenger side.
Q2:	Q2: So then you reached across her body --
A:	A: Uh-huh.
Q2:	Q2: -- like that to stab her?
A:	A: Uh-huh.
Q2:	Q2: Okay, stabbed once in the side of the neck?
A: Pero no—no le pegué. (Spanish File 2 0:03:52)	A: But I didn't—I didn't hit her.
Q1:	Q1: I didn't hit --
A: No. Es que ustedes no entienden es que yo traté pero no pude. (Spanish File 2 0:03:55)	A: No. What you all don't understand is that I tried but I couldn't.
Q1:	Q1: What you don't understand is I tried, but I couldn't.
A: Y también cuando se lo encaje, tampoco pude. (Spanish File 2 0:04:03)	A: And also when when I stuck it in her, I also couldn't.
Q1:	Q1: When I tried to stab her, I couldn't.
Q2:	Q2: Because she blocked you?
A:	A: Uh-huh.
Q1: ¿Porque ella se lo tapó? (Spanish File 2 0:04:09)	Q1: Because she blocked herself?
A: Y luego cuando él entró-- (Spanish File 2 0:04:10)	A: And then when he came in--
Q1:	Q1: Yes, and then --
A: Pues entonces la agarro asi y algo asi,-- (Spanish File 2 0:04:11)	A: Well then he grabbed her like this and something like this,--
Q1:	Q1: -- then when he came in --
A: y luego también hizo así. (Spanish File 2 0:04:15)	A: and then he also did this.
Q1:	Q1: -- he stabbed her.
Q2:	Q2: Did you yell at Alex to come into



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**PH=Sec. Polly Huber, MPD**

**A=Maricela Diaz**

	the car?
Q1: ¿Le gritaste a-- (Spanish File 2 0:04:21)	Q1: Did you yell at--
A:	A: No --
Q1: --Alex que entre en el carro? (Spanish File 2 0:04:22)	Q1: --Alex to enter the car?
A: No, él entró solo. (Spanish File 2 0:04:23)	A: No, he entered by himself.
Q1:	Q1: No, he came in by himself.
Q2:	Q2: What did you say to her when you attempted to stab her?
Q1: ¿Qué le dijiste a ella cuando la intentaste de acuchillar? (Spanish File 2 0:04:28)	Q1: What did you tell her when you tried to stab her?
A: Nada. (Spanish File 2 0:04:31)	A: Nothing.
Q2:	Q2: You didn't say anything to her?
A:	A: No.
Q2:	Q2: You -- you weren't even havin' a conversation with her?
Q1: ¿Estabas conversando con ella? (Spanish File 2 0:04:36)	Q1: Were you conversing with her?
A: Um, no más estábamos—uh, no mas le estaba diciendo, oh, que-- que lo iban a espantar a él o algo así. No me acuerdo. (Spanish File 2 0:04:38)	A: Um, we were just—uh, I was just telling her, oh, that—that he was gonna get scared or something like that. I don't remember.
Q1:	Q1: I just tellin' her that Alex was gonna get spooked.
Q2:	Q2: And then you just reached over across her body?
Q1: ¿Y luego se— no más le extendiste? (Spanish File 2 0:04:53)	Q1: And then—did you just reach?
A:	A: Uh-huh.
Q1: ¿Cuándo te día el cuchillo Alex? (Spanish File 2 0:04:56)	Q1: When did Alex give you the knife?
A: Uh, antes de que llegáramos allí. (Spanish File 2 0:05:00)	A: Uh, before we arrived there.

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**A=Maricela Diaz**

Q1: Y contigo manejando. (Spanish File 2 0:05:03)	Q1: And it was with you when driving.
A:	A: Uh-huh.
Q1: ¿Cómo te lo dio? (Spanish File 2 0:05:05)	Q1: How did he give it to you?
A: Por debajo de el lado, asi a este lado. (Spanish File 2 0:05:07)	A: Under the side, like this on this side.
Q1: ¿Así, por atras del asiento? (Spanish File 2 0:05:09)	Q1: Like this, behind the seat?
A: Uh-- (Spanish File 2 0:05:13) --	A: Uh--
Q1: Uh--(Spanish File 2 0:05:13) --	Q1: Uh--
A: Yo estoy aquí y me lo paso así. (Spanish File 2 0:05:14)	A: I'm here and he passed it here.
Q1:	Q1: Okay, I asked her how Alex handed her the knife.
Q2:	Q2: Okay, that's what I was gonna --
Q1:	Q1: Behind the seat.
Q2:	Q2: You reached around the seat then? How -- how soon prior to you making the stab at her, did you have the knife? How long did you have the knife?
Q1: ¿Cuánto tiempo trafas el cuchillo antes de que la acuchillaste la primera ves? (Spanish File 2 0:05:30)	Q1: How long did you have the knife before you stabbed her the first time?
A: Como unos quince minutos. (Spanish File 2 0:05:34)	A: Like fifteen minutes.
Q1:	Q1: 'Bout 15 minutes.
A: Porque ya después no lo quise hacer. (Spanish File 2 0:05:37)	A: Because then I didn't want to do it.
Q1:	Q1: 'Cause then I changed my mind.
Q2:	Q2: How long did this happen after you left Wal-Mart?
Q1: ¿Cuánto después de que salieron de Wal-Mart sucedió esto? (Spanish File 2 0:05:45)	Q1: How long after you left Wal-Mart did this happen?

**INTERVIEW WITH MARICELA DIAZ**

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**A=Maricela Diaz**

File 2 0:11:11)	
Q2:	Q2: We'll take care of that.
A: ¿Se la enseño? (Spanish File 2 0:11:13)	A: Should I show him?
Q1: Sí, sí. (Spanish File 2 0:11:14)	Q1: Yes, yes.
A: Mm-hm. Como por allí. (Spanish File 2 0:11:19)	A: Mm-hm. Like there.
Q2:	Q2: Okay. She scraped her leg.
Q1: Gracias. (Spanish File 2 0:11:23)	Q1: Okay (Spanish) Thanks.
Q2:	Q2: Thank you.
Q1:	Q1: Yeah, like a barbed wire hit. Okay. You want me to recap real quick and then we can, uh --
Q2:	Q2: Yes, please.
Q1: Voy a cubrir todo lo que me has dicho. (Spanish File 2 0:11:35)	Q1: I'm going to go over what you have told me.
A:	A: Mm-hm.
Q1: Sobre lo que pasó con Jasmine. (Spanish File 2 0:11:38)	Q1: About what happened with Jasmine.
A:	A: Mm-hm.
Q1: Y tú me dices si está mal o está bien o está correcto, lo que sea. (Spanish File 2 0:11:40)	Q1: And you tell me if it's wrong or it's okay or it's correct, or whatever.
A:	A: Mm-hm.
Q1: Lo que me contaste tú fue que la tarde de martes del diez, de este mes tú le llamaste a Jasmine a pedirle que te lleve a Wal-Mart (Spanish File 2 0:11:49)	Q1: Okay (Spanish) What you told me was that on the afternoon of Tuesday the tenth of this month, you called Jasmine to ask her to take you to Wal-Mart
A:	A: Mm-hm.
Q1: para comprar algunas-- (Spanish File 2 0:12:00)	Q1: to buy some
A:	A: Mm-hm.
Q1: algunas cosas. (Spanish File 2 0:12:02)	Q1: some things.
A:	A: Mm-hm.
Q1: Con el pretexto. O con la razón	Q1: With the pretext. Or reason to

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verdadera de que la iban a matar -- (Spanish File 2 0:12:04)	burn and you were going to kill--
A: Mm-hm. (Spanish File 2 0:12:11)	A: Mm-hm.
Q1: a cuchillazos. (Spanish File 2 0:12:12)	Q1: her by stabbing.
A:	A: Mm-hm.
Q1: Sí. Y tú y Alex habían planeado a acuchillar. (Spanish File 2 0:12:18)	Q1: Yes. And you and Alex had planned to stab her.
A:	A: Mm-hm.
Q1: El plan que hicieron fue que la iban a acuchillar y luego la iban a quemar. (Spanish File 2 0:12:23)	Q1: The plan that you two made was that you were going to stab her and then you were going to burn her.
A: Sí. (Spanish File 2 0:12:29)	A: Yes.
Q1: Sí. ¿Y el plan era que tú la ibas a acuchillar sola? (Spanish File 2 0:12:30)	Q1: Yes. And was the plan that you were going to stab her alone?
A:	A: No.
Q1: ¿O te iba a ayudar Alex? (Spanish File 2 0:12:36)	Q1: Or that Alex was going to help you?
A: El plan era que, como quien dice, yo tenía que empezarlo (Spanish File 2 0:12:39)	A: The plan was, like, that I had to start it.
Q1:	Q1: Mm-hm.
A: Y él lo tenía que acabar. (Spanish File 2 0:12:46)	A: And he had to finish it.
Q1: Okay. Bueno. Ella dijo que sí los iba a llevar. (Spanish File 2 0:12:48)	Q1: Okay. Good. She said that she would take you both. (give a ride)
A:	A: Mm-hm.
Q1: Y llegó, los levantó en el carro de ella. (Spanish File 2 0:12:56)	Q1: And she arrived, and picked you up in her car.
A:	A: Yeah.
Q1: Como después de las seis me dijiste. (Spanish File 2 0:13:02)	Q1: Like after six, you told me.
A: Sí. (Spanish File 2 0:13:04)	A: Yes.
Q1: ¿Podría haber sido después de las siete? (Spanish File 2 0:13:05)	Q1: Could it have been after seven?

