IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30400

DONIKA RAE GONZALES,

Petitioner and Appellee,

v.

WANDA MARKLAND, Warden, South Dakota Women's Prison

Respondent and Appellant.

APPEAL FROM THE CIRCUIT COURT
FIRST JUDICIAL CIRCUIT
BUFFALO COUNTY, SOUTH DAKOTA

THE HONORABLE DOUGLAS HOFFMAN
Circuit Court Judge

APPELLANT'S BRIEF

MARTY JACKLEY
ATTORNEY GENERAL

Chelsea Wenzel
Assistant Attorney General
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215
Email: atgservice@state.sd.us

ATTORNEYS FOR RESPONDENT
AND APPELLANT

Thomas P. Reynolds
322 Walnut Street
Yankton, SD 57078
Telephone: (605) 665-3000
Email:
treynolds@yanktonlawyers.com

ATTORNEY FOR PETITIONER
AND APPELLEE

Notice of Appeal filed July 11, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: **PAGE**

STATUTES:

CONSTITUTIONAL PROVISIONS:

OTHER AUTHORITIES"

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30400

DONIKA RAE GONZALES,

Petitioner and Appellee,

v.

WANDA MARKLAND, Warden, South Dakota Women's Prison

Respondent and Appellant.

PRELIMINARY STATEMENT

In this brief, Donika Rae Gonzales is referred to as "Gonzales" or "Petitioner." Wanda Markland, Warden of the South Dakota Women's Prison, will be referred to as "Respondent." Citations to the settled records for the jury trial (JT) and habeas trial (HR) are followed by the corresponding page number(s).

JURISDICTIONAL STATEMENT

On April 6, 2023, the Honorable Douglas Hoffman, Circuit Court Judge, First Judicial Circuit,[1] entered a Judgment and Order For Habeas Corpus Relief. HR:1261-62. Respondent moved for a Certificate of Probable Cause on May 3, 2023. HR:1282-83. Judge Hoffman issued a Certificate of Probable Cause on June 13, 2023, and

[1] Judge Hoffman, a circuit court judge from the Second Circuit, presided over this case per an Order from this Court. HR:15.

Respondent filed a Notice of Appeal on July 11, 2023. HR:1292, 1300.

This Court has jurisdiction under SDCL 21-27-18.1.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I. DO THE UNITED STATES AND SOUTH DAKOTA CONSTITUTIONS REQUIRE A CRIMINAL JURY TO BE DRAWN FROM THE COUNTY WHERE THE CRIME WAS COMMITTED?

The habeas court determined that Article VI, Section 7 of the South Dakota Constitution and the Sixth Amendment of the United States Constitution require a criminal jury to be drawn from the county where the crime was committed, or in a district that is demographically representative of that county.

Breck v. Janklow, 2001 S.D. 28, 623 N.W.2d 449

Cummings v. Mickelson, 495 N.W.2d 493 (S.D. 1993)

United States v. Grisham, 63 F.3d 1074 (11th Cir. 1995)

Williams v. Florida, 399 U.S. 78 (1970)

II. DID GONZALES ESTABLISH A VIOLATION OF THE FAIR CROSS-SECTION REQUIREMENT UNDER THE *DUREN* TEST?

The habeas court determined Gonzales established a prima facie violation of the fair cross-section requirement.

Duren v. Missouri, 439 U.S. 357 (1979)

St. Cloud v. Class, 1996 S.D. 64, 550 N.W.2d 70

United States v. Ashley, 54 F.3d 311 (7th Cir. 1995)

United States v. Erickson, 436 F. Supp. 3d 1242 (D.S.D. 2020)

III. DO THE ALLEGED VIOLATIONS IN GONZALES'S CRIMINAL TRIAL CONSTITUTE STRUCTURAL ERROR?

> The habeas court determined that Gonzales was not required to show prejudice because the violations the court found constituted structural error.

Miller v. Young, 2018 S.D. 33, 911 N.W.2d 644

State v. Evans, 2021 S.D. 12, 956 N.W.2d 68

STATEMENT OF THE CASE AND FACTS

Following a nine-day jury trial held in Brule County, Donika Rae Gonzales was found guilty of first-degree manslaughter and aggravated assault in connection with the beating death of her boyfriend's four-year old son. The killing happened at the family's home in rural Buffalo County. Upset because the child wet his pants, Gonzales threw the boy to the ground and began kicking and stomping on him. She lacerated his liver and an adrenal gland, injured his pancreas, and fractured multiple ribs. The child died of blunt force trauma to the abdomen.

The trial court sentenced Gonzales to 130 years in prison for the first-degree manslaughter conviction and imposed a concurrent 15-year sentence for the aggravated assault conviction. The trial court entered the Judgment of Conviction and Sentence on July 1, 2014.

Gonzales filed a direct appeal to this Court. Gonzales raised nine issues, none of which concerned the issues that formed the basis of the relief the habeas court granted. HR:50-99. This Court entered an order summarily affirming Gonzales's conviction and sentence on February 22, 2016. HR:102.

Gonzales filed an application for Writ of Habeas Corpus on October 6, 2016. HR:1-4. The habeas court granted a provisional writ and appointed counsel. HR:11, 13-14. Several amended applications followed, which included claims alleging the trial court lacked subject matter jurisdiction to hear Gonzales's criminal case, insufficient evidence supported the convictions, Gonzales "was deprived of her 6th Amendment right, as provided by the United States Constitution, because the jury pool did not consist of a fair cross-section of the community," and Gonzales was provided ineffective assistance of counsel because counsel failed to inform her about "critical aspects and decisions regarding the defense of her case; and [f]ailed to offer exculpatory evidence."[2] HR:32-33. The last amended application, filed on March 5, 2019, asserted two grounds for relief: 1) "the jury pool did not consist of a fair cross-section of the community in which the crime occurred and because she was not tried by a jury from the county in which the crime occurred," and 2) trial counsel provided ineffective assistance of counsel in that they failed "to explain and inform [Gonzales] of the ramifications of the Court empaneling both Brule and Buffalo County jurors," trial counsel failed to object to the trial court calling both Brule and Buffalo County jurors, and trial counsel did not

[2] The habeas court dismissed the cause of action that alleged insufficient evidence under the doctrine of Res Judicata and Gonzales withdrew her allegation related to subject matter jurisdiction.

offer allegedly "exculpatory evidence at trial, namely x-rays of the victim and pictures of [Gonzales's] hands."

The habeas court held a three-day trial and took judicial notice of both the trial and appellate records. HT1:7-8. Significant briefing occurred before, during, and after the habeas trial. The court granted habeas relief, concluding that Gonzales "was deprived of her right to be tried by a fair and impartial jury of her peers chosen from within the community where the crime occurred, and without a systematic dilution of Native American jurors." HR:1246. Specifically, the court determined that the "[a]pplication of the blended jury pool district concept . . . had the pernicious effect of excluding members of Gonzales' community and race from the process that determined her liberty." HR:1246. In the habeas court's view, the process violated both the Sixth Amendment to the United States Constitution and Article VI, Section 7 of the South Dakota Constitution. HR:1246. Deciding this violation amounted to structural error, the court refrained from analyzing whether the violations were prejudicial and determined that the only remedy was a new trial. *Id.* The habeas court ordered a "new trial with a Buffalo County jury or jury chosen from a jury district formed in a way that is consistent with the community where the crime occurred and does not work a systematic exclusion of Native Americans from [Gonzales's] jury pool." HR:1218.

STANDARDS OF REVIEW

Issues of statutory and constitutional interpretation are questions of law that this Court reviews de novo. *State v. Bowers*, 2018 S.D. 50, ¶16, 915 N.W.2d 161, 166. Because a claim for habeas corpus relief is a collateral attack on a final judgment, this Court's review is limited. *Stark v. Weber*, 2016 S.D. 38, ¶10, 879 N.W.2d 103, 106. "Habeas Corpus can only be used to review (1) whether the court had jurisdiction of the crime and the person of the defendant; (2) whether the sentence was authorized by law; and (3) in certain cases whether an incarcerated defendant has been deprived of basic constitutional rights." *Id.* (other citations omitted). Habeas corpus is not a remedy to correct irregular procedures and it is not a substitute for direct review. *Steichen v. Weber*, 2009 S.D. 4, ¶4, 760 N.W.2d 381, 386; *McDonough v. Weber*, 2015 S.D. 1, ¶18, 859 N.W.2d 26, 35. This Court reviews findings of fact under the clearly erroneous standard and applies the de novo standard of review to conclusions of law. *Stark* at ¶10. Constitutional questions are also reviewed de novo. *Steichen* at ¶7.

ARGUMENTS

I. THE HABEAS COURT ERRED IN ITS INTERPRETATION AND CONSTRUCTION OF THE UNITED STATES AND SOUTH DAKOTA CONSTITUTIONS.

In its decision, the habeas court conflated the constitutional concepts of venue, vicinage, and the right to an impartial jury drawn from a fair cross-section of the community with the language in Article

VI, Section 7 of the South Dakota Constitution and the common law definition of vicinage. The habeas court's conclusion is based on three premises: 1) according to the English common law definition of "vicinage," the words "county or district" in Article VI, Section 7 require a jury to be chosen from the county where the crime was committed; 2) though, at common law "vicinage" meant county, it can also be defined as "community"; and 3) the Sixth Amendment requires a defendant's jury be selected from a fair cross-section of the "community," so the jury pool must represent a fair cross-section of the county where the crime occurred. HR:1218. The inherent flaw in these premises is the focus on certain portions of the history of the concepts involved, instead of the plain language and ordinary meaning of the words in the constitutional provisions and statutes at issue and, when needed, the legislative history of the provisions and statues. Each of the concepts at issue will be discussed, in turn, in both state and federal contexts.

A. Federal Requirements

1. Venue

The concept of venue governs the place where a trial must be held. *Smith v. United States*, 599 U.S. 236, 242-43 (2023). The United States Constitution states: "Trials of all Crimes. . . shall be held in the State where the. . . Crimes shall have been committed." U.S. Const. Art. III, § 2, cl. 3. Congress limits the venue of federal criminal trials to "the district where the offense was committed." Fed. Rules Cr. Proc.

Rule 18. For purposes of this case, because Gonzales was tried in the state where the crime occurred, there was no violation of the venue right under the United States Constitution.

2. Vicinage

Vicinage, as opposed to venue, delineates the geographical location from where jurors must be drawn. *Smith* at 245; Steven E. Lewis, *The Sixth Amendment and the Right to a Trial by Jury of the Vicinage*, 31 Wash. & Lee L. Rev. 399, 399-400 (1974).[3] The Sixth Amendment to the United States Constitution provides defendants in criminal cases with certain procedural safeguards. Among these is the right to an "impartial jury *of the State and district* wherein the crime shall have been committed, which district shall have been previously ascertained by law." U.S. Const. Art. VI. Notably, the Vicinage Clause does *not* require the trial to take place in a certain *venue*. Lewis at 399-400. Instead, as explained above, Article III, § 2 governs venue.

The concept of vicinage, which translates to the "visne" or neighborhood, is deeply rooted in English jurisprudence, where "it was assumed that the juror knew the character of the parties and the witnesses and thus was capable of evaluating the credibility of their testimony." Lewis at 404; *Williams v. Florida*, 399 U.S. 78, 93, n. 35 (1970). Jurors were also taken from the neighborhood because they

---

[3] Available at http://scholarlycommons.law.wlu.edu/wlulr/vol31/iss2/7.

were utilized as a source of information about the case. *Zicarelli v. Gray*, 543 F.2d 466, 475 (3rd Cir. 1976) (*Zicarelli I*); Drew L. Kershen, *Vicinage*, 29 Okla. L. Rev. 801, 813 (1976) ("Kershen I").[4] If the jurors were expected to adjudicate the case based on their own knowledge, they had to be chosen from the neighborhood where the crime occurred. *Zicarelli I* at 475. However, as judicial perceptions of personal knowledge, improper character evidence, and the resulting prejudice evolved, adhering to the strict vicinage requirement eroded—in both England and the American colonies. Lewis at 404-05; *Williams* at 93 n. 35 (noting deviations from the "vicinage" requirement occurred in England and even greater deviations occurred in America). Indeed, in America, the colonies struggled to comply with a rigid vicinage requirement in criminal proceedings. Lewis at 405; *Zicarelli I* at 475-76 (noting that only five of the original thirteen colonies established constitutional limits on the geographic region where jurors could be drawn).

The question of whether the Constitution guarantees a certain feature of a jury trial is not necessarily reliant on whether the feature is traced back to the Magna Carta or whether it was part of the common law in 1789. *Williams* at 92-93 & n. 27-31 (examining cases where the Court determined what features of a "jury trial" were included in Article III and the Sixth and Seventh Amendments). Instead, the question is

[4] Available at: http://works.bepress.com/drew_kershen/72/.

whether the framers of the Constitution intended to codify the feature in the Constitution. *Id.* at 93-94, 99 (considering, also, the function the feature performs and its relation to the purpose of the jury trial).

The first constitutional provision to codify the right to a jury trial was Article III's venue provision, which guaranteed jury trials in the state where the crime was committed. U.S. Const. Art. III, § 2. The Constitutional Convention has very little history on this part of Article III. After the adoption of the Constitution, some expressed concern that Article III did not preserve the common-law right to a jury of the vicinage or the right to a jury trial in civil cases. *Williams* at 93-94. These concerns were part of the impetus for the introduction of amendments to the Constitution. *Id.* Proponents of the common law view of vicinage wanted the geographical area of the vicinage to be that of the county. However, difficulties arose as the term "vicinage" was "too vague if depending on limits to be fixed by the pleasure of the law, [and] too strict if limited to the county." *Williams at* 95. At the time, the jury selection processes throughout the states varied; some states required a jury to be drawn from the state at large, while others limited the jury to districts. *Id.* at 95 n. 39. Very few states drew jurors from the county, alone. *Id.*

A compromise was struck and the phrase "State and district" was included in the Sixth Amendment instead of the word "vicinage." Kershen I at 844-60. The clause, along with Article III, § 2, put a

geographical constraint on the source of the jury—i.e. State and district—thus limiting the government's power to transport the defendant to a foreign state for trial. *Smith* at 246-47 (recounting the Continental Congress's objections to Parliament's practice of transporting colonists overseas to stand trial for "pretend crimes."). But the size of the vicinage was left to Congress. *Williams* at 93, n.35, & 96 (recounting Madison's letter recognizing that deviation from the vicinage requirement was necessary in some cases and "must be therefore left to the discretion of the legislature to modify it according to circumstances."); *United States v. Grisham*, 63 F.3d 1074, 1079 (11th Cir. 1995).

Congress debated and passed the Judiciary Act of 1789 around the same time as the Sixth Amendment. *Zicarelli I* at 477. The "districts" contemplated in the Sixth Amendment were defined as the federal judicial districts. *Williams* at 93, n. 35, and 96; William W. Blume, *The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue*, 43 Mich. L. Rev. 59, 66 (1944).[5] At the time, only two of the states were divided into more than one judicial district. *Id.* The size of the judicial district for the rest was the entire state. *Id.*

For non-capital trials, the geographical area where the jurors would be drawn was left to the discretion of the judge, so long as the

[5] Available at: https://repository.law.umich.edu/cgi/viewcontent.cgi?article=9534&context=mlr.

jurors were selected from the district where the crime was committed and through procedures that would ensure an impartial jury, avoid excessive expense, and prevent excessive jury duty on citizens. Kershen I at 859. But, in capital cases, where no great inconvenience would occur, the trial was required to be held in the county where the crime was committed. *Id.*; *see also id.* at 854-55 (explaining how the drafter of the section made the "common assumption" that the jurors would be selected from the place where the trial was held). If the trial could not be held in the county, due to "great inconvenience," the trial could be moved to a different county. *Id.* However, at least twelve prospective jurors had to be summoned from the county where the crime occurred. *Id.* at 859 (noting that this provision made it clear that the other jurors were not required to be drawn from the county where the crime was committed);[6] *Williams* at 97, n. 43.

