No. 22-6932

IN THE SUPREME COURT OF THE UNITED STATES

In re GARLAND RAY GREGORY, JR.

PETITIONER

PETITION FOR WRIT OF MANDAMUS

Garland Ray Gregory, Jr. #01566
Mike Durfee State Prison
1412 Wood Street
Springfield, S.D. 57062-2238

Petition For Writ Of Mandamus

Petitioner is a state prisoner at the Mike Durfee State Prison, this petition arises from the Eighth Circuit Appellate Court's denial of petitioner's motion for a Certificate Of Appealability, of the Federal District Court's denial of petitioners Fed. Rule Civ. Proc. Rule 60(b)(4)(5) Motion.

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## Relief sought

Eighth Circuit Appellate Court, et. al. ordered to grant petitioner's Rule 60(b) Motion.

## Issue Presented

Petitioner's Rule 60(b)(4)(5) motion was unconstitutionally treated as a successive habeas application, denying equal protection of the law.

## Orders below

Attached as Exhibit - 1

## Jurisdiction

28 U.S.C. §1651(a)

## Statement of the Case

Petitioner's Rule 60(b) Motion is a continuation of the habeas filed 27 January 1981. The South Dakota Fourth Judicial Circuit Court, the United States District Court of South Dakota

Western Division, and the Eighth Circuit Appellate Court unconstitutionally denied petitioner's Rule 60(b)(4)(5) Motion, applying second or successive habeas (28 U.S.C. § 2244(b)(3)(A)) prohibitions.

**Argument**

1. Reasons For Granting The Writ.

South Dakota's Federal District, and Eighth Circuit Appellate Courts, denied petitioner Fourteenth Amendment protection,[1] and violated the Supremacy Clause (U.S.C.S. Const. Art. VI, cl 2),[2] in its clearly erroneous[3] application of Gonzalez's/AEDPA[4] prohibitions to petitioner's Rule 60(b)(4)(5) Motion application.

Understandably, Gonzalez is what it is. Yet it has this facet:

Banister v. Davis, 140 S. Ct. 1698, 1719 (2020): **"Gonzalez held, a Rule 60(b) motion that attacks "some defect in the integrity of the federal habeas proceeding"... does not count as**

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[1] **Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) "the purpose of the equal protection clause of the Fourteenth Amendment (emphasis original) is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by expressed terms of a statute or by its improper execution through duly constituted agents." (emphasis added)**

[2] **Murphy v. NCAA, 138 S. Ct. 1461, 1476 (2018) "And the Constitution indirectly restricts the States by granting certain legislative powers to Congress, see Art. 1, §8, while providing in the Supremacy Clause that federal law is the "Supreme Law of the Land... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl.2. This means that when federal and state law conflict, federal law prevails and state law is preempted."**
**Direct TV, Inc. v. Imburgia, 577 U.S. 47, 53 (2015) "Lower court judges are certainly free to note their disagreement with a decision of the U.S. Supreme Court, but the Supremacy Clause, U.S. Const. art. VI, cl.2, forbids State Courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source."**
**Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 324 (2015) "It is apparent that this Clause creates a rule of decision: Courts "shall" regard the "Constitution," and all laws "made in Pursuance thereof," as "the Supreme Law of the Land." They must not give effect to state laws that conflict with federal laws." (citation omitted)**

[3] **Anderson v. Bessemer City, 470 U.S. 564, 573 (1985) "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (citation omitted) (emphasis added)**

[4] **Gonzalez v. Crosby, 545 U.S. 524, 529 (2005) "The new habeas restrictions introduced by A.E.D.P.A. are made indirectly relevant, however, by that fact that Rule 60(b), like the rest of the Rules of Civil Procedure, applies in habeas corpus proceedings under 28 U.S.C. 2254 only "to the extent that [it is] not inconsistent with" applicable federal statutory provisions and rules. 28 U.S.C. § 2254 Rule 11;**

