No. 24-6093

IN THE

SUPREME COURT OF THE UNITED STATES

GARLAND RAY GREGORY, JR. – PETITIONER

VS.

STATE OF SOUTH DAKOTA – RESPONDENT

PETITION FOR REHEARING

ON PETITION FOR WRIT OF CERTIORARI

SOUTH DAKOTA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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

JURISDICTION

The Jurisdiction of this Court is invoked under U.S.C. § 1257(a), Supreme Court Rule 44 Rehearing.

PETITION FOR REHEARING

Garland Ray Gregory, Jr., the petitioner in this proceeding respectfully petitions for a rehearing of the order of the Court entered on January 21, 2025, received by petitioner January 27, 2025, denying the petition for writ of certiorari to the South Dakota Supreme Court. This petition made on the following ground:

"South Dakota's position that its statutory requirement for appointed counsel for indigent prisoners in habeas proceedings (SDCL § 21-27-4)[1] does not create a Fourteenth Amendment Equal Protection guarantee to constitutionally effective counsel, is an abuse of discretion violating the Fourteenth Amendment's Equal Protection guarantee."

The ground stated above confined to intervening circumstances of substantial and controlling effect or substantial grounds available to petitioner but not previously presented.

SUMMARY OF ARGUMENT

The State's position affirmed by the South Dakota Supreme Court:

"[t]here is no federal constitutional right to counsel 'when mounting collateral attacks upon their conviction.'" Lee v. Weber, 2023 S.D. 54, ¶ 11, 996 N.W.2d 905, 908 (quoting Pennsylvania v. Finley, 481 U.S. 551, 555, 107 S. Ct. 1990, 1993, 95 L.Ed.2d 539). Nor is there a state constitutional right to effective assistance of habeas counsel in South Dakota. Id. ¶ 13, 996 N.W.2d at 908. (From pg. 10 Appellee's Brief – Gregory V. State, No. 30734 August 8, 2024).

[1] 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…

Is an erroneous view of the law on a clearly erroneous assessment of evidence, an abuse of discretion (see Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990)), denying petitioner's Fourteenth Amendment protection guarantee, "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." City of Cleburne Tex. v. Cleburne Living Center, 473 U.S. 432, 439 (1985); U.S.C.A. Fourteenth Amendment.

There is no federal constitutional right to counsel when mounting collateral attack upon conviction, or state constitutional right to effective assistance of habeas counsel in South Dakota. Nevertheless, South Dakota's Legislature's 'statute created liberty interest' (see Wilkinson v. Austin, 545 U.S. 209, 221 (2005)) SDCL § 21-27-4, to effective assistance of habeas counsel, defined by the Court's standard held in Strickland v. Washington, 466 U.S. 668 (1984):

"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. See *Coleman v. Thompson*, 501 U.S. 722, 755, 111 S. Ct. 2546, 2567, 115 L.Ed.2d 640, 672 (1991). In light of our legislature's pronouncement, we must determine the standard to govern an effectiveness claim in a habeas appeal.

In *Krebs v. Weber*, [2] there was dicta which indicated that the *Strickland* standard was not appropriate for determining if the statutory right to counsel had been fulfilled. The State asserts that this dicta mandates that the *Gregory* [3] "cause and prejudice test" should govern instances when the right to counsel was statutorily granted.

The effective assistance of counsel standard announced in *Strickland* is well established. As recognized by at least one other court "it would be absurd to have a right to appointed counsel who *23 is not required to be competent." *Lozada*, 613 A.2d at 821; *Iovieno v. Comm. of Correction*, 242 Conn. 689, 699 A.2d 1003, 1010 (1997). We will not presume that our legislature has mandated some 'useless formality" requiring the mere physical presence of counsel as apposed to effective and competent counsel. *Lozado*, 613 A.2d at 821.

The actual holding in *Krebs* supports this position. As the majority in *Krebs* noted "no attorney, even one mounting a textbook perfect all-out effort let alone one who meets the *Strickland* standard of competence, could have produced a different result" *Krebs*, 2000 SD 40,

[2] Krebs v. Weber, 608 N.W.2d 322 (S.D. 2000)
[3] Gregory v. Solem, 449 N.W.2d 827 (S.D. 1989)

at ¶ 12, 608 N.W.2d at 326; see also Id. at ¶ 21 (Sabers, J., concurring specially in past and dissenting in part). A position that a statutory right to counsel does not mean effective counsel is at odds with commonsense and our prior analytical frame work. In other words, if the appointment of incompetent counsel was adequate in *Krebs*, there would have been no reason to even consider *Strickland*, ineffectiveness, or prejudice. To the extent the dicta in *Krebs* is inconsistent with this opinion, it is overruled.[4]

