

Ex - 1



Fourth Judicial Circuit Court

Michelle K. Comer
Circuit Court Judge

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Sandra Semerad
Court Reporter

March 16, 2021

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

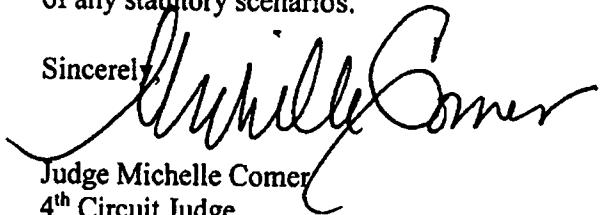
cv 21-50

RE: Gregory, Jr. v. State of South Dakota,

Dear Mr. Gregory:

I have received and reviewed your application for indigency as well as your Petition for Writ of Habeas Corpus. Based upon SDCL 21-27-3.3 your application must be denied as it was not brought within 2 years of any statutory scenarios.

Sincerely,



Judge Michelle Comer
4th Circuit Judge

FILED

MAR 16 2021

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT

By _____

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

GARLAND RAY GREGORY JR.,

Petitioner,

vs.

DANIEL SULLIVAN, WARDEN, STATE
PENITENTIARY; AND JASON
RAVNSBORG, ATTORNEY GENERAL
FOR THE STATE OF SOUTH DAKOTA,

Respondents.

CIV. 84-5133-JLV

ORDER

Petitioner Garland Ray Gregory, Jr., an inmate at the Mike Durfee State Prison in Springfield, South Dakota, appearing *pro se*, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.¹ (Docket 1). Pursuant to a standing order of April 1, 2018, the matter was referred to United States Magistrate Judge Daneta Wollmann pursuant to 28 U.S.C. § 636(b)(1)(B). The magistrate judge issued a report recommending the court dismiss the § 2254

¹Mr. Gregory captioned his pleading as a motion for relief pursuant to Fed. R. Civ. P. 60(b). (Docket 4). United States Magistrate Judge Daneta Wollmann recognized petitioner's claim for relief "must be interpreted as a petition for relief under 28 U.S.C. § 2254." (Docket 9 at p. 1 n.1) (Curry v. United States, 507 F. 3d 603, 604 (7th Cir. 2007)). The court agrees with the magistrate judge's characterization of Mr. Gregory's submission. See Huntimer v. Young, 4:19-CV-04125, 2019 WL 4934860, at *3 (D.S.D. Aug. 27, 2019) (citing Curry, 507 F. 3d at 604), report and recommendation adopted, 4:19-CV-04125, 2019 WL 4933418 (D.S.D. Oct. 7, 2019); Elliott v. South Dakota Seventh Circuit Court, 5:18-CV-05029, 2018 WL 11247857, at *1 (D.S.D. July 2, 2018) (citing Curry, 507 F. 3d at 604), report and recommendation adopted, CIV. 18-5029, 2018 WL 11247856 (D.S.D. Nov. 6, 2018).

petition without prejudice, "pending permission from the Eighth Circuit Court of Appeals to file a second or successive § 2254 petition." (Docket 9 at pp. 4-5).

Mr. Gregory timely filed objections to the report and recommendation ("R&R"). (Docket 11). In addition, Mr. Gregory filed a motion to stay this case until his case before the South Dakota Supreme Court is resolved. (Docket 13).

Having reviewed the R&R and Mr. Gregory's objections, the court finds the objections are legally without merit and that the R&R is an appropriate resolution of Mr. Gregory's petition. Accordingly, it is

ORDERED that petitioner's objections (Docket 11) are overruled.

IT IS FURTHER ORDERED that the report and recommendation (Docket 9) is adopted.

IT IS FURTHER ORDERED that the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (Docket 4) is dismissed without prejudice.

IT IS FURTHER ORDERED that petitioner's motion for stay (Docket 13) is denied as moot.

IT IS FURTHER ORDERED that, pursuant to 28 U.S.C. § 2253(c) and Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts, the court declines to issue a certificate of appealability. Although the court declines to issue a certificate of appealability, Mr. Gregory may timely seek a certificate of appealability from the United States Court of Appeals for the Eighth Circuit under Fed. R. App. P. 22. See Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts and Fed. R. App. P. 22.

IT IS FURTHER ORDERED that if Mr. Gregory does not attach a copy of the Eighth Circuit order 28 U.S.C. § 2244(b)(3)(A) authorizing the district court to consider any second or successive § 2254 application the Clerk of Court shall open a new case, immediately close the case and return all documentation to Mr. Gregory together with a copy of this order.

Dated March 2, 2022.

BY THE COURT:

/s/ Jeffrey L. Viken

JEFFREY L. VIKEN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

GARLAND RAY GREGORY JR.,

Petitioner,

vs.

