No. 24-6093

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

GARLAND RAY GREGORY, JR. – PETITIONER

VS.

STATE OF SOUTH DAKOTA – RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI

SOUTH DAKOTA SUPREME COURT

PETITON FOR WRIT OF CERTIORARI

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

QUESTIONS PRESENTED

1. Does South Dakota's position, in its statutory required appointment of counsel for indigent prisoners in habeas proceedings (SDCL § 21-27-4) there is no state constitutional right to effective habeas counsel; the cause of ineffectiveness being the South Dakota Supreme Court's intrusion into the attorney-client relationship and interference with habeas representation – an independent constitutional violation, violate the Fourteenth Amendment's Equal Protection and Due Process guarantee?

2. Does State Supreme Court's intrusion into the attorney-client relationship and interference with court appointed habeas counsel's representation in a manner that "involves such a probability that prejudice will result that it is deemed inherently lacking in due process, permitting an unknowing, involuntary, unconstitutional guilty plea to go uncorrected, call for the exception, collateral estoppel not applying, petitioner not having had a full and fair opportunity to litigate the issues in the earlier case?

3. Is the replacement counsel's ineffectiveness in Gregory v. State habeas proceeding, properly before the court as a component of the claim 'South Dakota Supreme Court intruded into the attorney-client relationship, interfered with habeas representation, counsel's ineffectiveness the requisite prejudice component of the claim'?

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

S.Ct.

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest court to review the merits appears at Appendix – A, and is published at Gregory v. State, 11 N.W.3d 915 (S.D. 2024).

The opinion of the South Dakota Fourth Judicial Circuit Court appears at Appendix – B, and is unpublished.

JURISDICTION

The date on which the final decision from the State Court was filed was October 7, 2024. A copy of that decision appears at Appendix – A.

The Jurisdiction of this Court is invoked under U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment – No person shall be *** deprived of life, liberty, or property, without due process of law;

Sixth Amendment – assistance of competent counsel

Fourteenth Amendment – Equal Protection and Due Process

Constitution of South Dakota Art. 6, § 7

...and to a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.

SDCL § 15-6-52(a) Effect of a court's findings. In all actions tried upon the facts without a jury ...find the facts specially, and state separately its conclusions of law thereon.

SDCL § 15-6-54(b) ...any order or other form of decision...which adjudicates fewer than all the claims...shall not terminate the action as to any of the claims...subject to revision at any time before the entry of judgment adjudicating all the claims.

SDCL § 15-6-63 Powers of Successor as to Proceedings Before Former Judge. Successor judge has no authority to render decision in case where judge has not heard testimony, unless parties so stipulate.

SDCL § 16-3-3 Substantial rights not to be affected by rules. No rule promulgated under this chapter shall in any manner abridge, enlarge, or modify the substantive rights of any litigant.

SDCL § 16-12B-17 Practice of law by magistrate. Any attorney who is a part-time magistrate may practice law under such conditions as the circuit judges sitting en banc in the judicial circuit may provide, subject to Supreme Court rule.

SDCL § 21-27-4 Counsel appointed for indigent applicant...for a writ of habeas corpus...if the judge finds that such appointment is necessary... appoint counsel for the indigent person...

SDCL § 21-27-16 Causes for discharge of applicant on judicial process

(3) Where the process is defective in some substantial form required by law;

(6) Where the process appears to have been obtained by fraud, false pretense...

SDCL § 23A-7-2 Pleas permitted to defendant - - Requirements for plea of guilty or nolo contendere.

The court may not enter a judgment unless it is satisfied that there is a factual basis for any plea...

SDCL § 23A-7-4(1) Advice as to rights to defendant pleading guilty or nolo contendere.

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

SDCL § 23A-7-14 Factual basis required before acceptance of plea other than nolo contendere.

The court shall defer acceptance of any plea except a plea of nolo contendere until it is satisfied that there is a factual basis for the offence charged or to which the defendant pleads.

SDCL § 23A-16-3 (Rule 18) Right to speedy trial by impartial jury - - Venue in the county where offense committed.

