No. 22 - 7532

IN THE SUPREME COURT OF THE UNITED STATES

REX GARD, PETITIONER

V.

BRENT FLUKE, WARDEN,
MIKE DURFEE STATE PRISON
STATE OF SOUTH DAKOTA
AND
THE ATTORNEY GENERAL
OF THE STATE OF SOUTH DAKOTA

EXTRAORDINARY WRIT OF HABEAS CORPUS
ACTUAL INNOCENCE AND MISCARRIAGE OF JUSTICE CLAIMS

Rex Gard #02758
Mike Durfee State Prison
1412 Wood Street
Springfield, South Dakota
57062-2238

QUESTIONS PRESENTED

1. Is Petitioner actually innocent and has a miscarriage of justice occurred?

2. Is the South Dakota Supreme Court's overturning of their own precedent in *State v. Reddick,*[1] "insofar as it conflicts with this decision," *State v. Gard,*[2] an unforeseeable retroactive judicial enlargement of statute in violation of *ex post facto* prohibitions and Due Process?

3. Does the failure of the State to provide evidence of intent in any of the charges violate this Court's holding in *United States v. Booker,*[3] invalidate Petitioner's conviction.

4. Does counsel's inability to properly understand the law and present it at trial violate Petitioner's Sixth Amendment right to reasonable counsel and fatally prejudice his case?

5. Does this Court's decision in *Lafler v. Cooper,*[4] requiring counsel to meet *Strickland v. Washington,*[5] standards during plea negotiations and at sentencing have retrospective application to set aside these convictions?

6. If the State is unable to prove misappropriation of partnership funds, must this conviction be set aside?

7. Must a State consider proportionality and the nature of the alleged offense in determining whether a sentence violates the Eighth Amendment prohibition against cruel and unusual punishment and the Fourteenth Amendment guarantees of Equal Protection and Due Process?

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[1] *State v. Reddick,* 2 SD 124, 48 N.W. 846 (1891)
[2] *State v. Gard,* 742 N.W. 2d 254, 262 (SD 2007)
[3] *United States v. Booker*, 543 US 220, 125 S.Ct. 738, 60 L.Ed. 2d 621, 2005 US LEXIS 628.
[4] *Lafler v. Cooper*, 566 US 156, 132 S.Ct. 1376, 182 L.Ed. 2d 398, 2012 US LEXIS 2322.
[5] *Strickland v. Washington,* 466 US 668, 104 S.Ct. 2052, 80 L.Ed. 2d 684, 1984 US LEXIS 1589.

LIST OF PARTIES IN COURT BELOW

The caption set out above contains the names of all the parties.

LIST OF CASES DIRECTLY RELATED TO THIS CASE

1. Petitioner was convicted in Lawrence County, South Dakota, CRI 044-1202, which is unpublished, but the judgment and sentence are attached as Appendix 1.

2. Petitioner's direct appeal to the South Dakota Supreme Court is found at *State v. Gard,* 742 N.W. 2d 257, (SD 2007), and is attached as Appendix 2.

Although not directly relevant to this 28 U.S.C. § 1257(a) action, Petitioner's further attempts at vindication in both state and federal courts are listed below:

3. Petitioner's first state Petition for Writ of Habeas Corpus is unpublished, but is in Lawrence County, South Dakota, CIV 08-704, October 5, 2009. Petitioner applied to both the circuit court and the South Dakota Supreme Court for Certificates of Probable Cause; these applications were denied. This decision is not attached because South Dakota Department of Corrections staff members repeatedly confiscated sizable portions of Petitioner's legal materials without allowing him to choose the material discarded. More than half of Petitioner's pleadings and transcripts were seized by staff during transfers.

4. Petitioner filed a Petition pursuant to 28 U.S.C. § 2254. The denial by Judge Viken is published at *Gard v. Weber*, CIV 10-5017-JLV (DSD March 3, 2012).

5. Petitioner filed an appeal from *Gard v. Weber* to the Eighth Circuit. Judgment denying appeal is unpublished under CIV 12-1780, September 4, 2012; the court's mandate was issued January 7, 2013.

6. Petitioner's next state Petition for Writ of Habeas Corpus, also *Gard v. Weber*, is unpublished under Lawrence County docket 12-443. There was no hearing.

7. Petitioner's pro se state Petition for Writ of Habeas Corpus, *Gard v. Dooley,* is unpublished under docket number 15-220 *"Gard v. Weber."* N.B. Judge Percy used the dismissal order from #12-443 in dismissing #15-220 without changing respondents.

8. Petitioner's pro se state Petition for Writ of Habeas Corpus is unpublished under docket number 16-47.

9. Petitioner's additional pro se state Petitions for Writ of Habeas Corpus were filed as "misc" and no action was taken. These are in Lawrence County files CIV 16-1, 17-1, and 18-1.

10. Petitioner filed a pro se Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, *Gard v. Fluke,* 2019 US Dist. LEXIS, 113512, which was dismissed without prejudice as a second or successive petition.

11. Petitioner applied for leave to file a second or successive petition with the Eighth Circuit Court of appeals, which was denied at *Gard v. Fluke,* 2020 US App. LEXIS 1421 (8th Cir. SD, January 13, 2020).

TABLE OF CONTENTS

Appendices

TABLE OF AUTHORITIES

As a pro se litigant, Petitioner is unsure of the proper procedure; citations for cases cited within quotations are also included.

Cases

TEXTS, TREATISES, AND LAW REVIEWS

Petitioner apologizes for failing to include copies of the texts quoted. The South Dakota Department of Corrections does not have a mechanism allowing inmates to print case law, statutes, or other legal materials.

CONSTITUTIONAL PROVISIONS, STATUTES, RULES, AND REGULATIONS

United States Constitution, Article I § 9: "No Bill of attainder or ex post facto law shall be passed."

United States Constitution, Article I § 10: "No State shall… pass any Bill of attainder, or ex post facto law…"

United States Constitution, Amendment V: "No person shall... be deprived of life, liberty or property without due process of law."

United States Constitution, Amendment VI: "In all criminal prosecutions, the accused shall... have the assistance of counsel for his defense..."

United States Constitution, Amendment VIII: "Excessive bail shall not be required, nor cruel and unusual punishments be inflicted."

United States Constitution, Amendment XIV: "No State shall... deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

South Dakota State Constitution, Article VI § 12: "No ex post facto law, or law impairing the obligation of contracts... shall be passed."

South Dakota State Constitution, Article VI § 15: "No person shall be imprisoned for debt arising out of or founded upon a contract."

South Dakota Codified Law 22-3-3, Aiding and Abetting: "Any person who, with the intent to promote or facilitate the commission of a crime, aids, abets, or advises another person in planning or committing the crime, is legally accountable, as principle to the crime."

South Dakota Codified Law 22-6-11, Presumptive probation for offender convicted of Class 5 or Class 6 Felony – Exceptions – Departure for aggravating circumstances: "The sentencing court shall sentence any offender convicted of a Class 5 or Class 6 felony... to a term of probation..."

South Dakota Codified Law 22-30A-1, Taking property with intent to deprive: "Any person who takes, or exercises unauthorized control over, property of another, with intent to deprive that person of the property is guilty of theft."

South Dakota Codified Law 22-30A-16, Honest and reasonable claim of right to property as affirmative defense: "It is an affirmative defense to a prosecution for theft that the defendant:

"(1) Was unaware that the property taken was that of another; or

"(2) Acted under an honest and reasonable claim of right to the property involved or that the defendant has a right to acquire or dispose of the property as he or she did."

South Dakota Codified Law 22-30A-17, Grand theft – Petty theft – Penalty: "Grand theft is a class 4 felony if the value of the property is more than five thousand dollars and less than or equal to one hundred thousand dollars."

South Dakota Codified Law 22-39-36, Forgery – Penalty: "Any person who, with intent to defraud, falsely makes, completes, or alters a written instrument of any kind is guilty of forgery. Forgery is a Class 5 felony."

IN SUPREME COURT OF THE UNITED STATES

PETITION FOR EXTRAORDINARY WRIT OF HABEAS CORPUS
BRIEF IN SUPPORT OF ACTUAL INNOCENCE CLAIM
A MICARRIAGE OF JUSTICE HAS OCCURRED

PETITIONER PRAYS that the United States Supreme Court review this petition in support of Petitioner's claim of Actual Innocence pursuant to the Miscarriage of Justice exception and grant certiorari and other such relief as requested below.

CITATIONS OF OPINIONS AND ORDERS IN THIS CASE

1. The original Judgment and Sentence is unpublished and attached as Appendix 1.
2. Petitioner's direct appeal to the South Dakota Supreme Court is found at State v. Gard, 742 N.W. 2d 257 (SD 2007), and is attached as Appendix 2.
3. Petitioner's first Petition for Writ of Habeas Corpus is unpublished in Lawrence County, South Dakota, Civ. 08-704, October 5, 2009. Petitioner no longer has access to this material due to prison staff seizing and discarding much of his legal material.

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked under 28 USC §§ 1257 and 2254, *et seq.* due to the nature of the deprivation and the ongoing denial of access to the courts. See *Will v. United States,* 389 US 90, 95, 88 S. Ct. 269, 19 L. Ed. 2d 305 (1967) ("only exceptional circumstances amounting to a 'judicial usurpation of power' will justify the invocation of this extraordinary remedy."); *Ex Parte Fahey*, 332 US258, 260, 67 S. Ct. 1558, 91 L. Ed. 2041 (1947) ("These remedies should be resorted to only where appeal is a clearly inadequate remedy.").

While this matter's history will be expanded infra, the appellate history is directly relevant to the question of jurisdiction and will be set out briefly here.