DANIEL SULLIVAN, WARDEN, STATE
PENITENTIARY; AND JASON
RAVNSBORG, ATTORNEY GENERAL
FOR THE STATE OF SOUTH DAKOTA,

Respondents.

CIV. 84-5133-JLV

ORDER

On March 2, 2022, the court adopted the report and recommendation of a magistrate judge and dismissed Mr. Gregory's petition. (Docket 15 at p. 2). The court declined to issue a certificate of appealability and advised Mr. Gregory of his right to "seek a certificate of appealability from the United States Court of Appeals for the Eighth Circuit under Fed. R. App. P. 22." Id. Without obtaining a certificate of appealability from the Eighth Circuit, Mr. Gregory filed a notice of appeal on March 16, 2022. (Docket 18). Mr. Gregory also filed a motion for leave to appeal without prepayment of fees together with a prisoner trust account report. (Dockets 23 & 24).

A party may proceed on appeal *in forma pauperis* automatically if *in forma pauperis* status was granted in the district court. Fed. R. App. P. 23(a)(3). Mr. Gregory did apply to proceed *in forma pauperis* in the district court but under the authority granted by 28 U.S.C. § 636(b)(1)(A), the magistrate judge denied the

request. (Docket 10 at p. 4). The order required Mr. Gregory to “pay the \$5.00 filing fee on or by March 8, 2022, or his case will not proceed.” Id. Mr. Gregory filed objections to portions of the report and recommendation of the magistrate judge but did not appeal his obligation to pay the filing fee. (Docket 11). Mr. Gregory has not paid the \$5 filing fee.

A party is not permitted to appeal *in forma pauperis* if “the district court—before or after the notice of appeal is filed—certifies that the appeal is not taken in good faith[.]” Fed. R. App. P. 23(a)(3)(A). “Good faith in this context is judged by an objective standard and not by the subjective beliefs of the appellant.” Maddox v. Chisago Cty. Sheriff Office, No. 10-CV-2133, 2010 WL 3119393, at *2 (D. Minn. Aug. 5, 2010) (citing Coppedge v. United States, 369 U.S. 438, 444-45 (1962)).

In determining whether an appeal is taken in good faith, the court must decide “whether the claims to be decided on appeal are factually or legally frivolous.” Id. (citing Coppedge, 369 U.S. at 444-45). “An appeal is frivolous, and therefore cannot be taken in good faith, ‘where it lacks an arguable basis either in law or in fact.’” Id. (quoting Neitzke v. Williams, 490 U.S. 319, 325 (1989)).

The court finds Mr. Gregory’s appeal is not taken in good faith because it is legally frivolous. See Dockets 9 & 15. The court finds Mr. Gregory would “lack[] an arguable basis either in law or in fact” in contesting this foundational error with his case on appeal. Neitzke, 490 U.S. at 325. The court must deny Mr. Gregory leave to proceed *in forma pauperis* on appeal.

Accordingly, it is

ORDERED that plaintiff's motion (Docket 23) is denied.

IT IS FURTHER ORDERED that plaintiff is not allowed to appeal *in forma pauperis*.

IT IS FURTHER ORDERED that plaintiff shall pay the \$505 appellate filing fee to the Clerk of the United States District Court for the District of South Dakota or seek leave to proceed *in forma pauperis* in the United States Court of Appeals for the Eighth Circuit.

Dated July 25, 2022.

BY THE COURT:

/s/ Jeffrey L. Viken

JEFFREY L. VIKEN
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 22-2001

Garland Ray Gregory, Jr.

Petitioner - Appellant

v.

Herman Solem, Warden, State Penitentiary; Jason Ravnsborg, Attorney General for the State of
South Dakota

Respondents - Appellees

Appeal from U.S. District Court for the District of South Dakota - Western
(5:84-cv-05133-JLV)

JUDGMENT

Before ERICKSON, STRAS, and KOBES, 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.

The motion to proceed on appeal in forma pauperis is denied as moot.

September 06, 2022

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

/s/ Michael E. Gans

Ex - 2

STATE OF SOUTH DAKOTA)
COUNTY OF LAWRENCE)
STATE OF SOUTH DAKOTA,)
Plaintiff,)
vs.)
GARLAND RAY GREGORY, JR.)
and)
JOHN CARL ARCHAMBAULT,)
Defendants.)