SDCL § 23A-34-18 A court must make specific findings of fact and state expressly it conclusions of law, relating to each federal, state or other issue presented. (Repealed)

SDCL § 23A-44-15 Plain error noticed though not brought to court's attention.

Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of a court.

SDCL § 24-15-4 "A person sentenced to life imprisonment is not eligible for parole by the Board of Pardons and Paroles." (circa 1979)

SUMMARY OF ARGUMENT

Petitioner urges that the United States Supreme Court grant his certiorari and examine his claim 'the South Dakota Supreme Court intruded into the attorney-client relationship, the intrusion prejudiced petitioner, the court interfering with his court appointed habeas counsel in a manner that 'involves such a probability that prejudice will result that it is deemed inherently lacking in due process' (See Estes v. Texas, 381 U.S. 532, 542-543 (1965)), precipitating ineffective assistance of habeas counsel violating the Fourteenth Amendment'.

The South Dakota Supreme Court expressing a bias revealing such a 'high degree of antagonism as to make fair judgment impossible' (Liteky v. United States, 510 U.S. 540, 555 (1994), Due Process entitles [Petitioner] to 'a proceeding in which he may present his case with assurance that no member of the court is predisposed to find against him' (see Marshall v. Jericho, Inc., 446 U.S. 238, 242 (1980)), in constitutionally examining his claim.

The State's position stated in Appellee's Brief, "[T]here is no federal constitutional right to counsel 'when mounting collateral attacks upon their conviction'" Cit. Omit. Nor is there a state constitutional right to effective assistance of habeas counsel in South Dakota. Cit. Omit. ... ineffective assistance claims are not usually cognizable in coram nobis proceedings. Cit. Omit. (From pg. 10 of Appellee's Brief - Gregory v. State, No. 30734 August 8, 2024).

"The Due Process Clause guarantees more than fair process... The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests," (Washington v. Glucksberg, 521 U.S. 702, 719-720 (1997)); "a liberty interest arising from the Constitution itself, or from an expectation or interest created by state laws or policies." Wilkinson v. Austin, 545 U.S. 209, 221 (2005).

The latter is what South Dakota created pursuant to SDCL § 21-27-4, interpreted in Jackson v. Weber, 637 N.W.2d 19, 22-23 (S.D. 2001):

"It is beyond dispute that our legislature has required that counsel be appointed for indigent prisoners in habeas proceedings. SDCL 21-27-4. Our legislature has spoken in spite of the fact the United States Constitution does not mandate this requirement. Cit. Omit. In light of our legislature's pronouncement, we must determine the standard to govern an ineffectiveness claim in a habeas appeal...

The effective assistance of counsel standard announced in *Strickland* [1] is well established. As recognized by at least one other court, "it would be absurd to have the right to appointed counsel who is not required to be competent."

We will not presume that our legislature has mandated some "useless formality" requiring the mere physical presence of counsel as opposed to effective and competent counsel. Cit. Omit.

A refusal to acknowledge the requirement of counsel means constitutionally effective counsel would weaken the mechanism to ensure "as a bulwark against convictions that violate fundamental fairness. Cit. Omit."

The Equal Protection Clause of the Fourteenth Amendment declaring "no state shall deny to any person within its jurisdiction the equal protection of the laws," (See City of Cleburne Tex. v. Cleburne Living Center, 473 U.S. 432, 439 (1985)), the State Supreme Court's interference denied petitioner the effective habeas counsel representation it provides for by statute (SDCL 21-27-4), precipitating the ineffective assistance of counsel defined by *Strickland*, their expressed standard for the competence of statute required habeas counsel.

The State Supreme Court's interference resulting in habeas counsel's errors failing to protect petitioner's liberty interests in a habeas process defective in substantial form required by law (SDCL § 21-27-16(3)), obtained by fraud (SDCL § 21-27-16(6)), depriving petitioner of a fair proceeding whose result is reliable.

[1] Strickland v. Washington, 466 U.S. 668 (1984)

The State argues "Not only are his claims barred by res judicata and collateral estoppel, but he waives his issues on appeal because he made no arguments on how the circuit court erred when it dismissed his writ. See Duerre v. Hepler, 2017 S.D. 8, ¶ 28, 892 N.W.2d 209, 220 ("It is well settled that the failure to brief an issue and support an argument with authority waives the right to have this Court review it). (From pg. 12-13 of Appellee's Brief - Gregory v. State, No. 30734 August 8, 2024).