Thus, the common law concept of "vicinage" was neither regularly used at the time the Constitution was drafted, nor was it enshrined in the Constitution itself. Instead, the term "vicinage" in the Vicinage Clause of the United States Constitution was intentionally omitted in the interest of flexibility. *Williams* at 93, n. 35.

At this time, the Supreme Court of the United States has not incorporated the Vicinage Clause to the states, despite several

[6] The requirement that twelve jurors be summoned from the county where the crime occurred in capital cases was repealed in 1862. Act of July 16, 1862, ch. 189, s 2, 12 Stat. 589.

invitations to do so. *Caudill v. Scott*, 857 F.2d 344, 345 (6th Cir. 1988); *Zicarelli v. Dietz*, 633 F.2d 312, 325-26 (3d Cir. 1980) (*Zicarelli II*); *Price v. Superior Court*, 25 P.3d 618, 624-33 (Cal. 2001). Nevertheless, because Gonzales was tried of a jury drawn from within the boundaries of the State and the federal district where the crime was committed, and both the federal judicial district and the state jury district were previously ascertained by law, [7] there is no issue under the Vicinage Clause of the Sixth Amendment. *Zicarelli II* at 325-26.

B. State Requirements

The habeas court's remaining premises, that the words "county or district" in Article VI, Section 7 and the common law definition of vicinage require a jury to be chosen from the county where the crime was committed (or be composed in the same manner as the county where the crime was committed) is also incorrect. HR:1218. The inherent flaw in the habeas court's analysis is the same as above—focusing on a select portion of the history of the common law vicinage

---

[7] The Sixth Amendment also requires the district to be previously ascertained by law. This clause was a remedy to the "English practice of removing prisoners for trial to England or elsewhere." *Zicarelli II* at 325. Thus, this phrase is a guard against the government arbitrarily redefining a district to meet the circumstances of a particular criminal case. *Id.* at 323. The Standing Order of the First Judicial Circuit in this matter, combining Brule and Buffalo counties into a jury district was entered on July 7, 2011. HR:736; SDCL 16-13-18.4 (enacted in 1997). Gonzales killed the child at issue on February 21, 2013. As a result, any constitutional concerns that would arise regarding the formation of a district to influence the outcome of the case are assuaged.

requirement rather than the plain language and meaning of the words in the constitutional provisions and statutes at issue.

1. Venue

Unlike the United States Constitution, the South Dakota Constitution does not have a provision governing venue. Nevertheless, this Court has previously held that a "defendant has a constitutional right to be tried by a jury in the county where the crime was alleged to have been committed." *State v. Whistler*, 2014 S.D. 58, ¶12, 851 N.W.2d 905, 909-10; *State v. Sutton*, 317 N.W.2d 414, 415 (S.D. 1982); *State v. Banks*, 387 N.W.2d 19, 21 (S.D. 1986) (citing *In re Nelson*, 102 N.W. 885 (S.D. 1902)). As explained below, neither the language of Article VI, Section 7, nor the analysis in *Nelson* support the conclusion that an accused has a constitutional right to a trial held *in* the county where the crime was committed.

Rather, in South Dakota, statutes regulate venue in a criminal case. SDCL 23A-16-5 (requiring issues of fact in a criminal action to be tried in the county where the action is brought or to which the place of trial is changed by the court); SDCL ch. 23A-16. For purposes of this case, the venue of the trial was to be in the county where the injury that caused the death was inflicted—i.e. Buffalo County. SDCL 23A-16-11. There is no dispute that both Gonzales and Respondent consented to changing the venue of the trial to Brule County for the convenience of

the parties, jurors, and witnesses, and for Gonzales's safety. SDCL 23A-17-6 (Rule 21(b)); HR:430, 465, 742-43, 1328-29.

2. Vicinage

Article VI, Section 7 states, in relevant part: "In all criminal prosecutions the accused shall have the right to. . . a speedy public trial by an impartial jury *of* the county *or district* in which the offense is alleged to have been committed." Similar to the language in the Sixth Amendment to the United States Constitution, this language regulates the area from which a jury must be drawn, not the location where the trial must be held. U.S. Const. Amend. VI.

In this case, the habeas court interpreted Article VI, Section 7 of the South Dakota Constitution to grant an accused the right to a jury comprised of residents of the county where the crime occurred. HR:1227-31. The court also suggested that this provision, along with the Sixth Amendment, rendered the trial court's application of SDCL 16-13-18.4 unconstitutional. As explained above, the habeas court's interpretation of the Sixth Amendment is erroneous. And a review of the plain language of Article VI, Section 7 shows that the Legislature and Judiciary were well within their authority to create the jury district at issue.

Plain Language

"Where a constitutional provision is quite plain in its language, [this Court] [interprets] it according to its natural import." *Davis v.*

State, 2011 S.D. 51, ¶77, 804 N.W.2d 618, 643. When considering the plain language of a constitutional provision, the provision must be read giving full effect to its parts. *Breck v. Janklow*, 2001 S.D. 28, ¶9, 623 N.W.2d 449, 454. Words used in the provision should be taken in their obvious and natural sense. *Doe v. Nelson*, 2004 S.D. 62, ¶9, 680 N.W.2d 302, 305 (utilizing the Black's Law Dictionary definition of the word at issue from the time the provision was adopted).

At the time the South Dakota Constitution was adopted, the word "district" was defined as "one of the portions into which an entire state or country may be divided for judicial, political, or administrative purposes." Henry Campbell Black, A Dictionary of Law, 379, (1891).[8] Thus, by the plain dictionary meaning, like counties, districts are certain geographical divisions of a state.

In addition to reviewing the plain language, the Court also considers other fundamental principles when analyzing a constitutional provision. Initially, unlike the United States Constitution, the South Dakota Constitution does not constitute a grant of legislative power. Instead, the South Dakota Constitution is a "limitation upon the legislative power and the legislature may exercise that power in any manner not expressly or inferentially proscribed by the federal or state constitutions." *Breck* at ¶9. Further, this Court presumes that statutes

[8] Available at: https://babel.hathitrust.org/cgi/pt?id=uiug.30112076155206&seq=393&q1=district.

are constitutional and "that presumption is not overcome until the act is clearly and unmistakably shown to be unconstitutional and no reasonable doubt exists that it violates constitutional principles." *Id.* Thus, if the plain language of Article VI, Section 7 does not prohibit jury districts, the use of the jury district, as authorized by the statute, will stand.

This Court first examined Article VI, Section 7 in *In re Nelson*, where a defendant challenged a state statute that allowed the trial court to move the location of the trial to a different county, without the defendant's consent, if the judge determined that a fair and impartial jury could not be had in such county or subdivision. *In re Nelson*, 102 N.W. 885, 887 (S.D. 1902). In analyzing Article VI, Section 7, the Court explained that the right was one that derived from the common law right to trial by jury and was one of the reasons the colonies separated from the mother country. *Id.* Interestingly, the historical explanation the Court provided described the right to be tried before a jury from a certain area—i.e. the visne or neighborhood—not to be tried *at* a specific location. *Id.* (describing how the sheriff of a county was required to return a panel of jurors "of the visne or neighborhood.").[9] While this is

[9] The Court in *Nelson* seemed to assume that the jury would be chosen from the place where the trial was venued, causing the line between venue and vicinage to blur. In later opinions that relied on *Nelson* and Article VI, Section 7, the line between venue and vicinage continued to blur. *Whistler* at ¶12; *Croan v. State*, 295 N.W.2d 728, 729-30 (S.D. 1980); *State v. Graycek*, 278 N.W.2d 184 (S.D. 1979).

true, at the time when the United States was formed, the concept of vicinage had changed from the common law right of a jury from the county.

The *Nelson* court seemingly recognized this change when it explained: "So far as the statute authorizes criminal actions to be tried out of the county *or district* in which the offense is alleged to have been committed, without the consent of the accused, it plainly and palpably conflicts with the state Constitution." *Id.* (emphasis added). The Court noted that "[t]here is nothing uncertain or ambiguous in this language, except, perhaps, the use of the word 'district,' which has uniformly been construed to mean the trial district, or territory from which the jury is summoned." *Id.*; Blume at 89-93 (noting the interpretation of "county or district" in other states' vicinage clauses and comparing the use of other phrases in state vicinage clauses).

Despite being unnecessary to the analysis, the Court theorized that the word "district" meant "judicial subdivision" because, in the Court's view, "where unorganized territory may be attached to an organized county for judicial purposes, the phrase 'judicial subdivision,' frequently found in our statutes, would have more accurately defined the right than the word 'district.'" *Id.* The Court then considered the clause if as if the word "district" were eliminated because "the territory from which the jury would be selected [was] coextensive with the boundaries of Lyman county." *Id.*; *Moeller v. Weber*, 2004 S.D. 110,

¶44, n. 4, 689 N.W.2d 1, 15 (defining "dicta" as "pronouncements in an opinion unnecessary for a decision on the merits and warning that "dicta should be avoided because, among other reasons, it is usually made through inadequate effort in its formulation.").

Although the Court's interpretation of the word "district" is dicta, the opinion made an important observation—under the language of Article VI, Section 7, jurors could be summoned from an area larger than a single county. Noticeably absent from the opinion is any suggestion that the South Dakota Constitution limited the Legislature's authority to create districts including more than one county. This is consistent with the plain language of the provision.

And in 1997, ninety-five years after the Court decided *Nelson*, the Legislature exercised its authority to create jury districts by enacting SDCL 16-13-18.4. So, while the term "district" was potentially ambiguous when the Court decided *Nelson*, the term is now clearly defined with the enactment of SDCL 16-13-18.4 and should be afforded its plain and obvious meaning as codified.

Constitutional Construction

Respondent contends that the term "district' is not ambiguous and requires no further construction. However, if this Court finds, as the habeas court did, that the term "district" is ambiguous, then it must engage in constitutional construction. "The object of constitutional construction is 'to give effect to the intent of the framers of the organic

law and the people adopting it.' " *In re Issuance of Summons Compelling Essential Witness To Appear & Testify in State of Minnesota*, 2018 S.D. 16, ¶14, 908 N.W.2d 160, 166. In construing a constitutional provision, no wordage should be found surplus and no provision can be left without meaning. *Kneip v. Herseth*, 214 N.W.2d 93, 102 (S.D. 1974).

Construing the term "district" as a geographical division of a state is consistent with other references to the term "district" throughout the State Constitution. *South Dakota Auto. Club, Inc. v. Volk*, 305 N.W.2d 693, 696 (S.D. 1981) ("A court, in construing a constitutional provision, must give regard to the whole instrument, must seek to harmonize the various provisions, and must, if possible, give effect to all the provisions."); *In re Janklow*, 1999 S.D. 27, ¶7, 589 N.W.2d 624, 626 (explaining that this Court construes terms in a constitutional provision in pari materia, which "supposes that all enactments are intended to be harmonious in their several provisions.").

The version of the Constitution ratified in 1889 used the word "district" in several different contexts, including, but not limited to:

1. Article III (Legislative Department), Section 3, states that "No person shall be eligible to the office of senator [or representative] who is not a qualified elector in the district from which he may be chosen. . ." and Article XIX Section 2 specifically defines the districts.

2. Article V (Judicial Department), Sections 5 and 6 state: "The supreme court shall consist of three judges, to be chosen from districts by qualified electors of the State at large, as herein

provided. The number of judges and districts may after five years from the admission of the State under this constitution be increased by law to not exceeding five."

3. Article V, Section 10 explains that a supreme court judge must live in the "district" from which he is elected and Section 11 identifies the judicial districts for the supreme court, "[u]ntil otherwise provided by law."

4. Article V, Section 17 ("Circuit Courts" subsection) allows the legislature to increase the number of judicial circuits and judges, so long as they are "formed of compact territory and be bound by county lines," also noting that the "increase of number or change in boundaries of districts shall not work the removal of any judge from his office" for the term in which he was elected or appointed.

5. Article V, Section 37 explains: "All officers provided for in this article shall respectively reside in the district, county, precinct, city or town for which they may be elected or appointed." [10]

See Laws Passed at the First Session of the Legislature of the State of South Dakota (1890).[11]

None of these other references to districts requires a geographical division based on common attributes or immutable characteristics such as gender, race, or national origin, as the habeas court suggests is necessary with its construction of the term in this case. Rather, a district is simply a geographical boundary. If the State Framers had wanted to base the boundaries of "districts" on certain attributes or

---

[10] Article V, Section 27 of the original Constitution permitted the Legislature to attach unorganized counties to organized counties for judicial purposes. However, the word "district" was not mentioned or otherwise tied to that action.

[11] Available at: https://sdsdl-montage.auto-graphics.com/#/item-details/entities_5953?from=search-results.

immutable characteristics, they certainly had the ability to do so. *Kneip* at 102.

As the above examples show, the contours of the political, judicial, and administrative "districts" were left to the Legislature, unless otherwise specified in the Constitution. At the time the South Dakota Constitution was drafted, the Sixth Amendment included the limitation that the jury must be drawn from the "state or district," with the definition of "district" being left to Congress in the interest of flexibility. The drafters of the South Dakota Constitution used language similar to the Sixth Amendment, except, instead of "State and district" the drafters used "county or district." Because there is nothing in the plain language of the Article VI, Section 7, or the rest of the original Constitution, that limits the definition of "district" in Article VI, Section 7, the definition of "district" must be left to the Legislature—as was done in the Sixth Amendment.

Historical Context

Respondent maintains the language of Article VI, Section 7 is plain and unambiguous, particularly when read with SDCL 16-13-18.4. However, the habeas court analyzed the historical context of Article VI, Section 7 because, in its view, the word "county" had a clear existing structure, while the term "district" did not. HR:1227. The habeas court believed this created an ambiguity that allowed for constitutional construction. Respondent disagrees with this conclusion but engages

in historical analysis to point out the errors of the habeas court and to show that the historical context supports Respondent's interpretation of the original Constitution. *Doe* at ¶10 ("Where the meaning of a constitutional provision is unclear, it is appropriate to look at the intent of the drafting bodies[.]").

The constitutional debates do not provide guidance about the adoption of Article VI, Section 7. However, contrary to the habeas court's assertion, when the Constitution was drafted the territorial legislature authorized jury districts (called "subdivisions") within the larger judicial districts that divided the territory. HR:1226. Prior to the adoption of the South Dakota Constitution, Dakota Territory had four types of courts: the supreme court, district courts, probate courts, and courts of the justices of the peace. *The Annotated Revised Codes of the Territory of Dakota*, 2nd Edition (1885) at 4.[12] The supreme court had appellate jurisdiction over cases from the district courts. *Id.*

The district courts were courts of general jurisdiction and the territory was divided into several judicial districts. *Id.* at 7-8, 334-35, 627-28. Each district had a judge that heard cases within the district and the judges of the districts formed the Territorial Supreme Court. *Id.* at 334-35. The judicial districts were divided into subdivisions with some subdivisions including more than one county and some including

---

[12] Accessed at https://babel.hathitrust.org/cgi/pt?id=mdp.35112104865342&seq=13.

unorganized territory. *Id.* at 336-37. To summon jurors for grand and petit juries, each county and subdivision within a judicial district was required to provide two hundred names from the last annual tax list to the district court clerk. *Id.* at 350-51. In subdivisions that included two or more counties, the subdivision was required to furnish two hundred names, with each county providing their proportional share of names. *Id.* at 350-51 (explaining how proportions are calculated); 635 (instituting a similar pro rata system for townships to provide proportional names to the county).