IN CIR. JUIT COURT
EIGHTH JUDICIAL CIRCUIT
INFORMATION FOR: Count I-
Conspiring to Murder
Count II - Murder by
Premeditated Design
VIOLATION OF SDCL 22-3-8 and
22-16-4

Craig D. Grottenhouse, as prosecuting attorney, in the name of and by authority of the State of South Dakota, makes and files this Information against Garland Ray Gregory, Jr. and John Carl Archambault, and charges as to:

That on or about the 1st day of November, 1979, in the County of Lawrence, State of South Dakota, Garland Ray Gregory, Jr. and John Carl Archambault did commit the public offenses of Count I - Conspiring to Murder, Count II - Murder by Premeditated Design, SDCL 22-3-8 and 22-16-4 in that Garland Ray Gregory, Jr. and John Carl Archambault: Count I - Comspiring to Murder

That on or about November 1, 1979, Garland Ray Gregory, Jr. and John Carl Archambault did willfully, unlawfully, and feloniously conspire with each other to commit the offense of premeditated murder, an offense against the State of South Dakota, and that said Garland Ray Gregory, Jr. and John Carl Archambault did the following overt acts to-wit: Did receive a 12 gauge shot gun belonging to Ronald Brumbaugh and load the same with five shells; did receive a Volkswagen automobile

from said Ronald Brumbaugh and transport Michael Young to a county road in Lawrence County, South Dakota, and did murder said Michael Young at that point by shooting said Michael Young with a shot gun and did at that time remove identification from the body of said Michael Young and destroy the same, and did thereafter fabricate evidence and statements to conceal said murder. Contrary to SDCL 22-3-8.

Count II - Murder by Premeditated Design

Did willfully, unlawfully and feloniously effect the death of human being without authority of law and with a premeditated design to effect the death of the person killed, to-wit:

Did willfully, unlawfully and feloniously murder Michael D. Young by means of a firearm with out authority of law and with a premeditated design to effect the death of said person. Contrary to SDCL 22-16-4.

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STATUTE AND SENATE BILL LANGUAGE

SDCL 2-14-1 Words to be understood in ordinary sense.

Words used are to be understood in their ordinary sense except also that words defined or explained in 2-14-2 are to be understood as thus defined or explained.

SDCL 15-6-52(a) Effect of a court's findings.

In all actions tried upon the facts without a jury or with an advisory jury, the court shall, unless waived as provided in 15-6-52(b), find the facts specially, and state separately its conclusions of law thereon.

SDCL 15-6-54(b) Multiple claims or parties.

When multiple claims for relief or multiple parties are involved in an action, the court may direct the entry of a final judgment as to one or more but fewer than all the claims or parties only on express direction that there is a just reason for delay and upon express direction for the entry of judgment. In the absence of such determination, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties 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 15-24-1 Supreme Court Procedure – Circuit court practice and procedure applicable except otherwise provided.

Except as otherwise indicated by statute or rule, the statutes and rules of practice and procedure in the circuits courts of this state shall apply to practice and procedure in the Supreme Court.

SDCL 22-3-8 Conspiracy against state or local government – Penalty.

If two or more persons conspire, either to commit any offense against the state of South Dakota, or to defraud the State of South Dakota, or any township, school district, or municipal corporation in any manner or for any purpose, and one or more of the parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy is guilty of conspiracy and may be punished up to the maximum penalty which may be imposed for a crime which is one level below the penalty prescribed for the crime underlying the conspiracy. However it is not a crime to conspire to commit a Class 2 misdemeanor or a petty offense.

SDCL 23A-7-4(1)(Rule 11(c)(1)) Statement of rights to defendant pleading guilty or nolo contendere.

Before accepting a plea of guilty or nolo contendere a court must address the defendant personally in open court, subject to the exception stated in 23A-7-5, and inform him of, and determine that he understands the following:

(1) The nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum penalty provided by law:

SDCL 23A-6-7(5) Required contents for indictment or information.

An indictment or information is sufficient if it can be understood there from:

(5) That the offense charged is designated in such a manner as to enable a person of common understanding to know what is intended.

SDCL 23A-8-3(3)(Rule 12(b)) Defense or objection raised by motion – Raising issues before trial.

Any defense, objection or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to the trial:

(3) Defenses and objections based on defects in the indictment or information (other than it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pending of the proceedings).

SDCL 24-5-1 Sentence reduction for good conduct.

Every inmate sentenced for any term less than life, or who has an indeterminate sentence set at a term of years, or who has a life sentence commuted to a term of years, and subject to the provisions of 24-2-7 and 24-2-18, is entitled to a deduction of four months from his or her sentence for each year and pro rata for any part of a year for first year to tenth, and six months for each year thereafter until the expiration of the sentence as pronounced by the court for good conduct.

Change Of Felony Prescription

2005 S.D. SB 43

Enacted, March 15, 2005

An act to revise the South Dakota criminal code

Text

Section 148. That section 22-6-1 be amended to read as follows:

22-6-1 Except as otherwise provided by law, felonies are divided into the following nine classes which are distinguished from each other by the following maximum penalties which are authorized upon conviction:

(4) Class 1 felony: fifty years imprisonment in the state penitentiary. In addition, a fine of fifty thousand dollars may be imposed: