

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 21-1338

Joseph Arguello

Petitioner - Appellant

v.

Jason Ravnsborg, Attorney General for South Dakota; Darin Young, Warden State Penitentiary
Respondents - Appellees

Appeal from U.S. District Court for the District of South Dakota - Southern
(4:20-cv-04088-KES)

JUDGMENT

Before LOKEN, WOLLMAN, and GRASZ, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

Appellant's motion to proceed in forma pauperis is denied as moot.

May 11, 2021

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

/s/ Michael E. Gans

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

JOSEPH ARGUELLO,

Petitioner,

vs.

JASON R. RAVNSBORG, Attorney
General for South Dakota; and DARIN
YOUNG, Warden State Penitentiary,

Respondents.

4:20-CV-4088-KES

JUDGMENT

Under the Order Adopting Report and Recommendation and Dismissing
Petition, it is

ORDERED, ADJUDGED, AND DECREED that judgment is entered in
favor of respondents and against petitioner, Joseph Arguello.

DATED January 28, 2021.

BY THE COURT:

/s/ Karen E. Schreier

KAREN E. SCHREIER
United States District Judge

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 21-1338

Joseph Arguello

Appellant

v.

Jason Ravnsborg, Attorney General for South Dakota and Darin Young, Warden State
Penitentiary

Appellees

Appeal from U.S. District Court for the District of South Dakota - Southern
(4:20-cv-04088-KES)

MANDATE

In accordance with the judgment of 05/11/2021, and pursuant to the provisions of Federal
Rule of Appellate Procedure 41(a), the formal mandate is hereby issued in the above-styled
matter.

June 01, 2021

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

JOSEPH ARGUELLO,

Petitioner,

vs.

JASON R. RAVNSBORG, Attorney
General for South Dakota; and DARIN
YOUNG, Warden State Pennitentiary,

Respondents.

4:20-CV-04088-KES

ORDER ADOPTING REPORT AND
RECOMMENDATION AND
DISMISSING PETITION

Petitioner, Joseph Arguello, filed a pro se petition for writ of habeas corpus 28 U.S.C. § 2254. The matter was referred to Magistrate Judge Veronica L. Duffy for a report and recommendation and she recommended dismissing the petition for failure to file the petition within the one-year statute of limitations period under the Antiterrorism and Effective Death Penalty Act (AEDPA). Docket 17. Arguello timely filed an objection to the report and recommendation. Docket 18. For the following reasons, the court adopts Magistrate Judge Duffy's report as supplemented herein.

STANDARD OF REVIEW

The court's review of a magistrate judge's report and recommendation is governed by 28 U.S.C. § 636 and Rule 72 of the Federal Rules of Civil Procedure. Under 28 U.S.C. § 636(b)(1), the court reviews de novo any

objections to the magistrate judge's recommendations with respect to dispositive matters that are timely made and specific. *See Fed. R. Civ. P. 72(b).* ("The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to"). In conducting its de novo review, this court may then "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1); *see also United States v. Craft*, 30 F.3d 1044, 1045 (8th Cir. 1994).

DISCUSSION

Arguello objects to that portion of the report and recommendation that finds that the time limits under the AEDPA were not equitably tolled. He cites ~~some case law to show that equitable tolling in general is proper~~. Docket 18 at 2. But he does not cite any facts to show why equitable tolling should be applied to his case.

The Supreme Court has held that the limitations period set forth in "§ 2244(d) is subject to equitable tolling in appropriate cases." *Holland v. Florida*, 560 U.S. 631, 645 (2010). "[But] a petitioner is entitled to equitable tolling only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Id.* at 649 (internal citation and quotations omitted). The Eighth Circuit Court of Appeals has applied the holding in *Holland* and found that a counsel's miscalculation of a filing deadline is a "garden variety claim" of neglect that does not warrant equitable tolling. *Rues v. Denney*, 643 F.3d 618, 622 (8th Cir. 2011).

Here, Arguello does not provide the court with any facts to show that he pursued his rights diligently and that extraordinary circumstances stood in his way to prevent the timely filing of his petition. The court finds that Arguello is not entitled to equitable tolling and his petition is time barred under the AEDPA.

Arguello cites many other cases and provides summaries of those cases in his objections, but he does not make an understandable argument as to how those cases apply to his claim. As a result, the court overrules his objections to the report and recommendation and finds that his petition is time barred.

CONCLUSION

This court has reviewed Magistrate Judge Duffy's report and recommendation de novo and Arguello's objections. This court adopts the report and recommendation and dismisses Arguello's petition for relief with prejudice.

Furthermore, based upon the reasons stated and under Fed. R. App. P. 22(b), the court finds that petitioner has not made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). Thus, a certificate of appealability is denied.

Thus, it is ORDERED

1. That the report and recommendation (Docket 17) is adopted in full as supplemented herein. Arguello's pro se petition for habeas corpus is denied with prejudice

2. Arguello's objections to the report and recommendation (Docket 18) are overruled.
3. Respondents' motion to dismiss (Docket 12) is granted.
4. Arguello's motion for leave to process (Docket 16) is denied as moot.
5. Arguello's motions for certificate of appealability (Dockets 15 and 18) are denied.