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A: Sí. (Spanish File 2 0:13:12)	A: Yes.
Q1: ¿Posible? (Spanish File 2 0:13:13)	Q1: Possibly?
A: ¿O después o antes? (Spanish File 2 0:13:20)	A: Uh-huh. (Spanish) Before or after?
Q1: Después de las siete. (Spanish File 2 0:13:22)	Q1: After seven.
A: No. Antes. Cuando me fue a recoger fue antes, como a las seis. (Spanish File 2 0:13:23)	A: No. Before. When she picked me up it was before, like six.
Q1: ¿Seis y qué? (Spanish File 2 0:13:27)	Q1: Six-what?
A: Seis y media, seis...No sé. (Spanish File 2 0:13:28)	A: Six-thirty, six...I don't know.
Q1: Seis y media. Okay. Está bien. Perdón. Fueron a la Wal-Mart. Allí Jasmine pagó por el líquido. (Spanish File 2 0:13:30)	Q1: Six-thirty. Okay. Okay. Excuse me. You all went to Wal-Mart. There, Jasmine paid for the liquid.
A:	A: Mm-hm.
Q1: Y le dijeron que iba a ser—o tú le dijiste que iba a ser para hacer un fogatón en casa. (Spanish File 2 0:13:42)	Q1: And you all told her that it was going to be—or you told her that it was going to be to make a bonfire at home.
A:	A: Mm-hm.
Q1: Este, Alex lo escogió. ¿Él escogió el product? (Spanish File 2 0:13:50)	Q1: Um, Alex chose it. He chose the product?
A: Sí. (Spanish File 2 0:13:55)	A: Yes.
Q1: Y ella lo pagó. (Spanish File 2 0:13:56)	Q1: And she paid for it.
A: Sí. (Spanish File 2 0:13:57)	A: Yes.
Q1: ¿Cuando iban saliendo o cuando iban entrando se encontró ella con la amiga? (Spanish File 2 0:14:01)	Q1: Did she meet the friend when you all were leaving or when you all were coming in?
A: Cuando íbamos entrando. (Spanish File 2 0:14:05)	A: When we were coming in.
Q1: Cuando iban entrando ella se encontró con la esposa del—del--	Q1: When you all were coming in she met the wife of the—the--

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A:	A: Uh-huh
Q1: Y a la orilla de la carretera allí, este, salio Alex de el carro. Para darte oportunidad a ti de acuchillarla. (Spanish File 2 0:15:23)	Q1: And there on the side road, um, Alex got out of the car to give you an opportunity to stab her.
A: Mm-hm. (Spanish File 2 0:15:26)	A: Mm-hm.
Q1: La intentaste de acuchillar. (Spanish File 2 0:15:27)	Q1: You tried to stab her.
A: Pero no pude.	A: But I couldn't.
Q1: No pudiste porque te bloqueó, ¿verdad? (Spanish File 2 0:15:29)	Q1: You couldn't because she blocked you, right?
A: No, porque hizo primero así. (Spanish File 2 0:15:30)	A: No, because she did this first.
Q1:	Q1: Mm-hm.
A: Pero después—después, este, ya después—antes de que el llegara, le trate también de hacerle así. Fue cuando me bloqueo tambien. (Spanish File 2 0:15:32)	A: But then—after, um, then after—before he came, I also tried to go like this. That's when she also blocked me.
Q1:	Q1: Mm-hm.
A: Pero el, si traté de, si se lo, como quien dice, bueno asi para aca- (Spanish File 2 0:15:42)	A: But the, I did tried to, I did, like, well this toward here-
Q1: Asi es que tú—tú—tú trataste— (Spanish File 2 0:15:46)	Q1: So then you— you—you tried to--
A: Uh-huh. (Spanish File 2 0:15:46)	A: Uh-huh.
Q1: Le hiciste así, y no pudiste. (Spanish File 2 0:15:47)	Q1: You did like this, but you couldn't.
A: Uh-huh, la primera. (Spanish File 2 0:15:49)	A: Uh-huh, the first.
Q1: Okay. Y luego cuando él entrando (Spanish File 2 0:15:50)	Q1: Okay. And then when he entered
A: Uh-huh, la segunda—(Spanish File 2 0:15:53)	A: Uh-huh, (Spanish) the second--
Q1: Entonces lo intentaste. (Spanish File 2 0:15:53)	Q1: Then you tried it.
A: Uh-huh, como para que el viera que	A: Uh-huh, like so that he could see

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yo si habia hecho algo. (Spanish File 2 0:15:54)	that I had done something.
Q1: Okay. Eso explica lo que me dijiste antes. (Spanish File 2 0:16:00)	Q1: Okay. That explains what you told me before.
A:	A: Uh-huh.
Q1: Bueno. Y luego entonces inmediatamente él--(Spanish File 2 0:16:03)	Q1: Okay. And then immediately he-
A: Él la agarró así y le empezó a hacer así. (Spanish File 2 0:16:06)	A: He grabbed her like this and started to do this.
Q1:	Q1: Mm-hm.
A: Y no sé si así, así, o así. No sé acuchilló así. (Spanish File 2 0:16:08)	A: And I don't know if it was like This, like this, or like this. I don't know if he stabbed like this.
Q1: ¿Cuántas veces la acuchilló? (Spanish File 2 0:16:13)	Q1: How many times did he stab her?
A: No sé. (Spanish File 2 0:16:15)	A: I don't know.
Q1: ¿Más que cinco? (Spanish File 2 0:16:16)	Q1: More than five?
A: Mm-hm, yo creo que sí.	A: Mm-hm, I think so.
Q1: ¿Más de diez? (Spanish File 2 0:16:19)	Q1: More than ten?
A: No sé. La mera verdad, no sé. (Spanish File 2 0:16:23)	A: I don't know. Truly, I don't know.
Q1: ¿Pero dijiste que era unos diez a quince minutos? (Spanish File 2 0:16:25)	Q1: But you said that it took ten to fifteen minutes?
A: Por eso no sé. (Spanish File 2 0:16:28) --	A: Because of this, I don't know.
Q1: ¿Para morir?(Spanish File 2 0:16:29)	Q1: To die?
A: La mera verdad, no sé. No sé cuantos cuchillazos le hiz,, díó. Porque si le digo que unas diez, y luego sale que mas, por eso no puedo decir si, cuntos exactos porque no estoy segura	A: Truly, I don't know. I don't know how many stabs he gave her. Because if I say it was like ten, and then it turns out it was more, that's why I can't say if, exactly how many because

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cuantos le hizo. (Spanish File 2 0:16:29)	I'm not sure.
Q1:	Q1:
A: --cuantos la hizo. (Spanish File 2 0:16:45)	A: how many times he did it.
Q1: Tú--Con--pensando de lo que es no tienes que ser exacto. Bueno. Después de eso, tú te saliste del carro. (Spanish File 2 0:16:47)	Q1: You--with--thinking about what it is, you don't have to be exact. Okay. After that, you got out of the car.
A: Mm-hm. Cuando ya--como-- (Spanish File 2 0:17:00)	A: Mm-hm. When--like--
Q1: Ya--ya no estaba--¿ya estaba muerta ella cuando saliste del carro? (Spanish File 2 0:17:02)	Q1: Already--she was already--was she already dead when you got out of the car?
A:	A: Mm-hm.
Q1: ¿Cómo se quedó ella? ¿Se quedó agachada, o tirada, o cómo? (Spanish File 2 0:17:07)	Q1: How was she left? Was she left Bent over, or laying down, or how?
A: Como así. (Spanish File 2 0:17:11)	A: Like this.
Q1: ¿Así no más? (Spanish File 2 0:17:13)	Q1: Just like that?
A: Con su, saco de aquí. (Spanish File 2 0:17:14)	A: With her, out right here.
Q1: ¿Con el cuchillo en--? (Spanish File 2 0:17:16)	Q1: With the knife in--?
A: Uh, sí. (Spanish File 2 0:17:17)	A: Uh, yes.
Q1: ¿En el cuello? Okay. ¿Y ése es el cuchillo que tenía, todavía tenía la agarradera? (Spanish File 2 0:17:18)	Q1: In her neck? Okay. And this was the knife that had, still had the handle?
A: Sí. (Spanish File 2 0:17:26)	A: Yes.
Q1: Okay. ¿Y entonces tú te saliste del carro? ¿Por qué? (Spanish File 2 0:17:27)	Q1: Okay. And then you got out of the car? Why?
A: Porque ya después--fue porque ya, como le dire--Porque--Porque ya después le dije que ya había sido,	A: Because after--it was because, how should I say it,--Because-- Because then I already told you,



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<p>porque ya iba a ser cuando ya la iba a quemar. (Spanish File 2 0:17:33)</p>	<p>it was when he was going to burn her.</p>
<p>Q1:</p>	<p>Q1: Mm-hm.</p>
<p>A: Y ya después la agarro y la metio en la cajuela. (Spanish File 2 0:17:54)</p>	<p>A: And then after, he grabbed her and put her in the trunk.</p>
<p>Q1: ¿El solo? ¿Tu no le ayudaste? ¿Segura? Okay. ¿Y tú lo miraste que él la metió en la cajuela? (Spanish File 2 0:17:57)</p>	<p>Q1: Him alone? Didn't you help him? Are you sure? Okay. And you saw him put her in the trunk?</p>
<p>A: Creo que sí, yo no mas lo miré. Porque cuando me salí, Ya nomas, ya después ya mire que, ya, ya, ya después ella no estaba y el estaba cerrando la cajuela. Pues es obvio que fue ella, que la estaba metiendo. (Spanish File 2 0:18:14)</p>	<p>A: I think so, I only saw him. Because when I got out, then just, then I saw that she was no longer there and he was closing the trunk. Well it was obvious that he was putting her in.</p>
<p>Q1: ¿Entonces tú regresaste a el carro? (Spanish File 2 0:18:26)</p>	<p>Q1: Then did you return to the car?</p>
<p>A: No, porque ya era cuando le estabe hechando esa cosa ei.</p>	<p>A: No, because that's when he was putting that staff on her. (points to lighter fluid)</p>
<p>Q1: Pero ¿qué no manejarón el carro de allí a los árboles? (Spanish File 2 0:18:33)</p>	<p>Q1: But, wasn't the car driven from there to the trees?</p>
<p>A: Por eso, manejo el.(Spanish File 2 0:18:36)</p>	<p>A: That's why, he drove.</p>
<p>Q1: ¿Fuiste tu con él? (Spanish File 2 0:18:40)</p>	<p>Q1: Did you go with him?</p>
<p>A: Sí, sí fui con él. (Spanish File 2 0:18:41)</p>	<p>A: Yes, yes I went with him.</p>
<p>Q1: ¿Cómo fuiste? (Spanish File 2 0:18:42)</p>	<p>Q1: How did you go?</p>
<p>A: Adentro del carro. (Spanish File 2 0:18:43)</p>	<p>A: Inside the car.</p>
<p>Q1: Pues, eso es lo que te pregunto.</p>	<p>Q1: Well, that's what I am asking you.</p>