The United States Supreme Court holds "A document filed *pro se* is "to be liberally construed," Cit. Omit., and "*pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." Erickson v. Pardus, 551 U.S. 89, 94 (2007).

The circuit court abused its discretion, not examining and ruling on petitioner's claim, the South Dakota Supreme Court intruded into petitioner's attorney-client relationship with his court appointed habeas counsel, in a manner that involved such a probability that prejudice will result it is deemed inherently lacking in due process. The circuit court holding the 'abuse of discretion' derived holdings of Gregory, 325 N.W.2d 297 (S.D. 1982)/353 N.W.2d 777 (S.D. 1984) barring petitioner from bringing claims again by res judicata.

The South Dakota Supreme Court replaced petitioner's habeas counsel at a crucial part of the proceedings, because the State Supreme Court's appointing the then habeas attorney as a part-time law trained magistrate, believed it was a conflict of interest, being conceivable the case could be overturned and assigned to him as a judge.

The same court erroneously treated petitioner's claim on a 'direct consequence' as a 'collateral consequence', both having distinct/different constitutional requirements, and

petitioner's habeas attorney replaced for the original court appointed habeas counsel failed to contest it.

These claims the State would have the Court believe are frivolous, and petitioner collaterally estopped from seeking review of. If what the Court has done as a matter of law and Due Process procedure violations are unassailable, then yes, the petitioner is wasting the Court's time. But that's not what this Court says:

"Although we have described the "law of the case[a]s an amorphous concept," "[a]s most commonly defined, the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." Cit. Omit. This doctrine "directs a courts discretion, it does not limit the tribunals power. Accordingly, the doctrine "does not apply if the court is 'convinced that [its prior decision] is clearly erroneous and would work a manifest injustice.' Cit. Omit." Pepper v. United States, 562 U.S. 476, 506-507 (2011).

It's apparent that petitioner got exactly what the court said it would not presume the legislature has mandated "the mere physical presence of counsel as opposed to effective competent counsel." Jackson, supra at 23.

The petitioner herein argues to this Court, the decision is clearly erroneous, and works a manifest injustice.

STATEMENT OF THE CASE

After its Order Directing Issuance Of Judgment Of Affirmance #30734, October 7, 2024, The South Dakota Supreme Court served petitioner with a Warning Order, dated October 9, 2024, (Appendix C) characterizing petitioner's appellate action "unduly repetitive, unwarranted by existing law, frivolous, and/or filed for an improper purpose (e.g. to harass)."

Its characterization is false, an attempt to intimidate and discourage petitioner from exercising the constitutional right of access to courts "ancillary to the underlying claim." (See Christopher v. Harbury, 536 U.S. 403, 415 (2002)). The South Dakota Supreme court intruded into the attorney-client relationship, and interfered with his habeas counsel in a manner that "involves such a probability that prejudice will result that it is deemed inherently lacking in due process" (Estes, supra), permitting an unknowing, involuntary, unconstitutional guilty plea to go uncorrected.

ARGUMENT

1. Does South Dakota's position, in its statutory required appointment of counsel for indigent prisoners in habeas proceedings (SDCL § 21-27-4) there is no state constitutional right to effective habeas counsel; the cause of ineffectiveness being the South Dakota Supreme Court's intrusion into the attorney-client relationship and interference with habeas representation – an independent constitutional violation, violate the Fourteenth Amendment's Equal Protection and Due Process guarantee?

Yes, 'an independent constitutional violation', the South Dakota Supreme Court intruding into the attorney-client relationship and the intrusion prejudiced the petitioner (See United States v. Sawatzky, 994 F.3d 919, 923 (8th Cir. 2021)), "constitutes cause." Coleman v. Thompson, 501 U.S. 722, 755 (1991)

2. Does State Supreme Court's interference with court appointed habeas counsel's representation in a manner that "involves such a probability that prejudice will result that it is deemed inherently lacking in due process" (Estes, supra), call for the exception "collateral

estoppel not applying, petitioner not having a full and fair opportunity to litigate the issues in the earlier case" Allen v. McCurry, 449 U.S. 90, 95 (1980)?