Dated January 28, 2021.

BY THE COURT:

/s/ Karen E. Schreier

KAREN E. SCHREIER

UNITED STATES DISTRICT JUDGE

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 21-1338

Joseph Arguello

Appellant

v.

Jason Ravnsborg, Attorney General for South Dakota and Darin Young, Warden State
Penitentiary

Appellees

Appeal from U.S. District Court for the District of South Dakota - Southern
(4:20-cv-04088-KES)

ORDER

If the original file of the United States District Court is available for review in electronic format, the court will rely on the electronic version of the record in its review. The appendices required by Eighth Circuit Rule 30A shall not be required. In accordance with Eighth Circuit Local Rule 30A(a)(2), the Clerk of the United States District Court is requested to forward to this Court forthwith any portions of the original record which are not available in an electronic format through PACER, including any documents maintained in paper format or filed under seal, exhibits, CDs, videos, administrative records and state court files. These documents should be submitted within 10 days.

February 12, 2021

Order Entered Under Rule 27A(a):
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.

NOTE TO PUBLIC ACCESS USERS Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.

U.S. District Court

District of South Dakota

Notice of Electronic Filing

The following transaction was entered on 2/12/2021 at 2:53 PM CST and filed on 2/12/2021

Case Name: Arguello v. Ravnsborg et al

Case Number: 4:20-cv-04088-KES

Filer:

WARNING: CASE CLOSED on 01/28/2021

Document Number: 28 (No document attached)

Docket Text:

ORDER denying [21] Motion to proceed by supplemental application. Arguello has filed a notice of appeal. If he wants to proceed, he needs to make his case to the Eighth Circuit Court of Appeals. This court is not aware of any recognized procedure by supplemental application. Signed by U.S. District Judge Karen E. Schreier on February 12, 2021. (Schreier, Karen)

4:20-cv-04088-KES Notice has been electronically mailed to:

Erin E. Handke erin.handke@state.sd.us, catherine.schlimgen@state.sd.us, janet.waldron@state.sd.us, lynell.erickson@state.sd.us, wade.warntjes@state.sd.us

4:20-cv-04088-KES This document must be sent in hard copy to:

Joseph Arguello
23102
SOUTH DAKOTA STATE PENITENTIARY
PO Box 5911
Sioux Falls, SD 57117-5911

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.

NOTE TO PUBLIC ACCESS USERS Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.

U.S. District Court

District of South Dakota

Notice of Electronic Filing

The following transaction was entered on 2/12/2021 at 2:50 PM CST and filed on 2/12/2021

Case Name: Arguello v. Ravnsborg et al

Case Number: 4:20-cv-04088-KES

Filer:

WARNING: CASE CLOSED on 01/28/2021

Document Number: 27 (No document attached)

Docket Text:

ORDER denying as moot [22] Motion for Certificate of Appealability. This court denied Arguello's motion for certificate of appealability on January 28, 2021. For those same reasons, the motion is denied again. Signed by U.S. District Judge Karen E. Schreier on February 12, 2021. (Schreier, Karen)

4:20-cv-04088-KES Notice has been electronically mailed to:

Erin E. Handke erin.handke@state.sd.us, catherine.schlimgen@state.sd.us, janet.waldron@state.sd.us, lynell.erickson@state.sd.us, wade.warntjes@state.sd.us

4:20-cv-04088-KES This document must be sent in hard copy to:

Joseph Arguello
23102
SOUTH DAKOTA STATE PENITENTIARY
PO Box 5911
Sioux Falls, SD 57117-5911

United States Court of Appeals

For The Eighth Circuit

Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24329

St. Louis, Missouri 63102

Michael E. Gans
Clerk of Court

VOICE (314) 244-2400
FAX (314) 244-2780
www.ca8.uscourts.gov

February 12, 2021

Mr. Joseph Arguello
SOUTH DAKOTA DEPARTMENT OF CORRECTIONS
23102
1600 North Drive
P.O. Box 5911
Sioux Falls, SD 57117-0911

RE: 21-1338 Joseph Arguello v. Jason Ravnsborg, et al

Dear Mr. Arguello:

The district court clerk has transmitted a notice of appeal in this matter. In accordance with Rule 24(a), Federal Rules of Appellate Procedure, the appeal has been docketed under the number indicated. Please include the caption and the case number on all correspondence or pleadings submitted to this court.

We note that there are motions pending in the district court. Once we receive a ruling on those motions, your appeal will proceed.

Counsel in the case must supply the clerk with an Appearance Form. Counsel may download or fill out an Appearance Form on the "Forms" page on our web site at www.ca8.uscourts.gov.

Please note that service by pro se parties is governed by Eighth Circuit Rule 25B. A copy of the rule and additional information is attached to the pro se party's copy of this notice.

Michael E. Gans
Clerk of Court

CYZ

Enclosure(s)

cc: Ms. Erin Elizabeth Handke
Mr. Matthew W. Thelen

District Court/Agency Case Number(s): 4:20-cv-04088-KES

Caption for Case Number: 21-1338

Joseph Arguello

Petitioner - Appellant

v.

Jason Ravnsborg, Attorney General for South Dakota; Darin Young, Warden State Penitentiary

Respondents - Appellees

Eighth Circuit Court of Appeals

PRO SE Notice of Docket Activity

The following was filed on 02/12/2021

Case Name: Joseph Arguello v. Jason Ravnsborg, et al
Case Number: 21-1338

Docket Text:

Prisoner case docketed. [5004062] [21-1338]

The following document(s) are associated with this transaction:

Document Description: Notice of Appeal Docketing Letter

Notice will be mailed to:

Mr. Joseph Arguello
SOUTH DAKOTA DEPARTMENT OF CORRECTIONS
23102
1600 North Drive
P.O. Box 5911
Sioux Falls, SD 57117-0911

Notice will be electronically mailed to:

Ms. Erin Elizabeth Handke: erin.handke@state.sd.us
Mr. Matthew W. Thelen: coadocs@sdd.uscourts.gov

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 21-1338

Joseph Arguello

Appellant

v.

Jason Ravnsborg, Attorney General for South Dakota and Darin Young, Warden State
Penitentiary

Appellees

Appeal from U.S. District Court for the District of South Dakota - Southern
(4:20-cv-04088-KES)

ORDER

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

June 29, 2021

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

/s/ Michael E. Gans

Seventh Judicial Circuit Court
P.O. Box 230
Rapid City SD 57709-0230
(605) 394-2571

CIRCUIT JUDGES

Craig A. Pfeifle, Presiding Judge
Matthew M. Brown
Jeffrey R. Connolly
Jeff W. Davis
Robert Gusinsky
Heidi L. Linngren
Robert A. Mandel
Jane Wipf Pfeifle

MAGISTRATE JUDGES

Scott M. Bogue
Todd J. Hyronimus
Bernard Schuchmann
Marya Tellinghuisen

COURT ADMINISTRATOR

Kristi W. Erdman

STAFF ATTORNEY

Laura Hilt

May 14, 2018

✓ Mr. Joseph Arguello, #23102
South Dakota State Penitentiary
PO Box 5911
Sioux Falls, SD 57117

Re: Case no. 51CIV16-000580

Dear Mr. Arguello:

I am in receipt of your Motion for the Appointment of Counsel, and accompanying paperwork, requesting the appointment of counsel to assist you with filing a (second) habeas application. Attorneys are not appointed for the preparation of habeas applications. Consequently, your Motion is denied. Additionally, please note that habeas cases are civil rather than criminal cases. Consequently, your paperwork will be filed in your civil habeas case (51CIV16-000580) as opposed to the related criminal case listed on your submission.

Sincerely,


Craig A. Pfeifle
Presiding Judge

CAP*lh

cc: Ms. Sarah Morrison, Pennington County State's Attorney's Office

United States Court of Appeals

For The Eighth Circuit

Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24329

St. Louis, Missouri 63102

Michael E. Gans
Clerk of Court

VOICE (314) 244-2400
FAX (314) 244-2780
www.ca8.uscourts.gov

February 16, 2021

Mr. Joseph Arguello
SOUTH DAKOTA DEPARTMENT OF CORRECTIONS
23102
1600 North Drive
P.O. Box 5911
Sioux Falls, SD 57117-0911

RE: 21-1338 Joseph Arguello v. Jason Ravnborg, et al

Dear Mr. Arguello:

We have received notification from the district court that your motions for certificate for appealability and in forma pauperis status have been denied. The fee remains due for this appeal. Enclosed is an order of this court setting out your options for satisfying the Eighth Circuit fee. If you fail to take either of these options, this appeal may be dismissed for failure to prosecute without further notice.

Following notification that the fees have been paid or a motion for leave to appeal in forma pauperis is filed, the notice of appeal will be treated as an application for certificate of appealability in accordance with Rule 22(b) of the Federal Rules of Appellate Procedure and will be forwarded to a panel of judges for consideration. You will be advised of any action taken by court.

If you have any questions, please contact this office.

Michael E. Gans
Clerk of Court

CYZ

Enclosures

cc: Ms. Erin Elizabeth Handke
Mr. Matthew W. Thelen

District Court/Agency Case Number(s): 4:20-cv-04088-KES

IN THE UNITED States Court of Appeals

FOR THE Eighth circuit

Joseph Arguello petitioner,

Cave- 21-1338

28 USC § 1291

**Motion for Rehearing and Rehearing
Enbunc**

Vs

Jason Ranvsborg et, al.

**Whether the district court abused its discretion in refusing to hold
evidentiary hearing on ineffective assistance claim? Court must hold in the
positive, reverse and remand.**

This court ruling is to show unless the motion files and record conclusively shows that Arguello is entitled to no relief. An evidentiary hearing is critical required unless the allegations in the motion are inherently incredible.contradicted by the record, merely conclusory, or would not entitle the petition to relief, even if true.