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<p>hacer que esta cosa suceda. De llamarle a Jasmine a pedirle que te lleve a la tienda con pretexto, con el fin de matar, eso—eso es un—hecho —es un hecho que no se puede des-hacer. Tú fuiste la que le llamaste. Como se dice, pues, le llamaste a su muerte. Porque tú ya sabías que la iban a matar. Por eso, esto no puede haber sucedido sin, sin que tú habías cooperado. ¿Y para comprobar que? , ¿Qué es lo que querían? ¿A cuál—¿Qué querían hacer con esto tú y Alejandro, o, este, Alex? (Spanish File 2 0:24:28)</p>	<p>make that thing happen. By calling Jasmine to ask her to take you to the store with the pretext, with the design of killing her, that—that is a—that is something that cannot be un-done. You called her. As they say, well, you called her to her death. Because you already knew that you were going to kill her.</p> <p>That's why, this could not have happened if you had not cooperated. And to prove what? What did you all want? Which—What did you hope to accomplish with this, you and Alejandro, or, um, Alex?</p>
<p>A: Bueno, bueno la mera verdad, hasta ayer le pregunte a le, y según nosotros, caul era el fin de matarla. Y el dice, "no se." Y le dije, tampoco se. (Spanish File 2 0:25:59)</p>	<p>A: Well, well the very truth, I asked him just yesterday, and according to us, what was the point of killing her. And he said "I don't know." I said, I don't know either.</p>
<p>Q1:</p>	<p>Q1: Mm-hm.</p>
<p>A: Yo no sé. No sé. Pero tampoco sé. (Spanish File 2 0:26:09)</p>	<p>A: I don't know. I don't know. But I don't know either.</p>
<p>Q1: ¿Cuál era el fin? ¿De comprobar el amor que tienes tú a él o él a ti? (Spanish File 2 0:26:16)</p>	<p>Q1: What was the point? To prove the love that you have for him or he has for you?</p>
<p>A: Yo le dije yo no sabía cuál era porque la mera verdad no-- (Spanish File 2 0:26:23)</p>	<p>A: I told you that I didn't know what it was because because truly--</p>
<p>Q1: ¿Qué piensas tú? (Spanish File 2 0:26:28)</p>	<p>Q1: What do you think?</p>
<p>A: Yo creo que comprobarlo. Lo quiero mucho, como el a mi. Según el dice que le compruebe su amor. Hasta por esto le compruebe.</p>	<p>A: To prove it I think. I love him very much, like he does me. Like he says to prove his love. I even proved it with this. (showing scars on wrists)</p>

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<p>No puedo. Que no. ¿Tú? ¿Qué?          Hey. Échatela tú, yo no puedo.          ¿Qué? ¿Qué? ¿Huh? Sí. Yo          también. Hey. ¿Qué? No puedo. No          puedo. ¿Qué? ¿Qué? ¿Eh? ¿Por          qué? ¿De qué? Entonces me quedo          callada. Me quedo callada. ¿Qué?          ¿Qué? ¿Qué? Hey. ¿Qué? ¿Huh?          ¿Que qué? Nada. Nada. Que tú me          estas echando toda la culpa a mi. Cállate.          (Spanish File 2 0:31:05)          1.04.38</p>	<p>can't. I said no. You? What?          Hey. You blame it on yourself, I          can't. What? What? Huh? Yes.          Me, too. Hey. What? I can't. I          can't. What? What? Eh? Why?          Of what? Then I'll stay quiet.          I'll stay quiet. What? What?          What? Hey. What? Huh? That          what? Nothing. Nothing. That          you're putting all the blame on me. Shut          up.</p>
<p>Q2:</p>	<p>Q2: You gotta use the bathroom again          you said?</p>
<p>A:</p>	<p>A: Yeah.</p>
<p>Q2:</p>	<p>Q2: Okay I have a -- one of our          female dispatchers comin' up like          right now and --</p>
<p>A:</p>	<p>A: Mm-hm.</p>
<p>Q2:</p>	<p>Q2: -- then we'll get ya okay?</p>
<p>A:</p>	<p>A: Mm-hm.</p>
<p>Q2:</p>	<p>Q2: All right, okay? And -- and just          so you know, uh, you know we've          got a warrant for your urine and          stuff like that, so I'm gonna have          ya provide a urine sample as well,          okay?</p>
<p>A:</p>	<p>A: Uh --</p>
<p>Q2:</p>	<p>Q2: It's just a -- you know, peein' in a          cup.</p>
<p>A:</p>	<p>A: Can you just tell the other boy or          the other man to tell me later          because I gotta go to the          bathroom.</p>
<p>Q2:</p>	<p>Q2: Okay she -- she's comin' right          now. Right now she's comin',          okay?</p>

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	that -- that Hector or I said to ya today when we were speakin' with ya that -- that made ya just wanna get it out?
A:	A: Who is Hector Mycin? Oh, that dude --
Q2:	Q2: Hector -- Hector is the other guy that was here.
A:	A: Oh, he what?
Q2:	Q2: Was -- was there anything that we said to ya --
A:	A: That --
Q2:	Q2: -- that made ya confess to it?
A:	A: Yeah.
Q2:	Q2: What -- what was that?
A:	A: Because he say if you got something that -- I don't know how he say, but he told me like if -- you know when you -- you wanna tell somethin' and you can't --
Q2:	Q2: You can't?
A:	A: -- you feel somethin' like --
Q2:	Q2: You just wanna get it out?
Q4:	Q4: Get it off your chest?
A:	A: Yeah, give the real that -- about that.
Q2:	Q2: Mm-hm.
A:	A: That's what peoples tell me that.
Q2:	Q2: Mm-hm.
A:	A: And that why I start -- stop crying --
Q2:	Q2: Right.
A:	A: -- and remember and then I -- I told.
Q2:	Q2: Okay.
A:	A: But I was afraid to tell you

**FILED**

JAN 22 2015

*Pam Kowal*  
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 First Judicial Circuit Court of SD

Salgado and Diaz  
 Communicating through interview room wall

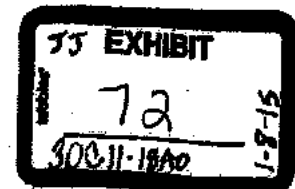
Translation by Hector Soto SFPD

i-Record system clock was used to correlate conversation

AS: Alexander Salgado  
 MD: Maricela Diaz

2:36:26 to 2:44:30

AS: Nena.  
 MD: ¿Qué?  
 AS: Nena.  
 MD: ¿Qué?  
 AS: ¿Eres tú?  
 MD: Si.  
 AS: ¿Qué te preguntaron?  
 MD: ¿Qué?  
 AS: ¿Qué te preguntaron?  
 MD: ¿Qué pedo?  
 AS: ¿Qué?  
 MD: ¿Qué?  
 AS: ¿Qué te preguntaron?  
 MD: De mi.  
 MD: Dile que estamos en vacaciones.  
 AS: ¿Qué?  
 MD: Dile que estamos en vacaciones.  
 AS: ¿Quefe-sofo-mafos-efe-mafo-nofos? (¿Que somos hermanos?)  
 MD: Huh?  
 AS: Dang. (whisper)  
 MD: Ay. *Afu-lefex*  
 AS: Hey.  
 MD: ¿Qué?  
 AS: Hey.  
 MD: ¿Qué?  
 AS: ¿A que horas fueron por ti?  
 AS: Hey.  
 MD: ¿Qué?  
 AS: ¿A que horas fueron por ti?  
 MD: ¿Qué que?  
 MD: Hey.



AS: ¿Qué?  
MD: Hey.

AS: ¿Qué?  
MD: Dile que estamos en vacaciones. ¿Si me escuchas?  
AS: ¿Qué que Nena?  
MD: Dile que estamos en vacaciones.  
AS: No te entiendo, hablas muy recio.  
MD: Dile que estamos en vacaciones.  
AS: No te escucho.  
MD: ¿Huh?  
AS: No te escucho.  
MD: ¿Ontas?  
AS: Aquí al lado tuyo.  
MD: ¿En un cuarto?  
AS: Si.  
MD: Yo estoy al lado tambien. Estoy por tu lado derecho.  
AS: ¿Estas afuera o adentro?  
MD: ¿Qué?  
AS: ¿Estas en un cuarto?  
MD: Simon, estoy en el primero al entrar.  
MD: Ahorita dices que vas al baño.  
AS: ¿Qué?  
AS: ¿Qué?  
MD: Ahorita que llegue alguien dile que vas al baño.  
AS: ¿Qué, que, que que?  
MD: Que ahorita que llegue alguien diles que vas al baño.  
AS: ¿Qué quiero ir al baño?  
MD: ¿Eh?  
AS: Acércate a la orilla.  
MD: Estoy a la orilla.  
MD: Wacha.  
AS: ¿Qué?  
MD: Dile que tu papa is Fernando Diaz, mi pa. Y tu ma es la... se va a apellidar Dominguez.  
MD: ¿Eh?  
AS: No te escucho.  
MD: ¿Qué les dijistes?  
AS: ¡Nada!  
MD: ¿Qué traes?  
AS: ¿Qué?  
MD: ¿Qué traes?  
AS: Nada.  
MD: ¿Qué les dijistes?  
AS: Nomás como me llamo. Alejandro Díaz.  
MD: ¿Y tu pa?