**a habeas petition at all, and so can proceed. 545 U.S. at 532, 125 S.Ct. 2641, 162 L.Ed.2d 480. (emphasis added)**

as well as other Supreme Court holdings:

Horne v. Flores, 557 U.S. 433, 447, 454 (2009) "**Federal Rule of Civil Procedure 60(b)(5) permits a party to obtain relief from a judgment or order if, among other things, "applying [the judgment or order] prospectively is no longer equitable."**

**at 454 Rule 60(b)(5) permits relief from a judgment where "[i] the judgment has been satisfied, released or discharged; [ii] it is based on a earlier judgment that has been reversed or vacated, or [iii] applying it prospectively is no longer equitable. Use of the disjunctive "or" makes it clear that each of the provisions three grounds for relief is independently sufficient..." (emphasis added)**

pronouncing petitioner's motion properly before the court for constitutional review. The deciding court's have abused their discretion[5] in denying petitioner's motion.

Petitioner's Rule 60(b) Motion is not successive. Petitioner's habeas is un-terminated,[6] the motion is a further iteration[7] of the habeas application filed 27 January 1981.

The statute of limitation is tolled,[8] petitioner's motion is properly filed.

The Federal District court's action holding it was restricted by Curry v. United States, 507 F.3d 603, 604 (7th Cir. 2007):

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[5] **Cameron v. EMW Women's Surgical Ctr., P.S.C., 142 S. Ct. 1002, 1012 (2022) "But a court fails to exercise it discretion soundly when it base[s] its ruling on an erroneous view of the law." Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405, 110 S. Ct. 2447, 110 L.Ed.2d 359 (1990)..."**

[6] In Gregory v. State, 353 N.W.2d 777 (S.D. 19984) The South Dakota Supreme Court, as it is required to do (SDCL § 15-24-1, §2-14-2.1), did not conclude the law (SDCL § 15-6-52(a)) on its specific finding on petitioner's SDCL § 23A-7-4(1)(Rule 11(c)(1) violation claim. (details in ii. Rule 60(b)(5) claim pg. 11)

[7] **Banister v. Davis, 140 S. Ct. 1698, 1705-1707 (2020): "The phrase "second or successive application," on which all this rides, is a "term of art," which "is not self-defining." (citation omitted) We have often made clear that it does not "simply 'refer'" to all filings made "'successively in time,'" following an initial application. (citation omitted) For example, the court of appeals agree (as do both parties) that an amended petition, filed after the initial one but before judgment, is not second or successive... So too, appeals from the habeas court's judgment (or still later petitions to this Court) are not second or successive; rather, they are further iterations of the first habeas application. Chronology here is by no means all. (emphasis added)**

[8] **Gonzalez v. Crosby, 545 U.S. 524, 527 (2005): "section 2244(d)(2) tolls the statute of limitations during the pendency of "properly filed" applications only... an application for state post conviction can be "properly filed" even if the state courts dismiss it as procedurally barred. See id. at 531 U.S. 4, 148 L.Ed.2d 213, 121 S. Ct. 361." (emphasis added)**

**"must be interpreted as a petitioner for relief under 28 U.S.C. § 2254."**

is the type of equal protection violation the Court characterizes in Olech, supra (fn. 1).

Secondarily, Gonzalez can't apply constitutionally, it creates a discriminated class,[9] against valid Rule 60(b)(4) void judgment claims being denied constitutional examination.[10]

Unavoidably the motion presents a mixed claim (the integrity of the proceedings, that examined the merit of the claim, effecting its outcome). Constructively, the integrity facet supersedes the merit concern; it invalidates the 'judgment', 'order', etc.; the definition of legal impotence: "A legal nullity, wholly void, without power or effect, whatsoever."[11]