Petitioner's direct appeal to the South Dakota Supreme Court was entered on November 4, 2007 (*Appx. 2)*. The trial court reappointed trial counsel as appellate counsel over petitioner's repeated objections; petitioner was thereby barred from presenting a claim of ineffective assistance of counsel at trial, because counsel are not allowed to argue their own previous, or continuing, incompetence. Other than a state habeas petition in which counsel refused to present any of Petitioner's claims, this was the last hearing of any kind of the merits of any of Petitioner's claims.

Petitioner then filed a habeas petition in the federal district court. Because of the intentional limitations of the South Dakota Department of Corrections' prison legal reference materials, he only became aware of the legal implications of his actual innocence claim after this matter was filed. Petitioner requested a stay from the court in order to amend his petition in line with this new information; both the stay and amendment were denied by District Court Judge Jeffrey Viken and the underlying petition was denied without hearing or addressing the merits. *CIV 5-10-5017 JLV, March 3, 2012.* Petitioner appealed to the Eighth Circuit, *CIV. 12-1780.* This appeal was denied and a mandate issued January 7, 2013.

The facts in this filing were submitted to the federal district court in a second habeas petition. This petition was denied based on the time limitations of the A.E.D.P.A. as a second or successive petition without hearing.[1] *Gard v. Fluke,* 2019 US District LEXIS 113512.

Petitioner then motioned for leave to file a second or successive petition in the Court of Appeals for the Eighth Circuit, *Gard v. Fluke,* 2020 US App. LEXIS 1421, January 13, 2020. This motion was also denied.

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[1] Volumes containing the text of the A.E.D.P.A. were not added to the MDSP law library until late 2013, well after all petitioner's deadlines had passed.

Petitioner asserts that the lower courts have incorrectly used the A.E.D.P.A. to screen and dismiss his filings, when the gateways for actual innocence and miscarriage of justice claims would have been the appropriate screening tools.

> "We have applied the miscarriage of justice exception to overcome various procedural defaults. These include 'successive' petitions asserting previously rejected claims, see *Kuhlmann v. Wilson,* 477 US 436, 454, 106 S.Ct 2916, 91 L. Ed. 2d 364 (1986) (plurality decision), 'abusive' petitions asserting in a second petition claims that could have been raised in a first petition, see *McCleskey v. Zant,* 499 US 46, 494-495, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991), failure to develop facts in a state court, see *Keeney v. Tamayo-Reyes,* 501 US 1, 11-12, 112 S. Ct. 1715, 118 L.Ed. 2d 318 (1992) and failure to observe state procedural rules, including filing deadlines, see *Coleman v. Thompson,* 501 US 722, 750, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991); *Murray v. Carrier,* 477 US 478, 495-496, 106 S. Ct. 2639, 91 L.Ed. 2d 397 (1986)." *McQuiggin v. Perkins,* 569 US 383, 392-393, 133 S. Ct. 1924, 185 L. Ed. 2d 1019 (2013)

Petitioner has repeatedly attempted to demonstrate to appellate courts at all levels the constitutional violations involved in his conviction and has been denied a hearing on the merits in both federal and state courts for 17 years. The state courts refuse to file petitions and the federal courts dismiss them as second or successive filings.

As a result of these dismissals or improper screenings, adequate relief has been forestalled in every other venue; without intervention from the United States Supreme Court, this miscarriage of justice will stand and an innocent man will remain in prison. There are no means that exist available to provide relief in this matter. Clear and undisputable constitutional violations have occurred in this matter and this writ is not only appropriate, but vital under these rare circumstances. *Dugger v. Adams,* 489 US 401, 419, 109 S. Ct. 1211, 103 L. Ed. 2d 436 (1989) ("Habeas review of a default claim is available, even if absent cause for default, if the failure to consider the claim would result in a fundamental miscarriage of justice.") (internal quotation marks omitted); *Carrier,* 477 US at 496 ("[W]e think that in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually

innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.")

This writ will be in aid of the Court's appellate jurisdiction because the Constitutional rights of Petitioner have been violated and he has been unlawfully detained in his liberty. Uncorrected violations of Constitutional rights can only serve to erode the faith and confidence of the public in the judicial system of the United States.

Pursuant to the *Rooker-Feldman* doctrine, 28 USC § 1257 has been interpreted to prohibit lower federal courts from directly reviewing judicial decisions reached by the highest state court. *Rooker v. Fidelity Trust Co.*, 263 US 413, 415, 44 S. Ct. 149, 68 L. Ed 362 (1923) (only Supreme Court can review state supreme court judgment considering constitutionality of state law); *ASARCO, Inc. v. Kadish,* 490 US 605, 622, 109 S. Ct. 2037, 104 L. Ed. 2d 696 (1989) (*Rooker-Feldman* interprets 28 USC § 1257 to grant exclusive jurisdiction to review state supreme court judicial opinions to [Supreme] Court).

"Before a writ of mandamus may issue, a party must establish that (1) no other adequate means [exist] to obtain the relief he desires. (2) the party's right to issuance of the writ is clear and indisputable, and (3) the writ is appropriate under the circumstance." (internal quotation marks omitted) *Hollingsworth v. Perry,* 558 US 183, 130 S. Ct. 705, 175 L. Ed. 2d 657, 663 (2010) (per curiam) (quoting *Ex Parte United States*, 287 US 241, 248-249, 535 S. Ct. 129, 77 L. Ed. 383 (1932))

Petitioner has clearly demonstrated through numerous rejected or dismissed filings that no means, adequate or otherwise, exist to provide relief; there have been clear and indisputable violations of his constitutional rights; and the right of every American to expect the courts to protect these rights is appropriate under every circumstance.

Without the intervention of the Supreme Court, the miscarriage of justice perpetrated by the State of South Dakota will be perpetuated and the rights of all individuals before the law will be diminished.

CONSTITUTIONAL PROVISIONS, STATUTES, RULES, AND REGULATIONS

Petitioner was charged under the following statutes:

SDCL § 22-3-3 Aiding and abetting	9, 16
SDCL § 22-30A-1 Taking property with the intent to deprive	9, 16
SDCL § 22-30A-17 Grand theft	9
SDCL § 22-39-36 Forgery	9, 16
The affirmative defense never presented by counsel is:	
SDCL § 22-30A-16 Honest and reasonable claim of right to property as affirmative defense	30
While not directly relevant to the instant matter, the statute reducing theft and forgery to presumptive probation offenses as part of a sentencing reform package is:	
SDCL § 22-6-11 Presumptive probation for offender convicted of Class 5 or Class 6 felony –Exceptions – Departure for aggravating circumstances	37
While this is not a statute with which Petitioner was charged, the South Dakota Supreme Court cited as justification for affirming this conviction:	
SDCL § 48-7A-203 Property acquired by partnership is not property of individuals	12

United States Constitutional Provisions which Petitioner contends South Dakota violated:

United States Constitution, Article I § 9: "No Bill of attainder or ex post facto law shall be passed."	i, 9-11, 13-14, 34, 37
United States Constitution, Article I § 10: "No State shall… pass any Bill of attainder, or ex post facto law…"	i, 9-11, 13-14, 34, 37
United States Constitution, Amendment V: "No person shall… be deprived of life, liberty or property without due process of	i, 10-11, 37-38

law."

United States Constitution, Amendment VI: "In all criminal prosecutions, the accused shall... have the assistance of counsel for his defense..." i, 11, 38

United States Constitution, Amendment VIII: "Excessive bail shall not be required, nor cruel and unusual punishments be inflicted." i, 10-11, 33, 38-39

United States Constitution, Amendment XIV: "No State shall... deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." i, 10-11, 13, 33, 37-39

The federal statutes under which this action is brought are:

28 U.S.C. § 1257 Certiorari 4, 6, 9

28 U.S.C. § 2254 Habeas corpus 2-3, 9

South Dakota Constitutional Provisions which Petitioner contends were violated:

Art. VI § 12: "No ex post facto law, or law impairing the obligation of contracts... shall be passed." 9-10

Art. VI § 15: "No person shall be imprisoned for debt arising out of or founded upon a contract." 19

STATEMENT OF THE CASE

The facts necessary to place in their setting the questions now raised can be briefly stated:

I. Course of Proceedings in this 28 USC §§ 1257, 2254 case before this Court.

Petitioner is in state custody in accordance with a judgment and sentence ordered by the Honorable Timothy R. Johns, Circuit Court Judge (ret.), which was filed on November 15, 2005. That judgment, filed in Lawrence County, South Dakota, CRI 04-1202, was entered after the court found Petitioner guilty of one consolidated count of theft and five counts of forgery. The circuit court sentenced Petitioner to 65 years in the South Dakota State Penitentiary. *Appx. 1.*

Petitioner appealed the circuit court's decision to the South Dakota Supreme Court, *State v. Gard,* 742 N. W. 2d 257 (SD 2007). *Appx 2.* Petitioner raised multiple issues at appeal. The court affirmed the decision of the lower court. *Id.* at 266.

Petitioner filed a *pro se* Petition for Writ of Habeas Corpus in state court, claiming, *inter alia*, ineffective assistance of counsel at trial and cruel and disproportionate sentencing. Appointed counsel filed an amended position, largely abandoning claims advanced by Petitioner in favor of an untenable theory of a "totality of errors." Following a hearing, Petitioner's application for habeas relief was denied. Both the circuit court and the South Dakota Supreme Court denied Certificates of Probable Cause.

Petitioner then filed a *pro se* Writ of Habeas Corpus in United States District Court, which was dismissed with prejudice. *Gard v. Dooley,* 5-10-5017-JLV (DSD March 3, 2012. The Eighth Circuit denied issuance of a Certificate of Appealability.

In 2012, Petitioner filed a *pro se* Writ of Habeas Corpus in state court, alleging multiple claims, which was dismissed without hearing.