AS: ¿Qué?  
 MD: ¿Y tu pa?  
 AS: Y ya.  
 MD: ¿Y tu ma?  
 AS: Si.  
 MD: ¿Cómo se llama?  
 AS: ¿Y tú que les dijiste?  
 MD: ¿Qué?  
 AS: ¿Qué?  
 MD: ¿Cómo se llama tu ma?  
 AS: Orale.  
 MD: ¿Cómo?  
 MD: Ay, puta madre, tengo que ir al baño.  
 Pause in conversation  
 MD: *Papa pifi. Papa pifi. Hey. Papa pifi.* (No response from Salgado)

3:20:28

AS: Nafe-nafa  
 MD: ¿Qué-fe?  
 MD: ¿Qué-fe?  
 AS: Hey.  
 MD: Ay. ¿Qué? ¿Cómo? Te estoy escuchando.  
 Pause in conversation  
 MD: ¿Papi? Hey. Hey. Hey. Alex. Alex. Alex. Hey. Hey. Afa-lefex. Efe. Hey.  
 (No response from Salgado)

7:35:10

AS: ¿Nena?  
 MD: ¿Qué?  
 AS: ¿Nena?  
 MD: ¿Qué?  
 AS: ¿Nena?  
 MD: ¿Qué?  
 AS: ¿Te echaste la culpa?  
 MD: ¿Huh?  
 MD: ¿Qué?  
 AS: ¿Qué si te echaste la culpa?  
 MD: No puedo.  
 AS: ¿Qué?  
 MD: No puedo.

AS: ¿Qué si te echaste la culpa?  
MD: ¡Que no!  
MD: ¿Tu?  
AS: Ya saben todo pendeja. Ya nos vieron.  
MD: ¿Qué?  
MD: ¿Hey?  
AS: ¿Qué?  
MD: Echate la tu. Yo no puedo.  
AS: Ey.  
MD: ¿Qué?  
AS: ¿Nena?  
MD: ¿Qué?  
AS: Te amo.  
MD: ¿Huh?  
AS: Te amo.  
MD: Si.  
AS: Te Amo.  
MD: Yo tambien.  
MD: Ey.  
AS: Ey.  
MD: ¿Qué?  
AS: Échate la culpa.  
MD: No puedo.  
AS: ¿Qué?  
MD: No puedo.  
AS: Ey.  
AS: ¿Nena?  
MD: ¿Qué?  
AS: Di que...  
MD: ¿Qué?  
AS: Ya no digas nada, nada, no, no les des nada ya. ¿OK.?  
MD: ¿Eh?  
AS: No digas nada.  
MD: ¿Por qué?  
AS: ¿Qué?  
MD: ¿De que?  
AS: Que no digas nada.  
MD: Entonces me quedo callada.  
AS: ¿Qué?  
MD: Me quedo callada.



7:45:29

AS: ¿Nena?

AS: ¿Nena?

MD: ¿Qué?

AS: ¿Nena?

MD: ¿Qué?

AS: ¿Nena?

MD: ¿Qué que? Hey.

AS: ¿Nena?

MD: ¿Qué?

AS: ¿Qué te dijeron?

MD: ¿Hah?

AS: ¿Qué te dijeron?

MD: ¿Qué que?

AS: ¿Qué te dijeron?

MD: Nada.

AS: ¿Qué?

MD: Nada. Que tu me estas echando toda la culpa a mi.

AS: ¿Qué?

MD: Callate. (sound of keys opening door.)

English:

2:36:26 to 2:44:30

AS: Sweetie.  
 MD: What?  
 AS: Sweetie.  
 MD: What?  
 AS: Is that you?  
 MD: Yes.  
 AS: What did they ask you?  
 MD: What?  
 AS: What did they ask you?  
 MD: What's wrong?  
 AS: What?  
 MD: What?  
 AS: What did they ask you?  
 MD: About me. (Mine)  
 MD: Tell them that we are on vacation.  
 AS: What?  
 MD: Tell them that we are on vacation.  
 AS: That we are brothers? (brother and sister)  
 MD: Huh?  
 AS: Dang. (whisper)  
 MD: Hey. *Alex*  
 AS: Hey.  
 MD: What?  
 AS: Hey.  
 MD: What?  
 AS: What time did they come for you?  
 AS: Hey.  
 MD: What?  
 AS: What time did they come for you?  
 MD: That what?  
 MD: Hey.  
 AS: What?  
 MD: Hey.  
  
 AS: What?  
 MD: Tell them that we are on vacation. You hear me?  
 AS: That what sweetie?  
 MD: Tell them that we are on vacation.  
 AS: I don't understand you, you talk too Fast.  
 MD: Tell them that we are on vacation.

AS: I can't hear you.  
MD: Huh?  
AS: I can't hear you.  
MD: Where are you?  
AS: Right here to your side.  
MD: In a room?  
AS: Yes.  
MD: I'm to the side too. I'm to your right side.  
AS: Are you inside or outside?  
MD: What?  
AS: Are you in a room?  
MD: Yeah, I'm in the first one as you enter.  
MD: Right now, say that you're going to the bathroom.  
AS: What?  
AS: What?  
MD: Right now when someone comes, tell them that you're going to the bathroom.  
AS: That what that what?  
MD: That right now when someone comes, tell them that you're going to the bathroom.  
AS: That I want to go to the bathroom?  
MD: What?  
AS: Get closer to the side.  
MD: I'm to the side.  
MD: Listen.  
AS: What?  
MD: Tell them that your father is Fernando Diaz, my dad. And your mom is...her last name is Dominguez.  
MD: What?  
AS: I can't hear you.  
MD: What did you tell them?  
AS: Nothing!  
MD: What's wrong?  
AS: What?  
MD: What's wrong?  
AS: Nothing.  
MD: What did you tell them?  
AS: That's all, just my name. Alejandro Diaz.  
MD: And your dad?  
AS: What?  
MD: And your dad?  
AS: That's all.  
MD: And your mom?  
AS: Yes.  
MD: What's her name?  
AS: And what did you tell them?  
MD: What?  
AS: What?

MD: What's your mom's name?  
 AS: Right on.  
 MD: What?  
 MD: Oh, son of a bitch I have to go to the bathroom.  
 Pause in conversation  
 MD: *Papa pifi. Papa pifi. Hey. Papa pifi.* (No response from Salgado)

**3:20:28**

AS: Nena. (Nafe-nafa, coded Spanish)  
 MD: What? (¿Qué-fe?, coded Spanish)  
 MD: What? (¿Qué-fe?, coded Spanish)  
 AS: Hey.  
 MD: Yeah. What? What? I am listening to you.  
 Pause in conversation  
 MD: Sweetie? Hey. Hey. Hey. Alex. Alex. Alex. Hey. Hey. Afa-lefex. Efe. Hey.  
 (No response from Salgado)

**7:35:10**

AS: Sweetie?  
 MD: What?  
 AS: Sweetie?  
 MD: What?  
 AS: Sweetie?  
 MD: What?  
 AS: Did you take the blame?  
 MD: Huh?  
 MD: What?  
 AS: That if you took the blame?  
 MD: I can't.  
 AS: What?  
 MD: I can't.  
 AS: That if you took the blame?  
 MD: I said no!  
 MD: You?  
 AS: They already know everything you idiot. They already saw us.  
 MD: What?  
 MD: Hey?  
 AS: What?  
 MD: You blame it on yourself, I can't.  
 AS: Hey.

MD: What?  
 AS: Sweetie?  
 MD: What?  
 AS: I love you.  
 MD: Huh?  
 AS: I love you.  
 MD: Yes.  
 AS: I love you.  
 MD: Me too.  
 MD: Hey.  
 AS: Hey.  
 MD: What?  
 AS: Take the blame.  
 MD: I can't.  
 AS: What?  
 MD: I can't.  
 AS: Hey.  
 AS: Sweetie?  
 MD: What?  
 AS: Say that...  
 MD: What?  
 AS: Don't say anything anymore, nothing, don't, don't give them anything now. OK.?  
 MD: Eh?  
 AS: Don't say anything.  
 MD: Why?  
 AS: What?  
 MD: About what?  
 AS: Don't say anything.  
 MD: Then I'll stay quiet.  
 AS: What?  
 MD: I'll stay quiet.

7:45:29

AS: Sweetie?  
 AS: Sweetie?  
 MD: What?  
 AS: Sweetie?  
 MD: What?  
 AS: Sweetie?  
 MD: That what? Hey.

AS: Sweetie?  
MD: What?  
AS: What did they tell you?  
MD: Huh?  
AS: ¿What did they tell you?  
MD: That what?  
AS: What did they tell you?  
MD: Nothing.  
AS: What?  
MD: Nothing. That you're putting all the blame on me.  
AS: What?  
MD: Shut up. (sound of keys opening door.)



dr. donald dutton

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With Don Dutton. ... Star: Don Dutton. Feedback. Please take 5 minutes to participate in our short IMDb survey. IMDb Picks: April - Still of Emilia Clarke in Game ...

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domestic violence expert dr. donald dutton to speak at ...  
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OUT OF BALANCE: BC HUMAN RIGHTS TRIBUNAL - safe  
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... media figures, the B.C. Human Rights Tribunal ruled in favor of complainant Fariba Mahmoodi in her sexual harassment case against Professor Don Dutton.

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Ms. Mahmoodi complained to the tribunal that Donald Dutton, a psychology ...  
According to Ms. Mahmoodi, Dr. Dutton inflicted sexual conduct with her, which ...

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Vancouver went and read everything the assembled killers had written to ...

Donald Dutton - Address, Phone Number, Public Records ...  
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## THE GLOBE AND MAIL

### The education of Don Dutton

Paul Sullivan

PAUL SULLIVAN

Published Wednesday, Jan. 19, 2000 12:00AM EST

Last updated Saturday, Mar. 21, 2009 3:34PM EDT

Don Dutton doesn't get around much any more.

Once a respected expert on domestic family violence on the West Coast, he spends most of his time at home these days, avoiding life.

The psychology professor is on stress leave from the University of British Columbia and hasn't taught since last fall. He doesn't get invited to many conferences, and he's afraid to go out anyway. Somebody might recognize him.