District courts had original jurisdiction over all criminal offenses. *Id.* at 1275. A criminal trial was permitted to take place in any county or subdivision within the judicial district. *Id.* The defendant could remove the trial from the county or subdivision if a fair and impartial jury could not be had in the county or subdivision. *Id.* at 1315-16.[13]

The First Legislature of South Dakota carried over all Territorial acts until "altered, amended, or repealed." *Doe at* ¶12, n. 6 (citing ch. 105, § 1 of the 1890 Session Laws). After dividing the State into eight circuits and establishing the terms of court for the circuit and supreme courts, the Legislature transferred the business of the territorial courts to the new state courts. SL ch. 73, § 1; SL ch., § 1-8; SL ch. 77

[13] The Complied Laws of the Territory of Dakota (1887) are similar to those cited in the 1885 editions. Available at: https://sdsdl-montage.auto-graphics.com/#/item-details/entities_598?from=search-results.

(1890).[14] The state circuit courts succeeded the district courts. SL ch. 77, § 3.

Nine years after statehood, the South Dakota Legislature continued the use of subdivisions within the circuits. *See* 1 *Statutes of the State of South Dakota*, 268 (1899) (permitting circuit court judges to create subdivisions with more than one county); *Green v. Siegel, Barnett & Schutz*, 1996 S.D. 146, ¶18, 557 N.W.2d 396, 402 (noting that the early State Legislatures, which were comprised of members of the Constitutional Convention, were not compelled to change the laws at issue). Petit juries were required to be drawn from the county or subdivision within a circuit and subdivisions with more than one county were required to provide their pro rata share of jurors to the circuit court clerk. 1 *Statutes of the State* at 280, 286-87. Criminal jury trials were required to be tried in the county or judicial subdivision where the case was pending, unless otherwise moved by the court. 2 *Statutes of the State of South Dakota*, 1489, 1562, 2065-66 (1899).[15]

Accordingly, based on the above historical context, districts preceded circuits. Subdivisions had always been part of the judicial make up, whether part of a district or circuit. This observation explains why the Court in *Nelson* believed "subdivision" would have been a better

---

[14] Available at: https://sdsdl-montage.auto-graphics.com/#/item-details/entities_5953?from=search-results.
[15] Available at: https://sdsdl-montage.auto-graphics.com/#/item-details/entities_602?from=search-results.

word than "district" in Article VI, Section 7. However, if the drafters wanted to use the word "subdivision," or otherwise limit the authority of the legislature to create subdivisions within the districts, they could have done so. Furthermore, by refraining from using the word "subdivision," or otherwise referring to subdivisions as districts in statute, the drafters indicated that they did not consider the two concepts to be the same. Because there is no indication that the use or definition of the word "district" was limited to subdivisions, Article VI, Section 7 cannot be read to mean "subdivision." *Breck* at ¶10.

Finally, the habeas court interpreted this Court's opinion in *Nelson* to mean that, once unorganized counties no longer existed, the word "district" would no longer have meaning. HR:1228. However, in the years immediately preceding and immediately following the drafting of the State Constitution, judicial subdivisions could include more than one organized county, along with unorganized counties and/or territory. 1 *Statutes of the State* at 286 (directing clerks of organized counties within a subdivision to transmit payment to the clerk of the organized county were court was held); *Codes of the Territory of Dakota* (1885) at 338; *Codes of the Territory of Dakota* (1887) at 120. The habeas court's interpretation and application of *Nelson* is incorrect.

Constitutional Revision

While Article VI, Section 7 has remained the same, Article V of the South Dakota Constitution has been revised. Amendments are usually

adopted for the purpose of making a change in the system. *Cummings v. Mickelson*, 495 N.W.2d 493, 499 (S.D. 1993). "Particularly applicable in the case of [revisions] are the rules related to the intent of the framers and adopters and the attainment of the object of the constitution." *Id.* "The courts are under the duty to consider the old law, the mischief, and the remedy, and to interpret the constitution broadly to accomplish this manifest purpose of the amendment." *In re Issuance of Summons* at ¶14. In this case, the revisions to Article V also support Respondent's position.

In 1969, the Legislature created a Constitutional Revision Commission to study the constitution and offer related proposals. SL ch. 225 (1969). The drafters of Article V explained that their over-arching goal was to further unify the judicial system, place greater rule-making and administrative authority in the supreme court, and eliminate the overlapping jurisdiction between the various levels of courts. 1 *Recommendations of the Constitutional Revision Commission* 34-35 (1971).[16] The revision commission also sought to grant the Legislature flexibility to fashion courts of limited jurisdiction to respond to the variable needs of different areas. The revisions to Article V were part of a larger effort to improve, simplify, and remove outdated or inconsistent provisions in the South Dakota Constitution. *Id.* at 7-8.

[16] Available at: https://babel.hathitrust.org/cgi/pt?id=umn.31951d02413555h&seq=11.

The revisions, which were largely approved by the Legislature and later adopted by the people, granted the Supreme Court authority to, among other things, determine the number of circuit courts and judges within a circuit; appoint and manage court personnel; assign judges to assist other courts and circuits; and promulgate rules of practice and procedure and rules governing the administration of the courts. *Id.* at 39-59; S.D. Cont. Art. V., Sections 3-12.

Importantly, this new and increased authority allowed the Court to respond to the changing needs of the state and court system. *Id.* For instance, the authority to control the number of circuit courts and judges was vested with the Supreme Court because the Court could use "the statistical information it collects. . . to determine the number and area of the Circuit Courts, as well as the number of Judges required for the efficient administration of justice." *Id.* at 39.[17] The commission also noted that, "[a]s the amount of litigation changed in areas, it is necessary to restructure *districts* to achieve greater economy and avoid wasted manpower." *Id.* (emphasis added).

This focus on flexibility and the ability to respond to changing needs of the state is consistent with Respondent's broad interpretation

---

[17] The commission proposed language that vested the Supreme Court with the authority to determine the number of circuits and judges with the consent of the senate. The language requiring the approval of the senate was not included in the adopted version. S.D. Const. Art. V, Section 3.

of "district" in Article VI, Section 7 and with the purpose of the similar language used in the United States Constitution.

This Court has a duty to interpret *the Constitution*, not just the revisions, broadly to accomplish the manifest purpose of the revisions. *Cummings* at 499. Because the goal, and practical effect, of the revisions was to make the court system flexible and responsive to the changing needs of the area, the phrase "county or district" in Article VI, Section 7 cannot be read to limit the Legislature and Judiciary's ability to create jury districts to respond to the needs of the state.

During the revision, the section referring to organized and unorganized counties in Article V was removed. At the time of the revision, like today, there were no unorganized counties or territories to attach. The Constitutional Revision Commission proposed changes to the Bill of Rights, including the removal of "district" from Article VI, Section 7, but the Legislature did not adopt those suggestions for submission to the voters—the language of Article VI, Section 7 remained the same. 3 *Recommendations of the Constitutional Revision Commission* 12-36 (1975). [18] Thus, even if the original version of the Constitution, or the historical context, limited the word "district," the

[18] The commission's edits removed the word "district" in Article VI, Section 7 and, in the comments, it claimed that the new section was "basically modeled after correction Section 7 and retains all of its substantive provisions." 3 *Recommendations of the Commission* at 24. This view of the provisions in Article VI, Section 7 is likely due to the *Nelson* opinion and adherence to that interpretation in the decades afterwards.

revisions repealed that limitation. *Cummings* at 501-02 ("Had the will of the legislature and the people been to retain or expand [the previous provisions] the same could have been easily drafted into [the article].").

In sum, the habeas court's conclusion misinterpreted the dicta in *Nelson*, violated the methods of constitutional interpretation and construction this Court utilizes, and failed to consider the revisions to the Constitution in the 1970s. There is nothing in the Sixth Amendment or Article VI, Section 7 of the South Dakota Constitution that prohibits the creation of a jury district.

II. THE HABEAS COURT ERRED IN ITS APPLICATION OF THE *DUREN* TEST.

A. The Constitutional Right to a Fair Cross-Section of the Community

The Sixth Amendment guarantees that an accused be tried before an "impartial jury of the state and district wherein the crime was committed." U.S. Const. Amend. VI. Though not in the language of the amendment, "an essential characteristic of an impartial jury is that the jury be drawn from a fair cross section of the community." *Zicarelli II* at 314-15 (citing *Taylor v. Louisiana*, 419 U.S. 522, 526 (1975)). The right to an impartial jury drawn from a fair cross-section of the community has been incorporated to the states via the Fourteenth Amendment. *State v. Hall*, 272 N.W.2d 308, 310 (S.D. 1978).

The requirement for representation on juries was first granted under the equal protection clause. *Zicarelli II* at 315 (*citing e.g. Smith v.*

Texas, 311 U.S. 128, 129-30 (1940) (vindicating the rights of black persons to challenge the systematic exclusion of jurors of his or her from grand and petit juries). Then, relying on the Sixth Amendment, the United States Supreme Court determined "that the American concept of the jury trial contemplates a jury drawn from a fair cross section of the community." *Taylor* at 527. As the Court in *Glasser v. United States* explained:

> But even as jury trial, which was a privilege at common law, has become a right with us, so also, whatever limitations were inherent in the historical common law concept of the jury as a body of one's peers do not prevail in this country. Our notions of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government. For It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.

Id. (quoting *Glasser*, 315 U.S. 60, 85-86 (1942)) (cleaned up). Thus, the right to an impartial jury that is a fair cross-section of the community, under the Sixth Amendment, is not rooted in the common law, but in our country's own history and purpose. This distinction is important when determining what protections the Sixth Amendment provides.

When determining whether the jury pool represented a fair cross-section of the community, the "community" is the geographical location from which the jurors are drawn. *Grisham* at 1080. Just as Congress has the discretion to determine the size of the districts, Congress also has the flexibility in selecting the geographic location from which jurors

are chosen—so long as that location is within the State and district where the crime occurred. *Id.*

Further, the South Dakota Constitution, like the United States Constitution, leaves the determination of what constitutes a "district" to the discretion of Legislature. The Legislature also has the flexibility to determine the location where jurors are drawn, so long as the location is within the county or district. *State v. Faust*, 678 A.2d 910, 917 (Conn. 1996) (determining parameters of a community should be left to the legislature).

Similarly, both Congress and the South Dakota Legislature codified the fair cross-section requirement in statute.

28 U.S.C. 1861:

> It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the **district or division** wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.

SDCL 16-13-10.1:

> It is the policy of the State of South Dakota that all litigants in the courts of this state entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross-section of the community in the **municipality, district, or county** where the court convenes. It is further the policy of the State of South Dakota that all citizens of this state, qualified for jury duty, shall have the opportunity to be considered for service on grand and petit juries in the courts of this state, and shall have an obligation to serve as jurors when summoned for that purpose.

See Hall at 310; *Taylor* at 529 (relying on 28 U.S.C. 1861 for context when explicitly announcing that the fair cross-section requirement was an essential component of the Sixth Amendment).

According to Rule 18 of the Federal Rules of Criminal Procedure, a trial must be venued within the district where the offense was committed. Then, according to 28 U.S.C. 1861, jurors must be drawn from the district or division where the court convenes. 28 U.S.C. 1863(b)(2). "Division" is defined as: 1) the statutory divisions of a judicial district; or 2) if a division has more than one place for holding court, or if the district has no divisions, the counties, parishes, or similar political subdivision surrounding the places where court is held, as the district court plan determines. 28 U.S.C. 1869(e). For the second option, each county, parish, or political subdivision must be included in a division. *Id.*

Federal courts are given the discretion to determine which divisions handle different types of cases (criminal, civil, etc.) and may maintain jury boxes for each division, comprised of the eligible jurors in that division, for use in the proceedings held in the division. Drew L. Kershen, "*Vicinage--Part II,*" 30 Oklahoma Law Review 1, 101-02 (1977).[19] Thus, depending on what the federal courts choose, jurors may be selected from the entire district or a division within that district.

---

[19] Available at: http://works.bepress.com/drew_kershen/73/.

While the Sixth Amendment requires the jury to be drawn from the State and district, it is well settled that the clause does not confer a right to have jurors drawn from the entire district or any specific portion of a district. *Ruthenberg v. United States*, 245 U.S. 480, 482 (1918) (concluding that the Sixth Amendment does not prohibit a jury drawn from a subdivision of a judicial district); *Zicarelli I* at 479 & n. 69-71; *United States v. Baker*, 98 F.3d 330, 337 (8th Cir. 1996); *United States v. Ashley*, 54 F.3d 311, 314-15 (7th Cir. 1995). Nor is there a requirement to have jurors drawn from the immediate vicinity of the crime. *Baker* at 337; *Zicarelli I* at 479-80 & n. 69-71. If the district is split into divisions, there is no right to have the jury selected from any particular division, including the one where the crime was allegedly committed. *Id.* The Sixth Amendment only prohibits selecting jurors that reside outside of the state and district. *Zicarelli I* at 481; *Grisham* at 1079 (noting that the Sixth Amendment requires an "an impartial jury *of the State and district.*") (emphasis added). The rest is within the discretion of the legislatures and courts.

As it has done in the past, the South Dakota Legislature exercised its discretion to allow for the creation of jury districts. SDCL 16-13-18.4. The presiding judge of a circuit has the discretion to create a jury district "by joining [a] county with one or more other counties within the circuit." *Id.* Thus, the "community" that provides the basis for the right to an impartial jury in South Dakota is the county or jury district from

which the jurors are drawn. In this case, the trial court utilized the jury district, so Gonzales was entitled to a jury drawn from a fair cross-section of the jury district—Buffalo *and* Brule Counties.

B. The Duren Test

In 1979, the United States Supreme Court provided the test to determine when a violation of the fair cross-section requirement occurred. *Duren v. Missouri*, 439 U.S. 357 (1979).[20] This Court has also adopted the *Duren* test. *State v. Wright*, 2009 S.D. 51, ¶48, 768 N.W.2d 512, 529. In order to establish a fair cross-section claim, Gonzales was required to prove: "(1) the group excluded is a 'distinct' group in the community; (2) the representation of this group in the jury pool is not fair and reasonable in relation to the number of such persons in the community; (3) this under representation is due to the systematic exclusion of the group from the jury selection-process." *Id.* Respondent concedes that Native Americans are a distinct group. *St. Cloud v. Class*, 1996 S.D. 64, ¶11, 550 N.W.2d 70, 74.

For the second prong, this Court, along with the Eighth Circuit Court of Appeals, uses the absolute disparity calculation. *Id.* at ¶13 n.7; *United States v. Erickson*, 436 F. Supp. 3d 1242, 1254 (D.S.D. 2020). To calculate absolute disparity, the percentage of Native Americans on the list of persons eligible to serve on the petit jury is

[20] The test for a violation of 28 U.S.C. 1861 is the same used for violation of the constitutional fair cross-section requirement. *United States v. Rodriguez*, 581 F.3d 775, 790 (8th Cir. 2009).

subtracted from the percentage of Native Americans in the general population—resulting in the "absolute difference." *Id.* Of the 7,167 people in the Buffalo/Brule jury district, 2,053, or 29%, are Native American. HR:726-29, 732.

During the habeas trial, Gonzales provided testimony from Christie Obago, who said she personally knew a lot of Native Americans in Buffalo County. Ms. Obago conceded that she did not know if she identified all of the Native Americans on the jury pool list, did not know the race of everyone in Brule County, and did not conduct further investigation into the race of any jurors. HR:417-19. This is not an acceptable method of identifying the race of jurors. *Compare State v. Lohnes*, 432 N.W.2d 77, 84 (S.D. 1988) (noting that the defendant's use of surnames and cross-referencing names with addresses where Native Americans usually lived was unreliable and amounted to inadequate proof under the second prong of *Duren*) *with St. Cloud* at ¶15 (approving of the use of unsworn questionnaires mailed to jurors). Respondent has no burden of proof in a habeas corpus action, only the burden of meeting the petitioner's evidence. *Davi v. Class*, 2000 S.D. 30, ¶26, 609 N.W.2d 107, 114. And this Court "will not presume that the source for jury selection fails to provide for a fair cross-section of the community absent adequate proof." *Wright* at ¶51.