Cite, Roundtree v US, 751 F 3d 923,926-27(*8th Cir 2014).

this court is required to consider whether district court was required to conduct an evidentiary hearing;**Engelen v US, 68 F 3d 238,240-41(*8th Cir 1995).**

In accordance to Martinez v Ryan 566 US 1, 14-17.The United States Supreme Court *holding whether the claim has some merit, herein a substantial one. Fed Constitutional issue.*

Thus can only be achieved by district court hearing the parties both sides.

Question of law and fact is legal standard of review and burden of proof /legal analysis

an error of law as court cannot make a factual determination based on the relative credibility of the individuals without an evidentiary hearing and observing that if neither statement is facially incredible and both contain similar specificity, counsel contrary statement is sufficient to support a finding that movants allegations cannot be accepted as true *cf Roundtree v US 751 F 3d 923,925-27(8th Cir 2014)*. **Credibility of narrators is required State v Craig, 850 NW 2d 828,839.** (As here raised Fed 22 2021 State did not raise its insubstantial).

Cited United States v Blaylock, 20 F 3d 1458(*9th Cir 1994) Ida 1468-69; US v Morrison, 449 US 361, 364, 66 L Ed 2d 564,101 S.CT. 665(1981). This is court of appeals should reverse and permit district court to rule on new trial. As State having asked for thirty days to respond.

Cited, Simmons v Lockhart, 915 F 2d 372,376(*8th Cir 1990) seen in application It is not same thing as saying it cannot be cause to excuse a procedural default. AS here due to Arguello was not given notice of admonishments as did not know that it's required of trial judge to admonish the jury at each recess nor that Attorney Rensch had not objected Judge Duffy saying this flies.

And wherefore, its State Habeas proceedings State court failed to appoint counsel to represent him. Establishing cause as Arguello being then prohibited from raising his ineffective assistance of counsel claim on direct appeal. Showing because could not raise ineffective assistance of counsel in his direct appeal, and had not been given counsel in State habeas proceedings procedural default must be excused lifted. Cause for government interference, inordinate delay, and unjustifiable delay in State court proceedings. **Cite Bookwalter v Steele 2017 US Dist Lexis 201514[*3]. State involvement is even greater when they appoint counsel.**

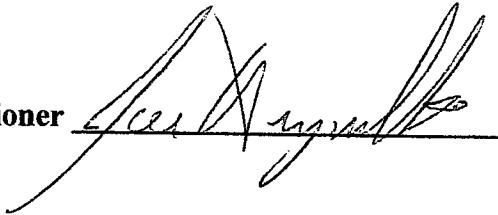
Certificate of service

One true and correct copy placed in the US mail postage prepaid to the following

**Matthew W. Thelen
US District Court of South Dakota
US Courthouse
Office of the clerk,
400 Phillips, Rm 128
Sioux Falls, SD 57401**

**United State Court of Appeals
For the eighth circuit
St Louis, Missouri 63102**

Pro-se by the petitioner



Signed this 26 day of May 2021

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 21-1338

Joseph Arguello

Appellant

v.

Jason Ravnsborg, Attorney General for South Dakota and Darin Young, Warden State
Penitentiary

Appellees

Appeal from U.S. District Court for the District of South Dakota - Southern
(4:20-cv-04088-KES)

ORDER

The \$505 appellate filing and docketing fee has not been paid and is due. Appellant is directed to either pay the fee in the district court or file a motion for leave to proceed in forma pauperis in this court within 28 days of the date of this order. If appellant does not pay the fee or move for IFP status by March 16, 2021, this appeal may be dismissed for failure to prosecute without further notice.

February 16, 2021

Order Entered Under Rule 27A(a):
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Mr. Joseph Arguello
#23102
SOUTH DAKOTA DEPARTMENT OF CORRECTIONS
1600 North Drive
P.O. Box 5911
Sioux Falls, SD 57117-0911

Eighth Circuit Court of Appeals

PRO SE Notice of Docket Activity

The following was filed on 06/04/2021

Case Name: Joseph Arguello v. Jason Ravnsborg, et al
Case Number: 21-1338

Docket Text:

PETITION for enbanc rehearing and also for rehearing by panel filed by Appellant Mr. Joseph Arguello w/service 05/26/2021 [5042328] [21-1338]

The following document(s) are associated with this transaction:

Document Description: petition for rehearing filed

Notice will be mailed to:

Mr. Joseph Arguello
SOUTH DAKOTA DEPARTMENT OF CORRECTIONS
23102 _____
1600 North Drive
P.O. Box 5911
Sioux Falls, SD 57117-0911

Notice will be electronically mailed to:

Ms. Erin Elizabeth Handke: erin.handke@state.sd.us

Eighth Circuit Court of Appeals

PRO SE Notice of Docket Activity

The following was filed on 03/01/2021

Case Name: Joseph Arguello v. Jason Ravnsborg, et al

Case Number: 21-1338

Docket Text:

MEMORANDUM of Appellant Mr. Joseph Arguello in support of application for certificate of appealability, Doc No. [5004076-2]. w/service 03/01/2021. [5009409] [21-1338]

The following document(s) are associated with this transaction:

Document Description: Memo in Support of Application for COA

Notice will be mailed to:

Mr. Joseph Arguello
SOUTH DAKOTA DEPARTMENT OF CORRECTIONS
23102
1600 North Drive
P.O. Box 5911
Sioux Falls, SD 57117-0911

Notice will be electronically mailed to:

Ms. Erin Elizabeth Handke: erin.handke@state.sd.us

Eighth Circuit Court of Appeals

PRO SE Notice of Docket Activity

The following was filed on 03/01/2021

Case Name: Joseph Arguello v. Jason Ravnsborg, et al
Case Number: 21-1338

Docket Text:

MOTION for leave to proceed on appeal in forma pauperis, filed by Appellant Mr. Joseph Arguello w/service 03/01/2021. [5009417] [21-1338]

The following document(s) are associated with this transaction:

Document Description: Motion for IFP

Document Description: Envelope

Notice will be mailed to:

Mr. Joseph Arguello
SOUTH DAKOTA DEPARTMENT OF CORRECTIONS
23102
1600 North Drive
P.O. Box 5911
Sioux Falls, SD 57117-0911

Notice will be electronically mailed to:

Ms. Erin Elizabeth Handke: erin.handke@state.sd.us

Mr. Joseph Arguello
#23102
SOUTH DAKOTA DEPARTMENT OF CORRECTIONS
1600 North Drive
P.O. Box 5911
Sioux Falls, SD 57117-0911

*****NOTE TO PUBLIC ACCESS USERS***** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing.

Eighth Circuit Court of Appeals

Notice of Docket Activity

The following transaction was filed on 02/18/2021

Case Name: Joseph Arguello v. Jason Ravnsborg, et al

Case Number: 21-1338

Docket Text:

RECORD FILED - MISC. RECORD, Comments: 1 envelope containing 1 CD of State Court Records [Return to the District Court at end of case], Source Location: USDC / SDSF [5005767] [21-1338] (Scott Lewandoski)

Notice will be electronically mailed to:

Ms. Erin Elizabeth Handke: erin.handke@state.sd.us

Notice will be mailed to:

Mr. Joseph Arguello
SOUTH DAKOTA DEPARTMENT OF CORRECTIONS
1600 North Drive
P.O. Box 5911
Sioux Falls, SD 57117-0911

The following information is for the use of court personnel:

DOCKET ENTRY ID: 5005767

RELIEF(S) DOCKETED:

DOCKET PART(S) ADDED: 6709301, 6709302

Mr. Joseph Arguello
#23102
SOUTH DAKOTA DEPARTMENT OF CORRECTIONS
1600 North Drive
P.O. Box 5911
Sioux Falls, SD 57117-0911

STATE v. ARGUELLO
2015 S.D. 103

548 N.W.2d. 463
(SD 1996)

Pertains to
Consecutive
Sentences
Topic
Summary
Consecutive
Sentences

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

JOSEPH ARGUELLO,
873 N.W.2d. 490
(SD 2015)

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT OF
THE SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE JEFF W. DAVIS
Judge

MARTY J. JACKLEY
Attorney General

JOHN M. STROHMAN
Assistant Attorney General
Pierre, South Dakota

Attorneys for plaintiff
and appellee.

ROBERT VAN NORMAN
Rapid City, South Dakota

Attorney for defendant
and appellant.

CONSIDERED ON BRIEFS
ON NOVEMBER 30, 2015

OPINION FILED 12/30/15

[¶10.] The record is unclear whether the judge ever watched the videos. At an earlier motion hearing, the parties indicated that the judge should watch the videos at his convenience because they were the subject of a pretrial motion. The judge indicated at the end of that hearing that he would "get the videos watched." But there is no indication in the record—from a decision of the court or otherwise—whether the judge actually viewed the videos. We need not, however, determine whether the judge watched the videos in this case. Even if we assume he did not, Arguello cannot establish prejudice. Arguello failed to challenge the sufficiency of the evidence on appeal. Therefore, the sufficiency of the evidence to support the State's case stands unchallenged. Because Arguello has not established prejudice, we reject his challenge to his conviction on this ground.

[¶11.] We do, however, reiterate that it is improper to leave the courtroom during a trial. "The presiding judge is an integral part of the trial court, and ought not to be absent for any period while the trial is proceeding." *O'Conner*, 231 N.W. at 524. "It will thus be seen that the judge is an essential constituent of a court, and that there can be no court in the absence of the judge or judges." *State v. Jackson*, 21 S.D. 494, 113 N.W. 880, 881 (1907). Moreover, a judge's absence can have a significant effect on the jury. Jurors are mindful of a judge's behavior during trial—every word the judge says and every action the judge takes is received with deference. *People v. Vargas*, 673 N.E.2d 1037, 1042 (Ill. 1996). Therefore, a "judge's absence from the bench during the course of the trial may create a negative impression in the minds of the jury to the detriment of the defendant." *Id.* We also note that a judge's absence may cause the jury to believe the matters in court are

ZINTER, Justice

[¶1.] Joseph Arguello was convicted of [REDACTED]

[REDACTED] Arguello appeals his conviction on the ground that the trial judge left the courtroom during the presentation of evidence. Arguello also appeals on the ground that the judge failed to give the jury a statutorily required admonishment before recesses and adjournments. We affirm.

Facts and Procedural History

[¶2.] Joseph Arguello had a twenty-year, on-again, off-again relationship with R.D. During one period of separation, R.D. married another man and they had three children. R.D. divorced in 2007, and she reunited with Arguello in 2008. [REDACTED]

[REDACTED]

[REDACTED]

[¶3.] Circuit Court Judge Jeff Davis presided at trial. Immediately after the jury was empaneled on the first day of trial, Judge Davis gave the following admonition to the jury:

It's important that you honor your oaths as jurors. There's a statutory admonition I'm required to give you, which essentially says: You are to form or express no opinions about the case, discuss it among yourselves or allow anyone to discuss it with you until it's finally submitted to you for your determination. It's important that the testimony and the evidence come only from the witness stand and has been properly admitted for you folks to consider. Rather than say that at every recess, I'll say "Remember the admonition," and that's what I'm talking about.

The judge did not give the full admonition again during the three-day trial. At each recess or adjournment, he told the jury to "remember the recess admonition" (on one

occasion he told the jury to "remember the recess admonition that I've given you in the past"). The judge also failed to give any admonition before one lunch recess.

[¶4.] Near the end of the second day of trial, the attorneys and the judge agreed that the jury would view videos [REDACTED]

[REDACTED] The judge then told the jury that he had "a little mission about 4 o'clock that involve[d] the state's attorney's office on entirely unrelated matters" and that he would leave the courtroom while the jury watched the videos. The judge also told the jury that if necessary, "they'll change [the videos] and offer them separate." The judge told the bailiff the jury could take a break "in between" and he would be "back around . . ." The transcript does not reflect the time the judge actually left the courtroom and the time he returned. However, there is no dispute that the judge left the courtroom while the videos were presented to the jury and he returned to discharge the jury for the day. It appears from the transcript that both attorneys agreed to have the videos played without the judge's presence.¹

Decision

[¶5.] Arguello appeals raising two issues. Arguello first argues that Judge Davis caused structural error, invalidating the convictions, because he left the courtroom during the presentation of evidence.² Structural error requires reversal

1. Arguello's appellate counsel did not represent him at trial.
2. Arguello argues that the judge's absence from the courtroom violated Arguello's constitutional rights. We review alleged violations of constitutional rights de novo. *State v. Ball*, 2004 S.D. 9, ¶ 21, 675 N.W.2d 192, 199.

without a showing of prejudice. *Guthmiller v. Weber*, 2011 S.D. 62, ¶ 16, 804 N.W.2d 400, 406 (“A structural error resists harmless error review completely[.]”). Structural errors so greatly affect the framework of the trial that they merit automatic reversal. *Id.* ¶ 16 (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 282, 113 S. Ct. 2078, 2083, 124 L. Ed. 2d 182 (1993)). However, structural errors occur only “in a very limited class of cases.” *Neder v. United States*, 527 U.S. 1, 8, 119 S. Ct. 1827, 1833, 144 L. Ed. 2d 35 (1999).

[¶6.] This Court, following *Neder*, has only recognized six types of structural error:

(1) a deprivation of the right to counsel; (2) a biased judge; (3) an unlawful exclusion of grand jurors of the defendant’s race; (4) a deprivation of the right of self-representation at trial; (5) a deprivation of the right to a public trial; and (6) an erroneous reasonable doubt standard.

Guthmiller, 2011 S.D. 62, ¶ 16, 804 N.W.2d at 406 (citing *Neder*, 527 U.S. at 8, 119 S. Ct. at 1833); *State v. Hayes*, 2014 S.D. 72, ¶ 17, 855 N.W.2d 668, 674-75. We have also followed the Supreme Court in rejecting any sort of “functional equivalent[s].” *Guthmiller*, 2011 S.D. 62, ¶ 16, 804 N.W.2d at 406 (citing *Neder*, 527 U.S. at 8, 119 S. Ct. at 1833). Therefore, we have declined to find an error structural unless it fits within one of the six categories. *See id.* at ¶ 17 (“Here, the trial judge’s improper comments do not fit within one of the six categories of structural error recognized by the Supreme Court.”).

[¶7.] This case is like *Guthmiller*. The judge erred in leaving the courtroom during the presentation of evidence, but the error is not one of the six recognized structural errors. *See Guthmiller*, 2011 S.D. 62, ¶¶ 17-18, 804 N.W.2d at 406-7.

Arguello recognizes the *Guthmiller* categorical framework. Therefore, he argues

that the judge's absence from the courtroom violated some of the constitutional rights recognized in the six categories; i.e. the rights to counsel, due process, and a public trial. But there is no evidence suggesting that the judge's absence violated any one of those constitutional rights. There is certainly no evidence suggesting a constitutional violation so egregious as to "necessarily render[] [the] trial fundamentally unfair." *See id.* at ¶ 16. Because the error in this case does not fit the categorical framework, we conclude that no structural error occurred.