In Gregory v. State, 325 N.W.2d 297, (S.D. 1982)/353 N.W.2d 777 (S.D. 1984), the South Dakota Supreme Court intruded into petitioner's attorney-client relationship , interfering with petitioner's habeas representation in a manner that involves such a probability that prejudice will result that it is deemed inherently lacking in due process (Estes, supra), because of an imagined conflict of interest.

Newly appointed counsel failed to contest holdings violating statutory/constitutional due process protections, permitting an unknowing, involuntary, unconstitutional guilty plea to go uncorrected. Failing in his 'duty to bring to bear such skill and knowledge as will render the proceeding a reliable adversarial testing process, there being a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different (See *Strickland*, supra at 694), denying petitioner the full and fair opportunity to litigate the issues in the earlier proceedings, which the Court holds collateral estoppel cannot be applied to. Allen, supra.

The formal evidence of original court appointed habeas counsel's removal that petitioner has, is text from Gregory v. Solem, 449 N.W.2d 827, 835 n.1 (S.D. 1989): "Shortly after remand, Mueller left to become a magistrate and was replaced by Mr. Jackley. Jackley represented petitioner in future remand proceedings and Gregory II."

Petitioner has requested by motion (Exhibit – E) copies of the formal documents purveying the change of habeas counsel, which has not been responded to.

The court's change of petitioner's court appointed habeas counsel was unwarranted. Replacing habeas counsel because of an imagined, future conflict of interest (sic – having been

appointed a part-time law trained magistrate, it was foreseeable that the case could be overturned and assigned to him), which was not unpreventable, unavoidable, a sudden, urgent reality calling for counsel's replacement. The case overturned, the possibility of anything other than re-arraignment, would never transpire before a part-time law trained magistrate.

Additionally, counsel not prevented by statute from continuing to represent petitioner. Pursuant to SDCL § 16-12B-17 – Practice of law by magistrate. "Any attorney who is a part-time magistrate may practice law under such conditions as the judges sitting en banc in the judicial circuit may provide, subject to Supreme Court rule." Pursuant to SDCL § 16-3-3 – Substantive rights not to be affected by rules. "No rule promulgated under this chapter (16-3) shall in any manner abridge, enlarge, or modify the substantive rights of any litigant." The court's action changing the habeas counsel did, placed petitioner at an experiential disadvantage.

The over arching response of the State is the abuse of discretion 'based' holdings in Gregory, 325 N.W.2d 297 (S.D. 1982)/353 N.W.2d 777 (S.D. 1984), where petitioner's State Supreme Court replaced habeas attorney failed to bring to bear such skill and knowledge as would render the proceedings a reliable adversarial testing process. The process that produced these holdings is, pursuant to SDCL § 21-27-16(3), defective in substantial form required by law, and pursuant to SDCL § 21-27-16(6), obtained by fraud, false pretense.

At the root of these violations, the South Dakota Supreme Court's intrusion into petitioner's attorney-client relationship. The habeas proceeding pronounced a 'condemned practice' clearly and fully established the factual basis required by SDCL §§ 23A-7-2, 23A-7-14. Violating 'Plain error statute' SDCL § 23-44-15, the court failed to review petitioner's claim pursuant to SDCL § 23A-6-3; Const. Art. 6, § 7, U.S.C.A. Const. Amends. 5, 14 (precedent Boykin v. Alabama, 395 U.S. 238 (1969)). Violating SDCL 15-6-52(a) failing to conclude the

law on its specific finding of the violation of SDCL § 23A-7-4(1). A further violation of SDCL § 15-6-52(a) failing to find the facts and conclude the law of petitioners actual/correct second SDCL § 23A-7-4(1) violation claim. Holdings based on erroneous views of the law, and clear erroneous assessment of evidence, abuses of discretion (See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990)), denying petitioner equal protection of the laws, "which is essentially a direction that all persons similarly situated should be treated alike. Cit. Omit." City of Cleburne Tex. v. Cleburne Living Center, 473 U.S. 432, 439 (1985).