Nevertheless, even using Gonzales's insufficient numbers, the absolute disparity calculation is not constitutionally inadequate.

Gonzales identified 53 Native Americans on the list of 236 qualified jurors, which amounts to 22% representation. Thus, the absolute disparity in this case was 7% (29%-22%), well below constitutional threshold limit of 15%. HR:732; *St. Cloud* at ¶13; *Erickson* at 1254 (accepting a 7.4% disparity).

Instead of using the above calculations, the habeas court calculated the "predicted percentage of Native Americans" on the qualified jury list from each county and subtracted that number from the percentage of Native Americans in Buffalo County for a 58% "absolute disparity." HR:1237-38. The statistics and method of calculation the court utilized are not consistent with the absolute disparity calculation, nor did the court provide any citation or other support for its version of the test. The court's numbers were based on its assumption that Gonzales was entitled to a jury pool consistent with the demographics of Buffalo County. HR:1235-36. But the purpose of the *Duren* test is to evaluate the process of drawing jurors, not the act of defining the community. *Ashley* at 314. Indeed, even when the geographical location from which where the jurors are drawn is moved to an entirely different location, it is the new location that constitutes the "community," for purposes of the fair cross-section requirement, not the geographical location where the crime occurred. *Mallet v. Bowersox*, 160 F.3d 456, 461-62 (8th Cir. 1998).

Finally, the habeas court erroneously determined that, because its disparity calculation was so large, Gonzales established a prima facie case of exclusion and the burden shifted to Respondent. HR:1238-40. The cases the court relied upon for its burden shifting determination used an equal protection analysis instead of the *Duren* test. HR:1238-39; *Duren at* 368, n. 26 (distinguishing fair cross-section challenges from equal protection challenges); *Casteneda v. Partida*, 430 U.S. 482, 494-97 (1977) (establishing an equal protection violation requires showing that a group is a recognizable and distinct class singled out for different treatment under the law and underrepresented on jury venires *over a significant amount of time*—once underrepresentation is established, the burden shifts to the government to dispel discriminatory intent).[21]

Under the *Duren* analysis, Gonzales must establish that the underrepresentation was caused by systematic exclusion *before* the burden shifts to the government. *Berghuis v. Smith*, 559 U.S. 314, 332-33 (2010). And this Court has repeatedly held that numbers alone are not enough to establish a prima facie case under *Duren*. *Wright* at ¶50.

---

[21] Selection procedures that are susceptible to abuse or that are not racially neutral support a presumption of discrimination. *Id.* In *Casteneda*, appointed jury commissioners chose jurors from the community. These highly subjective procedures are in stark contrast to the random selection of jurors South Dakota courts utilize. SDCL ch. 16-13; *United States v. Williams*, 264 F.3d 561, 569-70 (5th Cir. 2001) (rejecting a claim that the district court's decision to expand the jury pool resulted in an equal protection violation).

Thus, the habeas court erred in deviating from the *Duren* test and finding that Gonzales established a prima facie case.

The habeas court did not approve of the "sua sponte" use of the jury district in this case because it did not comport with the court's conflated interpretation of the common law and the concept of "community" for purposes of the Sixth Amendment. However, this does not equate to systematic exclusion of Native Americans or a violation of the fair cross-section requirement. *Ashley* at 314; *United States v. Young*, 618 F.2d 1281, 1287-88 (8th Cir. 1980).[22] In this case, there is no suggestion that the trial court failed to follow South Dakota's objective procedures, which, as this Court has explained, secure the fundamental right to an impartial jury "by seeking to eliminate as far as possible the vagaries of human subjectivity and arbitrariness from the jury selection process." *Miller v. Young*, 2018 S.D. 33, ¶16, 911 N.W.2d 644, 649. Expanding the geographical area from which the jury was

[22] In *Young*, the court noted that the defendant's actions in striking prospective jurors that were from the geographical area he said was underrepresented "flies in the face" of his fair cross-section claim. *Young* at 1287. In this case, of the fifty-three individuals on the qualified juror list Gonzales identified as Native American, twenty-four were either pre-excused by the trial court or not otherwise mentioned in the jury-trial record on roll-call; twenty-three were excused or struck by Gonzales; and only four individuals were excused or struck by the State. JT:2269-2364, 2424-60, 2617-34, 2806-15. In an unusual turn of events, during strike down, Respondent made a Batson challenge regarding Gonzales's use of preemptory strikes on Native Americans. JT:2806-11. Two Native Americans were selected for the jury. JT:2818. Considering Gonzales excused or struck Native Americans at a rate of over five times that of the State, her argument that there was not enough Native Americans on the jury rings hollow.

drawn to ensure Gonzales has a big enough venire from which to choose an impartial jury does not equate to a systematic exclusion of a distinct group. Because Gonzales did not, and cannot, establish prongs two or three of the *Duren* test, the habeas court erred granting her a new trial and its decision should be reversed.[23]

The habeas court's premises, that the Sixth Amendment requires the jury to be drawn from a fair cross-section of the "community" where the crime occurred, and that "community" must be consistent with the common law definition of "vicinage," is incorrect. The drafters of the Sixth Amendment intentionally deviated from the common law definition of vicinage and allowed legislatures to determine what constitutes a "community," so long as the community is in the State and federal district where the crime occurred.

III. THE HABEAS COURT ERRED IN DETERMINING THAT THE ALLEGED ERRORS IN GONZALES'S TRIAL CONSTITUTED STRUCTURAL ERROR.

Following the practice of the United States Supreme Court, this Court uses a categorical approach to structural errors. *State v. Evans*, 2021 S.D. 12, ¶42, 956 N.W.2d 68, 85, n. 13. "A constitutional error is either structural or it is not.: *Id.* Errors are only structure if there has been: (1) a deprivation of the right to counsel; (2) a biased judge; (3) an

---

[23] The habeas court cited *Alvarado v. State*, 486 P.2d 891 (Alaska 1971), but did not provide any analysis. This case was decided before *Duren* and was limited to its facts. As such, Respondent will not engage in further analysis in this brief.

unlawful exclusion of grand jurors of the defendant's race; (4) a deprivation of the right of self-representation at trial; (5) a deprivation of the right to a public trial; [or] (6) an erroneous reasonable doubt standard." *Id.* This Court does not use the "functional equivalent test" because it is inconsistent with the categorical approach. *Id.*

In this case, Gonzales did not prove constitutional error, much less structural error. The only arguable error was in not adding more counties to the jury district to reach the threshold of 10,000. This statutory violation does not amount to constitutional error, nor does it fit into any of the categories listed above. *Moeller* at ¶10 (explaining the issues that may be reviewed through habeas corpus, including jurisdiction and basic constitutional rights); *House v. Hatch*, 527 F.3d 1010, 1026 (10th Cir. 2008) (noting that, "no Supreme Court case holds that a transfer of venue over a defendant's objection, even to a venue in which virtually no person of the defendant's race resides, constitutes a structural defect or fundamental error" and the Sixth Amendment "requires only that a defendant be provided a jury composed of a fair cross section of the venire pool."). Failing to reach the 10,000-population threshold "did not negate the objective procedures that secure a defendant's fundamental right to an impartial jury." *Miller at* ¶17. Practically speaking, had the trial judge included other counties in close proximity to Buffalo County, such as Aurora or Douglas, the

venire could have had a lower percentage of Native Americans. HR:543-45, 1368-69.

In *Good Lance v. Black Hills Dialysis, LLC*, this Court suggested that the circuit court's standing order, which prohibited the entire population of a county from participating as a juror, was a "structural defect." 2015 S.D. 83, ¶28, 871 N.W.2d 639, 648. In that case, this Court had not approved the standing order, in violation of the express language of SDCL 16-13-18.3. The standing order also violated SDCL 16-13-10.1.

On the other hand, in this case, the express language of SDCL 16-13-18.4 did not require this Court approve the creation of the jury district. HR:737, 786-87. Nor did the court's determination prohibit an entire population of a county from participating. Instead, the court expanded the geographical location from which the jury pool was located to ensure Gonzales had the opportunity to choose an impartial jury from the venire. *Miller* at ¶19 (noting that "technical departures from the jury selection statutes and violations which do not threaten the goals of random selection and objective disqualification do not constitute a substantial failure to comply."). Gonzales examined her jury panels and secured a fair and impartial jury—a jury which unanimously found her guilty. The habeas court erred, as a matter of law, in determining that Gonzales established a constitutional error and concluding that the error was structural.

CONCLUSION

Respondent respectfully requests this Court reverse the habeas court's order granting Gonzales habeas corpus relief.

Respectfully submitted,

MARTY JACKLEY
ATTORNEY GENERAL

/s/ Chelsea Wenzel
Chelsea Wenzel
Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215
Email: atgservice@state.sd.us

CERTIFICATE OF COMPLIANCE

1. I certify that the Petitioner's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Petitioner's Brief contains 9,922 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2016.

Dated this 20th day of September 2023.

/s/ Chelsea Wenzel
Chelsea Wenzel
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 20, 2023, a true and correct copy of Appellant's Brief in the matter of *Donika Rae Gonzales v. Wanda Markland, Warden of the South Dakota Women's Prison*, was served by using Odyssey File and Serve upon Gonzales through her attorney, Thomas P. Reynolds, at treynolds@yanktonlawyers.com.

/s/ Chelsea Wenzel
Chelsea Wenzel
Assistant Attorney General

Appendix

STATE OF SOUTH DAKOTA) :SS COUNTY OF BUFFALO)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
DONIKA RAE GONZALES, Petitioner, vs. **WANDA MARKLAND, Warden, South Dakota Women's Prison,** Respondent.	08 CIV 17-3 **MEMORANDUM DECISION GRANTING HABEAS CORPUS RELIEF**

INTRODUCTION

This case involves a Native American defendant charged with committing murder of a Native American victim in a Native American community contained within an organized county consisting of approximately 84% Native American people. The State of South Dakota, through its various branches of government and elected officials, created a jury district which allowed crimes committed within that county to be tried with a jury selected from a pool of residents chosen mostly from a neighboring, majority white county, such that the pool consisted of only 23% Native American people. Petitioner Donika Rae Gonzales (Gonzales) did not consent to using such altered jury pool in her case. The utilization of a jury pool so constituted violated her rights under both the State and Federal Constitutions to be tried by a jury selected from a pool of residents representing a fair cross section of the community where the crime occurred. The application of this systematic process had the effect of diluting members of her own community and minority race from that pool of prospective jurors. Under United States Supreme Court and

South Dakota Supreme Court precedent, this systematic dilution of Gonzales' racial and communal peers from her jury pool was structural error which cannot be determined to be harmless, as a matter of law. Therefore, Gonzales' Third Amended Petition for Writ of Habeas Corpus must be granted, and this matter is remanded for a new trial with a Buffalo County jury or jury chosen from a jury district formed in a way that is consistent with the community where the crime occurred and does not work a systematic exclusion of Native Americans from her jury pool.

FACTUAL AND PROCEDURAL BACKGROUND

Gonzales, a member of the Crow Creek Sioux Tribe, was charged in Buffalo County, South Dakota with alternative counts of Second Degree Murder, First Degree Manslaughter, Aggravated Assault, and Felony Child Abuse. *See* 08 CRI 13-1. The Crow Creek Indian Reservation covers the western half of Buffalo County as well as the extreme southern portions of Hughes and Hyde Counties, along the Missouri River in central South Dakota. The charges arose from the death of a Native American child, M.N., age 4. The death occurred in the rural Buffalo County home that Gonzales shared with M.N.'s father and was outside the Crow Creek reservation boundaries.

On April 11, 2014, following a nine-day trial in neighboring Brule County, a jury convicted Gonzales of First Degree Manslaughter and Aggravated Assault. The Honorable Judge Bruce Anderson sentenced Gonzales on July 1, 2014, to 130 years in the state penitentiary as to the Manslaughter conviction and 15 years, concurrent, as to the Aggravated Assault conviction. Gonzales filed a direct appeal to the South Dakota Supreme Court raising nine issues, none relevant to the issues at bar. On February 22, 2016, the Supreme Court summarily affirmed.

Following the Supreme Court's affirmance, Gonzales filed a Motion for Modification of Sentence. Judge Anderson held a hearing on the motion on June 10, 2016. An Amended Judgment of Conviction and Sentence was filed on June 23, 2016, modifying Gonzales' sentence to 90 years as to the Manslaughter conviction with 50 years suspended. Gonzales was ordered to serve 15 years as to the Aggravated Assault conviction, with that sentence concurrent with the Manslaughter sentence.

This is Gonzales' first proceeding for habeas corpus relief. This matter came before the Court for an evidentiary hearing on May 19 and 20, 2021 and April 29, 2022. Petitioner appeared via ITV throughout and was represented by her attorney Thomas Reynolds. Assistant Attorneys General Douglas Barnett and Amanda Miller appeared on behalf of Respondent at the various hearings. Gonzales sets forth the following claims in her Third Amended Petition for Writ of Habeas Corpus:

- That Gonzales was deprived of her rights under the Sixth Amendment to the United States Constitution and Article Six, Section Seven of the South Dakota Constitution, **because the jury pool did not consist of a fair cross-section of the community in which the crime occurred and because she was not tried by a jury from the county in which the crime occurred.** (Emphasis added).
- That Gonzales was deprived of effective assistance of counsel during critical stages of her defense, in that her trial counsel:
    - Did not explain and inform Gonzales of the ramifications of the Court impaneling both Brule and Buffalo County Jurors;
    - Did not object to the Court calling Brule County jurors; and

- Failed to offer exculpatory evidence at the trial, namely x-rays of the victim and pictures of Gonzales's hands.

The emphasized portion of the claims asserted in the Third Amended Petition became the central focus of the habeas trial. At the conclusion of the last hearing, the Court took the matter under advisement and allowed the parties time to submit post-trial briefs. Having reviewed the record and considered the arguments and briefs of counsel as well as conducting extensive legal research into the issues at hand, the Court grants habeas relief.

STANDARD OF REVIEW

The history of habeas corpus can be traced to the Habeas Corpus Act of 1679, which has been described as the "stable bulwark of our liberties" and was the model upon which the habeas statutes of the thirteen original American colonies were based. *See Boumediene v. Bush*, 553 U.S. 723, 742 (2008) (citing 1 W. Blackstone, Commentaries *134). SDCL 21-27-1 states, "Any person committed or detained, imprisoned or restrained of his liberty, under any color or pretense whatever, civil or criminal, except as provided herein, may apply to the Supreme or circuit court, or any justice or judge thereof, for a writ of habeas corpus." However, habeas corpus is not a substitute for direct review and the scope of habeas review is limited. "'Habeas corpus can be used only to review (1) whether the court had jurisdiction of the crime and the person of the defendant; (2) whether the sentence was authorized by law; and (3) in certain cases whether an incarcerated defendant has been deprived of basic constitutional rights.'" *Loderman v. Class*, 1996 SD 134, ¶3 (quoting *Loop v. Class*, 1996 SD 107, ¶11 (citations omitted)). The habeas applicant has the burden of proving entitlement to relief by a preponderance of the evidence. *Hays v. Weber*, 2002 SD 59, ¶11 (citing *New v. Weber*, 1999 SD 125, ¶5 (citing *Lien v. Class*, 1998 SD 7, ¶11)).