[¶8.] This conclusion is supported by our pre-*Neder* cases disapproving judges leaving the courtroom during trials. Although we have consistently disapproved of this conduct, we have not reversed without a showing of prejudice. In *O'Connor v. Bonney*, 57 S.D. 134, 231 N.W. 521, 524 (1930), the judge and court reporter left the courtroom during closing arguments. We "emphatically disapproved" the judge's departure but we affirmed the judgment, indicating that the judge's absence alone was insufficient to reverse. *O'Connor*, 231 N.W. at 524 ("We do not say that what is claimed to have taken place during the absence of the judge and reporter in this case would alone be sufficient cause for reversal, but such practice is emphatically disapproved."). In *Poe v. Arch*, 26 S.D. 291, 128 N.W. 166, 168 (1910), a trial judge briefly left the courtroom when a party fainted and was carried to an adjoining room, but defense counsel continued with his argument. We again upheld the jury verdict because there was no prejudice to the defendant. *Id.*

Many other state and federal cases support the conclusion that a trial judge's absence is improper, but it is not structural error.³

[¶9.] Because there was no structural error, Arguello must establish prejudice. Arguello argues that he was prejudiced because the judge's absence prevented a fair consideration of his motion for judgment of acquittal. Arguello contends that because the judge was not present to observe [REDACTED]

[REDACTED] the judge could not have properly considered Arguello's challenge to the sufficiency of the evidence.

3. See *United States v. Love*, 134 F.3d 595, 604-05 (4th Cir. 1998) (rejecting the defendant's argument that the judge's temporary absence was structural error, requiring a showing of prejudice to justify reversal); *Heflin v. United States*, 125 F.2d 700, 701 (5th Cir. 1942) (holding that a judge's absence for a few minutes during closing argument did not result in prejudice and was thus not reversible error); *People v. Garcia*, 826 P.2d 1259, 1266 (Colo. 1992) (holding that although the judge erred in leaving during the playing of a video during trial, defendant's failure to object waived the error); *Sherman v. Marden*, 525 N.W.2d 550, 553 (Minn. Ct. App. 1994) ("While it is true that a judge who, with or without objection, leaves the courtroom while court continues in session demonstrates poor judgment, here the judge's absence was not so egregiously prejudicial as to deny Sherman a fair trial."); *State v. Scott*, 824 N.W.2d 668, 687 (Neb. 2012) ("Although we disapprove of the judge's practice, we conclude that Scott did not establish prejudice resulting from the judge's absences and that the district court did not err when it overruled the motion for new trial on this basis."); *Coddington v. State*, 254 P.3d 684 (Okla. Crim. App. 2011) (holding that a judge's absence does not automatically create structural error).

We recognize that other cases have concluded that a judge's absence from the courtroom can be structural error. See, e.g., *United States v. Mortimer*, 161 F.3d 240, 242 (3d Cir. 1998) (finding structural error when the judge vanished during closing statements, without consent or knowledge of either party); *Riley v. Deeds*, 56 F.3d 1117, 1119-20 (9th Cir. 1995) (holding that a judge's absence was structural error when the judge did not present himself to have testimony read back, leaving the task to his law clerk); *People v. Vargas*, 673 N.E.2d 1043, 1038 (Ill. 1996) (holding that a judge's absence during a felony trial is per se reversible error). However, *Neder* was decided after these cases, and South Dakota applies the *Neder* categorical approach.

not important enough to merit attention. We adopt the Massachusetts Supreme Court's view that:

The very act of a judge's presiding over the trial has a profound and sobering influence on all those who are present in the courtroom. '[T]he core of our constitutional system is that individual liberty must never be taken away by shortcuts. . . .'

Commonwealth v. Bergstrom, 524 N.E.2d 366, 377 (Mass. 1988) (quoting *Jay v.*

Boyd, 351 U.S. 345, 369-70, 76 S. Ct. 919, 933, 100 L. Ed. 2d 1242 (1956) (Black, J., dissenting)).

[¶12.] Arguello also argues that we should reverse his convictions because Judge Davis failed to fully and regularly admonish the jury at each recess and adjournment.⁴ SDCL 23A-24-5 requires that the following admonition be given to jurors at each adjournment of court:

Jurors shall, at each adjournment of court, whether permitted to separate or kept in charge of officers, be admonished by the court as follows: You are reminded that you are not to discuss any aspect of this case among yourselves or with anyone else and that you should not form or express any opinion on the case until it is given to you for decision.

Id. Substantial compliance with this requirement is sufficient. *State v. Brim*, 2010 S.D. 74, ¶ 14, 789 N.W.2d 80, 85 (holding that the judge substantially complied with the statute at each and every recess and adjournment); *see also State v. Iron Necklace*, 430 N.W.2d 66, 78 (S.D. 1988) (holding that failing to specifically admonish one alternate juror at the beginning of trial was not grounds for a mistrial when the judge carefully followed the statutory mandate at every other

4. Jury admonitions involve courtroom procedure. We review a trial judge's alleged violation of courtroom procedures for an abuse of discretion. *State v. Selalla*, 2008 S.D. 3, ¶ 18, 744 N.W.2d 802, 807.

adjournment). Substantial compliance means "actual compliance with respect to the substance essential to every reasonable objective of the statute." *R.B.O. v. Congregation of Priests of Sacred Heart, Inc.*, 2011 S.D. 87, ¶ 12, 806 N.W.2d 907, 911-12 (quoting *Wagner v. Truesdell*, 1998 S.D. 9, ¶ 7, 574 N.W.2d 627, 629).

Substantial compliance cannot be shown unless the purpose of the statute has been served. *Id.*

[¶13.] Arguello contends that the judge did not substantially comply with the statutory mandate. We agree. On the first day of trial, immediately after the jury had been empaneled, the judge's first admonition substantially complied with the statute. However, he never gave the one-sentence admonishment again in a three-day trial. Instead, at each adjournment or recess, he merely told the jury to "remember the admonition." Additionally, the judge gave no admonishment before the lunch recess on the second day of trial.

[¶14.] The purpose of the admonishment is to prevent juror misconduct. More specifically, its purpose is to dissuade jurors from forming or expressing any opinion about the case until all of the evidence has been presented. The admonishment is also intended to dissuade jurors from talking about the case with anyone, including each other, until the case has been finally submitted for their consideration. In a three-day trial, these purposes are not fulfilled by only one admonishment given before the presentation of evidence has started. It is too much to expect that jurors will remember the specific admonitions one, two, and three days after they are first given. To be effective, it is also important to emphasize the admonition when the evidence is being heard—the time when jurors are most likely

to forget to keep an open mind until they hear all of the evidence. Additionally, the admonition must be repeated to dissuade the jurors from communicating among themselves and with others. The stakes are too high in today's environment of smartphones, the internet, and social media to not repeat the full admonition. We are not suggesting that substantial compliance cannot be found without parroting the statute at every break. But the purpose of the admonishment is to prevent juror misconduct, and only one actual admonishment at the end of jury selection is not sufficient to satisfy that purpose. We conclude that the admonishments given in this case did not substantially comply with the statute.

[¶15.] The question then, is what is the remedy for the failure to substantially comply with the statute? Arguello argues that reversal is required because if we condone what occurred, SDCL 23A-24-5 will become a nullity. Arguello is correct to the extent that we cannot condone the admonitions given in this case. However, our cases have established that reversal is not warranted where there is no indication that the failure to properly admonish resulted in prejudice. *See Brim*, 2010 S.D. 74, ¶ 13, 789 N.W.2d at 85 ("The trial court's failure to admonish the first panel of venirepersons does not constitute reversible error as there is no indication that the failure to do so affected the verdict in this case."); *see also Iron Necklace*, 430 N.W.2d at 78 (concluding that a minor omission did not affect the verdict); *State v. Lang*, 354 N.W.2d 723, 725 (S.D. 1984) (same).

[¶16.] A prejudice requirement is warranted because the admonition is a prophylactic measure against juror misconduct, but if the harm the statute is intended to prevent never occurs, reversal to have the admonition given would be

pointless. *United States v. Nelson*, 102 F.3d 1344, 1348 (4th Cir. 1996) (holding a judge's complete failure to admonish jury was not fundamental error meriting automatic reversal where the party failed to object and no prejudice or harm was shown).⁵ See also *State v. Lopes*, 826 A.2d 1238, 1252-53 (Conn. App. Ct. 2003) (holding that the defendant was not entitled to reversal without a showing of prejudice, even though the judge did not comply with the terms of the statute); *People v. Small*, 2 A.D.2d 935, 935, (N.Y. App. Div. 1956) *aff'd*, 143 N.E.2d 512 (N.Y. 1957) (holding that it was error for a judge to not admonish the jury at all on any subject until the case was submitted, but it was not reversible error without a showing of prejudice). Because Arguello concedes that he cannot show prejudice as a result of this error, we also deny his challenge to his convictions on this ground.

[¶17.] Affirmed.

[¶18.] GILBERTSON, Chief Justice, and SEVERSON, WILBUR, and KERN, Justices, concur.

5. *Nelson* acknowledged *United States v. Williams*, 635 F.2d 744, 745 (8th Cir. 1980), where no showing of prejudice was required to warrant reversal. *Nelson* noted that *Williams* was decided before *United States v. Olano*, 507 U.S. 725, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993). In *Olano*, the Supreme Court noted that reversal would be pointless in a case where no harm resulted from an alternate juror sitting in on deliberations. *Olano*, 507 U.S. at 738, 113 S. Ct. at 1780. Because *Olano* held that reversal for that error would be pointless where the harm sought to be prevented never occurred, *Nelson* declined to follow *Williams*. We are persuaded by the reasoning in *Nelson*.

**Additional material
from this filing is
available in the
Clerk's Office.**