Petitioner brought two classes of Rule 60(b) claims: two Rule 60(b)(4) void judgment claims, one Rule 60(b)(5) overturned judgment claim, and one Rule 60(b)(5) satisfied judgment claim. The nature of the void judgment claim as 'Constitutionally' characterized across the circuits is exemplified succinctly in language from New York Life Ins. Co. v. Brown, 84 F.3d 137, 142 (5th Cir. 1996):

**"When, however, the motion is based on a void judgment under Rule 60(b)(4) the district court has no discretion - the judgment is either void or its not." (emphasis added)**

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[9] **Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) "Our cases have recognized successful equal protection claims brought by a "class of one," where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. (citations omitted) (emphasis added)**

[10] **New York Life Ins. Co. v. Brown, 84 F.3d 137, 142 (5th Cir. 1996): "When, however, the motion is based on a void judgment under Rule 60(b)(4) the district court has no discretion - the judgment is either void or its not." (emphasis added)**

[11] **United Student Aid Funds v. Espinosa, 559 U.S. 260, 271 (2010) "A void judgment is a legal nullity...Although the term "void" describes a result, rather than the conditions that render the judgment unenforceable, it suffices to say that a void judgment is one so effected by a fundamental infirmity that the infirmity may be raised even after the judgment becomes final." (emphasis added)**
**LaCroix v. Fluke, 2022 S.D. 29, P20 "We have further concluded that a defendant can challenge, in a request for post-conviction relief, the circuit court's jurisdiction to act on a criminal charge. This is because "[s]ubject matter jurisdiction cannot be conferred by agreement, consent, or waiver" or be "acquired by estoppel." Also, "[a] judgment rendered by a court without jurisdiction to pronounce it is wholly void without any force or effect whatever." (citations omitted) (emphasis added)**

declaratively stating, that the constitutional examination for whether the judgment is void or not, is required to take place.

**i.** Petitioner's Rule 60(b)(4) insufficient information void judgment claim.

The information filed (Exhibit -2) did not set forth all the elements necessary to constitute the offense intended to be punished. The agreement element[12] is missing from the information. Nor does the statute (SDCL § 22-3-8) language, satisfy the Constitution's Sixth Amendment requirement; it does not "descend to the particulars,"[13] and led to the "uncertainty and ambiguity,"[14] demonstrated by petitioner's words in court:

Gregory v. State, 353 N.W.2d 777, 779 (S.D. 1984) **"I dispute the fact that I did not shoot Michael Young [sic], and I did not make an open agreement to shoot Michael Young to John Archambault. But I did carry on a conversation with him about that. But I didn't agree to it. But I was involved in the conversation where it was mentioned. (emphasis added)**

denying the element, the "distinct evil". Jimenez-Recio, supra

There is the posit of this claim being previously before the court in Gregory v. Class, 1998 S.D. 106. Petitioner was unconstitutionally denied (Gregory v. Weber 99-3371)

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[12] **United States v. Jimenez Recio, 537 U.S. 270, 274 (2003) "The Court has repeatedly said that the essence of a conspiracy is "an agreement to commit an unlawful act. United States v. Carll, 105 U.S. 611, 612. That agreement is "a distinct evil," which may exist and be punished whether or not the substantive crime ensues." Salinas v. United States, 522 U.S. 52, 65, 139 L.Ed.2d 352, 188 S. Ct. 469 (1997)**

[13] **Russell v. United States, 369 U.S. 749, 765 (1962) "The indictment or information shall be a plain concise and definite written statement of the essential facts constituting the offense charged. It is an elementary principle of criminal pleading, that where the definition of an offense , whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition, but it must state the species, -- it must descend to particulars.'" An indictment not framed to apprise the defendant "with reasonable certainty, of the nature of the accusation against him...is defective, although it may follow the language of the statute." "In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set fort all the elements necessary to constitute the offense intended to be punished..."**