ANALYSIS AND DECISION

I

The underlying crimes occurred in Buffalo County, South Dakota, which is 84% Native American. At the time the crimes were committed, Gonzales, who is Native American, was a resident of Buffalo County. However, by administrative order under the auspices of S.D.C.L. 16-13-18.4, the jury trial was held in Brule County, South Dakota, which is much larger than Buffalo and overwhelming white. The jury pool for the case consisted of a pro rata allocation of residents of the two counties. Gonzales claims that she was deprived her Sixth Amendment rights under the U.S. Constitution and her rights under Article Six, Section Seven of the South Dakota Constitution because the jury pool did not consist of a fair cross-section of the community in which the crimes occurred, due to systematic legislative and judicial processes depriving her of a jury pool consisting of Buffalo County residents which, in turn, significantly diluted the Native American population of her jury pool. This was all done without her consent. As a corollary ground, Gonzales asserts that her attorneys were constitutionally ineffective as trial counsel when they failed to either explain to her that this was improper or object to it on her behalf.[1]

Article VI, Section 7 of the South Dakota Constitution provides:

> In all criminal prosecutions the accused shall have the right to defend in person and by counsel; to demand the nature and cause of the accusation against him; to have a copy thereof; to meet the witnesses against him face to face; to have compulsory process

[1] Petitioner claims that her trial attorneys were ineffective because, among other things, they did not explain and inform Petitioner of the ramifications of the Court impaneling both Brule and Buffalo County jurors and did not object to the Court calling Brule County jurors. All of the ineffective assistance claims, other than those relating to the jury composition, are facially without merit and not analyzed further herein. Her ineffective assistance claims relating to failure to advise of and object to the jury composition issues are significant, but in this Court's view are subsumed in her larger claims of direct structural error in the selection of the jury pool. When an error is so fundamental as to be structural error, it is not necessary to clothe it in the garb of ineffective assistance to invoke constitutional protections.

> served for obtaining witnesses in his behalf, 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.**

(Emphasis added.) The Sixth Amendment to the United States Constitution also guarantees the right of the accused to an *impartial jury*, and that right has been applied to state prosecutions by incorporation into the Due Process Clause of the Fourteenth Amendment. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 551 (1976) (citing *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) ("Because 'trial by jury in criminal cases is fundamental to the American scheme of justice,' the Due Process Clause of the Fourteenth Amendment guarantees the same right in state criminal prosecutions."). The right to an impartial jury under the 6th and 14th Amendments prohibits systematic dilution of the racial composition of a jury pool. *See Taylor v. Louisiana*, 419 U.S. 522 (1975); *Turner v. Fouche*, 396 U.S. 346 (1970); *Duren v. Missouri*, 439 U.S. 357 (1979); *U.S. v. Erickson*, 436 F.Supp.3d 1242 (D.S.D. 2020); *St. Cloud v. Class*, 1996 S.D. 64, 550 N.W.2d 70.

II

"In all criminal prosecutions, the defendant has a constitutional right to be tried by a jury **in the county where the crime was alleged to have been committed.**" SDCL 23A–16–3 (Rule 18)(emphasis added); *State v. Whistler*, 2014 S.D. 58, ¶ 12 (citing S.D. Const. art VI, § 7); *State v. Banks*, 319 N.W.2d 19, 21 (S.D. 1986); *State v. Sutton*, 317 N.W.2d 414, 415 (S.D. 1982) ("The term 'jury trial' . . . can only mean the full constitutional right of a 'speedy public trial by an **impartial jury of the county in which the offense is alleged to have been committed.**'") (Emphasis added). SDCL 23A-16-11 provides that the venue of a prosecution for murder or manslaughter, "when the injury which caused the death was inflicted in one county and the

person injured dies in another county or out of state, is in the county where the injury was inflicted." In this case the injury was inflicted in Buffalo County.

It is the duty of the court to advise the defendant of his fundamental right to trial by a jury of the county wherein the offense is alleged to have been committed, and failure is a denial of due process. *Application of Garritsen*, 376 N.W.2d 575, 577 (S.D. 1985) ("The record must indicate that the defendant was informed of his right to a jury trial in the county in which the crime was committed."). In this case, Gonzales was so advised at her Initial Appearance before Judge Kiner on March 5, 2013. Tr. of Initial Appearance, p. 9. She was subsequently advised at her arraignment on April 15, 2013 by Judge Anderson that she would be tried by a Buffalo County Jury. Tr. of Arraignment, pp. 22-23.

SDCL 16-13-18.4, first enacted in 1997, states:

> If any county within a circuit has a population of less than five thousand, the presiding circuit court judge may create a jury district by joining that county with one or more other counties within the circuit until the total population of the counties exceeds ten thousand. Each county within a jury district is entitled to pro rata representation upon the master jury list to be computed by the presiding judge upon the basis of the last official census.

Pursuant to this legislation, the Presiding First Circuit Judge entered a Revised Order Creating a New Jury District on July 6, 2011 (Jury District Order.) It stated that Buffalo County had a population of 1,912 according to the 2010 census. The Order joined Buffalo County with Brule County to form a jury district with a total population of 7,167. As provided by SDCL 16-13-18.4, the JDO ordered that the master jury list drawn for the district would consist of 73.5% residents of Brule County and 26.5% resident of Buffalo County. It further ordered that, in such instances, the petit jury panel must be divided into two panels, Panel A consisting of jurors who are residents of Brule County and Panel B consisting of jurors who are residents of Buffalo County. The Order went on to mandate that trials venued in Brule County would summon jurors

from Panel A and trials venued in Buffalo County would summons jurors from Panel B, *unless the judge presiding over the trial ordered that jurors be summoned from both panels.* In this case, both panels were summoned by Judge Anderson. According to Respondent, all of this was authorized by the "county or district" language clause of S.D. Const. Art. VI, § 7. Gonzales disputes this interpretation.

Gonzales asserts that use of the jury district with Panel A blended with Panel B in this case was unconstitutional because she had a fundamental constitutional right to be tried by a jury of Buffalo County residents, who are members of the community where the crime occurred, rather than jurors selected from a district which was constituted in such a way as to greatly dilute the jury pool of her neighbors, as well as members of her ethnicity. The record reflects that of the 236 total jurors within the jury pool in her case, 182 jurors (77%) were residents of Brule County and 54 (23%) were from Buffalo County. Per the record, Brule County is 8.5% Native American and Buffalo County is 84% Native American. As so constituted, overall the jury pool consisted of a similar breakdown, 54 Native Americans (23%) and 181 (77%) non-native jurors. Per Exhibit A, seven of the Native American Jurors were from Brule and eight of the non-natives were from Buffalo. The 14 jurors (including two alternates) empaneled included only one Buffalo County Resident, who was one of two Native Americans total on the petit jury in the case.

Respondent maintains that Gonzales' claim is without merit because she was tried by a jury of the *district* where the crime occurred, which is a term explicitly stated in Article VI Section 7 of the State Constitution, and said district was authorized by statute and created by court order. Further, Respondent points out that no claim has been raised that improper *Batson* challenges were used to dilute the jury pool of Native American constituents; therefore,

according to Respondent, there should be no inference of impartiality predicated upon dilution of the ethnic composition of the venire merely due to an administrative procedure. *See Batson v. Kentucky*, 476 US 79 (1986) (Equal Protection violation to utilize peremptory strikes based upon race); *But see, Holland v. Illinois*, 493 US 474, 477 (1990) (dilution of racial composition of jury pool implicates Sixth Amendment right to fair and impartial jury).

Although no *Batson* challenge was raised in the case, and so there is no record establishing improper peremptory challenges, troubling revelations of the state prosecutor's mindset in jury selection regarding jurors from the community where the crime occurred are revealed where he asked Judge Anderson, during a telephonic pretrial conference, *outside the presence of Gonzales*, "Are we restricted in any fashion under the statutory scheme or otherwise from routinely striking, peremptorily striking people because they are Buffalo County members, from that pool?" He then rephrased, "Are we prohibited from routinely striking Buffalo County residents based solely upon the fact that they're from Buffalo County?" *Id.* at p. 10. When Judge Anderson suggested that this approach may implicate *Batson*, the prosecutor responded, "And that's a side issue, Judge. It's a side effect. There's a good chance we would be striking people because they're from Buffalo County, but because they're from Buffalo County they very well may be Native American. We're not striking them based upon their race. We're striking them based on their residence." *Id.* at p. 10-11. Judge Anderson's response was that "there's some very touchy issues there. We'll address that. And I'm not saying no." *Id.* But the issue was never addressed. Of the 34 jurors passed for cause, only four were Buffalo County residents. One was stricken by the State, two by the defense, and one was seated who was Native American. *See* Voir Dire sheet filed in 08CRI 13-1 compared to Exhibit A herein. The other seated juror who was Native American was from Brule County. *Id.* Of the six Native Americans

passed for cause, two were seated, the state struck three, and the defense struck one. *Id.* Although *Batson* issues were not raised in the case, clearly the dichotomy in the demographics of the jury panels from the two counties played a large role in how the State viewed its strategic advantages in having a jury consisting of mainly Brule County residents and gave an open invitation to manipulation to further that end.

III

South Dakota's Constitution guarantees "a speedy public trial by an impartial jury of the *county or district* in which the offense is alleged to have been committed." When the South Dakota Constitution was drafted, there were no jury districts within the state (or the preceding territory). There were counties, and there were areas within the state boundaries that were yet to be organized into actual counties. *In re Nelson*, 19 S.D. 204, 10 N.W. 885, 887 (1902). So, there was a potential need for jury districts to adjudicate state crimes as well as civil disputes arising outside of county boundaries. *Id.*

The idea of the county as a political and geographical subdivision and constituent of the concept of community, in 1889 and today, is fixed and certain. The meaning of a county is ubiquitous – "the largest territorial division for local government in a state." Black's Law Dictionary (Fifth Ed. 1979) at 316. "Community" is synonymous with "neighborhood," "vicinity" and "locality." *Id.* at 254. A "community" is a "body of people living in the same place, under the same laws and regulations, who have common rights, privileges or interests." *Id.* It "connotes congeries of common interests arising from associations—social, business, religious, governmental, scholastic, recreational." *Id.* A "district" has always been a much more pliable and amorphous term -- "One of the territorial areas into which an entire state or country, county, municipality or other political subdivision is divided, for judicial, political, electoral, or

administrative purposes." *Id.* at 427. While counties and communities share many common elements, districts clearly are synthetic creatures of administrative convenience that can cross distinct communal borders for bureaucratic efficiency.

The South Dakota Supreme Court has explicitly held that both the Federal and State Constitutions guarantee that a petit jury will be selected from a "fair cross section of the ***community***." *State v. Wright,* 2009 S.D. 51, ¶47; *St. Cloud v. Class*, 1996 S.D. 64, ¶9; *State v. Hall,* 272 NW2d 308, 310 (SD 1978) (emphasis added). S.D. Const. Art. VI, § 7 was copied verbatim from neighboring Nebraska. *See* NE Const. Art. I, § 11. Several other states admitted to the Union prior to South Dakota used identical language, as will be discussed below. The fact that, at the time of the drafting of S.D. Const., Art. VI, § 7, the term "county" had a clear reference to an existing structure of geographically defined governmental subdivisions, while the term "district" did not, creates a critical ambiguity of constitutional dimension in this case, requiring inquiry into the source of this usage.

The South Dakota Constitution was ratified in 1889 and Article VI, § 7 has not been amended. In 1902, the Supreme Court of South Dakota discussed the import of the language of this section guaranteeing the right of the accused to trial by an impartial jury of the "county or district in which the offense is alleged to have been committed." *See In re Nelson,* 19 S.D. 214, 102 N.W. 885 (1902). The Supreme Court noted that this language is "found in numerous state constitutions." *Id.* at 887. Our Supreme Court posited that this right

> is simply declaratory of an incident of the common-law right of trial by jury. Sir William Blackstone says: "When, therefore, a prisoner on his arraignment has pleaded not guilty, and for his trial hath put himself upon the country, which country the jury are, the sheriff of the county must return a panel of jurors *** freeholders, without just exception, and of the visne or neighborhood, which is interpreted to be of the county where the fact is committed." 2 Cooley, Blackstone (3d Ed.) 491.

Id. The Supreme Court went on to declare that this right guaranteed by Article VI, § 7 to trial with a jury impaneled from the county or neighborhood "is ancient, sacred, and absolute," and "**can neither be taken away nor abridged by the Legislature.**" *Id.* (Emphasis added.)

The Supreme Court then considered the precise meaning of the word "district" within this clause of Article VI, § 7, noting that the term "judicial subdivision" would have "more accurately defined the right than the word 'district,'" because, at the time of ratification South Dakota included within its boundaries unorganized territory which would, by necessity, "be attached to a county for judicial purposes." *Id.* Where that is not the case, according to the Supreme Court, **"the clause may be considered as if the word 'district' were eliminated."** *Id.* (Emphasis added.) As such, in *In re Nelson*, which was a habeas corpus case, the Supreme Court held:

> It is the relator's constitutional right to be tried by an impartial jury of Lyman County. The jury must not only be impartial. *It must be of the county in which the crime is alleged to have been committed.* Until the accused has been tried by such a jury, or shall have waived his right by consenting to a change of place of trial, he cannot be lawfully convicted. If such a jury cannot be secured, there will be no tribunal before whom he can be tried, and the ends of justice in an individual instance may be defeated. But however regrettable such a result might be, its possibility or even probability cannot be invoked to justify a disregard of *so plain a provision of the state Constitution.*

Id. (Emphasis added.)

A plain reading of *In re Nelson* stands for the proposition that in the modern era, where our entire state is subdivided into counties, any trial of an accused, without his or her consent, by a jury consisting of persons who are not residents of the county in which the crime is alleged to have occurred, is void as unconstitutional. That is the precise interpretation of identical language in the Kansas Constitution by the Kansas Supreme Court 29 years later.

In re Nelson was cited with approval by the Supreme Court of Kansas in the case of *In re Oberst*, 133 Kan. 364, 299 P. 959 (1931). Interpreting the exact same language, the Kansas

Supreme Court held that, "as used in the Constitution, the ... word "district" in Section 10 was used to describe something that no longer exists in our state, and that the word at the present time is virtually obsolete...." Id. 299 P at 960. Specifically, the Kansas Supreme Court recounted how, at the time that their constitution was written, the Kansas Territory extended west "to the summit of the Rocky Mountains," with few delineated counties within its exterior borders. *Id.* at 961. Thus, the Kansas Supreme Court interpreted this *identical language* to that which was later used in SD Const. Art. VI, § 7 to mean that "one accused of a crime should be tried by a jury of the county, or, *if the crime was committed in territory not included in any organized county*, then by a jury of the district where the crime was alleged to have been committed." *Id.* at 962. (Emphasis added.) In other words, the only purpose of the inclusion of the term "district" within this provision regarding criminal trial juries was "to provide for the administration of justice in all the *vast domain not included in organized counties* at the time that the Constitution was adopted." *Id.* (Emphasis added.) *Accord, Dodge v. Nebraska*, 4 Neb 220 (1876).[2]

To undergird this interpretation, the Kansas Supreme Court turned to the foundational principle of "vicinage." Citing to the Supreme Court of our mutual sister state Nebraska, the *Obersi* Court reasoned further:

> [T]he design of the provision of the bill of rights seems to be *to secure to the accused a trial by a jury from the vicinage where the crime is supposed to have been committed,* so that he may have the benefit of his own good character and standing with his neighbors, if these he has preserved, and also such knowledge as the jury may possess of the witnesses who give evidence before them.