Petitioner's next petition, Civ. 15-220, was the first time the holdings in *Lafler v. Cooper* were advanced as a claim for relief. This was dismissed without hearing and a Certificate of Probable Cause was denied by the South Dakota Supreme Court.

Another four petitions were filed; the first received the by-now summary dismissal; the final three were ignored, filed as "miscellaneous" under 16-1, 17-1, and 18-1, by Presiding Judge Michael Day, who had been a partner in the law firm representing Petitioner's partner and alleged victim, Barry Smith.

Petitioner's next petition was dismissed in state and federal courts as time barred, despite Petitioner's assertion of actual innocence and invocation of the miscarriage of justice exception.

II. Relevant facts concerning the State convictions for theft and forgery in this case.

Petitioner was the owner of contracting firm Planet Builders. In 2003, Petitioner, Dr. Barry Smith (Smith) and Dr. Rick Little (Little) began discussing opportunities in real estate speculation, describing a vision of developing luxury homes in the Spearfish area. Smith and Little invested with Petitioner in a development company, Dakota Properties Development, LLC (DPD), incorporating in January 2004. Smith and Little signed construction contracts with Petitioner for a number of smaller projects, deferring plans for the larger development.

In September 2004, Smith's illness worsened and Little assumed sole operating control of DPD. Little unexpectedly advised Petitioner that he would no longer be allowed to bill DPD for materials, requiring him to submit invoices for Little to pay creditors directly. Little also began telling creditors and customers that Petitioner had been fired and to refuse him credit, leading to multiple defaults. Prior to this decision by Little, all operating monies had been drawn on the DPD credit line; Petitioner had made regular payments to all creditors and none of the accounts were past-due or in arrears.

Following an investigation by Spearfish police, which Little, as a "friend of the force" was largely allowed to conduct on his own, Petitioner was indicted in December 2004. Smith and Little were able to retain all of Petitioner's equipment and materials, as well as being able to walk away from unpaid laborers and materialmen, while keeping customers' payments.

Petitioner was advised by counsel Thomas E. Adams that he could not be convicted in any of the alleged crimes because it was legally impossible to be convicted of stealing from one's own business. Adams advised Petitioner that the State's plea offer of fifteen years was no offer at all, because all the charges had to be consolidated or sentenced concurrently, so he was facing a maximum of fifteen years.

Following Adams' advice, Petitioner took the matter to trial, expecting the acquittal his attorney guaranteed. Instead, he was found guilty and sentenced to 65 years.

Over Petitioner's repeated objections, Adams was reappointed for Petitioner's direct appeal. In their affirmation of the conviction, the South Dakota Supreme Court overruled the century-old unchallenged precedent in *Reddick* upon which Adams relied, that "no one could be guilty of stealing or embezzling what belongs to him..." *Id.* 48 N.W. 2d at 247, retroactively applying their decision to him.

III. Existence of Jurisdiction Below.

Petitioner was convicted in the Fourth Judicial Circuit for the State of South Dakota of 15 courts of theft pursuant to SDCL §§ 22-3-3, 22-30A-1, and 22-30A-17; as well as 6 counts of forgery pursuant to SDCL § 22-39-36. Petitioner directly appealed to the highest court in the state, the South Dakota Supreme Court, and repeatedly attempted further collateral review in both state and federal courts. He now duly appeals to the Supreme Court pursuant to 28 USC §§ 1257, 2254, seeking Direct Collateral Review in this Extraordinary Writ of Habeas Corpus.

IV. The South Dakota Supreme Court has decided Constitutional questions in this case in a way in conflict with the applicable decisions of this Court.

This is a case involving unconstitutional judicial enlargement of a statute in violation of the *ex post facto* prohibitions of both the United States and South Dakota Constitutions, along with numerous other constitutional implications, wherein one of the partners in a firm alleged theft and fraud against another partner, resulting in the accused being sentenced to functional life in prison.

At the time of Petitioner's trial, the existing law in South Dakota was based on the precedent in *State v. Reddick*, which held that partners could not steal from the company they

owned. At appeal, the South Dakota Supreme Court overturned *Reddick*, retroactively applying their new interpretation to Petitioner, allowing his conviction to stand.

Petitioner's counsel encouraged him to refuse a 15 year plea offer, based on a complete misapprehension of both criminal law and court procedure. Counsel failed to prepare for sentencing, allowing false and misleading statements to be introduced as aggravating circumstances for sentence enhancement and failing to present any of the witnesses Petitioner offered to refute these claims, resulting in a sentence over four times longer than the sentence Petitioner was advised to reject as the worst possible outcome. This failure incarcerated a man who is actually innocent and remains imprisoned due to a miscarriage of justice.

Petitioner's cumulative sentence of 65 years is far greater than all the cumulative sentences for theft and forgery imposed in Lawrence County between 2001 and 2011. *Appx. 3.* The South Dakota Supreme Court did not find this to be disproportionate or in violation of the Eighth Amendment. None of Petitioner's alleged crimes involved violence and the maximum amount alleged to have been stolen was less than $100,000.

In reaching its decision to affirm, the court decided these settled principles were not to be applied to the case at bar because:

1. The precedent in "*Reddick* is overruled to the extent it conflicts with this decision." *Gard,* 742 N.W. 2d at 262 (emphasis added). *Ex post facto* violations were not addressed.

2. "Defendant waived for appellate review issue as to whether evidence was sufficient to establish intent element of forgery." *Id.* at 258. The merits of Petitioner's Due Process claim were not addressed.

3. To determine whether a sentence appears grossly disproportionate, [South Dakota] Supreme Court considers the conduct involved, and any relevant past conduct, with utmost

deference to the Legislature and the sentencing court; if these circumstances fail to suggest gross disproportionality, sentencing review ends. *Id.* at 258. The merits of Petitioner's Eighth Amendment cruel and unusual punishment claim were not addressed.

4. The appointment of trial counsel as appellate counsel denied Petitioner the right to present evidence of ineffective counsel before, during, and after trial, violating Petitioner's Sixth Amendment right to reasonable counsel.

Petitioner respectfully urges that all aspects of this decision are erroneous and at variance with this Court's decisions as explained in the Argument below.

ARGUMENT

I. Is the South Dakota Supreme Court's overturning of *State v. Reddick* "insofar as it conflict with this decision," *Id.* at 262, an unforeseeable retroactive judicial enlargement of the statute in violation of the *ex post facto* prohibitions and Due Process protections?

In January 2004, Petitioner began a partnership with Doctors Smith and Little with the ultimate goal of developing luxury condos in the Spearfish, South Dakota area. The company secured a construction loan, in which Petitioner was the 100% guarantor, although Smith and Little did cosign the note.

For most of 2004, Petitioner operated Planet Builder crews at properties owned by DPD as well as at properties owned by the doctors, purchasing supplies, maintaining payroll, and acquiring equipment for their planned future expansion through the loan. Smith and Little insisted Petitioner, even as a partner in DPD, sign construction contracts for each of these projects as owner of Planet Builders.

In September 2004, Little began informing clients and creditors that Petitioner had been fired and to deny him credit. Little then went to his friend, the Spearfish Chief of Police, to

complain about a treacherous contractor. The Chief and County Sheriff's Department allowed Little to conduct his own investigation, letting him provide the evidence and witnesses he chose.

Until Little dismissed Petitioner, no checks for any of the DPD projects, either drawn directly from DPD or from Planet Builders' accounts, failed to clear. Payments to all suppliers and laborers were made in timely fashion and no account was in arrears. Despite having free rein on the investigation and no meaningful legal oversight, Little and his friendly Chief were not able to demonstrate Petitioner used DPD funds for any but licit purposes.

Petitioner was convicted and trial counsel was reappointed for the direct appeal. With the assistance of jailhouse lawyers, Petitioner was finally able to convince Adams that *State v. Reddick*, 2 SD 124, 45 N.W. 846 (1891) would be relevant to his appeal.

> "[E]ach partner is the ultimate owner of an undivided interest in all the partnership's property, and none of such property can be said, with reference to either partner, to be the property of another, and no one can be guilty of stealing what belongs to him... the courts have uniformly held that a general partner cannot be convicted of embezzling partnership property which comes into his possession or under his control by virtue of his being such partner and joint owner."
>
> *State v. Reddick,* 2 SD at 125-126 (internal citations omitted)

> "It is true that nearly all the states which undertake to define embezzlement require the subject of the offense to be the 'property of another,' and this has almost universally been construed to mean that it must wholly be the property of another. It has resulted that, as a rule, a member of an ordinary partnership could not be convicted of embezzlement of partnership property..."
>
> *Id* at 126-127.

During Petitioner's appeal, counsel argued *Reddick* as the controlling precedent in South Dakota. The South Dakota Supreme Court cited statutes from foreign jurisdictions and the civil statutes of the Uniform Partnership Act[2], none of which were the basis of the indictment, in order to justify the imposition of criminal penalties for the violation of a civil contract.

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[2] SDCL § 48-7A-203.

> "In all free governments, the good sense of mankind, since the day when imprisonment for debt was abolished, has condemned and frowned down any attempt to coerce the performance of civil obligations by criminal penalties."
> *Commercial National Bank v. Smith,* 60 SD 376, 381-381, 244 N.W. 521.

The South Dakota Supreme Court chose to overturn the century-old precedent established in *Reddick*, retroactively applying their new interpretation to Petitioner, because an Iowa court "recognized the trend in case law has been away from recognizing a partnership as an aggregation of individuals and toward partnerships as legal entities." *Gard,* 742 N.W. 2d at 262 (internal quotes and citations omitted).

Based on the rules and statutes adopted in other states, the South Dakota Supreme Court was "trendy" enough to hold that "*Reddick* is overruled, to the extent it conflicts with this decision." *Id.* Not overruling it entirely, merely enough to justify maintaining Petitioner's convictions, applying it to his case in a blatant display of an *ex post facto* imposition of a penalty for something which statute and precedent had held not to be criminal at the time of its alleged commission.

> "An unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. 1. § 10 of the Constitution forbids. If a state legislature is barred by the *ex post* facto clause from passing such a law, it must follow that a state supreme court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." *Bouie v. City of Columbia,* 378 US 347, 354-355, 12 L. Ed. 2d 894 (1964); *Marks v. United States*, 430 US 188, 192, 51 L. Ed. 2d 260, 97 S. Ct. 990 (1977) (reiterating the *Bouie* principle).
> *Helton v. Fauver,* 930 F.2d 1040, 1044-1045 (3rd Cir. 1991)

Petitioner did not have the fair warning to which he was entitled under the Due Process Clause of the Fourteenth Amendment. *Bouie*, 378 US at 354-355; See also *Marks v. United States; Hamling v. United States,* 418 US 87, 116, 41 L. Ed. 2d 590, 94 S. Ct. 2887 (1974); and *Douglas v. Buder,* 412 US 430, 7 L.Ed. 2d 52, 93 S. Ct. 2199 (1973) (each describing the test in terms of "unforeseeability" and "fair notice" or "fair warning") among countless other cases. As

far as Petitioner knew, based on his years of experience, he was conducting business as intended, in accord with the law and with the plans he and his partners had discussed at the time of incorporation and for many months thereafter.

A three-prong test was established in *Beazell v. Ohio,* 269 US 167, 70 L.Ed. 2d, 46 S. Ct. 68 (1925), for violations of the *ex post facto* clause:

> "[A] law is unconstitutional if it (1) punishes as a crime an act that was innocent when done; or (2) makes more burdensome the punishment for a crime after its commission; or (3) deprives one charged with a crime of any defense available according to law at the time the act was committed." *Id.*

In the instant case, when the alleged crime was committed, *Reddick* was the existing law in South Dakota, holding for more than a century that a partner could not steal from a partnership because "no one can be guilty of stealing... what belongs to him." *Id.* 2 SD at 125. There was no way to predict that the South Dakota Supreme Court would, despite a hundred years of legislative inaction, determine that Petitioner's case would be the opportune moment to overturn the portion of *Reddick* which would allow the State to maintain a conviction. When Petitioner was convicted, the law was clear: partners could not steal from their partnership.

Violation of the second *Beazell* prong, punishment, is self-evident in that, since stealing from oneself was not a crime at the time of the alleged crime, any punishment is *ipso facto* more burdensome.

The defense available at the time of the alleged crime was that, as a partner in DPD, Petitioner was pursuing legitimate partnership interests and had not broken the law of stolen from himself or his partners. Neither the trial court nor the appellate court allowed Petitioner this previously cognizable defense and allowed the State's failure to prove any malfeasance to stand.

Existing interpretation of statutes hold and cannot be rewritten to convict an individual who has not violated the law as written or as understood without running afoul of the *ex post*

facto prohibition.

> "[T]he [Missouri] Supreme Court recognized that no case other than *Majors* had presented the precise questions involved and then specifically overruled *Majors*. In doing so, the court significantly expanded the scope of the state's felony murder statute. Finally, no cases arising between *Majors* and *Moore I* undermined the authority of *Majors*... [W]e can only conclude that until *Moore I, Majors* was the controlling law, and no intervening case has been found which in any way challenged or weakened its authority. As a result the change in law adopted by the [Missouri] Supreme Court expanding the scope of the state's felony murder statuette was constitutionally unforeseeable. Therefore, the new rule may not be applied retroactively to *Moore's* case and may only apply to conduct occurring after the date of the decision in *Moore I.* See *Bouie* 378 US at 354."
>
> *Moore v. Wyrick,* 766 F.3d 1258-1259 (8th cir. 1985)

In *Moore*, when the Missouri Supreme Court rewrote an existing statute and retroactively applied their interpretation, the Eighth Circuit was forced to reverse their unconstitutional holding. The South Dakota Supreme Court found their own precedent and adherence to the Constitution would needlessly release Petitioner, merely to avoid constitutional violations and the federal district courts have abdicated their duty and refused to address the merits of Petitioner's case. This Court must reverse their holding and require South Dakota to recognize the Constitution.

Between *Reddick* and *Gard*, only one other South Dakota case cited *Reddick*: *State v. Dansky,* 68 SD 32, 298 N.W. 24, 1941 SD LEXIS 23. The *Dansky* court held that Dansky was not guilty of embezzlement because he was not a partner and had no fiduciary relationship with the partners or company, which does not remotely align with the instant case. In the matter before this Court, Petitioner was the sole vested partner in DPD and

> "the taking by a partner as such, with felonious intent, of partnership property, is neither larceny or embezzlement under the General Criminal Code, because the property of the firm is not, as to either partner, the property of another."
>
> *Reddick*, 2 SD at 126.

As in *Moore,* no intervening cases exist to weaken or challenge the holding in *Reddick.*

The need for the South Dakota Supreme Court to "overturn *Reddick* insofar..." *Gard*, 742 N.W. 2d at 262, is proof that it was the law of the land at the time of Petitioner's conviction and no one could have had the fair notice required by the Due Process Clause. There was no intervening case for the South Dakota Supreme Court to cite as rebuttal to this claim.

> "[T]here is no dispute that if a judicial construction of a criminal statute is unexpected, and thus does not give fair warning, then for a state court to apply such an unforeseeable standard to the defendant in the case in which the new standard is announced would violate the due process clause."
>
> *Helton,* 930 F.3d at 1044-1045.

> The issue of whether the judicial expansion of a criminal statue was or was not foreseeable and consequently can or cannot be applied retroactively is a question of federal law subject to this Court's determination. c.f. *Weaver v. Graham,* 450 US 4, 33, 67 L. Ed. 2d 17, 101 S. Ct. 960 (1980) (*ex post facto* claim is one of federal law).
>
> *Id.* 930 F.3d at 1045.

A miscarriage of justice has occurred. Petitioner was charged, convicted, and incarcerated for something which was not a crime. He remains innocent of any of the alleged crimes. Therefore, Petitioner's conviction for the use of partnership funds must be set aside.

II. Does the State's failure to provide evidence of the element of intent related to any of the charges alleged mandate that this conviction be set aside?

Petitioner was charged with theft, aiding and abetting, and forgery. Each of these crimes requires the State to establish beyond a reasonable doubt that the accused had the intent to commit the crime. The plain language of the statutes is precise: SDCL § 22-3-3 "Any person who, with the *intent* to promote..."; SDCL § 22-30A-1 "Any person who takes... with *intent*... is guilty of theft."; SDCL § 22-39-36 "Any person who, with *intent* to defraud... is guilty of forgery." (emphasis added in each).

No evidence or testimony was introduced at trial to demonstrate Petitioner's intentions regarding the construction materials, equipment, or payroll he continued to purchase and use on

DPD projects. The alleged forgeries involved lines of credit at such luxury boutiques as Lowe's and Knecht's Home Center, where Petitioner continued to purchase building materials intended and used for DPD projects, delivering thousands of dollars of materials directly to Little himself. Prior to Little's edict that Petitioner required approval from Little to make purchases for DPD projects and Little ensuing dissemination of rumors concerning Petitioner, none of the accounts were in arrears. This is the evidence presented to the jury that Petitioner had the *intent* to defraud his partners: maliciously continuing to do his job.

> The right to have a jury make the ultimate determination of guilt has an impressive pedigree/ Blackstone described "trial by jury" as requiring that "*the truth of every accusation*... should afterward be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbors..." 4 W. Blackstone, *Commentaries on the Laws of England,* 343 (179) (emphasis added.)
>
> *United States v. Gaudin,* 15 US 506, 510, 132 L.Ed. 2d 444, 115 S. Ct. 2310 (1995)

> It has been settled throughout our history that the Constitution protects every criminal defendant "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 394 US 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). It is equally clear that the "Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged." *Gaudin*, 515 US at 510. These basic precepts, firmly rooted in the common law, have provided the basis for recent decisions interpreting modern criminal statutes and sentencing procedures.
>
> *United States v. Booker,* 543 US 220, 230, 125 S. Ct. 738, 160 L. Ed. 2d 621 (1984).

> "The Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged; one of the elements in [Gaudin's] case is materiality; respondent therefore had a right to have the jury decide materiality." *Gaudin*, 515 US at 511.

In the instant matter, the element in question is intent. Petitioner contends that all purchase in question and all lines of credit allegedly sought were done for the specific purpose of advancing the legitimate purposes of the company. No testimony or evidence produced by the State demonstrates and intent to defraud Petitioner's partners, company, or clients. Petitioner has

the Constitutional right to demand that a jury determine whether the element exist s after the State introduces evidence to prove it beyond a reasonable doubt.

The South Dakota Supreme Court decided that this issue was waived during the direct appeal because of counsel's failure to raise it at trial. *Gard*, 742 N.W. 2d at 264; habeas counsel refused to advance the claim.

> There is, however, a "manifest miscarriage of justice" standard that the Seventh Circuit has applied in instances such as where the defendant failed to make a Rule 29 motion at the close of evidence. Where applicable, the court will reverse only if the record is so devoid of evidence of guilt or if the evidence of a *key element* is so lacking that a conviction would be shocking. *United States v. Chaparro*, 953 F.3d 462, 468 (7th Cir. 2020)."
>
> *United States v. Taylor*, 266 F.3d 593, 597-598 (7th Cir. 2020) (emphasis in original)

The "manifest miscarriage of justice" existing in this matter requires these charges be set aside, both to vindicate Petitioner's Constitutional rights and to inform the South Dakota Supreme Court that the Constitution applies even in the Dakota territories.

III. Was Petitioner fatally prejudiced by the inability to argue ineffective assistance of counsel during his direct appeal?

Following Petitioner's conviction in circuit court, he applied to the court for appellate counsel, specifically asking that new counsel be appointed because trial counsel, Adams, had told him he would not be allowed to argue ineffective assistance of trial counsel against himself, although Adams did acknowledge the breadth and number of his errors in preparation and at trial. Despite Petitioner's repeated requests and objections, Adams was reappointed and the accumulated fatal errors Adams made at trial were not available for review.

> The Supreme Court established a two-pronged test to evaluate the performance of counsel. The first prong of the *Strickland* test is whether the attorney's representation was deficient in that it fell below an objective standard of reasonableness. Petitioner must show that counsel made such serious errors that the attorney was not functioning as the "counsel" guaranteed by the Sixth

> Amendment. *Strickland,* 466 US at 687-88; *Sowell v. Bradshaw,* 372 F.2d 821, 836 (6th Cir. 2004); *Wickline v. Mitchell,* 319 F.3d 813, 819 (6th Cir. 2003); *Carter v. Bell,* 218 F.3d 581, 291 (6th Cir 2000); *Gravely v. Mills,* 87 F.3d 779, 785 (6th Cir. 1996).
>
> *Green v. United States,* 65 F.3d 546, 551 (6th Cir. 1995).

In Petitioner's case, Adams did not understand South Dakota law, informing Petitioner that there was no way he could be convicted because the case was barely even circumstantial; that the South Dakota Constitution banned imprisonment for debt under contract[3]; that all the charges had been described as part of a common scheme and were therefore required to be consolidated or sentenced concurrently, meaning that Petitioner's maximum sentencing exposure was only that of the most severe charge. Petitioner was advised that it was not necessary to consider the offered plea bargain because there could be no conviction and the State's offer of a fifteen year sentence was already the maximum possible sentence. Pre- and post-trial lapses of Mr. Adams will be discussed below.

> To satisfy the second prong under *Strickland*, the prejudice element, Petitioner must show there is a reasonable probability that, but for the deficient performance of his attorney, the result of his criminal proceeding would have been different and more favorable to Petitioner. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding. *Strickland,* 466 US at 693-94; *Campbell v. United States,* 364 F.3d 727, 730 (6th Cir. 2004); *Griffin v. United States,* 330 F.3d 733, 736, (6th Cir. 2003); *Mason v. Mitchell,* 320 F.3d 604, 617 (6th Cir. 2003); *Wickline*, 319 F.3d at 819; *Skaggs v. Parker,* 235 F.3d 261, 270-71 (6th Cir. 2000); *Carter*, 218 F.3d at 591; *Arredondo v. United States*, 178 F.3d 778, 782 (6th Cir. 1999); *Austin v. Bell*, 126 F.3d 843, 848 (6th Cir. 1997); *West v. Seabold,* 73 F.3d 81, 84 (6th Cir. 1996).
>
> *Talley v. United States,* 2006 US Dist. LEXIS 86401 at 22-23.

Adams did not object during the trial when the State repeatedly referenced Petitioner's partners as "the good doctors," placing in the jury's minds that Smith and Little were innocent victims who had been manipulated and robbed by the vicious stranger before them. This prejudice was further amplified when Prosecutor John Fitzgerald conducted the following

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[3] Art. VI § 15; the advice was accurate, but never presented to the court.

exchange during Gard's cross-examination (trial transcript, P 1412, L 22-23 – P 1413, L 1-6):

> "Q: Have you paid any of the judgment to the doctors?
> A: Have I paid any of the judgment?
> Q: Yeah.
> A: Actually, no, I haven't paid any of the judgment personally.
> Q: All right. Let me ask you, Mr. Gard, has someone else paid it for you?
> A: Has some else paid what for me?
> Q: Has someone else paid the $300,000.00 that the Court decided you owed the doctors?"

This was clearly an argument calculated to prejudice the jury to assume that the defendant had already been found guilty of the charged offense. There is no reason, strategic or otherwise, for defense not to immediately object or bring it to the attention of the trial court.

Adams' complete misapprehension of the law and deficient courtroom performance show that at no time did he act as the counsel mandated by the Sixth Amendment.

As discussed, *supra*, Adams did not object to the State's complete failure to present any evidence of intent related to charges of either theft or forgery until he feebly suggested during the direct appeal that *why* Petitioner was spending partnership funds might be relevant to the finding of guilt. No testimony or documents established that Petitioner spent any of the partnership's money on anything but advancing partnership interests. The South Dakota Supreme Court determined that his failure to object during trial constituted a waiver of the claim. *Gard,* 742 N.W. 2d at 264, although this failure to establish a requisite element of any of the alleged crimes impacted the ability of the jury as fact-finders to correctly evaluate the sufficiency of the State's case. "[T]he Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged." *Booker,* 543 US at 230.

The claims presented by Adams in the direct appeal were rejected, partially overruling the precedent in *State v. Reddick*, upon which Adams relied, "to the extent it conflicts with this decision[,]" *Gard,* 742 N.W. 2d at 262, and deciding that "[t]here is nothing in the record that

demonstrates the circuit court erred by refusing to consolidate the forgery counts." *Id.* at 264. Although it had been part of his argument to reject the plea offer, Adams failed to raise the state constitutional issue of imprisonment for debt under contract at all.

Petitioner believes that counsel who is incapable of understanding the construction of multiple statutes must axiomatically fail to meet the *Strickland* standard of reasonableness.

Counsel was not allowed to allege that he, himself, had provided ineffective assistance of counsel at trial and was then ineffective during the appeal, prejudicing Petitioner in both proceedings and damaging Petitioner's claims for further appeals.

Petitioner contends that Adams's ignorance was prejudicial and he did not knowingly waive any of the claims reasonable counsel would have raised at trial or on appeal. Adams did not ask the court for a directed verdict or to instruct the jury regarding the missing element of intent in any of the alleged crimes; did not move for a dismissal based on the unconstitutionality of imprisonment for debt; and did not prepare for sentencing, allowing the State to present easily refutable statements to justify the enhancement of Petitioner's sentence.

Adams had the duty to move for acquittal following the trial on a variety of claims and did not do so. Adams should have been prepared to move for a directed verdict if the jury returned a finding of guilt.

> *United States v. Webster,* 775 F.3d 897, 905 (7th Cir. 2015) (when a defendant fails to move for acquittal under Rule 29 at close of evidence or within 14 days of verdict, court will reverse only if there is error that is plain, affects defendant's substantial rights, and seriously affects fairness, integrity, or public reputation of judicial proceeding, making miscarriage of justice)

Adams' numerous failures at trial and deficient performance during Petitioner's appeal fatally prejudiced Petitioner's later attempts at judicial redress because Adams either ignorantly failed to preserve the claims or addressed them so ineptly that successive courts considered the

matter closed.

> "[T]he benchmark for judging any claim of ineffective assistance of counsel must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 US at 686.

Petitioner was not afforded the reasonable counsel guaranteed by the Sixth Amendment at trial or on appeal under the standard established by this Court in *Strickland v. Washington,* suffering a miscarriage of justice. Because of this failure, this conviction must be set aside.

IV. Does this Court's holding in *Lafler v. Cooper,*[4] extending *Strickland* standards to the trial preparation and plea negotiation process apply in State proceedings?

> "[T]he decision whether to plead guilty or contest a criminal charge is ordinarily the most important single decision in a criminal case... *United States v. Gordon*, 156 F.3d 376, 380 (2nd Cir. 1998) (quoting *Boria v. Keane*, 99 F.3d at 496-97) cited in *Malpica-Garcia v. United States*, 2009 US Dist. LEXIS, 72323, 2009 WL 2512425 at *3 (DPR 2009). Knowledge of sentencing exposures is crucial to the decision of whether to plead guilty. See *United States v. Day*, 969 F.2d 39, 43 (3rd Cir. 1992), cited in *Malpica-Garcia v. United States, supra; Malpica-Garcia v. United States,* 2009 US Dist. LEXIS 72323, 2009 WL 1743906 at *3 (DPR 2009)."
> *Feliciano-Rodriguez v. United States,* 115 F.Supp. 2d 203, 222 (MA D.C. 2015)

As discussed, *supra,* Petitioner was appointed Thomas E. Adams at trial counsel to defend against charges of theft and forgery. In the course of normal trial preparation, Prosecutor John Fitzgerald proffered a plea offer of a fifteen year sentence. Adams conveyed this offer to Petitioner, advising him that it was a meaningless offer because the maximum sentencing exposure Petitioner faced was only the fifteen year maximum of the most severe charge, since the law required the common scheme alleged in the indictment to be consolidated or sentenced concurrently. Additionally, according to Adams, because the South Dakota State Constitution prohibited imprisonment for debt under contract, a perfect description of Petitioner's position, it would be impossible to convict him.

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[4] 566 US 156, 132 S. Ct. 1376, 182 L.Ed. 2d 398, 2012 US LEXIS 2322.

As in *Lafler*, defendant's counsel communicated a plea offer to the defendant, but provided erroneous advice to defendant that he could not be convicted at trial, resulting in a rejection of the plea offer. *Lafler,* 132 S.Ct at 1383-1384.

While Petitioner would never describe his courtroom experience as fair, having many issues with counsel and the State's performances at trial, this Court, in *Lafler*, rejected the notion that "[a] fair trial wipes away any deficient performance by defense counsel during plea bargaining." *Id.* at 1388. The fact remains that Petitioner only went to trial because Adams told him he could not be convicted and remains in prison after serving more than the sentence he was advised to reject since Adams did not understand the law and had not researched relevant precedents.

Based on this tower of faulty advice, Petitioner took the matter to trial, was convicted, and sentenced to 65 years. But for the advice of counsel, Petitioner would have almost certainly accepted the plea offer and already completed his sentence, instead of needing to serve almost 30 years to reach his initial parole eligibility date.

The South Dakota Supreme Court found Adams to be in error on every point. The precedent in *State v. Reddick* was irrelevant. "[A] partner who misappropriates funds from the partnership can be convicted of embezzlement." *Gard*, 742 N.W. 2d at 262[5]. While the trial court did consolidate the theft charges, as Adams predicted, the "common scheme" describing the forgery charges in the indictment remained separate counts at sentencing. "There is nothing in the record that demonstrates the circuit court erred by refusing to consolidate the forgery counts." *Id.* at 266.

Roughly seven years after Petitioner's appeal, in *Lafler v. Cooper* and *Missouri v. Frye,*

[5] As a pedantic reminder, Petitioner was convicted of theft and forgery, not embezzlement, a distinction the South Dakota Supreme Court ignores in the interest of maintaining a conviction.

132 S.Ct. 1399, 182 L.Ed. 2d 379 (2012) "[t]he Supreme Court [] addressed the question whether the Constitutional right to effective counsel extends to the negotiation and consideration of plea offers..." *Jacobs v. United States,* 10 F.Supp. 3d 272, 277 (CT D.C. 2014). The Supreme Court held, in light of the practical reality that the overwhelming majority of state and federal proceedings end in a guilty plea instead of trial, that defense counsel has a duty to communicate formal offers from the prosecution to agree to a plea on terms and conditions that may be favorable to the accused. *Frye*, 132 S. Ct. at 1408; *Jacobs,* 10 F.Supp. 3d at 277.

> "A defendant suffers a Sixth Amendment injury" because "[d]efense counsel have a Constitutional duty to give their clients professional advice on the crucial decision of whether to accept a plea offer from the government."
> *Pham v. United States,* 317 F.3d 178, 182 (2nd Cir. 2003)

The Second Circuit adopted a test in *United States v. Gordon,* 156 F.3d 376 (2nd Cir. 1998) to which the Supreme Court in *Lafler* conformed its ruling, for determining what evidence a court may consider when deciding whether a defendant would have accepted an earlier plea offer instead of going to trial. Such "reasonable probability" is shown where (1) the petitioner asserts that he would have accepted the plea offer and (2) there is a significant disparity between the sentence that would have been served if the plea offer had been accepted and the sentence the petitioner is now serving. *Gordon,* 156 F.3d at 380.

The plea offer counsel advised Petitioner to reject as too extreme was fifteen years. The sentence Petitioner received after counsel's performance at trial was 65 years. The fifty year disparity would appear to be prejudicial. As in *Lafler*, the prejudice alleged is having to stand trial. *Lafler*, 132 S. Ct. at 1383. Any additional jail time has *Strickland* implications. *Id.* at 1386.

In *Frye*, this Court also noted the importance of considering whether "the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time" in the prejudice analysis. *Frye,* 132 S. Ct. at 1409; *Smith v.*

Mirandy, 2016 US Dist. LEXIS 4314 at 54.

There is no doubt that *Strickland v. Washington* also applies to representation outside the trial setting, which would include sentencing and appeal. See *Hill v. Lockhart,* 474 US 52, 57, 106 S. Ct. 366, 88 L.Ed. 2d 203 (1985); *Bonneau v. United States,* 961 F.2d 17, 20-22 (1st Cir. 1992); *United States v. Tajeddini*, 945 F.2d 458, 468-469 (1st Cir. 1991) (abrogated on other grounds by *Roe v. Flores-Ortega,* 528 US 470, 120 S. Ct. 1029, 145 L.Ed. 2d 985 (2000). *A fortiori*, the right to effective counsel applies to the plea bargaining process. See *Frye,* 132 S. Ct. at 1405 ("Indeed the Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings.") quoting *Montejo v. Louisiana,* 566 US 778, 786, 129 S. Ct. 2079, 173 L.Ed. 2d 955 (2009), which in turn quotes *United States v. Woods,* 388 US 218, 227-28, 87 S. Ct. 1926, 18 L.Ed. 2d 1149 (1967); *Feliciano-Rodriguez,* 115 F.Supp. at 216-17.

> "The prejudice [in going to trial rather than accepting the plea] is obvious due to the difference between a life sentence and 15½ years. [Feliciano-Rodriguez] notes that counsel [] told him he faced 40-47 years if found guilty by a jury, and that if he knew he faced a life sentence, he definitely would have accepted the 15½ years." *Id.* at 212-13.

In the instant matter, Petitioner was presented with an offer of fifteen years. He is not aware whether the State intended or was willing to drop any of the charges in exchange for this plea because counsel assured him that it was legally impossible for him to be found guilty and the sentence offered was the maximum possible.

> "If counsel failed to adequately communicate and explain the plea offer to Petitioner and allowed Petitioner to reject the plea offer without a sufficient understanding of the offer and the consequences of its rejection, then counsel's performance would be deficient."
>
> *Smith v. Mirandy,* 2016 US Dist. LEXIS 4314 at 57.

As a result of counsel's advice, Petitioner rejected the plea offer and was convicted at

trial on almost all counts and sentenced to a total of 65 years, more than four times longer than the offered sentence counsel dismissed as already being the maximum possible exposure.

> "[T]he lower potential sentence and fewer number of convictions that would have resulted from accepting the plea offer tend to support Petitioner's claim that he 'very likely' would have agreed to the offer if fully explained to him by counsel. Moreover, there is not reason to believe... that the prosecution would have canceled the offer or that the trial court would have rejected the plea agreement."
> *Mirandy* at 57.

Following his failure to properly understand the law in his plea agreement negotiation and abject failure to operate as counsel at trial, Adams continued his ineptitude during the sentencing hearing.

Sentencing was continued when the State failed to provide a witness list to Petitioner. However, even after a witness list was provided, counsel did not prepare for the hearing, ignoring Petitioner's directions to subpoena witnesses, failing to prepare to rebut the State's allegations, and failing to motion for acquittal for lack of evidence. Counsel continued his failure to perform as the "counsel" guaranteed by the Sixth Amendment, violating the protections outlined in *Strickland v. Washington, Lafler v. Cooper,* and *Missouri v. Frye.*

An investigator for the Wyoming Automobile Dealers Association provided unchallenged testimony that the court cited at sentencing as "several other complaints had been lodged against Gard during the performance of his business." *Gard,* 742 N.W. 2d at 265. Despite Petitioner's urging, defense counsel refused to challenge this witness's qualification as an expert, refused to ask the witness to specify or elaborate on these alleged complaints in any way (e.g. "What was the complaint against Gard?") or to ask him to explain why the Automobile Dealers Association would ever be "investigating" complaints against a building contractor. This witness was not on the supplied list, but neither the court nor defense counsel thought it worthy of comment or objection.

A civil suit withdrawn after depositions but prior to filing was the basis for "Gard being investigated for almost $300,000 in unaccounted money." *Id.* at 265. The suit had been withdrawn and was a dead issue more than a year before the original South Dakota indictment. Once again, defense counsel had not bothered to prepare and did not have the witnesses or documentation Petitioner offered to refute this allegation.

> Improper remarks include... comments that imply that the prosecutor has special knowledge of facts not in front of the jury or of the credibility and truthfulness of witnesses and their testimony...
>
> *United States v. Francis,* 170 F.3d 546, 550 (6th Cir. 1999)

Without the assistance of reasonable counsel, Petitioner could not show the falsity of the witnesses' testimony. Both the sentencing court and the South Dakota Supreme Court gave explicit attention to the unsupported and unrefuted allegations introduced by the prosecutor, permitting the outrageous and excessive sentences to stand, citing these claims to justify the imposition of the most egregious sentences imposed in the county for forgery or theft in more than a decade see *infra.*. Had defense counsel been competent or done more than sit in the appropriate chair, Petitioner would have been able to refute in their totality all of the aggravating allegations made at sentencing.

> Although "[c]laims of prosecutorial misconduct are reviewed deferentially on habeas review," *Millender v. Adams,* 376, F.3d 520, 528 (6th Cir. 2004) (internal citations omitted), where the prosecutor "has made repeated and deliberate statements clearly designed to inflame the jury and prejudice the rights of the accused...[the Court] cannot allow a conviction so tainted to stand."
>
> *Sizemore v. Fletcher,* 921 F.2d 667, 670 (6th Cir. 1990).

> Inappropriate commentary is especially dangerous to the accused because it "carries with it the imprimatur of the government and may induce the jury to trust the government's judgment rather than its own view of the evidence."
> *United States v. Young,* 470 US 1, 18-19, 105 S.Ct. 1038, 84 L.Ed. 2d 1 (1985); *Stermer v. Warren,* 360 F.Supp. 3d 639, 654 (ED MI 2018).

The prosecutor's introduction of unrelated prejudicial statements, unqualified and unchallenged witnesses, and numerous references to the abuses the "good doctors" endured at the hands of Petitioner, which all went unchallenged by the alleged defense counsel, both at trial and at sentencing, completely destroyed the pretense of an adversarial process. Defense counsel merely served as a fig-leaf, allowing the appearance of judicial process in the incarceration of an innocent man for alleged civil offenses.

Adams did not prepare for the sentencing hearing, allowing the State to describe the vile creature in the dock in any way they wanted, without objection, without witnesses, and without any need to demonstrate contact with reality.

This Court, in *Lafler v. Cooper* and *Missouri v. Frye*, established that the Sixth Amendment guarantees of reasonable counsel applies to representation outside the trial setting. "Indeed the Sixth Amendment guarantees a defendant the right to have counsel present all 'critical' stages of the criminal proceedings." *Montejo v. Louisiana,* 556 US at 786, quoting *United States v. Woods*, 388 US 227-228; *Feliciano-Rodriguez*, 115 F.Supp. at 216-217.

While counsel was physically present in court, at no time did he serve as the counsel guaranteed in the Sixth Amendment. In his analysis of the law, evaluation of the plea offer, conduct at trial, egregious failures at sentencing, and eventual ineptitude during direct appeal, counsel failed Petitioner, who will serve decades more in prison because of his counsel's actions, unless this Court "'neutralizes the taint' of a Constitutional violation. *United States v. Morrison,* 449 US 361, 365, 101 S.Ct. 665, 66 L.Ed. 2d 564." *Lafler*, 132 S.Ct. at 1381, by vacating this conviction.

V. If the State does not prove the misappropriation of partnership funds, is imprisonment for debt unconstitutional and must the conviction be set aside?

Petitioner was alleged to have spent monies belonging to the partnership for purposes other than the legitimate advancement of company purposes. None of the alleged thefts or forgeries was for purposes other than corporate interests, e.g. opening lines of credit at Lowe's Home Store, etc. Witnesses Little supplied through the offices of his friendly Spearfish Chief of Police merely speculated about the *possible* purchases or activities of Petitioner without providing any evidence connecting DPD monies directly to Petitioner's personal spending.

Can the partners require that all funds paid to Petitioner, including payroll and other disbursements, received in the course of his business be subsumed into partnership goals or is he allowed to spend the monies received as payment for invoices as he sees fit?

In *State v. Suchor,* 2021 SD 2, the circuit court entered findings of acquittal on several charges on counsel's motion and the South Dakota Supreme Court reversed the remaining charges of grand theft because the State was unable to prove misappropriation of funds by a contractor.

The fact pattern in *Suchor* is remarkable similar to the instant case: Suchor was a contractor operating New Wave Builders in Spearfish, South Dakota, who contracted to build three houses for three clients. Petitioner brought his Planet Builders operation to Spearfish on a contract with Smith, which led to the DPD partnership and additional contracts with Smith and Little to build houses. Petitioner and Suchor were both accused of non-violent property crimes; Petitioner was actually accused of stealing far less than Suchor.

In *Suchor*, the State was unable to prove that Suchor had redirected or misappropriated more than $500; in Petitioner's case, the State made no attempt to show that the purchases or alleged forgeries were for any purpose other than company business; whether Petitioner had the right to spend monies paid on invoices for work performed and materials delivered was never

addressed. Petitioner's counsel allowed this and the court did not question the omission.

It is clearly stated in *State v. Gard* that there was a contract signed for each of the construction projects begun under DPD auspices. *Id.* 742 N.W. 2d at 259, in addition to the partnership documents. Even as a partner, Smith and Little required signed construction contracts with Petitioner on every project, both privately and as part of DPD. The funds in questions were freely given to Petitioner, deposited into his account for use as necessary. Petitioner "[a]cted under an honest and reasonable claim of right to the property involved... [and] that [he] had a right to acquire or dispose of the property as he... did." SDCL 22-30A-16(2). Petitioner paid DPD debts and his own debts from monies received under invoice without issue or question for most of a year.

Until Little prevented Petitioner from paying corporate bills, nothing was in arrears and all accounts, materials, and labor were paid on time. "Petitioner used money for legitimate purposes. Any other money in his account is not partnership or State's issue." *Commercial National Bank v. Smith,* 60 SD 376 (SD 1932).

The prosecution in this case has simply criminalized Petitioner for using money that was his by virtue of payment of invoices and imprisoned him.

> "[T]he Legislature has not the power to provide that a contractor who breaches his agreement to pay a certain class of debts with money that is his own shall, for that reason alone, be deemed guilty of a crime punishable with imprisonment. Nor has it the power so to interfere with the right of contract as to provide, in effect, that the money paid to a contractor under his contract shall not be absolutely his own property to do with as he pleases, but shall be received by him in trust to pay a certain favored class of creditors. Any legislation that makes it a crime for one to use his own money for any other purpose other than the payment of his debts is violative of section 15 or article VI of the Constitution of this state, which *expressly inhibits imprisonment for debt* except in cases of fraud... There can be nothing so injurious to the public welfare in the failure of a debtor to pay his just debts as to require the exercise of police power."
>
> *Id.* 60 SD at 381-382 (emphasis added)

Petitioner is imprisoned for debt arising out of contract, contrary to the Constitutions of the State of South Dakota and the United States. In their justification of the imposition of criminal penalties for civil debts, the South Dakota Supreme Court cites foreign jurisdictions, "trends" in other states, and the civil statutes of the Uniform Partnership Act. *Gard*, 742 N.W. 2d at 262.

Nothing produced by the State has demonstrated that any of the funds in question were not available, pursuant to the partnership agreement and construction contracts, to use as he saw fit; none of the partnership funds were misappropriated. At this time, Petitioner has been imprisoned for seventeen years for what, at its base, was a disagreement between partners about the direction of the company; access to a cooperative police chief escalated this from a civil suit into incarceration.

In *State v. Reddick*, the South Dakota Supreme Court held that a partner who misappropriates partnership funds does not commit theft because "each partner is the ultimate owner of an undivided interest in the partnership property[.]" *Id.* 48 N.W. at 847.

The *Reddick* court explained that none of such property can be said, with reference to either party, to be the property of another, and no one can be guilty of stealing what belongs to him. *Id.* The South Dakota Supreme Court's determination that in Petitioner's specific case *Reddick* was no longer good law was addressed, *supra.*

Nowhere was the question of whether Petitioner ever spent DPD monies on any purpose other than the agreed-upon goals of the partnership addressed. Petitioner spent his personal and Planet Builders monies as he wished, without interfering with the operation of DPD.

> "Because the State did not present any evidence on an essential element of the offense, the circuit court erred in denying Suchor's motion for judgment of acquittal as to this count." *Suchor,* at ¶ 20;

> "[A] conviction... requires the State to establish, circumstantially at the very lease, that Suchor used these payments for some other purpose than costs related to the [client's] project. Because such critical evidence is absent in the record, the circuit court erred in denying Suchor's motion for judgment of acquittal as to this count." *Suchor,* at ¶ 26;
>
> "Without evidence from which the jury could have inferred that Suchor used [client's money for purposes other than his project], the conviction on this charge cannot stand... The circuit court erred in denying Suchor's motion for judgment of acquittal as to this count." *Suchor,* at ¶ 31.

Repeatedly, the South Dakota Supreme Court stressed the State's failure to present the requisite element, the scintilla of proof that Suchor had used clients' funds for a purpose other than that for which they were intended as significant in sustaining a conviction. Because Suchor had competent counsel, he was aware that failure to prove the elements of a crime required a directed verdict and so moved the court. Petitioner was not afforded such competence; the South Dakota Supreme Court determined counsel's failure to move for acquittal immediately following close of evidence constituted a waiver of the claim. *Gard*, 742 N.W. 2d at 264.

Petitioner used DPD funds for partnership purposes and used his own money to provide for himself. He had no obligation under statute or the partnership agreement to live on the streets to avoid collecting earned payroll in order to provide more cash for outstanding DPD debt. See also *United States v. Rodriguez*, 139 F.3d 439, 448 (9th Cir. 1996) (if a party committed theft every time it failed to pay, or failed to cause another to pay, money when due, RICO law would swallow up much of the common law of contracts.).

> "[T]he Legislature is without authority to provide that a contractor shall be deemed guilty of a crime punishable by imprisonment for failure to pay the claims of creditors furnishing labor and material paid to him under contract."
> *Commercial National Bank*, 60 SD at 380.

Unlike *Suchor*, where creditors did go unpaid even though Suchor had been paid by his clients, in this matter, none of DPD's creditors, laborers, or materialmen went unpaid or were

ever paid late until Petitioner's "partner" unexpectedly cut off access to corporate funds.

The South Dakota Supreme Court has demonstrated that it is capable of recognizing injustice under certain limited circumstances. Petitioner's treatment in the circuit court and before their bench, compared to that seen in *Suchor*, raises significant due process and equal protection questions.

Public trust and reliance in the fairness of the judiciary mandate that this miscarriage of justice be recognized and Petitioner's convictions be set aside.

VI. Must a State consider proportionality in determining whether a sentence violates the Eighth Amendment prohibition against cruel and unusual punishment and the Fourteenth Amendment guarantees of Equal Protection and Due Process?

Petitioner was sentenced to fifteen years for the consolidated theft charges and ten years on each of five counts of forgery, all run consecutively, the maximum enhanced penalty statutorily allowed on each count. *Appx. 1.* These were all non-violent property crimes; Petitioner has never been convicted of a violent offense.

In the South Dakota Supreme Court's discussion of whether this sentence was disproportionate, the court reasoned that "[t]he sentencing court noted that Gard had two prior felonies for theft convictions," *Gard*, 742 N.W. 2d at 265, which were for "hot checks" in Texas in 1991, 13 years prior to this conviction. This was the only portion of the sentencing hearing which was based on documented reality, although South Dakota law does not allow felonies more than ten years old to be considered in sentencing enhancement.

The alleged "history of theft that spans twenty years[]" *Id* at 265 had no basis in law or fact. Because the court referenced the two bad checks of Petitioner's actual prior charges, it seems apparent had Petitioner's actual criminal record before it. No other charges were ever

filed, Petitioner was never convicted in any court, yet the court used this "twenty year" record to justify the imposition of the maximum possible penalty.

One might suppose this might be relevant to an allegedly evidence-based Article III court, but the sentencing court demonstrated a bias against Petitioner in creating a fictional criminal history and accepting the unsupported claims and insinuations of the prosecutor, seeming to intuit a criminal empire from bounced checks and a business dispute, turning a judicial process into an unconstitutional Bill of Attainder and declaring Petitioner outlaw based on allegations of seeking business credit at a home store.

> [A] sentence may violate due process if it is based upon "material information of constitutional magnitude." *Roberts v. United States,* 445 US 556, 100 S.Ct. 1358, 63 L.Ed. 2d 622 (1980); see also *United States v. Tucker,* 404 US 443, 447, 92 S.Ct. 589, 30 L.Ed. 1690 (1948). To prevail on such a claim, the petitioner must show (1) that the information before the sentencing court was materially false in imposing the sentence. *Tucker,* 404 US at 447; *United States v. Stevens,* 851 F.2d 140, 143 (6th Cir. 1988); *United States v. Polselli,* 747 F.2d 356, 358 (6th Cir. 1984). A sentencing court demonstrates actual reliance on misinformation when the court gives "explicit attention" to it, "found[s]" its sentence "at least in part' on it, or gives "specific consideration" to the information before imposing sentence. *Tucker* 404 US at 444, 447.

When the average sentence for theft and forgery in Lawrence County was less than 20 months, *Appx. 3,* and Petitioner received 780 months for a non-violent property crime, largely based on the "explicit attention" given to false information, it has serious Constitutional implications.

> "[A]s the criminal laws make clear, non-violent crimes are less serious than crimes marked by violence or the threat of violence. (the State recognizes that the criminal law is more protective of people than property) *Enmund v. Florida,* 458 US 782 (1982)
>
> *Solem v. Helm,* 463 US 277, 292-293 (1983)

In *Helm,* also a South Dakota case, the defendant received a sentence of life without parole for his seventh non-violent felony, the issuance of a "no account" check. All of his prior

felonies were non-violent, none were crimes against people, and alcohol was a contributing factor in each.

> "Not until after the United States Supreme Court's decision in *Solem v. Helm* did the South Dakota Supreme Court recognize a prison sentence within the statutory limits constitute cruel and unusual punishment. In *Helm* the Supreme Court held the defendant's sentence must be 'proportionate to the crime' committed and no penalty is considered 'per se constitutional.'"
>
> *Note: South Dakota Supreme Court: State v. Pack, Proportionality of Sentences – Should it be a necessary factor in determining whether a sentence "Shocks the conscience of the court?"*
>
> *Stephanie E. Carlson,* 40 SD L. Rev. 130 at 130.

The South Dakota Supreme Court held that "[g]iven the fact that Gard's sentences were within the statutory maximum, his history of prior theft convictions, and other complaints, this sentence does not constitute gross disproportionality[]" and did not "constitute cruel and unusual punishment." *Gard,* 742 N.W. 2d at 265-266. As a reminder, both his criminal history and "other complaints" had been falsely inflated by the court without objection by counsel.

Justice Henderson, in his dissent in *State v. Pack,* noted that in the court's test, whether the sentence "shocks the conscience" or was "so disproportionate to the crime" as to trigger the Eighth Amendment proportionality analysis, the majority should "notice the little word 'or'; it is powerful." *Pack* 516, N.W. 2d at 670; see *State v. Bad Heart Bull,* 257 N.W. 2d, 715, 720 (SD 1977) (determining the "shock the conscience" standard by considering only whether a reasonable person would be shocked by the sentence); *State v. Becker,* 51 N.W. 1018, 1033 (1892) (limiting the court to the consciences of reasonable men when determining if the sentence was shocking). A sentence is unconstitutional under the Eighth Amendment when it is "grossly disproportionate to the crime." *Ewing v. California,* 5338 US 11, 23, 123 S. Ct. 1179 (2003).

The proportionality analysis set forth in *Helm* includes the following three prongs; (1) "the gravity of the offense and the harshness of the penalty," (2) "the sentences imposed on other

criminals in the same jurisdiction," and (3) "the sentences imposed for the same offense in other jurisdictions." *Solem v. Helm*, 463 US at 292.

In the instant matter, the severity of the offense was bounced checks; the harshness was functional life in prison. Sentences in the same and other jurisdictions, both South Dakota and sister states, were bare fractions of the punishment imposed on Petitioner, forcing him to serve decades more than the second harshest sentence imposed for similar crimes. *Appx. 3.* In 17 years, he has never met another person who received any sentence remotely similar for non-violent, non-drug-related property crimes. Petitioner's sentence is in line with those imposed for manslaughter or sex offenses, not buying construction materials.

> "In *State v. Pack* despite the [South Dakota Supreme Court's] prior use of the proportionality standard, the South Dakota Supreme Court concluded there was no need to perform a proportionality review of defendant's sentence since it did not shock the conscience of the court. This decision deprived the defendant of a proper judicial review, which should have included a proportionality analysis."
> *Stephanie E. Carlson,* 40 SD L. Rev. 130 at 131. (footnotes omitted)

> "Of the 98 inmates serving sentences within the range of the sentence which Mr. Gehrke could receive, up to 15 years... the average sentence of prisoners serving time in South Dakota for this offense in early September 1991 was just over 8 years...
>
> "Under a cold analysis of this record, statistics reveal Gehrke's sentence was beyond the pale of sound discretion. Trial court abused its discretion. *State v. Reed*, 451 N.W. 2d 128, 132 (SD 1990)... An epitome of over-reaction blankets the sentence. Objectivity was forsaken. Sister states, e.g. Montana and Minnesota, when maximum sentences are compared, do not reflect a sentence as tough as this one by a considerable margin. Finally, this defense lawyer produced the statistics and data to win this appeal. Beautiful job. But he loses the appeal. Why? Not by or in law, my legal brethren, rather by statist mind set. Yes, the same mind set which has created new confinement/ prisons, correctional facilities (more mortar and bricks to imprison) and fewer colleges"
> *State v. Gehrke,* 491 N.W. 2d 421, 429 (SD 1992)

The conscience of the South Dakota Supreme Court was not shocked by Petitioner being sentenced to functional life imprisonment, nor reaching initial parole eligibility until age 70, for allegedly forging checks with no history of violence.

One would hope that the conscience of a reasonable man would find this shocking and a complete distortion of all that the courts should aspire to be.

The implementation of sentencing reform in 2013, which included forgery as a presumptive probation crime under SDCL 22-6-11, threw Petitioner's sentence ever further beyond the pale. In the first eighteen months of its implementation, the longest sentence imposed by the State of South Dakota for forgery was only five years, received by nine people. *Appx. 4.* 74% of those newly convicted of forgery received only probation, while each of Petitioner's forgery sentences received twice the current maximum. *Id.*

Based on the falsehoods of the prosecutor, the demonstrated bias of the judge, the impotence of counsel, the gross disproportionality of the sentence compared to the severity of the crime and the sentences imposed on every other person convicted of similar crimes, and in light of the sentencing reforms instituted in South Dakota, Petitioner asks that this sentence be set aside or, in the alternative, that he be remanded for sentencing in line with the current standards.

VII. The questions raised in this petition are important and unresolved.

The South Dakota Supreme Court has decided important questions of constitutional law in contradiction to decisions that have been previously settled by this Court and are a firm basis for granting direct collateral review in this case.

1. The South Dakota Supreme Court overruled their own precedent, subjecting Petitioner to retroactive judicial enlargement of statute, without fair notice that his alleged behavior would now be criminal, in violation of Constitutional *ex post facto* prohibitions dating back to *Calder v. Bull,* 3 Dall. 386. Justice cannot be justice if it is a surprise.

2. Petitioner was not represented by competent and reasonable counsel during plea negotiations, at trial, at sentencing, or at appeal. He was denied Due Process at all stages in

violation of the Fifth, Sixth, and Fourteenth Amendments. Because counsel was not allowed to present a claim of ineffective assistance of counsel against himself, no court has heard evidence regarding any of the highly prejudicial failings of counsel.

3. The State failed to present evidence or attempt to prove the requisite element of intent in connection with a single charge of the indictment and the South Dakota Supreme Court refused to address the merits of this claim because of counsel's failings, despite this Court's holding in *United States v. Booker,* requiring the elements be proven beyond a reasonable doubt.

4. Petitioner's sentence was excessive, cruel, and grossly disproportionate to the severity of the crime and exceeds every other similar sentence imposed in the jurisdiction by decades, in violation of the Eighth Amendment prohibition against cruel and unusual punishment. The State was allowed by the court and defense to present extensive false testimony to justify the imposition of this functional life sentence.

5. This petition presents to this Court a fundamental question for review – may a conviction that is entirely in opposition to the facts of the indictment be allowed to stands? This Court has always held in the negative and the decision of the court below is sufficiently outrageous that it is important that this Court affirm the reliance in both State and Federal jurisdictions on Constitutional principles by overturning the conviction in this case.

CONCLUSION

Petitioner is actually innocent of the crimes alleged and has been imprisoned for seventeen years through a grievous miscarriage of justice.

The judgment below is a unique departure from decisions of this Court which require that convictions achieved through violations of statutes and Constitutional provisions be set aside at any time after conviction. As such, it represents a breach in the walls erected by the Fifth, Sixth,

Eighth, and Fourteenth Amendments to the Constitution and numerous decisions of this Court that were designed to protect citizens from being convicted by a State in the absence of the requisite elements of the felonies alleged and without the assistance of effective counsel. The lower courts have refused to allow Petitioner to argue the merits of this matter; no other relief is available.

This Petition for Extraordinary Writ of Habeas Corpus should be granted.

1. Petitioner requests that this Court appoint counsel to properly represent him, and '

2. Allow this Writ to issue and release Petitioner from this miscarriage of justice.

Respectfully submitted this 17th day of April, 2023

Petitioner, pro se
Mike Durfee State Prison
1412 Wood St.
Springfield, SD 57062

Petitioner, Rex Gard, swears that the foregoing document is true and correct under the penalty of perjury, pursuant to 28 U.S.C. § 1746.

Dated this 17th day of April, 2023 in Bon Homme County, South Dakota.

Notary Public – South Dakota

Subscribed and sworn to me this 17 day of April, 2023

My Commission Expires Apr. 4, 2024

TIFFANY VOIGT
SEAL NOTARY PUBLIC SOUTH DAKOTA SEAL