Other than calling petitioner's ineffective counsel claim frivolous and collaterally estopped from bringing them, neither the State Circuit Court nor the States Attorney General directly responded to petitioner's claim against the South Dakota Supreme Court. The State Attorney General responding, "But "[t]here is no federal constitutional right to counsel 'when mounting collateral attacks upon their convictions.'" "Nor is there a state constitutional right to effective assistance of habeas counsel in South Dakota." "Further, "ineffective assistance claims are not usually cognizable in coram nobis proceedings." (pg. 10 Gregory v. State, Appellee's Brief, No. 30734 August 8, 2024)

Be that as it may, the State created statutory right that counsel be appointed for indigent prisoners in habeas proceedings (SDCL § 21-27-4), and the South Dakota Supreme Court's interpretation "it would be absurd to have the right to appointed counsel who is not required to be competent," by its standard pronounced in *Strickland*, (Jackson, supra), petitioner is entitled to, guaranteed and protected by the Fourteenth Amendment. (See Cleburne, supra.)

Pursuant to the State created liberty interest (Wilkinson, supra), "once an attorney-client relationship has formed, petitioner enjoys a right to continue to be represented by that attorney as 'counsel of his own choosing'." See People v. Ellis, 225 A.D.3d 784, 785 (2024). The South

Dakota Supreme Court intruded into the attorney-client relationship, the intrusion prejudiced the petitioner, a Sixth Amendment violation is established. See Sawatzky, supra.

Petitioner has not had a full and fair opportunity to litigate the issues in the earlier proceeding, collateral estoppel cannot be applied. Allen, supra.

3. Is the replacement counsel's ineffectiveness in Gregory v. State habeas proceeding, properly before the court as a component of the claim 'South Dakota Supreme Court intruded into the attorney-client relationship, interfered with habeas representation, counsel's ineffectiveness the requisite prejudice component of the claim'?

a. In Gregory, 325 N.W.2d 297, 299 (S.D. 1982), the process, pursuant to SDCL 21-27-16(3) is defective in substantial form required by law, and the habeas counsel failed to contest it. The court based its finding of fact and conclusion of law on the 'failure to constitutionally establish a factual basis for the guilty plea, statutorily required by SDCL §§ 23A-7-2, 23A-7-14, a liberty interest created by state law (Wilkinson, supra), on a condemned practice ("Allowing one circuit judge to enter a finding based on testimony heard by another circuit judge', which the court holds, "does not render the plea valid... court condemned a similar practice in Hinman v. Hinman, 443 N.W.2d 660 (S.D. 1989)...court held, "[a] successor judge has no authority to render a decision in a case where he has not heard the testimony." Quist v. Leapley, 486 N.W.2d 265, 268 (S.D. 1992).)

In *Gregory* the court held, "A fair reading of the plea taking court's comments indicates the preliminary hearing transcript was noticed for the factual basis, which it clearly and fully established. Id. at 299. "The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws, which is essentially a direction that all persons similarly situated should be treated alike."

Cleburne, supra. The court's action in *Gregory* denies petitioner equal protection of the law. The plea taking judge in petitioner's case is a successor judge (petitioner arraigned on or about November 6, 1979, before Judge Timothy R. Johns; preliminary hearing on or about November 13-14, 1979, before Judge R.E. Brandenberg; change of plea hearing, on or about March 13, 1980, before Judge Robert A. Miller). What was done/allowed to establish the statute required factual basis, is the 'condemned practice', the process being defective (SDCL § 21-27-16(3)), denying petitioner equal protection of the law.

The court in Gregory has not observed petitioner's constitutionally protected liberty interest pursuant to SDCL § 15-6-63 - Hinman, supra, Quist, supra. Understandably the *Boykin* triumvirate exists to no harmless error disposition, and appears to be the application the court holds to. This violates petitioner's equal protection rights. The same reason for the statutory protection exists in petitioner's statute created liberty interest.

Civil procedures are not precariously created. So not allowing one circuit court judge to enter a finding based on testimony heard by another circuit judge (SDCL § 15-6-63 – Hinman, supra, Quist, supra), is the legal interpretation and imposition of the contemplated will of the South Dakota Supreme Court, and the South Dakota Legislature; and a constitutionally protected liberty interest of the petitioner.

What renders this violation particularly specious, is the court's quoting the trial judge's "I have read the entire file of the Archambault case, which includes, as counsel are aware of, and we should make of record, the statements given to polygraph people and then again the reports of the polygraph people to the state's Attorney and to the Court." *Gregory* at 298.

Trial judge's dicta made contemptibly exacerbating by the report of Psychiatrist Frederick M. Miller, M.D. (attached in it entirety Appendix – D). Where the mental state and

credibility of the witness, and the witnesses testimony the judge is giving validity to, through the auspices of the 'condemned practice' is illustrated. 'Racist antagonism' toward black people' (pg. – eight of report) "punched out by a black nigger" [petitioner is of African American ethnicity]. Among other revelations the Psychiatrist summarizes Archambault as (pg. – two) "A paranoid personality that borders on an incipient paranoid psychosis," "A mild or moderate organic brain syndrome; (pg. – nine) "He is an unreliable and non-credible witness," "It is quite possible that the results of any polygraph examination performed on Mr. Archambault would be grossly unreliable..."

Petitioner's statutory created liberty interest, constitutionally protected, has been obliterated by the apparent ranting of a sociopath, the judge has not himself heard.

Habeas counsel ineffective, failing to contest the court's findings and conclusions, that violate the petitioner's due process rights, "failing to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland* at 688.

Petitioner's claim is not frivolous, or unwarranted by existing law.

b. Pursuant to SDCL § 23A-44-15 'Plain error noticed though not brought to court's attention', pursuant to SDCL § 21-27 16(3) the process defective in substantial form required by law. Pursuant to the court's holding in State v. Brammer, 304 N.W.2d 111, 114 (S.D. 1981), habeas counsel failed to contest the court's refusal to examine the *Boykin* claim/*Sutton* [2] issue (statutorily required by SDCL § 23A-16-3, S.D. Const. Art. 6, § 7, U.S.C.A. Const. Amend. 5, 14), violated petitioner's statutory created right and liberty interest, leaving the claim un-terminated (SDCL § 15-6-54(b).

The court held, "Appellant argues on appeal that his plea was invalid because he was not advised of his right to trial in the county in which the offense was alleged to have been

[2] State v. Sutton, 317 N.W.2d 414 (S.D. 1982)

committed, "pursuant to our holding in Sutton supra. This issue is not before us as it was not raised in appellant's Petition or Supplemental and Additional petition, it was not an issue at the post-conviction hearing, and it was not included in his proposed findings and conclusions." Gregory, 325 N.W.2d 297, 300 n.5 (S.D. 1982).

Contrarily the court holds, "We now conclude that in view of SDCL § 23A-44-15, we must give recognition to the legislatively created plain error rule... We must analyze the error and determine whether it substantially affected the rights of appellant, and thereby prejudiced him." Brammer, supra at 114.

In *Gregory* there was no such *analysis*; 'all persons being similarly situated should be treated alike' (Cleburne, supra), this denies petitioner equal protection of the law. The court's holding in *Sutton* establishes the constitutional and prejudicial nature of the claim affecting substantial rights.

Habeas counsel's failure to contest it, is a failure in counsel's "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process (*Strickland*, at 688), and the cause to obtain federal review of the default and prejudice of the violation. See Trevino v. Thaler, 569 U.S. 413, 421 (2013). Petitioner's claim is not frivolous or unwarranted by existing law.

c. Pursuant to SDCL § 21-27-16(3) the process defective in substantial form required by law, pursuant to SDCL §§ 15-6-52(a), 23A-34-18 (repealed) the court not concluding the law on its specific statutory finding (exactly what the statute tasks the court to do – 'the ordinary meaning of the statute language accurately expressing the legislative purpose' (See Hardt v. Reliance Standard Life Ins. Co., 560 U.S. 242, 251 (2010); Salzer v. Barff, 792 N.W.2d 177, 179 (S.D. 2010)), and direct admission that the trial court violated SDCL § 23A-7-4(1).

The court has not concluded the law on this specific finding, leaving the habeas un-terminated (SDCL § 15-6-54(b)). After finding the fact that the statute had been violated, as a negation of their admission, the court's language trivializing *Henderson v. Morgan, 426 U.S 637, 647 (1975)*:

"[n]ormally there contains either an explanation of the charge by the trial judge or at least a representation by defense counsel that the nature of the charge has been explained to the accused. Moreover, even without such an express representation, it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit." Gregory, 353 N.W.2d at 780.

Ignoring the full breadth of Henderson, supra:

Id. at 647 "This case is unique because the trial judge found as a fact that the element of intent was not explained to respondent... it also forecloses the conclusion that the error was harmless beyond a reasonable doubt..."

Henderson doesn't allow a complete failure by the trial court, or nullify the prejudicial showing of the express violation. Petitioner's claim is not frivolous or unwarranted by existing law. Habeas counsel failed to protect petitioner's liberty interest as it pertains to the court's duty to conclude the law on their specific finding, failing to bring to bear such skill and knowledge as will render the proceedings a reliable testing process'. *Strickland* at 688.

d. Pursuant to SDCL 21-27-16(6) the process obtained by fraud, false pretense, and the habeas counsel failing to contest, the courts failure to find the facts and conclude the law (to examine petitioner's actual 'correct' claim) on the trial court's failure to advise on the 'direct consequences' of the plea pursuant to SDCL § 23A-7-4(1).

The court's response to petitioner's claim, "We follow those decisions which have held it is not necessary for a court to inform of the collateral consequences of a guilty plea such as eligibility for parole, in order for a plea to be intelligently and voluntarily entered. Cit. Omit." Gregory, 353 N.W. 2d 777, 781 (S.D. 1984).

Be that as it may, petitioner's plea consequences are 'direct'. The court acknowledges petitioner's habeas claim is on a 'direct consequence':

"Based upon the portions of the transcript that we have produced above, it is abundantly clear that the defendant was fully aware that he would receive a life sentence upon entering a plea of guilty to the charge of conspiracy to commit murder." Gregory at 781.

Treating petitioner's claim failure to advise on the 'direct consequences' of the plea, as a failure to advise on the 'collateral consequences' of the plea, the court has not reviewed petitioner's actual claim, denying petitioner Due Process and Equal Protection of the law. The process obtained by fraud and false pretense.

By statute, SDCL § 24-15-4 "A person sentenced to life imprisonment is not eligible for parole by the Board of Pardons and Paroles." (circa 1979), forgoes the possibility of ever leaving prison alive, a direct consequence. Courts across the circuits and South Dakota hold the advisement required on direct consequences:

"The standard as to voluntariness of guilty pleas must be essentially that defined by Judge Tuttle of the Court of Appeals for the Fifth Circuit; "(A) plea of guilty entered by one fully aware of the direct consequences." Brady v. United States, 397 U.S. 742, 755 (1970).

"Defendant must be informed of the "direct," but not the "collateral," consequences of his plea." United States v. Gillette, 2018 WL 3151642 *6 (U.S.D.C. District S.D. Central Division).

Habeas counsel's failure to object to the court's finding on the wrong claim is a failure to "render adequate legal assistance." *Strickland* at 686.

Petitioner entitled to careful consideration and plenary processing of his claims, including opportunity for presentation of relevant facts. (See Harris v. Nelson, 394 U.S. 286, 298 (1969). The court has failed to examine petitioner's actual claim, and the habeas counsel failed to contest it. Petitioner's claim is not frivolous.

CLOSING

The State Supreme Court intruded into the attorney-client relationship. Counsel who was replaced for the original habeas counsel, "simply by failing to render adequate legal assistance" (*Strickland* at 688), prejudiced petitioner. There is a reasonable probability but for counsel's unprofessional errors the result of the proceedings would have been different.

Petitioner prays this Court will hand down a decision that will eventually allow petitioner to re-plead and stand trial.

The petition for writ of certiorari should be granted.

Respectfully, submitted,

Garland R. Gregory, Jr.

Garland Ray Gregory, Jr. pro se

Dated this 20th day of November, 2024.