Id. (Emphasis added.) Hence, the Court concluded that the term "district" was derived from, and thus synonymous with, the "vicinage." *Id.*

[2] "If the Constitution had provided that the trial of one accused of a crime must take place in the county where the offense is alleged to have been committed, there would have been endless confusion about bringing one to trial who was charged with having committed a crime in some unorganized territory. In fact, the administration of justice would have broken down." *Id.* at 964.

Preceding both *Oberst* and *Nelson* was *Olive v. State*, 11 Neb 1, 7 NW 444 (1880), *overruled on other grounds*, *Whitcomb v. State*, 102 Neb 236, 166 NW 533 (1918). The Nebraska Bill of Rights contains the exact same "county or district" language adopted by South Dakota and Kansas. NE Const. Art. I, § 11. Olive challenged a statute in Nebraska that allowed the District Judge to assign trial of a cause arising in an unorganized county or territory to any organized county within that Judicial District. 7 NE at 445. Called upon to interpret the meaning of the word "district" within that section of the Bill of Rights, the Nebraska Supreme Court held that the term was used by the drafters "in a restrictive sense, **to limit and control the exercise of both legislative and judicial power**...." *Id.* at 446. (Emphasis added.) The *Olive* Court expounded further that, although the generic word "district" has many meanings in various contexts, its usage in the Bill of Rights, "although not synonymous with the word 'county,' yet, by its connection with it, the intention evidently was that they should be taken in a similar sense, and as designating the precise portion of territory, or division of a state, over which a court at any particular sitting, may exercise power in criminal matters." *Id.* While unclear as to what circumstances would allow this, the opinion in *Olive* states that, although "the legislature may... create trial districts which shall include more territory than a single county," any such law must be in accord with the "grand design" of securing the fundamental right of the accused to "**a trial by a jury from the vicinage where the crime is supposed to have been committed,** so that he may have the benefit of his own good character and standing with his neighbors, if these he has preserved...." *Id.* (Emphasis added.) *But see, People ex rel Smith v. Rodenburg*, 254 Ill. 386, 392, 98 NE 764, 767 (1912) (holding, under identical provision for trial within the "county or district" that any subdivision forming a trial district must be wholly contained within the boundaries of the county where the crime occurred- "[A]ny district created by legislative action

must be within the county and cannot extend beyond it. There would have been no reason for limiting the prosecution to the county... if the General Assembly could enlarge such territory by creating a district and thereby destroy the limitation.")

Considering this context, particularly the penetrating observations in *In re Nelson*, the most cogent reasoning is that SD Const. Art. VI, § 7 requires trial by a jury drawn from the county where the crime allegedly occurred, and any trial division that can pass constitutional muster must be formed as a subdivision within the boundaries of a single county. An alternative, plausible interpretation would allow formation of a trial jury district which could exceed the boundaries of one county, so long as the district included the county where the crime occurred, and the additional area was contiguous and could be considered a common vicinage with the county in accordance with the traditional understanding of the term. Any district that isn't conformed to one of these two configurations is patently unconstitutional.

IV

Petitioner retained and called as an expert witness at the habeas trial Attorney Phillip O. Peterson, who prepared a report and testified that, in his legal opinion, the use of the jury district in this case violated Gonzales' constitutional right to trial within the vicinage where the crime occurred. While the Sixth Amendment to the U.S. Constitution does not guarantee the accused a trial within the vicinage where the crime occurred as part of its "fair cross-section of the community" requirement (*See Williams v. Florida, 399 US 78, 93. 35 (1970); See generally, Taylor v. Louisiana*, 419 US 522, 525 (1975); *Accord, Caudill v. Scott*, 857 F2d 344, 345-46 (6th Cir. 1988); *Cook v. Morrill*, 783 F2d 593, 595-96 (5th Cir. 1986); *Zicarelli v. Dietz*, 633 F2d 312, 325-26 (3rd Cir. 1980), nonetheless, Mr. Peterson's analysis is spot-on with respect to Article VI, § 7 of the South Dakota Constitution. As noted in section III above, the history of the

legal concept of "vicinage" in general is fundamental to a proper understanding of SD Const. Art. VI, § 7, and fully supports Mr. Peterson's opinions and testimony in that regard.

The Oxford English Dictionary defines "vicinage" as "[a] number of places lying near to each other taken collectively; an area extending to a limited distance round a particular spot; a neighborhood." *Oxford English Dictionary*, "Vicinage" (2d ed. 1989). The OED cites Thomas Fuller's Church History (1655): "King Ethelred . . . began the tryal of Causes by a Jury of twelve men to be chosen out of the Vicenage." *Id.* "Technically, 'vicinage' means neighborhood, and 'vicinage of the jury' meant jury of the neighborhood or, in medieval England, jury of the county."). *Williams v. Florida*, *supra*, at 93 n. 35 (citing 4 William Blackstone, Commentaries *350–51.)

The Declaration and Resolves of the First Continental Congress adopted on October 14, 1774, stated:

> That the respective colonies are entitled to the common law of England, and more especially to the great and **inestimable privilege of being tried by their peers of the vicinage**, according to the course of that law.

Journals of the Continental Congress 69 (1904) (emphasis added). On October 26, 1774, the Continental Congress approved an address to the people of Quebec, drafted by Thomas Cushing, Richard Henry Lee, and John Dickinson, arguing that:

> [One] great right is that of trial by jury. This provides, that neither life, liberty nor property, can be taken from the possessor, **until twelve of his unexceptionable countrymen and peers of his vicinage, who from that neighbourhood** may reasonably be supposed to be acquainted with his character, and the characters of the witnesses[.]

Journals of the Continental Congress 107 (1904) (emphasis added). The United States Declaration of Independence (1776) accuses King George III of "transporting us beyond seas to be tried for pretended offences." The Declaration of Independence (U.S. 1776).

The omission of specific vicinage language from the United States Constitution was among the objections of the Anti-federalists to the ratification of the Constitution. *Crawford v. Washington*, 541 U.S. 36, 49 (2004) (citing R. Lee, Letter IV by the Federal Farmer (Oct. 15, 1787), reprinted in 1 B. Schwartz, The Bill of Rights: A Documentary History 469 (1971)). James Madison explained the omission of a vicinage clause to the Virginia Ratifying Convention as follows:

> It was objected yesterday, that there was no provision for a jury from the vicinage. If it could have been done with safety, it would not have been opposed. It might so happen that a trial would be impracticable in the county. Suppose a rebellion in a whole district, would it not be impossible to get a jury? The trial by jury is held as sacred in England as in America. . .. It is a misfortune in any case that this trial should be departed from, yet in some cases it is necessary.

Williams, 399 U.S. at 94 n.35 (quoting 3 M. Farrand, Records of the Federal Convention 332 (1911)).

Before the adoption of the federal Constitution, two state constitutions provided an explicit vicinage right. D. Kershen, *Vicinage*, 29 Okla. L. Rev. 801, 815 (1976). The Virginia Constitution of 1776 provided: "in all capital or criminal prosecutions a man hath a right to . . . an impartial jury of twelve men of his vicinage." *Id.* The Pennsylvania Constitution of 1776 read similarly but said "county" instead of "vicinage"; it was amended in 1790 to say "vicinage." Id. at 815-16. Two others, New Hampshire (1784), and Georgia (1777 and 1789), required crimes to be tried in the county where committed. *Id* at 807. Maryland (1776) and Massachusetts (1780) declared that "trial of crimes near where the crime occurred was essential." *Id.*

Due to the vicissitudes of political negotiation, the Federal Constitution does not require trial within a county or vicinage. Nonetheless, as made clear by the South Dakota Supreme Court in *In re Nelson*, the undergirding of vicinage is elemental to an understanding of SD Const. Art. VI, § 7, as it is to many other similar or identical clauses in other states' Bills of Rights, as

interpreted by such states' highest courts, because "vicinage" and "county" are linked conceptually to the ideas of neighborhood, peerage, locality, and community, and the participants in those state constitutional conventions desired that those attributes be fundamental to the criminal jury selection process in their respective states.

As noted by the many authorities cited above, the concept of a criminal trial "in the county where the offense was alleged to have occurred" is deeply imbedded in the constitutional history of England. *See* H. Hallam, Vol. 1, *The Constitutional History of England from the Accession of Henry VII to the Death of George II* at p. 19 (A.C. Armstrong and Son ed.) (Hillsdale College Library Collection) (also available in Cambridge Library Collection - British and Irish History, General- Cambridge University Press.) In the case at bar, the creation of this jury district by administrative order and commingling of jury cohorts from Buffalo and Brule County for process efficiency crossed distinct communal lines that have existed long before SDCL 16-13-18.4 was conceived.

While Buffalo and Brule Counties are contiguous, their residents are not common peers, localities, neighbors, or communities in any relevant sense of those critical concepts. They are, rather, literally worlds apart. This is a historical and sociological fact that simply cannot be ignored. Creation of this jury district in 2011 disregarded centuries of cultural and communal history and discord illustrating the vast gulf between these disparate communities and counties, and a jurisprudential foundation to our laws dating back to medieval times.

V

The record reflects that Buffalo County is comprised of approximately 84% Native Americans, and Brule County is comprised of 85% Caucasian individuals and 9% Native

Americans. Only 23% of the jury pool in Gonzalcs' case was Native American. Of the 12 jurors deciding the case, only 2 of them were Native American, roughly 17%. She argues that the small number of Native American jurors in the jury pool resulted from the jury district that was used, and thus was an unconstitutional systematic exclusion of Native American jurors under the 6th and 14th Amendments to the United States Constitution.

It is beyond question that Native Americans are a distinct ethnic community. Indeed, the South Dakota Supreme Court has so held. *Primeaux v. Dooley*, 2008 SD 22 at ¶13. *See also Alvardo v. State*, 486 P2d 891 (Alaska 1971). *See generally*, Fixico, D. L. (2004). *Native Pathways: American Indian Culture and Economic Development in the Twentieth Century* (B. Hosmer & C. O'Neill, Eds.) University Press of Colorado, http://www.jstor.org/stable/j.ctt46nvxp. Native American history and the community relations between our Native citizens *vis-a-vis* the European cohort that settled here in the 19th century demonstrates that these communities are distinct, and often at odds politically, socially, and in many other dimensions. *See generally* T. Holm, *The Great Confusion in Indian Affairs: Native Americans and Whites in the Progressive Era,* New York, USA: University of Texas Press, 2005; F. Bordewich, *Killing the White Man's Indian: Reinventing Native Americans at the End of the Twentieth Century,* Anchor Books, 1996; T. Biolsi, *Deadliest Enemies: Law and the Making of Race Relations on and off Rosebud Reservation,* Univ. of Minnesota Press, 2001.

Native American representation in Petitioner's jury pool certainly was not a fair cross-section in relation to the number of Native American residents in Buffalo County, which is the community where the offense occurred. This underrepresentation of Native Americans in the jury pool was, without question, due to systematic exclusion of that group from the jury selection process resulting from the creation of the jury district and the combining in this case of the two

panels, the larger one being from Brule County. The issue is whether Gonzales was entitled to a jury pool consistent with the demographics of the county and community where the crime occurred, which was majority Native American, rather an administratively constructed district that, because of the joinder of the much larger and demographically different Brule County, has few of the hallmarks of the community or vicinage where the crime occurred.

"The Sixth Amendment to the United States Constitution guarantees that a petit jury will be selected from a panel of names representing a fair cross section **of the community**." *St. Cloud v. Class*, 1996 S.D. 64, ¶ 9, 550 N.W.2d 70, 73 (citing *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975) (emphasis added); *State v. Hall*, 272 N.W.2d 308, 310 (S.D. 1978)).

SDCL 16-13-10.1 provides in part:

> It is the policy of the State of South Dakota that all litigants in the courts of this state entitled to trial by jury shall have the right to grand and petit juries selected at random from a **fair cross-section of the community** in the municipality, district, or county where the court convenes. It is further the policy of the State of South Dakota that all citizens of this state, qualified for jury duty, shall have the opportunity to be considered for service on grand and petit juries in the courts of this state, and shall have an obligation to serve as jurors when summoned for that purpose.

(Emphasis added.) Indeed, the South Dakota Supreme Court has admonished "that the burden is now on the judiciary, not only to prevent purposeful discrimination against minorities but to insure that all identifiable groups **in the community** are fairly represented on jury panels. *State v. Hall*, 272 NW2d 308, 310 (SD 1978) (emphasis added). "It is not important whether the discrimination was purposeful or not." *Id.*

To prevail on her federal claim herein, Gonzales must show that the creation of this blended district and the utilization of the blended panels amounts to an exclusion and:

(1) the group excluded is a "distinct" group **in the community**;
(2) the representation of this group in the jury pool is not fair and reasonable in relation to the number of such persons **in the community**;

(3) this underrepresentation is due to the systematic exclusion of the group from the jury-selection process.

St. Cloud, 1996 S.D. 64, ¶ 10 (citing *State v. Lohnes*, 432 N.W.2d 77, 83-84 (S.D. 1988) (citing *Duren v. Missouri*, 439 U.S. 357 (1979); See also, *Turner v. Fouche*, 396 U.S. 346 (1970).

As noted above, there is no dispute that Native Americans are a "distinct" group. Clearly, the first prong is met. Indeed, in many aspects Native Americans are a community unto themselves, and that is the overarching theme of this case; that is, Brule and Buffalo counties can in no valid sense be considered a single community for jury districting purposes.

However, Respondent argues that Petitioner didn't meet her burden of establishing the second prong because her basis for identifying the race of the 236 jurors was insufficient. To the contrary, the evidence and statistical data of record in this case is very similar in nature to that approved in *St. Cloud v. Class*, 1996 SD 64, where census data and unsworn letters from jurors self-reporting their ethnicity was admitted by the habeas court and affirmed on appeal, because the same was considered to be "more probative on the point for which [they are] offered than any other evidence which the proponent can procure through reasonable efforts." *Id.* at ¶15. In this case, it has been shown, as noted above, that of the 236 jurors called for the jury pool, 182 jurors (77%) were from Brule County, which is less than 9% Native, and 54 (23%) were from Buffalo County, which is 84% Native. These population and demographic statistics for the two counties are uncontroverted, and the letter attached to the Third Amended Petition from Christine Obago, a secretary who works for the Crow Creek Sioux Tribe, identifying the Native Americans listed in the jury venire, is entirely consistent with this. Ms. Obago indicates in her cover letter that she placed an asterisk by the names of the Native American people on the jury list "that I know of personally." There are 53 asterisks on that juror sheet. Of those Native American jurors, 7 are listed as Brule County residents and the other 46 are from Buffalo County. A simple math

calculation for statistical probability will confirm the accuracy of these numbers. 9% of 182 Brule County jurors = 16 Native jurors; 54 Buffalo County Jurors x 84% = 45 Native jurors. So, the proportion of the actual Buffalo County Juror panel that were Native Americans (46) was within a 2% variance from the proportional expectation (45). The Brule County number was a little lower than expected- 16 predicted and 7 identified Native American jurors.

Even if we assume, for the benefit of the doubt to the State, that Ms. Obago missed some Brule County jurors that were Native Americans, and substitute the higher, predicted statistical average number of 16 for Brule County Native American Jurors, that brings the number of hypothetical Native American Jurors in the panel only up to 62 out of 236, which is 26%. Comparing that to the 84% Native American constituency in Buffalo County leaves us with, best case scenario, a 58% absolute disparity. (Using Ms. Obago's count gives us a 23% Native American pool, or 61% absolute disparity.)