Prof. Dutton is living a nightmare authored by Franz Kafka and staged by the B.C. Human Rights Tribunal. It began 5½ years ago when he met a student named Fariba Mahmoodi. And he's still tossing and turning. You may recall Prof. Dutton. He's good copy. First, he testified for the prosecution in the O. J. Simpson murder case as an expert on domestic abuse at the pre-trial hearing. Then he starred in his own hearing where he was found guilty of sexual harassment for creating a "sexualized environment" in his dealings with Ms. Mahmoodi.

It took the tribunal from May of 1998 to the end of October of 1999 to decide that when the professor invited Ms. Mahmoodi to his place, offered her a glass of wine, made her a tape of his favourite Loreena McKennitt tunes, got a fire going and sat too close to her in the glow of candlelight, he was up to no good.

That, the tribunal concluded, was no way to conduct a meeting about getting into graduate school, and awarded Ms. Mahmoodi \$13,000 for injury to her dignity and self-respect, counselling fees to get over the trauma, and lost wages.

The tribunal did not validate Ms. Mahmoodi's claim that the professor kissed her and fondled her, because it turned out Ms. Mahmoodi had credibility problems of her own. She forged a reference letter, collected welfare and student loans at the same time in violation of provincial rules, and demanded that Prof. Dutton pay her \$100,000 and get her into graduate school.

"I feel dissed," he said from the scene of the crime, his home near Kits Beach, "dissed and pissed. I feel the same trauma symptoms that a woman feels after she's been raped -- chronic

anxiety, loss of sleep." To salvage something -- justice, common sense -- the 56-year-old professor is trying to launch a judicial review of the tribunal's decision. "I'll be in court until I retire. The way I feel, that will be next week."

Much has been written and spoken about the Dutton verdict, mostly about the invention of the sexualized environment. "We're very close to having thought police," says Craig Jones of the B.C. Civil Liberties Association. "People no longer know how to act."

You can read the work of the thought police -- the 85-page judgment has been posted on the tribunal's Web site ( ) -- and, I must admit, it's a compelling read. Author Frances Gordon has taken meticulous care to sift through the evidence to find a needle of truth in a haystack of baloney.

But it should never happen in a democracy. Based on a flimsy test -- that something probably happened -- a man's life has been ruined. Ms. Gordon's judgment strikes at the very core of Prof. Dutton's identity, and no one may ever call him again for expert testimony or solicit his opinion at a learned gathering or publish any of his books on domestic violence.

Somehow, we've come to live in a world where creating a "sexualized environment" is allowed to destroy someone's life, where government-appointed citizens preside over hearings in which the burden of proof lies with the accused, where the complaints of even the most unreliable people are somehow upheld.

What is most frightening is that this process will be reviewed only if Don Dutton overcomes the heebie-jeebies and is able to persuade a court to undertake a judicial review. Because the human-rights social experiment in this province has gone terribly wrong, and Prof. Dutton seems the only one willing or able to fix it. *E-mail:*

*Jeffrey Simpson returns next week.*

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IN THE MATTER OF THE *HUMAN RIGHTS CODE*  
R.S.B.C. 1996, c. 210 (as amended)

AND IN THE MATTER of a complaint before  
the British Columbia Human Rights Tribunal

BETWEEN:

**Fariba Mahmoodi**

**COMPLAINANT**

AND:

**The University of British Columbia, Faculty of Arts,  
Department of Psychology and Dr. Donald Dutton**

**RESPONDENTS**

**REASONS FOR DECISION**

Tribunal Member:	Frances Gordon
Counsel for the Complainant:	Clea Parfitt
Counsel for the University of British Columbia:	Frances Watters
Counsel for Dr. Donald Dutton:	Gregory Steele
Place and Date of Hearing:	Vancouver, British Columbia March 9-13, 16-20, and 30-31, 1998 April 1 and 2, 1998 May 4-8, 12, 14 and 20, 1998

and I had to do the next thing.

So I wrote the - I had the form [sic] so I fill it out myself and signed it, and put his name. But Dr. Knight already given [sic] me before".

[40] When asked whether she was prepared to do whatever was necessary to get her application accepted, she reiterated that she had given herself to Dutton and said: "... I mean I didn't lie about my transcript or my score, I could have changed those too, if I was that dishonest. Because I knew that I didn't have the good marks."

[41] Mahmoodi identified a reference letter she had previously received from Knight addressed to the University of British Columbia law school and dated February 21, 1994, which she said led her to believe that she had his support. She initially testified that she had seen the letter first when Margaretha Hoek, an employee of the University Equity Office, obtained it from the law school some time after she had sent in the falsified reference. However, she changed her testimony when confronted about the fact that she had written the reference without having seen Knight's reference. She then said that Knight had provided her with two original letters of reference which she had sent to the University law school and to another school which she did not identify. She said the letters were identical except for the addressees. She had not kept copies of either.

[42] By late February, it became clear to Mahmoodi that Dutton had become considerably distanced from her. Her doubts were reinforced, in part, when she made enquiries at the Graduate School Admissions Office about the completeness of her file just prior to the deadline on February 14, 1995. She said that the secretary left the file open and within her view so that she was able to observe several blank portions of Dutton's reference. She forcefully denied the suggestion that she had looked through the confidential file herself. However, she admitted that the mere reading of the open file was wrong.

[43] Because Mahmoodi sensed that Dutton's support was waning, she drafted a letter and delivered it to him on March 6 or 7, 1995. The letter alluded to the "romantic" setting of the meetings and referred to Dutton's "intention to use me and force me to have sex with you." It also referred to Mahmoodi's intention to bring sexual harassment charges against Dutton. In the letter, Mahmoodi made Dutton an offer:

However, I give you a chance to save your reputation, I give you chance and time to live up to your promise you made to me that night. By [sic] end of April, if I don't hear from admission office, and get admitted I will do whatever I can do to destroy you professionally. I will go public with this news and see a lawyer ...

[44] In cross-examination, Mahmoodi said that, when she wrote the letter, she had not considered it as a "threat." Asked if she now recognised it as such, she responded, "I think so." She later testified that she "... was just reminding him of his promise."

[45] Based on her observations, Mahmoodi said that she concluded that Dutton had fooled and manipulated her into believing that he would live up to his part of the deal. As a result, she became passionately angry. Eventually, her anger turned to vengeance. In cross-examination, she described the nature of her feelings:

Q: If he was going to destroy your dream, then you were going to do whatever it took to destroy his dream, his reputation in the community?

A: That's right.

Q: You would do whatever it took to get revenge?

A: Yes

Q: You would do whatever it took to destroy him?

A: I think he does deserve that.

[46] However, having admitted that Dutton deserved to be destroyed, Mahmoodi later denied, in cross-examination, that she was prepared to do anything to destroy him:

Q: And what was really a professor who perhaps was recklessly blind about what message he may have been sending out, you turned into a charge of sexual assault?

A: It was sexual assault because he didn't ask for my permission to take me to guest room.

O: It became a sexual assault. Ms. Mahmoodi.

interviews with Paish and two interviews with Marchak. The new evidence, favourable to her case, included Dutton greeting her at the door on December 30 with a glass of wine in his hand; Dutton referring to the woman in the picture in his kitchen as "just a friend"; a mysterious hang-up phone call that she assumed was Dutton on January 5; and the fact that Dutton asked her to dance for him.

[181] Failing to mention certain evidence in previous statements does not lead, in all cases, to a negative inference with respect to credibility, particularly where the significance or relevance of the evidence may not be initially evident to the witness or where the witness provides a reasonable explanation for the omission. Given the nature of this case, however, the relevance of the evidence of a request to "dance for me," and the evidence that Dutton greeted her at the door with a glass of wine ought to have been obvious to Mahmoodi long before the hearing. I find that the lack of timely disclosure by Mahmoodi of this relevant evidence is a factor to consider when assessing her credibility.

#### *6.1.4 Wrathful Conduct*

[182] Much evidence was heard with respect to Mahmoodi's wrathful conduct after she realised that Dutton had not supported her application to graduate school. She explained her conduct by saying that she was angry because she had "given herself" to Dutton who had disappointed her and she had no way to go back. Although I find that her behaviour could be consistent with having been sexually harassed, it is equally consistent with her having been deeply disappointed in Dutton's lack of support for her academic career.

[183] The Respondents say that Mahmoodi's willingness to engage in illegal conduct, namely threats and extortion, calls into question her character and the reliability of her testimony. They assert that her behaviour is consistent with that of a person who is willing to do anything, because of anger. This is consistent with Mahmoodi's own evidence that she would do "whatever it took" to get revenge.

[184] On balance, I find that Mahmoodi's willingness to repeatedly use threats to persons in positions of authority over her in order to control events and outcomes demonstrates that, for her, the ends justified the means. The fact that she consistently minimised the seriousness of the threats she made and recast threats as innocent "reminders" is also of concern. She minimised her responsibility for making them by

saying that she was "out of control" and "upset" between March 1995 and January 1996. Her explanation does not provide a full answer because it ignores the fact that, during this period, she engaged in other rational behaviour including registration for university and interviews with Paish and Marchak. I find that the disproportion of her behaviour to the events combined with her continued deflection of responsibility for her actions do reflect negatively upon Mahmoodi's reliability as a witness.

[185] Evidence of Mahmoodi's *animus* toward Dutton and the University is relevant to her credibility only if the evidence establishes that it has affected her ability to perceive and to tell the truth. In this regard, Mahmoodi's final response to the question on cross-examination relating to whether her passion to enter graduate school had been replaced by a passion to destroy Dutton is noteworthy. She initially responded that she had a reason for doing this: she had given herself to Dutton and there was no way of going back. She later declined to deny that her passion was now to destroy Dutton: "I have no answer for that." The only logical conclusion to draw from this response is that she knew that the answer was unfavourable to her. In the result, I find that the evidence of Mahmoodi's anger toward Dutton also has a negative bearing on the assessment of her credibility.

#### 6.1.5 *York University Transcript*

[186] In her 1998 application to become a student at the Institute of Chartered Accountants, Mahmoodi did not bring to their attention that her York University transcript erroneously identified her undergraduate degree as a B.A. in economics rather than psychology. I do not find that this evidence establishes an intent to deceive as Mahmoodi filed with the Institute her transcript which documented that most of her course work was in psychology.

#### 6.1.6 *Receipt of Student Loan*

[187] The Respondents also say that Mahmoodi engaged in a sophisticated and calculated scheme to deceive the university student loan office into giving her a student loan when she did not intend to become a student. Daniel Worsley of the University's Awards and Financial Aid Office testified that students must be registered in at least 60 percent of a full course load in order to be eligible to receive a student loan. He said that

[229] Although the tape reveals that Dutton and Mahmoodi discussed graduate school at the January 6 meeting, there is nothing on the tape to suggest that they discussed "methodological details" which, according to Dutton, was the reason for the meeting. It is also difficult to understand why Dutton chose to have this discussion in his living room rather than in his laboratory where presumably resources and data would have been available.

[230] Dutton's interest in avoiding family obligations and making Mahmoodi feel at home during the second visit, the timing and length of both visits coupled with the invitation to dinner, the crackling fire, candles, wine, soft seductive music, the gift of a tape and rides home lead me to conclude that the visits had all of the sexual overtones of a "date" and communicated the potential for romance. Although Mahmoodi saw the meetings as an opportunity to exchange friendship for Dutton's support, I find that Dutton's sole aim was the gratification of his own personal and sexual interests in Mahmoodi. I find that Dutton created and controlled a sexualized environment which failed to acknowledge the normal professional boundaries between a professor and a student. He also failed to appreciate a professor's position of trust in relation to his student and a student's vulnerability vis-à-vis a professor. In doing so, he engaged in sexual conduct in relation to Mahmoodi.

[231] In reaching this conclusion of fact, I have relied heavily on the evidence found on the audio tape. In this regard, the audio tape is useful both for what it includes and for what it leaves out. It does not establish Mahmoodi's allegation that Dutton kissed and touched her in the living room or that he fondled and digitally penetrated her in the guest bedroom. In fact, the allegation of sexual touching in the guest bedroom took place after the tape ended. I do not find the absence of voices during the period that Mahmoodi says she was being kissed in the living room determinative of the issue as there are other periods of time when there is no allegation of touching and at which time voices are not clearly heard. Given Mahmoodi's compromised credibility and without independent evidence to support her allegation of sexual touching in the living room or the guest bedroom, I am unable to find that those allegations of sexual touching occurred.

#### 6.3.2 *Did Mahmoodi welcome a sexualized environment?*





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ORDERED that pursuant to SDCL 23A-27-27 judgment for the following costs is hereby ordered docketed as judgment against the Defendant:

Attorney fees:	\$10,136.88
Investigation costs:	\$1,418.20
Prosecutor's costs:	\$28.25

The court advised the Defendant of his right to appeal the aforementioned Judgment.

On the 3<sup>rd</sup> day of May, 2000, the court entered an AMENDED JUDGMENT OF CONVICTION, which contained the following sentence:

ORDERED that the Defendant, Daniel Neil Charles a/k/a Daniel Heinzelman a/k/a Daniel Ingalls, is sentenced to Life in Prison in the South Dakota State Penitentiary, there to be fed, clothed, maintained and provided with all the necessities of life, and it is further

ORDERED that the court costs of \$50.00 are waived, and it is further

ORDERED that the Defendant make restitution, to the best of his ability, to the South Dakota Victim's Compensation Fund for the victim's burial expenses and other expenses, not to exceed the amount of \$10,000.00, and it is further

ORDERED that a civil judgment is to be entered in the amount of \$10,136.88 attorney fees, \$1,418.20 investigation costs, \$28.25 Prosecutor's costs, to be paid to the Meade County Auditor.

On the 17<sup>th</sup> of February, 2015, the court entered an ORDER VACATING SENTENCE AND SCHEDULING RE-SENTENCING HEARING. The court found that *Miller v. Alabama*, 132 S. Ct. 2455 (2012), which held that mandatory life-without-parole sentences imposed on children are unconstitutional, should be applied retroactively to Mr. Charles. The court further found that Mr. Charles' sentence was unconstitutional because he received a mandatory life-without-parole sentence for a crime committed when he was fourteen years old. The court granted the Defendant's Motion to Correct Illegal Sentence. The court subsequently scheduled re-sentencing for October 21 and 22, 2015.

On the 21<sup>st</sup>, 22<sup>nd</sup>, 23<sup>rd</sup>, and 30<sup>th</sup> days of October, 2015, the court held the re-sentencing hearing. The Defendant appeared personally and through counsel, Alicia D'Addario, John Dalton, and Robert Van Norman. Robert Mayer, Gregory Sperlich, and Kevin Krull appeared on behalf of the State. The parties presented evidence and testimony in mitigation and in aggravation of punishment. The prosecuting attorney addressed the court, counsel for the

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Defendant spoke on behalf of the Defendant, and the Defendant made a statement in his own behalf.

### SENTENCE

On the 30<sup>th</sup> day of October, 2015, the court pronounced its sentence. The Defendant appeared personally and through counsel, Alicia D'Addario and John Dalton. Robert Mayer, Gregory Sperlich, and Kevin Krull appeared on behalf of the State. The Court had asked the Defendant whether any legal cause existed to show why Judgment should not be pronounced. No cause was offered. The Court pronounced the following sentence:

ORDERED that the Defendant, Daniel Neil Charles a/k/a Daniel Heinzelman a/k/a Daniel Ingalls, is sentenced to a term of ninety-two (92) years in the South Dakota State Penitentiary, there to be fed, clothed, maintained, and provided the necessities of life; and it is further

ORDERED that the Defendant shall receive credit for sixteen (16) years and three (3) months already served; and it is further

ORDERED that the court costs of \$50.00 are waived, and it is further

ORDERED that the Defendant make restitution, to the best of his ability, to the South Dakota Victim's Compensation Fund for the victim's burial expenses and other expenses, not to exceed the amount of \$10,000.00, and it is further

ORDERED that a civil judgment is to be entered in the amount of \$10,136.88 attorney fees, \$1,418.20 investigation costs, \$28.25 Prosecutor's costs, to be paid to the Meade County Auditor.

### NOTICE OF APPEAL

You, DANIEL NEIL CHARLES A/K/A DANIEL HEINZELMAN A/K/A DANIEL INGALLS, are hereby notified that you have a right to appeal as provided by SDCL 23A-32-15 and 23A-32-16 which you must exercise by filing a notice of appeal with the Meade County Clerk of Courts, and serving a copy of the same upon the Attorney General of the State of South

STATE v. DANIEL NEIL CHARLES A/K/A DANIEL HEINZELMAN A/K/A DANIEL  
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Dakota and the Meade County State's Attorney and filing proof of such service, within thirty  
(30) days from the date that this Judgment is signed, attested and filed with said Clerk.

DATED this 13 day of November, 2015, at Sturgis, South Dakota, nunc pro tunc to the  
30<sup>th</sup> day of October, 2015.

BY THE COURT:

  
\_\_\_\_\_  
Honorable Jerome A. Eckrich  
4<sup>th</sup> Circuit Court Judge

ATTEST:

  
\_\_\_\_\_  
Clerk of Courts

By: \_\_\_\_\_

Deputy



**FILED**

NOV 13 2015

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM  
4TH CIRCUIT CLERK OF COURT

By: \_\_\_\_\_

IN THE SUPREME COURT  
STATE OF SOUTH DAKOTA

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No. 27432

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STATE OF SOUTH DAKOTA,  
Plaintiff/Appellee

vs.

MARICELA NICOLASA DIAZ,  
Defendant/Appellant

---

APPEAL FROM THE CIRCUIT COURT  
FIRST JUDICIAL CIRCUIT, HANSON COUNTY, SOUTH DAKOTA

THE HONORABLE SEAN M. O'BRIEN  
CIRCUIT COURT JUDGE  
&  
THE HONORABLE TIMOTHY W. BJORKMAN  
CIRCUIT COURT JUDGE

NOTICE OF APPEAL FILED ON APRIL 1, 2015

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**APPELLANT'S REPLY BREIF**

---

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### **Preliminary Statement**

References to the transfer hearing will be to the designation (TH) followed by the applicable volume and page number; suppression hearing transcript will be to the designation (SH) followed by the applicable page; jury trial transcripts will be referred to as (JT) followed by the applicable volume and page number; and references to the sentencing hearing will be to the designation (SH) and the applicable page. References to the State's/Appellee's Brief will be to the designation (SB) followed by the applicable page number.

### **Jurisdictional Statement**

This Court has appellate jurisdiction pursuant to SDCL §15-26A-1(1), SDCL §23A-32-2; SDCL §23A-32-5 and SDCL §23A-32-9.

### **Request For Oral Argument**

Appellant, Maricela Diaz, and her counsel, Doug Dailey and Chris Nipe, respectfully renew the request for the privilege of appearing before this Court for oral argument.

### **Statement of the Issues**

1. **The Trial Court Abused Its Discretion in Ordering Diaz be Tried in Adult Court.**

The trial court in the juvenile case held that Diaz should be transferred from juvenile court to adult court. The most important cases are: *State v. Jensen*, 1998 S.D. 52; *State v. Harris*, 494 N.W.2d 691 (S.D. 1993); *State v. Rios*, 499 N.W.2d 906 (S.D. 1993); and *State v. Flying Horse*, 2002 S.D. 47. The most important statute is SDCL § 26-11-4.

2. **Trial court abused its discretion in denying a new hearing on the transfer of Diaz to adult Court despite newly discovered evidence following the hearing regarding the State's expert witness Dr. Donald Dutton.**

The trial court denied defendants motion to grant a new hearing on the transfer of Diaz to adult court after new evidence was disclosed by the State in regard to its expert witness who testified on behalf of the State at the transfer hearing. The most important cases are: *Bridgewater Quality Meats, LLC v. Heim*, 2007 S.D. 233; and *Steele v. Steele*, 510 N.W.2d 661 (S.D. 1994). The most important statute is SDCL §15-6-59(b)

3. **The trial court erred in admitting the statements made by Diaz to law enforcement.**

This Court held the statements of Diaz were admissible as it found Diaz knowingly and intelligently waived her Miranda rights. The most important cases are: *State v. Maricela Nicolasa Diaz*, 2014 S.D. 27; *Miranda v. Arizona*, 384 U.S. 436; 86 S.Ct. 1602 (1966); *State v. Horse*, 2002 S.D. 57; and *People in the Interests of J.M.J.*, 2007 S.D. 1. The most important statutes are: SDCL §26-7A-12; SDCL §26-7A-13; SDCL §26-7A-15; and SDCL §26-7A-17.

4. **Trial Court failed to adequately instruct the jury with a full and correct statement of the law applicable to the effects of physical and sexual abuse on a juvenile's perception of imminent fear, thereby, denying her right to present her Defense.**

The trial court denied the use of Defendant's proposed jury instructions which would have instructed the jury on the heightened sense of imminent danger felt by children who suffer from physical and sexual abuse. The most important cases are: *State v. Walton*, 600 N.W.2d 524 (S.D. 1999); *State v.*

*Springer*, 2014 S.D. 80; and *Miller v. Alabama*, 132 S.Ct. 2455 (2012). The most important statutes are: NA.

5. **The Trial Court Abused its Discretion in Sentencing Diaz to 80 Years, with No Time Suspended.**

The trial court sentenced Diaz to 80 years in prison for first degree murder, and a 50 year sentence for aggravated kidnapping, to run concurrently with no time suspended. The most important cases are: *State v. McKinney*, 2005 S.D. 73; *State v. Hinger*, 1999 S.D. 91; *Bult v. Leaply*, 507 N.W.2d 325 (S.D. 1993). The most important statutes are: NA

6. **The Sentenced Imposed on Diaz Violated the Principle of Proportionality of Sentencing.**

The trial court sentenced Diaz to 80 years in prison for first degree murder, and a 50 year sentence for aggravated kidnapping, to run concurrently with no time suspended. The most important cases are: *Solem v. Helm*, 463 U.S. 277 (1983); *State v. Bonner*, 1998 S.D. 30; *State v. Rhines*, 1996 S.D. 55; 7 *State v. Blair*, 2005 S.D. 75. The most important statutes are: NA

7. **The Trial Court Erred by Sentencing Diaz to a De Facto Life Sentence.**

The trial court sentenced Diaz to 80 years in prison for first degree murder, and a 50 year sentence for aggravated kidnapping, to run concurrently with no time suspended. The most important cases are: *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d. 825 (2010); *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2010); *Miller v. Alabama*, 132 S.Ct. 2455

(2012); and *Montgomery v. Louisiana*, S.Ct. Docket 14-280. The most important statutes are: NA

### **Statement of the Case**

Appellant Diaz hereby incorporates the Statement of the Case contained in the Brief of Appellant as though fully set forth herein.

### **Statement of Facts**

Appellant Diaz hereby incorporates the Statement of the Facts contained in the Brief of Appellant as though fully set forth herein.

### **ARGUMENTS**

#### **1. The Trial Court Abused Its Discretion in Ordering Diaz be Tried in Adult Court.**

The State's Brief is a fanciful and lurid concoction of misstated facts, matters outside of the record, and the State's own psychiatric evaluation (in its brief) which is nowhere supported in the record.

The State, in its brief, continually paints the 15-year old Diaz (and even the 13-year old Diaz) as some sort of sexual predator, and resorts to a terrible "blame the victim" game regarding sexual abuse. Any trial court in South Dakota, and this Court on appeal, would not, in a criminal proceeding against a rapist, consider an argument that the child was "asking for it." However, that is just what the State does in its brief time and time again. "Diaz's claim that Salgado forcibly sexually abused her is contradicted by statements that she made to Indian Child Services and to Dr. Bean, in which she described her sexual relations with Salgado as consensual. (SB 11). The State continues to argue "On another occasion, Diaz engaged in sexual activity with a JDC guard, leading

to the guard's arrest for sexual exploitation of a minor" (SB 18) and "sought out the relationship" with Salgado. (SB 41). Diaz was universally considered by all examining psychiatrists as the victim of sexual abuse by Salgado, and of course, South Dakota law considers her to be a sexual abuse victim also. Salgado was guilty of the rape of Diaz (see SDCL 22-22-1(5)) and obviously the jail guard exploited her sexually which is also indicative of Diaz' naiveté and vulnerability to sexual predators. To let the State paint Diaz as anything but a victim in these circumstances is a monumental disservice to all of the sexual abuse victims in South Dakota.

The State tries to portray Diaz, the 15-year old girl with no prior criminal experience, to be in control, both physically and emotionally, of Salgado, the adult gangbanger who belonged to the gang Sureno 13. "At times, Salgado was fearful of Diaz." (SB 12). "Diaz, not Salgado, is calling the shots." She tells him to take the blame and refuses to take the blame herself. "Salgado was cowed into killing to escape her jealous wrath." (SB 15). "She flaunted her dominion over him." (SB 15). "Diaz could bend Salgado to her will..." (SB 15). Such an assertion is laughable – that the five-foot tall, 100 pound, 15-year old girl could intimidate and physically dominate the adult gang member. Salgado admitted at the transfer hearing that he beat up another man because he thought he was making advances toward a previous girlfriend (TH Vol. III 494), that he was doing drugs (smoking 10 to 15 blunts a day) (TH Vol. III 511), using crack cocaine (TH Vol. III 512), that he smacked Diaz (TH Vol. III 521), and that he cut Diaz's wrists (TH Vol. III 529), and that, although Diaz sometimes tried to fight back, "She was not strong enough." (TH Vol. III 526). Dr. Gunderson testified that "she was very dependent upon him, and was very controlling of her..." (TH Vol. IV 729).

Although the State relies heavily on the testimony of later the discredited Dr. Donald Dutton in its argument, Dutton didn't know that Salgado had admitted to physically abusing Diaz, didn't know that Salgado had violated a protection order in favor of Diaz by taking her to South Dakota, and, astoundingly, didn't even know the legal age for consent for sex. (TH Vol. V 980, 981). Although everyone relied on what Alex Salgado said about his relationship with Diaz, no one tested him to see if he was sociopath or a psychopath. (See TH Vol. V 979). As to the argument that the impeachment evidence later provided by the State regarding Dutton should not be considered in whether the transfer should have actually been made or a new hearing granted, it is clear that an expert testifying about the appropriateness of sexual relationships would be impeached by an examination of whether he had an inappropriate sexual relationship with a student under his dominion. The findings attached to the State's Brief states that "I find that Dutton's sole aim was the gratification of his own personal and sexual interests in Mahmoodi. I find that Dutton created and controlled a sexualized environment ..... he engaged in sexual conduct in relation to Mahmodi." (SB Appendix 081). This is the expert upon which the State relies, and presented to the juvenile trial court, to testify about the nature of the relationship between Diaz and Salgado? The State also attaches an article which is not part of the record which sympathizes with Dr. Dutton over the situation, and also states that "A simple Google search of Dr. Dutton's name turns up numerous links to articles reporting on the complaint as well as the tribunal's opinion itself." (SB Appendix at 072-075). These items are not part of the record at all. It is clear that they were printed on April 7, 2016, and should not be considered in any way by the court. Although it is clear that an appeal

must be based on the record and not on the argument of counsel, (see *Department of Revenue of State of Ill. for Use of People v. Steinkopf*, 513 N.E.2d 1016, 160 Ill.App.3d 1008, 112 Ill.Dec. 407 (Ill. App. 1 Dist., 1987),) it is improper argument to inject matters before the Court which are not even in the trial record.

The State even inserts its own diagnosis of Diaz on appeal. “Diaz’s diagnosis of conduct disorder, the juvenile euphemism for sociopathy, demonstrates that she is a continuing danger to other people. (SB 18). No psychiatrist testified that a conduct disorder is “the juvenile euphemism for sociopathy” as referred to in the State’s Brief. The State again refers to Diaz in the same terms later in its brief. “Diaz is a proto-sociopath, ...” (SB 25). State’s Brief “Diaz’s “complete absence of emotional reaction to having committed a very intimate homicide” signified conduct disorder (sociopathy) of a severe nature. (SB 21).

That is not a correct recital of the record and no one testified that Diaz was a sociopath, either at the transfer hearing or at trial.

Dr. Bean and Dr. Hansen, who testified for the State at the transfer hearing, clearly testified that juveniles cannot be diagnosed with a personality disorder (such as being a sociopath), “namely, because adolescents are young and those traits aren’t as ingrained or as enduring or persistent”, in the words of Dr. Hansen. (TH Vol. III 570). In other words, because “juvenile minds are different.” *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016). Exactly.

The State tries to buttress its argument that the trial court was correct in its transfer decision by referencing Dr. Craig Rypma, stating that Dr. Rypma found that Diaz exhibited traits of anger and resentment (SB 20), and refers again to Dr. Rypma’s



testimony on Page 23 of the State's Brief. There is one problem with that. Dr. Rypma did not testify at the transfer hearing. Similarly, the State refers to Ivan Contreras, having to protect the victim from Diaz at a party. (SB 29). Although there is some reference to Contreras in the transfer hearing, he did not testify at the transfer hearing, and, in fact, died prior to trial.

The State refers to Dr. Gunderson's testimony at the transfer hearing and in more than one place in its brief says that Dr. Gunderson said that Diaz tends to be oppositional, resistant, sneaky, underhanded, and provocative and flirtatious as a means of gaining attention or achieving her ends. (SB 20). That is not correct and the State has misrepresented those findings continually in these proceedings. Dr. Gunderson said that Maricela was in a class of individuals that could have those characteristics – that the test creates a bubble of characteristics that people in that category may or may not have. It was not a literal description of Diaz. (TH Vol. IV 726, 727). She further testified that Maricela's results were not unusual for an adolescent, that she did not have an unusual profile, and that it was quite similar to others that she had seen. (TH Vol. IV 728). Again, Dr. Bean testified that a conduct disorder "is a very common diagnosis in a child adolescent." Dr. Bean went on to state that "it's not an unusual diagnosis. It's – kids who are disobedient, truant, running around, not following their parents' admonitions are a common group of individuals coming in for diagnostic evaluation in the child adolescent division of our department of psychiatry", (TH Vol. V 1006), and further stated that "the people we had at McCrossan's Boys Ranch were 99 percent cognitive – or conduct disorders." (TH Vol. V 1017). So, rather than the psychotic depiction of Diaz wrongfully portrayed by the state, her psychiatric examinations revealed a very normal

pattern for a child experiencing trouble.