[14] **Hamling v. United States, 418 U.S. 87, 117 (1974) ) "It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as "those words themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished ...at 118 ... Where guilt depends so crucially upon such a specific *identification of fact*, our cases have uniformly held that an indictment must do more than simply repeat the language of the criminal statute. 369 U.S., at 764." (emphasis added)**

constitutional review[15] of the State's coram nobis decision. The State's decision there is not only clearly erroneous,[16] but what it distinguished as 'point three':

**at P23: "Points three and four assert the state and federal reviewing courts erred in ruling against Gregory. (citation omitted) We view these claimed errors as pure legal questions, not amenable to coram nobis, and conclusively decided in earlier proceedings. (emphasis added)**

also subsequently overturned by a South Dakota Supreme Court decision Olesen v. Young, 2015 S.D. 73, P7 (basis for Rule 60(b)(5) claim addressed later).

The Court's holdings:

**Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006) "Subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived." (emphasis added)**

**United States v. Cotton, 535 U.S. 625, 630 (2002) "Consequently, defects in subject matter jurisdiction require correction regardless of whether the error was raised in district court." (emphasis added)**

require review[17] of petitioner's claim.

The South Dakota Supreme Court never held or said the claim (insufficient information) wasn't true, it said:

**at P21 "Gregory's first claim of error, regarding a defective information charging conspiracy to commit murder, was not brought up in prior proceedings. Even if we agreed for argument's sake that this was a jurisdictional error, we do not believe it was fundamental. Furthermore both points should have been raised in Gregory's earlier proceedings..." (emphasis added)**

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[15] **Smith v. Robbins, 528 U.S. 259, 292 (2000) "When a State elects to provide appellate review, however, the terms on which it does so are subject to constitutional notice." (emphasis added)**

[16] **Anderson v. Bessemer City, 470 U.S. 564, 573 (1985) "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (citation omitted) (emphasis added)**

[17] **Cooper v. Aaron, 358 U.S. 1, 18 (1958) "States are bound by the United States Supreme Court Constitutional interpretations." (emphasis added)**

'inferring' the statute **SDCL § 23A-8-3(3)(Rule 12(b)** forbid it from being brought in the manner that it was; which is untrue; and that they didn't think it was fundamental, which is also untrue.[18]

In Gregory v. Class, 1998 S.D. 106, P21, the court held:

**"Gregory's first claim of error, regarding a defective information charging conspiracy to commit murder, was not brought up in prior proceedings. Even if we agreed for argument's sake that this was a jurisdictional error, we do not believe it was fundamental. Furthermore both points should have been raised in Gregory's earlier proceedings..." (emphasis added)**

This is clearly erroneous, and no law of the case doctrine applies.[19]

The claim clearly being fundamental, was identified as such, contradicting what the court wrote at P21:

**at P32 "SABERS, Justice (concurring specially)**
**"The state further argues that coram nobis is inapplicable in this case as the writ is available to redress error of fact and not of law. We hold however, that coram nobis encompasses legal errors of constitutional significance such as jurisdictional defects...**
**The error presented in this case is of the fundamental nature contemplated by coram nobis. To allow a felony conviction to stand when it's based upon void conviction would be an injustice of the first magnitude." (emphasis added)**

Which is what the court has done, 'an injustice of the first magnitude'.

He goes on, in contradistinction to the earlier language at P21 purporting disqualification by the claim not being brought in earlier proceedings:

**at P32: "Petitions based upon fundamental defects may be heard and granted, notwithstanding the fact that the judgment was affirmed on appeal or has otherwise**

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[18] **Rosales-Mireles v. United States, 138 S. Ct. 1897, 1907 (2018) "reversing judgment for plain error as a result of insufficient indictment." (emphasis added)**

[19] **Pepper v. United States, 562 U.S. 625, 630 (2002) "Although we describe the "law of the case [a]s an amorphous concept," "[a]s most commonly defined, the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." (citation omitted) This doctrine "directs a courts discretion, it does not limit the tribunals power." "*Ibid.* Accordingly, the doctrine "does not apply if the court is 'convinced that [its prior decision] is clearly erroneous and would work a manifest injustice.' Agostini v. Felton, 521 U.S. 203, 236, 117 S. Ct. 1997, 138 L.Ed.2d 391 (1997)" (emphasis added)**

**become final... Similarly, lack of jurisdiction may be recognized in coram nobis even if the defect was known at the time of trial. (citation omitted) (emphasis added)**

The facts being what they are, were either never examined, or there has been an abuse of discretion.[20]

From its inception the orders and judgments rendered by the court in State v. Gregory, Fourth Judicial Circuit Court (CR. 79-520), have been wholly void and without force or effect whatever. LaCriox, supra

There is nothing for a statute of limitation, A.E.D.P.A. restrictions, etc., to attach to.

Also, pursuant to the U.S. Supreme Court's holding in Jefferson v. Upton, 560 U.S. 284, 289-290 (2010):

**"[T]his habeas application was filed prior to the enactment of the Antiterroism and Effective Death Penalty Act of 1996 and is therefore governed by federal habeas law as it existed prior to that point. (citation omitted)(emphasis added)**

petitioner's un-terminated habeas, filed 27 January 1981, and the actions in furtherance of it are a continuation of that un-terminated post-conviction/habeas petition.

**ii.** Petitioner's second Rule 60(b)(4)void judgment claim:

The South Dakota Supreme Court, as it is required to do (SDCL § 15-24-1, §2-14-2.1), did not conclude the law on its specific finding on petitioner's SDCL § 23A-7-4(1)(Rule 11(c)(1)) violation habeas claim.

**Gregory v. State, 353 N.W.2d 777 (S.D. 1984): at 779 ) "At the outset we must agree with petitioner that the record does not reveal that the trial court ever specifically outlined to petitioner the element of the offense of conspiracy to commit murder. Accordingly, we must determine whether the record indicates that defendant was aware of the nature of the offense to which he entered a guilty plea and, if so, whether such a showing satisfies the requirements of SDCL § 23A-7-4(1)." (emphasis added)**

[20] **Hubbell v. Fed Ex Smart Post, Inc., 993 F.3d 558, 575 (6th Cir. 2019) "abuse of discretion, "defined as a definite and firm conviction that the trial court committed a clear error of judgment."**

Failing to conclude the law on its specific finding of fact, on petitioner's specific claim, in the words of its statute:

**"shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." SDCL § 15-6-54(b) Multiple claims or parties. (emphasis added)**

What the court did was apply a 'totality of circumstances' analysis:

Gregory, supra at 780-781 : **"...the record in the instant case, when viewed in the totality of the circumstances, fairly supports the finding that the petitioner understood the nature of the charges against him and that his guilty plea was accepted in compliance of both statutory and constitutional requirements ...at 781... This is not to say that we are fully satisfied with the record that was made by the trial court at both December 12, 1979, arraignment and the March 13, 1980 change of plea proceeding. SDCL 23A-7-4(1) is clear and direct in its terms. We strongly urge our trial courts to comply fully with the requirements of this statute. There is no reason to cut constitutional corners, especially in cases involving as serious a crime as that with which petitioner was charged." (emphasis added)**

to the nature of that Rule 11 concern, consequently not supported by U.S. Supreme Court holding:

United States v. Broce, **488 U.S. 563, 570 (1989) "By entering a plea of guilty, the accused is not simply stating that he did the discrete acts described in the indictment; he is admitting guilt of a substantial crime. That is why the defendant must be instructed in open court on "the nature of the charge to which the plea is offered," Fed. Rule Crim. Proc. 11(c)(1), and why the plea "cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." McCarthy v. United States 394 U.S. 459, 466 (1969) (emphasis added)**

subsequently overturned by its own holdings:

Olesen v. Young, **2015 S.D. 73, P7 "We said in Rosen "[T]he totality of the circumstances analysis is inapplicable when the record reflects that no canvassing regarding a *Boykin* waiver ever took place." 2012 S.D. 15¶11, 810 N.W.2d at 766. See also Monette, 2009 S.D. 77, ¶16, 771 N.W.2d at 926-27. "In complete absence of a *Boykin* canvassing, a critical step is missing and the reviewing court does 'not consider the additional facts under the totality of the circumstances analysis'." Bilben, 2014 .D. 24, ¶14, 846 N.W.2d at 339 (quoting Rosen, 2012 S.D. 15, ¶11, 810 N.W.2d at 766. (emphasis added)**

Pursuant to U.S.C.S. 14th Amendment, U.S.C.S Const. Art. VI, CL2 (fn. 2), the Court's holding in Horne v. Flores, 557 U.S. 433, 447, 454 (2009):

**"Federal Rule of Civil Procedure 60(b)(5) permits a party to obtain relief from a judgment or order if, among other things, "applying [the judgment or order] prospectively is no longer equitable."**

**at 454 Rule 60(b)(5) permits relief from a judgment where "[i] the judgment has been satisfied, released or discharged; [ii] it is based on a earlier judgment that has been reversed or vacated, or [iii] applying it prospectively is no longer equitable. Use of the disjunctive "or" makes it clear that each of the provisions three grounds for relief is independently sufficient..." (emphasis added)**

permits petitioner's Rule 60(b)(5) claims, to be before the court for review.

**iii.** The decisions in Gregory v. State, 353 N.W.2d 777 (S.D. 1984); and Gregory v. Class, 1998 S.D. 106, have been overturned by subsequent S.D. Supreme Court holdings:

**Olesen v. Young, 2015 S.D. 73, P7 "We said in Rosen "[T]he totality of the circumstances analysis is inapplicable when the record reflects that no canvassing regarding a *Boykin* waiver ever took place." 2012 S.D. 15¶11, 810 N.W.2d at 766. See also Monette, 2009 S.D. 77, ¶16, 771 N.W.2d at 926-27. "In complete absence of a *Boykin* canvassing, a critical step is missing and the reviewing court does 'not consider the additional facts under the totality of the circumstances analysis'." Bilben, 2014 .D. 24, ¶14, 846 N.W.2d at 339 (quoting Rosen, 2012 S.D. 15, ¶11, 810 N.W.2d at 766. (emphasis added)**

that narrowed the scope[21] of SDCL § 23A-7-4(1)(Rule 11(c)(1), in a fundamental manner that their finding past their affirmation of the Rule's violation, being prohibited by their holding(s), is retrospectively applicable to the petitioner.

**iv.** The judgment in State v. Gregory, Fourth Judicial Circuit Court (CR. 79-520) has been satisfied. Petitioner's plea agreement[22] was inadvertently[23] breached by the South Dakota

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[21] **Schriro v. Summerlin, 542 U.S. 348, 351 (2004) "New substantial rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms." (citation omitted) (emphasis added)**

[22] **Puckett v. United States, 556 U.S. 129, 137 (2009) "Plea bargains are essentially contracts, subject to interpretation under general contract principles."**

[23] **Santobello v. New York, 404 U.S. 257, 262 (1971) "That the breach of agreement was inadvertent does not lessen it impact." (emphasis added)**

Legislature's 2005 action (language in Exhibit - 3) amending petitioner's felony classification. Capping penalty at fifty (50) years maximum imprisonment, petitioner's life sentence violates the plea bargain. Petitioner presently incarcerated past the 'good-time' (SDCL § 24-5-1) discharge date (on or about 21 October 2006) of the legal sentence.

**Conclusion**

For the reasons stated above, petitioner respectfully request that his Writ of Mandamus be granted.

Dated this 20th day of October, 2022

Garland R. Gregory Jr.

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