Considering these uncontroverted demographics and populations of the two counties, and the proportions mixed to create the blended jury pool in this case, it is mathematically certain that the jury pool was diluted of Native Americans drastically by merging Buffalo County with Brule for purposes of jury selection in this case, and the exhibit from the tribal official is consistent with what the statistics objectively prove. The undisputed record reflects mathematical, statistical and direct evidence as to overall disparity calculations of at least 58%, and undoubtedly establishes a *prima facie* case of exclusion as discussed in *Rose v. Mitchell*, 443 U.S. 545 at 565 (1979.) This level of exclusion is dramatically beyond the 15% threshold recognized as an outer limit by the South Dakota Supreme Court in *Hall, supra. See also, St. Cloud v. Class*, 1996 SD 64 at ¶19; *Primeaux v. Dooley*, 2008 SD 22 at ¶15. Having done so, the burden shifted to Respondent to rebut that *prima facie* case, and Respondent didn't even attempt

to do so. *Id; Castenada v. Partida*, 430 US 482, 495 (1977). Gonzales has met her burden of proof on this issue.

The "absolute disparity calculation" is the established test used to evaluate whether there is *prima facie* evidence of underrepresentation of a distinct group. It was recognized by the South Dakota Supreme Court in *Hall* and *St. Cloud* and recently was applied in *United States v. Erickson*, 436 F. Supp. 3d 1242, 1254 (D.S.D. 2020). Both sides in this case agree it is the touchstone. "Under the absolute disparity calculation, the percentage of Indians on the list of persons eligible for petit jury service is subtracted from the percentage of Indians in the general population, resulting in a figure constituting the absolute difference." *Erickson*, 436 F. Supp. 3d at 1254.

"The Supreme Court of the United States in *Swain v. Alabama*, determined that an underrepresentation of as much as ten percent as calculated by the 'absolute disparity concept' does not constitute prima facie evidence of underrepresentation." *United States v. Erickson*, 436 F. Supp. 3d 1242, 1254 (D.S.D. 2020) (citing *Swain v. Alabama*, 380 U.S. 202, 208–09 (1965) (overruled on other grounds by *Batson v. Kentucky*, 476 U.S. 79 (1986))). The South Dakota Supreme Court has stated that an absolute percentage difference of 15% or more would require supplementation of the jury panel. *State v. Hall*, 272 N.W.2d 308, 310–11 (S.D. 1978) ("Although the United States Supreme Court has not indicated what percentage of underrepresentation on a single panel would constitute a violation of the fair cross-section requirement, it appears that an absolute percentage difference of fifteen percent or more would require supplementation of the jury panel."). Indeed, the *Hall* Court ruled that a 23% absolute disparity in the jury venire, women over men, is unconstitutional. *Id.* at 311, Thus, the established gray area, or "margin of error" for absolute disparity, is established as being between

10-15%. In *Castaneda, supra*, 430 US at 495-96, the historic grand jury venire averaged 39% Hispanic as compared to the county population at large being 79% Hispanic, and this 40% disparity was deemed by the United States Supreme Court to be beyond constitutional tolerances. A 37% to 60% comparison between jury venire and community population for African Americans (23% disparity) was likewise held unconstitutional in *Turner v. Fouche, supra*, 396 US at 539. Comparing the disparity between the Native American constituency of the jury pool that was available in Buffalo County versus the constituency in the blended district used in this case is at least 58%. That level of disparity, based upon the caselaw cited above, is *per se* unconstitutional.

The United States Supreme Court has articulated an additional process to be considered in determining whether an established significant underrepresentation is unreasonable – that is, the existence of a "significant state interest" that *justifies and outweighs* the infringement of a defendant's constitutional right to a jury drawn from a fair cross section of the community. *Duren, supra*, 439 US at 368-70; *Taylor v. Louisiana*, 419 US 522, 533-34 (1975). Here the State has made no suggestion of an interest, other than administrative convenience, to justify its policy that has been shown to have diluted the minority composition of her jury venire, and administrative convenience can never trump a fundamental constitutional right. *See Duren, supra* at 367-68 ("The right to a proper jury cannot be overcome on merely rational [basis] grounds.") *See also, Garcia-Durantes v. Warren*, 978 F.Supp 2d 815, 835 (E.D. MI 2013) ("The burden shifts to the State to show a 'significant state interest [that is] manifestly and primarily advanced by those aspects of the jury selection systems... that resulted in the disproportionate exclusion of a distinct group.'... The State makes no claim that any such interest exists in this case.") (Quoting *Duren*, 439 US at 367-68.) Better services for juror convenience in Chamberlain, which

is not sufficient to trump a fundamental constitutional right, doesn't explain why the entire jury panel wasn't chosen from Buffalo County and the case tried in Chamberlain with the Buffalo County jurors, as the trial judge at one point said would be done. The trial court never even attempted to summon a full jury panel from Buffalo County in the case, and Respondent in this case has never suggested that it wouldn't have been possible to muster a jury from the approximately 1900 residents there. Gann Valley is the county seat, where there is a courthouse that was constructed at Buffalo County taxpayer expense for the specific purpose of trying Buffalo County cases with jurors who live there.

It is undeniable, in this Court's view, that the underrepresentation of Native American jurors in this case is due to systematic processes. The State Legislature authorized formation of jury districts by combining county jury pools, the Presiding Judge of the First Circuit created this particular district and the process for selecting this combined venire by entering a Standing Order, and the trial judge ordered it to be implemented in this case *sua sponte*. The trial judge first proposed that the trial be had in Chamberlain but with Buffalo County jurors only. *See* Transcript of Arraignment, 4-15-13, pgs. 22-23. Had that occurred, there would be no error. But, that proposal morphed, without reasoning, into that of holding the trial in Chamberlain with a blended jury from both counties. *See* Transcript of Motions Hearing, 5-7-13, pgs. 3-4. Oddly, the proposition later reverted to the original proposal of a Buffalo County jury picked in Gann Valley, and then a trial in Chamberlain. *See* Transcript of Motions Hearing, 9-27-13, pgs. 4-5. Then, at a hearing *outside the presence of Ganzales*, defense counsel effectively stipulated to the blended jury panels and the judge said, "all right." *See* Transcript of Telephonic Hearing, 1-15-14, pgs. 4-5. The testimony at the habeas hearing confirms that Petitioner's right to a Buffalo County jury, or one at least that was drawn from a jury district blending Buffalo County jurors

with jurors selected from other nearby communities with similar racial composition and community characteristics, was never explained to her. Nor did she ever state that she was waiving that right either to counsel or the trial court. This is not a proper record to predicate the denial of a fundamental constitutional right.

VI

Respondent called a legal expert in the case, retired Magistrate Judge Mark Smith. Mr. Smith correctly distills the Petitioner's constitutional claims down to their essential elements, which are that her jury pool was, by the utilization of the blended jury district panels, systematically diluted of Native American, who were replaced by members of a distinct and separate majority white community. He errs, in the Court's view, in his process for determining whether Petitioner's rights were violated. With no supporting rationale, he simply posits, *a priori*, that Gonzales' community is the Brule and Buffalo Jury District, and with that premise accepted, his conclusion is that the jury panel in the case was a fair cross section of that district. That argument is circular. His reasoning is exactly what was condemned as pernicious by the Illinois Supreme Court in *Smith v. Rodenburg, supra,* 96 NE at 767. The true issue here is how the blended jury district which was administratively created in this case compares to the community that the South Dakota Constitution anchors as the locality from which her jurors are to be summoned, which is Buffalo County. The reason for this is, as established above, Brule County residents in general can, in no legal or factual way, be validly characterized as members of Gonzales' vicinage, community, or locality, because of the vast gulf in the culture and racial composition between the two communities.

The gravamen of Gonzales' claim is the uncontested fact that Buffalo County is overwhelmingly a Native American community and Brule County is overwhelmingly not. So,

the proportionality analysis must proceed from the perspective of how the jury pool actually used under SDCL 16-13-18.4 in this case compares to how it would have looked had the jury been selected without resort to that law; that is, completely from the community where the crime occurred- Buffalo County (or, at least, a hypothetical Jury District created under SDCL 16-13-18.4, but comprised of Buffalo County residents and supplemented, if necessary, by jurors from some other contiguous area consisting of people who could reasonably be identified as being from her own community or vicinage.)

Respondent puts forth several contentions to the effect that the jury district used in this case is constructed logically without regard to race, such as that the arbitrary circuit boundaries ought not be crossed in creating jury districts due to administrative confusion, that actually trying a murder case in Gann Valley, which is the county seat of Buffalo County, would be challenging due to lack of services for hosting a jury for a multiple-day trial, and that getting a sufficient number of jurors to report for jury duty in such a sparsely populated county would be daunting. In the Court's view, these hypothetical logistical challenges, even if true, would not trump a constitutional mandate that a criminal defendant is entitled to a jury pool that is drawn from the community where the crime occurred and does not systematically dilute minority constituents from it.

That there would have been any difficulty summoning enough jurors to try the case from within Buffalo County was never established before trial, because it wasn't even attempted. Nor did the Respondent even attempt to prove at the habeas hearing that it would have been a serious problem. So that hypothetical obstacle cannot meet the *Duran* test requiring a significant state interest. Indeed, concern about the level of juror compliance in a predominantly Native American county has been rejected by the South Dakota Supreme Court as a sufficient basis to

justify changing the county from which jurors are impaneled, *even in a civil case. Good Lance v Black Hills Dialysis, LLC, 2015 SD 83, ¶19.* To the contrary, as held in *Hall, supra*, it is the judiciary's duty to ensure that even inadvertent dilution of minority representation on jury panels is avoided. *Hall, supra* at 310.

VII

The analyses set forth above show that use of the blended jury panel in this case systematically diluted the ethnic composition of the jury venire in violation of the United States Constitution and also deprived Gonzales of a trial by jurors selected from within the county or community wherein the crime occurred, in violation of the South Dakota Constitution. Nevertheless, unless these errors rise to the level of ***structural errors***, we must consider the prejudice prong before any relief can be granted. It is well-established habeas corpus jurisprudence that, on collateral review, constitutional error in a case does not justify relief for the petitioner unless she can show that the error resulted in "actual prejudice" to her. *Brecht v. Abrahamson,* 507 US 619, 638 (1993). This standard has been articulated as whether the petitioner can show that the constitutional error "had substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 637 (quoting *Kotteakos v. United States,* 328 US 750, 776 (1946)). This standard has been described by the South Dakota Supreme Court as a "showing that the jury's verdict would reasonably likely have been different" absent the constitutional error, *Guthmiller v. Weber*, 2011 SD 62, ¶1, or that the error has "undermined confidence in the outcome of the trial," *Neels v Dooley,* 2022 S.D. 4, ¶13.

"Structural error" is a limited category of errors that are so egregious that they are deemed, as a matter of law, to have "undermine[ed] the fairness of a criminal proceeding as a whole." *Neels, supra,* at ¶16. A structural error is an error that violates a constitutional right that

is "so basic to a fair trial that [its] infraction can never be treated as harmless error." *Chapman v. California,* 386 US 18, 23 (1967). Examples of such fundamental error include the total deprivation of the right to defense counsel in a criminal case, or a biased judge. *Arizona v. Fulminante,* 499 US 279, 309 (1991). The common thread in these cases is that "[t]he entire conduct of the trial from beginning to end is obviously affected" by these conditions. *Id.* at 309-10. *See also, State v. Evans,* 2021 S.D. 12, n. 13.

The systematic exclusion of an identified demographic group, such as by race or gender, is structural error. In *Vasquez v. Hillery,* 474 US 254 (1986), the United States Supreme Court held that exclusion of members of the defendant's race from a grand jury is structural error. "When constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm." *Id.* at 263. *See also, Guthmiller, supra* at ¶16. Indeed, the *Vasquez* Court noted as another example of structural error, cases "where a petit jury has been selected upon improper criteria... because the effect of the violation cannot be ascertained." *Id. See also Rose v. Mitchell, supra,* 443 U.S. at 556 ("Since the beginning, the Court has held that where discrimination in violation of the Fourteenth Amendment is proved, ' "[t]he court will correct the wrong, will quash the indictment[,] or the panel[;] or, if not, the error will be corrected in a superior court," and ultimately in this court upon review,' and all without regard to prejudice.") (Quoting *Neal v. Delaware,* 103 US 370, 394 (1881)); *Duren, supra,* 439 US at 370 (exception of women from jury service required reversal of conviction without consideration of prejudice); *Taylor v. Louisiana, supra,* 419 US at 438 (same); *Castenada v. Partida, supra,* 430 US at 500 (accord, Hispanic racial disparity.) The same result obtains under state court holdings for violation of their vicinage clauses. *See Alvarado v. Alaska, supra,* 486 P2d at 906; *Olive v.*

Nebraska, supra, 7 NW at 448; *Wheeler v. State,* 24 Wis. 52, 54 (1869); *State v. Denton,* 46 Tenn. 539, 543 (1869); *Osborne v. State,* 24 AR 629, 633 (1867). *See generally, U.S. v. McGill,* 815 F3d 846 (D.C. Cir. 2016); *People v. Lopez,* 974 NE 2d 291, 362 Ill. Dec. 770 (2012). The errors in this case violated both the state and federal constitutions and are structural as a matter of law.

CONCLUSION

The Constitutions of both our state and nation forbid the use of jury districts that sunder a defendant from trial by her communal peers and systematically dilute the racial composition of her jury pool. Here, Gonzales was deprived of her right to be tried by a fair and impartial jury of her peers chosen from within the community where the crime occurred, and without a systematic dilution of Native American jurors. Application of the blended jury pool district concept in this case had the pernicious effect of excluding members of Gonzales' community and race from the process that determined her liberty. This violated both the Sixth Amendment to the United States Constitution and Article VI, Section 7 of the South Dakota Constitution, was structural error, and the only remedy is retrial with a jury selected in a constitutional manner.

Therefore, habeas relief is granted, and Gonzales must be retried or released. Within thirty days, counsel for Petitioner shall submit the appropriate Findings of Fact and Conclusions of Law incorporating this Memorandum Decision, along with a proposed Writ for the Court's consideration. Respondent shall have a similar time to file Objections and Alternative Proposed Findings of Fact and Conclusions of Law.

Dated this 22 day of March, 2023.

BY THE COURT:

Douglas E. Hoffman
Circuit Court Judge

ATTEST: _____, Clerk of Courts

By: _____ Deputy

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS
COUNTY OF BUFFALO) FIRST JUDICIAL CIRCUIT

* *

DONIKA RAE GONZALES, 08CIV17-000003

Petitioner,

v. FINDINGS OF FACT AND CONCLUSIONS OF LAW

WANDA MARKLAND, WARDEN,
S.D. WOMEN'S PRISON,

Respondent.
* *

The above-captioned matter having come on for trial before this Court upon the Petitioner's Third Amended Petition for Writ of Habeas Corpus on May 19 and May 20, 2021, and April 29, 2023, the Petitioner appearing via ITV and her counsel, Thomas P. Reynolds, appearing personally and the Respondent appearing by and through Amanda Miiller, Assistant Attorney General, and Doug Barnett, Assistant Attorney General, and the Honorable Douglas E. Hoffman presiding.

The Court having considered the testimony of the witnesses and exhibits received in evidence and having considered the statements and written arguments of counsel; and the Court having reviewed the pleadings and motions and generally the file herein; and the Court having issued its Memorandum Decision on the 12th day of March, 2023, and pursuant to SDCL 15-6-52(a), the Court hereby makes its findings of fact and conclusions of law as set forth in the Court's Memorandum Decision of March 12, 2023, on file herein, which is incorporated hereto by reference and which Memorandum Decision constitutes in its entirety the Court's findings of fact and conclusions of law in this matter.

Dated this _____ day of _____, 2023.