We agree with the rationale employed by the Appellate Court of Ilinois when addressing the statutory right to counsel. *In the Matter of Carmody*, 247 Ill. App.3d 46, 210 Ill. Dec. 782, 653 N.E.2d 977, 983 (1995). In addressing this statutory right, the court concluded that providing a right to counsel implicitly included *effective counsel*, as require by *Strickland* Id. "[T]he legislature could not have intended to provide an individual...with the right to counsel and to permit that counsel to be prejudicially ineffective." Id. at 984. After being granted a state *right* "it would be a hollow gesture serving only superficially to satisfy due process requirements." Id. (citations omitted). We agree with those courts that have held that an independent right to effective assistance of counsel arises by statute in post-conviction hearings. See *Young v. State*, 724 So.2d 82, 83 (Ala. Cr.App. 1998); *Bejarano v. Warden*, 112 Nev. 1466, 929 P.2d 922, 926 (1996); *McKague v. Whitley*, 112 Nev. 159, 912 P.2d 255, 258 n.2 (1996).

We recognize that if habeas counsel must meet the same competency standard as trial counsel, then more than one claim of ineffective assistance of counsel may be brought on occasion. However, ineffective assistance of counsel at a prior habeas proceeding is not alone enough for relief in a later habeas action. Any new effort must eventually be directed to error in the original trial or plea of guilty. A refusal to acknowledge that the requirement of counsel means *constitutionally effective counsel* would weaken the habeas mechanism to ensure "as a bulwark against convictions that violate fundamental fairness." *Lozada v. Warden*, 223 Conn. 834, 613 A.2d 818, 822 (1992). Jackson's decision to exercise his right, as provided by state statute, requires this Court to recognize his constitutional substantive due process right to *effective* assistance of counsel.

Our holding must be that counsel mandated by SDCL 21-27-4 makes it "implicit that this means competent counsel." *Lozada*, 613 A.2d at 822. Jackson v. Weber, 637 N.W.2d 19, 22-23 (S.D. 2001)

Is a constitutional substantive due process right to effective assistance of counsel, protected by the Constitution's Fourteenth Amendment.

ARGUMENT

The Equal Protection clause of the Fourteenth Amendment, secures every person within a State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by expressed terms or by its improper execution through duly constituted agents (see Village of

[4] Likewise, overturns Gregory v. Solem, 449 N.W.2d 827 (S.D. 1989), in this respect.

Willowbrook v. Olech, 528 U.S. 562, 564 (2000)). The requirement for effective habeas counsel created by SDCL § 21-27-4, establishes a liberty interest from the expectation created by state law (see Wilkinson v. Austin, 545 U.S. 209, 221 (2005)), the Due Process Clause provides heightened protection against interference with. See Washington v. Glucksberg, 521 U.S. 702, 720 (1997). The necessity for habeas counsel established by state statute requires constitutionally effective counsel.

There is a constitutionally protected disposition that the provision be unimpeded, unhampered by state/government actions, that at a minimum protects against the form of gross interference that occurred in petitioner's habeas review process.

Petitioner is not challenging the discretionary aspect of entitlement to appointment of habeas counsel. Nonetheless, once constitutionally effective habeas counsel is deemed necessary, and made pursuant to SDCL § 21-7-4, the Fourteenth Amendment's provisions attach.

There were no conflicts that required the changing of petitioner's habeas counsel, the South Dakota Supreme Court's action, an independent constitutional violation, constitutes 'cause' (see Coleman v. Thompson, 501 U.S. 722, 755 (1991)), there being a liberty interest for appointment of effective habeas counsel to indigent petitioners, such liberty interest protected by the Fourteenth Amendment. Washington v. Glucksberg, 521 U.S. 702, 720 (1997).

The South Dakota Supreme Court violating Sixth and Fourteenth Amendment provisions, interfering with petitioner's attorney-client relationship, which petitioner enjoyed a right to continue in. See People v. Ellis, 225 A.D.3d 784, 785 (2024). The intrusion into the attorney-client relationship, the intrusion prejudicing the petitioner, a Sixth Amendment violation is established. See State v. Sawatzky, 994 F.3d 919, 923 (8th Cit. 2021).

CLOSING

For the reasons set forth, petitioner requests the Court to set aside the order denying the petition for a writ of certiorari to the South Dakota Supreme Court.

Respectfully Submitted,

Garland Ray Gregory, Jr. Pro se

Dated this 3rd day of February, 2025.

CERTIFICATE OF PRO SE PETITIONER

I, Garland Ray Gregory, Jr. - Pro se, certify that the above petition is presented in good faith and not for delay.

Dated this 3rd day of February, 2025.

Garland Ray Gregory, Jr. - Pro se