Again, contrary to the State's lurid assertion that "Diaz had amassed a significant record of anti-social conduct" (SB 18), it is clear that Diaz skipped some school, only partook of drugs or alcohol because Salgado furnished them to her, and that her only involvement in the juvenile justice system or any contact with law enforcement was a CHINS proceeding because of Salgado and the effect that he had on her. The State also portrays Diaz as a continuing problem in the Minnehaha County Juvenile Detention Center. However, Jeffrey LeMair testified at the transfer hearing that "there's been nothing of violence to another youth, to a staff member, profane gestures, threats of our lives, threats to escape. The greatest threat was to harm self, and she told us about it." (TH Vol. IV 784). He later states in response to questioning as follows: "Are there any incidents of violence that you've noted in Maricela's incident report? Answer: None... Question: No violence directed at another person? Answer: Nothing." (TH Vol. IV 789). He goes on to say, in contrast to the State's Brief, that Diaz "matured" (TH Vol. IV 790) and was "compassionate". (TH Vol. IV 791).

Finally, the State's argument that the juvenile system did not have secure facilities to keep Diaz is belied by the very fact that she was housed in the Minnehaha County Juvenile Detention Center until she was 18. In light of the plain fact that the State did have secure juvenile facilities, her lack of a criminal record, her age, and in light of the domination of Diaz by Alexendar Salgado. This matter should have remained in juvenile court.

**2. Trial court abused its discretion in denying a new hearing on the transfer of Diaz to adult Court despite newly discovered evidence following the hearing regarding the State's expert witness Dr. Donald Dutton.**

Appellant Diaz relies on the argument contained in the Brief of Appellant with regard to this issue.

**3. The trial court erred in admitting the statements made by Diaz to law enforcement.**

The State argues that the Defendant's standing objection to the introduction of her statements to law enforcement was insufficient to raise the issue once again with this Court and to raise the additional grounds that have been presented, and that "clear error" must exist for this Court to consider this argument again. While Defendant argues that clear error did exist, Diaz does not agree that clear error is necessary for these issues to be considered. Where a litigant has advanced the issue below, which gives the trial court an opportunity to rule, and the court rules, it is not necessary to object at trial in order to preserve the issue for appeal. Diaz had earlier made a motion in limine to suppress her statements to law enforcement. That is sufficient to preserve the issue, and this argument, for appeal. "A means of giving the trial court an opportunity to rule on admissibility of evidence is the motion in limine. The purpose of a motion in limine is to dispose of legal matters so counsel will not be forced to make comments in the presence of the jury which might prejudice his presentation." The (intermediate court of appeals) therefore did not need to resort to plain error review to reach the merits of the error alleged by the Kobashigawas on appeal. *Kobashigawa v. Silva*, 300 P.3d 579, 129 Hawai'i 313 (Hawaii, 2013). See also, *State v. Kelly*, 685 P2d 564 (Wash.2d, 1984), "the

party losing the motion in limine has a standing objection.” The authorities disclose that the allowance of a standing objection to the introduction of evidence, thus preserving the issue for appeal, has been allowed only to the party losing the motion to exclude the evidence. See Kelly, *supra*; *State v. Sullivan*, 847 P.2d 953, 69 Wn.App. 167 (Wash.App. Div. 2, 1993) . See also *State v. Haddock*, 897 P.2d 152, 257 Kan. 964 (Kan., 1995), where Haddock filed a pretrial motion in limine seeking to exclude DNA evidence. At trial, his counsel objected before the expert DNA testimony, stating the "Court knows our position, that it's not sufficiently shown to be reliable for the procedures in this case." The trial court granted a standing objection. Haddock argued in a pretrial motion that the marital discord evidence should be excluded as irrelevant, unduly prejudicial, and inadmissible under K.S.A. 60-455. Haddock renewed his earlier objections to such evidence at trial, thus preserving the issue for appeal.

This is codified in South Dakota statutes at §19-19-103, which provides in part, “Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.”

When Diaz has previously made a motion in limine with regard to the statements of law enforcement, and then sought a standing objection to the introduction of the testimony at trial, that is sufficient to preserve the issue for appeal and presentation to this court. Clear error is not required.

**4. Trial Court failed to adequately instruct the jury with a full and correct statement of the law applicable to the effects of physical and sexual abuse on a juvenile's perception of imminent fear, thereby, denying her right to present her Defense.**

Appellant Diaz relies on the argument contained in the Brief of Appellant with regard to this issue.

**5. The Trial Court Abused its Discretion in Sentencing Diaz to 80 Years, with No Time Suspended.**

Once again, the State argues that Diaz, despite her young age “sought out” the relationship with Salgado, and resisted attempts from child welfare personnel to keep her away from Salgado, in order to pursue an “unfettered” relationship with him. This is also noted by the trial court in sentencing. This is once again an attempt to force responsibility for a sexual relationship upon a victim. This again, was a 15-year old defendant, with no criminal record, whose only involvement in the court system at all was being a child in need of supervision, who came under the control of her sexual and physical abuser. The trial court abused its discretion by imposing an 80 year sentence with no time suspended on such a child.

**6. The Sentenced Imposed on Diaz Violated the Principle of Proportionality of Sentencing.**

Appellant Diaz relies on the argument contained in the Brief of Appellant with regard to this issue.

**7. The Trial Court Erred by Sentencing Diaz to a DeFacto Life Sentence**

The State argues that Diaz did not receive a de facto life sentence because the

parole eligibility table codifies leniency for Class A juvenile offenders by affording them Class C eligibility status under SDCL 24-15A-32. Therefore, the State argues, Diaz need only serve 50% of her sentence, which equates to a de facto 40 year sentence. However, this Court should not consider possible parole as a factor in deciding whether a court has imposed a life sentence. The legislature is in complete control over whether Diaz ever receives parole. Our parole statutes were completely changed in 1996. What is to say that they will not be changed again, or eliminated? The status of the possible parole of Diaz is complete speculation. That is because parole is not a legal right of the defendant. That is clear both from case law and statute.

See *Martin v. Chandler*, 122 SW3d 540 (Ky., 2003), where the appellant argued that a change in the parole statutes constituted an improper enhancement of his sentence. The Supreme Court of Kentucky disagreed, stating “The appellant misunderstands the nature of parole. The Supreme Court long ago established that parole is not a right but a privilege. Furthermore, “[g]rant of parole is not a right but a matter of grace or gift to persons deemed eligible ....” Thus, the appellant still faces a maximum five-year sentence; no more and no less. When he becomes eligible for parole is largely irrelevant.” *Martin*, supra. Parole is a matter of grace. *Myers v. Ridge*, 712 A.2d 791 (Pa. Cmwlth. 1998). *Quinones v. Commonwealth* (Pa. Commw. Ct., 2010).

Finally, that rule is codified in SDCL §24-15-1.1, which provides that “Parole is the discretionary conditional release of an inmate from actual penitentiary custody before the expiration of the inmate's term of imprisonment. The prisoner remains an inmate under the legal custody of the Department of Corrections until the expiration of the inmate's term of imprisonment. A prisoner is not required to accept a conditional parole.

A prisoner is never entitled to parole. However, parole may be granted if in the judgment of the Board of Pardons and Paroles granting a parole would be in the best interests of society and the prisoner. Neither this section or its application may be the basis for establishing a constitutionally protected liberty, property, or due process interest in any prisoner.”

Therefore, if the parole statutes are amended once again to increase the time that Diaz must serve, she will be subject to those new, harsher limits. If those statutes are amended to eliminate parole, she will serve the 80 year sentence. She will not be able to file a new appeal to have this Court consider this issue again if that happens. If parole is not a right- if parole or the lack of it cannot be the basis for a constitutional challenge based on liberty, property, or due process – then why should this Court consider it in deciding this issue? This Court should consider the one firm fact of this sentence – Diaz is sentenced to 80 years in prison, and that exceeds her life expectancy.

### **CONCLUSION**

Wherefore, Appellant Maricela Diaz respectfully requests that this Court for the relief requested herein and as contained in the Brief of Appellant.

Respectfully submitted this 16<sup>th</sup> day of May, 2016.



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Doug Dailey  
Chris A. Nipe

**Attorneys for Appellant  
Maricela Diaz**

## CERTIFICATE OF COMPLIANCE

Pursuant to SDCL §15-26A-66, counsel for the Appellee does hereby submit the following:

The foregoing brief is 10 pages in length. It is typed in proportionally spaced typeface in Times New Roman 12 point. The word processor used to prepare this brief indicates that there are a total of 3,160 words in the body of the brief.



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Doug Dailey

## CERTIFICATE OF MAILING AND PROOF OF SERVICE

Doug Dailey states that he is an attorney for Appellant, Maricela Nicolasa Diaz, and that on the 16<sup>th</sup> day of May, 2016, he caused to be sent a true and correct copy of the Appellant's Reply Brief and this Certificate of Mailing and Proof of Service in the above-entitled matter by electronic service, to:

Marty Jackley  
SD Attorney General  
[atgservice@state.sd.us](mailto:atgservice@state.sd.us)

Paul Swedlund  
Deputy Attorney General  
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and that he mailed the original and two copies of the Brief of Appellant and this Certificate of Mailing and Proof of Service to the Clerk of the Supreme Court of South Dakota, 500 East Capitol, Pierre, SD 57501-5070, by depositing the original and two copies of the same in the United State's Mail, postage prepaid first class mail, on the 16<sup>th</sup> day of May, 2016.



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Doug Dailey