Attest:
Miller, Charlene
Clerk/Deputy

BY THE COURT: **4/6/2023 1:40:11 PM**

Douglas E. Hoffman
Circuit Court Judge

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS.	
COUNTY OF BUFFALO	)	FIRST JUDICIAL CIRCUIT
DONIKA RAE GONZALES,	)	
	)	08 CIV. 17-03
Petitioner,	)	
	)	STATE'S PROPOSED
vs.	)	FINDINGS OF FACT
	)	AND CONCLUSIONS OF LAW
WANDA MARKLAND, WARDEN, S.D. WOMEN'S PRISON,	)	
	)	
Respondent.	)	

This matter, having come before the Court for an evidentiary hearing on the May 19 and 20, 2021 and April 29, 2022, the Defendant appearing via ITV and with her counsel, Thomas Reynolds, who was personally present, and the State appearing by and through counsel, Assistant Attorneys General, Doug Barnett and Mandy Miiller, and the Court having heard the testimony of witnesses, the arguments of counsel, and being fully apprised of the record herein, now therefore enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Following a nine-day jury trial held in Brule County, Donika Rae Gonzales was found guilty of first-degree manslaughter and aggravated assault in connection with the beating death of her boyfriend's four-year old son.

2. The killing happened at the family's home in rural Buffalo County.

3. The Court utilized a jury district for Gonzales's jury trial, which is authorized under Article VI, Section 7 of the South Dakota Constitution and SDCL 16-13-18.4.

4. At the time of Gonzales's jury trial, Buffalo County had a total population of 1,912 residents.

5. The South Dakota Unified Judicial System is divided into seven distinct circuits.

6. Buffalo County is contained in the First Circuit, along with the counties of Aurora, Bon Homme, Brule, Charles Mix, Clay, Davison, Douglas, Hanson, Hutchinson, McCook, Turner, Union, and Yankton.

7. Brule County is the only county contained in the First Circuit that is contiguous with Buffalo County.

8. The jury district in this matter consisted of residents from Buffalo and Brule Counties.

9. Pursuant to the Revised Order Creating a New Jury District, *see* Exhibit 4, there was a pro rata selection of potential jurors with 331 summoned from Brule County and 119 summoned from Buffalo County.

10. The 450 summoned jurors made up the Petit Jury List.

11. Christine Obago testified at the evidentiary hearing regarding the racial makeup of the qualified jurors. Ms. Obago's testimony, the only testimony provided on this matter, is not reliable.

12. Ms. Obago testified that, based on her personal knowledge of individuals in Buffalo County, 53 of the 236 individuals on the qualified juror list in Gonzales's jury trial were Native American.

13. Ms. Obago acknowledged that she did not have any personal knowledge of the race of the individuals on the qualified juror list from Brule County, that some of the individuals on the qualified juror list may have been Native American that she was simply unaware of, and that she failed to make any investigation into determining whether any of the individuals on the qualified juror list were Native American.

14. Gonzales acknowledged that some of the Brule County jurors on the qualified juror list were Native American, but Ms. Obago failed to identify any.

15. Despite the lack of adequate evidence regarding racial makeup of the jurors, the Petitioner's identification of jurors and their race will be accepted for purposes of calculation only.

16. The percentage of Native Americans identified by Petitioner on the list of persons eligible for jury service at Gonzales's trial was 22%. Exhibit 1.

17. The percentage of Native Americans in the combined jury district was 29%. Exhibit 1.

18. Although Gonzales now claims that the jury was not comprised of a fair cross-section of the community because Native Americans were systemically concluded, she responded to the State's *Batson* Challenge during voir dire at her trial as follows:

> I believe that the makeup of this jury that we have is made up of residents of both . . . Brule County and Buffalo County and that there is a significant racial diversity in the two counties that was evidenced by the people that were brought in and questioned.

Transcript of Jury Trial, Volume 4, page 13.

CONCLUSIONS OF LAW

1. Any Finding of Fact deemed to be a Conclusion of Law shall be appropriately incorporated in these Conclusions of Law, and vice versa.

2. This Court has jurisdiction of the parties to and the subject matter of this action.

3. The Petitioner's fair cross-section claim under the Sixth Amendment's guarantee of an impartial jury trial is separate and distinct from a claim implicating the Sixth Amendment's limitation on vicinage. *See Zicarelli v. Gray*, 543 F.2d 466, 473 (3d Cir. 1976) [Zicarelli I] (recognizing "the differences between the two separate aspects of the [S]ixth [A]mendment[.]").

4. To establish a fair cross-section claim, a petitioner must prove: "(1) the group excluded is a 'distinct' group in the community; (2) the representation of this group in the jury pool is not fair and reasonable in relation to the number of such persons in the community; (3) this under representation is due to the systematic exclusion of the group from the jury-selection process." *State v. Wright*, 2009 S.D. 51, ¶ 48, 768 N.W.2d 512, 529.

5. As to the first prong, Native Americans are a distinct group. *See, e.g., St. Cloud v. Class*, 1996 S.D. 64, ¶ 11, 550 N.W.2d 70, 74.

6. Petitioner fails to meet the second prong. Initially, Petitioner has failed to accurately identify the racial identity of the members on the qualified juror list. Unlike the verification letters that were sent in *St. Cloud*, 1996 S.D. 64, ¶ 14, 550 N.W.2d at 74, the Petitioner here had an individual testify to the people she personally knew to be Native American and who resided in Buffalo County only. This testimony is incomplete, speculative, and wholly unreliable.

7. "The State has no burden of proof at a habeas corpus proceeding, only the burden of meeting the evidence of the petitioner, who has the burden of proof." *Davi v. Class*, 2000 S.D. 30, ¶ 26, 609 N.W.2d 107, 114.

8. Even if Petitioner's numbers were accepted, the absolute disparity threshold in this case is only 7%. This is "less than the 15% underrepresentation at which the jury panel should be supplemented." *Id.* at 19, 550 N.W.2d at 76.

9. The Petitioner suggests using a disparity calculation that would subtract the percentage Native Americans from the total population of Buffalo County from the percentage of Native Americans on the qualified juror list.

10. However, the South Dakota Supreme Court has recognized that the "community" is "the percentage of Indians in the total population of the

counties." *Id.* at ¶ 18, 550 N.W.2d at 75 (citing *United States v. Black Bear*, 878 F.2d 213, 215 (8th Cir.1989).

11. Thus, "[t]o determine if Indians are unfairly excluded from juries, we compare the percentage of Indians in the total population of the counties to the percentage of Indians on the master jury list." *Id.*

12. Here, the percentage of Native Americans in the total population of Buffalo and Brule Counties was 29%. The total population of Native Americans on the qualified juror list was 22%. This is an absolute disparity of 7%, well below the constitutional standard requiring supplementation.

13. Because the second prong has not been met, the Court need not address the third prong.

14. To the extent that the issues of fair cross-section and vicinage have been conflated, a "claim that the cross section requirement was violated by the mere fact that [a petitioner] was tried by a jury drawn from a panel that did not include residents of [the county where the crime occurred]" has been rejected. *Zicarelli v. Dietz*, 633 F.2d 312, 316 (3d Cir. 1980) [*Zicarelli II*].

15. Article VI, Section 7, of the South Dakota Constitution provides an accused the right to a "jury of the county or district in which the offense is alleged to have been committed." (Emphasis added).

16. The Legislature has provided the following framework for creating jury districts:

> If any county within a circuit has a population of less than five thousand, the presiding circuit court judge may create a jury district by joining that county with one or more other counties within the circuit until the total population of the counties exceeds ten thousand. Each county within a jury district is entitled to pro rata representation upon the master jury list to be computed by the presiding judge upon the basis of the last official census.

SDCL 16-13-18.4.

17. Because Buffalo County had a "population of less than five thousand," the presiding judge had discretion to create a jury district.

18. A defendant's consent or waiver is not required for the creation or use of a jury district.

19. Under SDCL 16-13-18.4, Buffalo County had to be joined "with one or more other counties within the circuit."

20. Both Buffalo and Brule Counties are within the First Circuit.

21. The term "district" in the South Dakota Constitution is not ambiguous. Particularly when read together with SDCL 16-13-18.4.

22. The Legislature presumably knew that Article VI, Section 7, of the State Constitution permitted a "jury of the county or district in which the offense is alleged to have been committed."

23. With this knowledge, Legislature chose to enact a districting statute.

24. This is within the prerogative of the Legislature.

Dated this _____ day of _____ 2023.

Honorable Douglas E. Hoffman
Circuit Court Judge

Denied. Douglas E. Hoffman, Judge.
4/6/23

Filed: 4/4/2023 5:02 PM CST Buffalo County, South Dakota 08CIV17-000003

STATE OF SOUTH DAKOTA) :SS		IN CIRCUIT COURT
COUNTY OF BUFFALO)		FIRST JUDICIAL CIRCUIT
DONIKA RAE GONZALES	*	CIV. 17-03
Petitioner,	*	
vs.	*	JUDGMENT AND ORDER FOR HABEAS CORPUS RELIEF
BRENDA HYDE, Warden of the South Dakota Women's Prison,	*	
Respondent.	*	

The above-entitled action having come on for evidentiary hearings before the Court on May 19 and 20, 2021, and April 29, 2022, at Sioux Falls, South Dakota, the Honorable Judge Douglas Hoffman, presiding; the Respondent not being personally present, but being represented by Assistant Attorneys General Douglas Barnett and Amanda Miller; the Petitioner Donika Rae Gonzales, being present personally from Prison via ITV, and represented by Thomas Reynolds of Yankton, SD; and the Court, having heard the testimony of the witnesses and argument of counsel, and reviewed all of the files, records and exhibits herein and in the underlying criminal file 08CRI13-1, having issued its Memorandum Decision, and having made and entered Findings of Fact and Conclusions of Law, and good cause appearing, it is hereby:

ORDERED, ADJUDGED AND DECREED that Habeas Corpus relief is granted to Petitioner, and it if further,

ORDERED, ADJUDGED AND DECREED that Petitioner Donika Rae Gonzales shall be discharged from the custody of the Respondent Brenda Hyde, Warden of the South Dakota Women's Prison, and it is further,

ORDERED, ADJUDGED AND DECREED that Petitioner's convictions and sentences in Buffalo County Criminal File 08CRI13-1 are declared null and void; and it is further,

ORDERED, ADJUDGED AND DECREED that the Petitioner Donika Rae Gonzales shall be remanded to the custody of the Buffalo County Sheriff's Office for further proceeding in Buffalo County Cr. 13-01 consistent with the Memorandum Decision issued by the Court herein.

Dated this 6 day of April, 2023.

BY THE HABEAS CORPUS ACT:

Hon. Douglas E. Hoffman
Circuit Court Judge

ATTEST:
Charlene Miller, Clerk of Courts

Clerk of Courts/Deputy

(SEAL)

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30400

* *

DONIKA RAE GONZALES,

Petitioner and Appellee,

v.

WANDA MARKLAND, Warden, South Dakota Women's Prison

Respondent and Appellant.

* *

Appeal from the Circuit Court
FIRST JUDICIAL CIRCUIT
BUFFALO COUNTY, SOUTH DAKOTA

THE HONORABLE DOUGLAS HOFFMAN, Circuit Court Judge

APPELLEE'S BRIEF

Thomas P. Reynolds
322 Walnut Street
Yankton, SD 57078
Telephone: (605) 665-3000
Email: treynolds@yanktonlawyers.com

ATTORNEY FOR PETITIONER
AND APPELLEE

MARTY JACKLEY
ATTORNEY GENERAL

Chelsea Wenzel
Assistant Attorney General
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501

Telephone: (605) 773-3215
Email: atgservice@state.sd.us

ATTORNEYS FOR RESPONDENT
AND APPELLANT

Notice of Appeal filed July 11, 2023

Filed: 11/21/2023 10:11 AM CST Supreme Court, State of South Dakota #30400

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

PRELIMINARY STATEMENT

In this brief, Donika Rae Gonzales is referred to as "Gonzales" or "Petitioner". Wanda Markland, Warden of the South Dakota Women's Prison, will be referred to as "Respondent". Citations to the settled records for the jury trial (JT) and habeas trial (HR) are followed by the corresponding page number(s).

JURISDICTIONAL STATEMENT

On April 6, 2023, the Honorable Douglas Hoffman, Circuit Court Judge, First Judicial Circuit, entered a Judgment and Order for Habeas Corpus Relief. HR: 1261-62. Respondent moved for a Certificate of Probable Cause on May 3, 2023. HR: 1282-83. Judge Hoffman issued a Certificate of Probable Cause on June 13, 2023, and Respondent filed a Notice of Appeal on July 11, 2023. HR: 1292, 1300. This Court has jurisdiction under SDCL § 21-27-18.1.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I. THE UNITED STATES AND SOUTH DAKOTA CONSTITUTIONS REQUIRE A CRIMINAL JURY TO BE DRAWN FROM THE COUNTY OR DISTRICT WHERE THE CRIME WAS COMMITTED.

The habeas court correctly determined that Article VI, Section 7 of the South Dakota Constitution and the Sixth Amendment of the United States Constitution require a criminal jury to be drawn from the county or district where the crime was committed.

State v. Whistler, 2014 S.D. 58, 851 N.W.2d 905

State v. Wright, 2009 S.D. 51, 768 N.W.2d 512

St. Cloud v. Class, 1996 S.D. 64, 550 N.W.2d 70

II. GONZALES ESTABLISHED A VIOLATION OF THE FAIR CROSS-SECTION REQUIREMENT UNDER THE *DUREN* TEST.

The habeas court correctly determined Gonzales established a prima facie violation of the fair cross-section requirement under the *Duren* Test.

Duren v. Missouri, 439 U.S. 357 (1979)

St. Cloud v. Class, 1996 S.D. 64, 550 N.W.2d 70

United States v. Ashley, 54 F.3d 311 (7th Cir. 1995)

United States v. Erickson, 436 F. Supp. 3d 1242 (D.S.D. 2020)

III. THE VIOLATIONS IN GONZALES'S CRIMINAL TRIAL CONSTITUTED STRUCTURAL ERROR.

The habeas court correctly determined that the violations in Gonzales criminal trial constituted structural error.

Neels v. Dooley, 2022 S.D. 4, 969 N.W.2d 729

STATEMENT OF THE CASE AND FACTS

Gonzales, a member of the Crow Creek Sioux Tribe and resident of Buffalo County, was found guilty of Manslaughter in the First Degree and Aggravated Assault on April 11, 2014, for events that were alleged to have occurred exclusively in Buffalo County, South Dakota. HR: 32-33; 48-49; 443. The trial, however, took place in Brule County, South Dakota, with a petit jury (including alternates) that consisted of thirteen Brule County residents and one Buffalo County resident. HR: 239-249; 359. The Crow Creek Indian Reservation covers the western half of Buffalo County along the Missouri River in central South Dakota. HR: 429.

The Trial Court summoned the jury pool using a Standing Order issued by the Presiding Judge of the First Circuit pursuant to SDCL § 16-13-18.4, which created a

jury district comprised of Buffalo County and Brule County residents. HR: 238; 343. SDCL § 16-13-18.4 permits a presiding judge to create a jury district for any county with a population of less than five thousand, by joining that "county with one or more other counties within the circuit until the total population of the counties exceeds ten thousand. Each county within a jury district is entitled to pro rata representation upon the master jury list to be computed by the presiding judge upon the basis of the last official census."

The jury district that was created in this instance had a total population of 7,167 persons, with 1,912 persons from Buffalo County and 5,255 persons from Brule County. HR: 363; 562-563; 739-742. The Standing Order stated that the "master jury list drawn for said district shall consist of 73.5% residents of Brule County and 26.5% residents from Buffalo County." HR: 817. The Presiding Judge cited the United States Census in its Standing Order as to the populations of both counties. HR: 817. According to the United States Census, the population of Buffalo County is comprised of approximately 80% Native Americans and the population of Brule County is comprised of approximately 85% whites and 9% Native Americans. HR: 488-490; 739-742.

236 total jurors were called for the jury pool. 182 or 77% of those jurors were from Brule County and fifty-four (54) or 23% were from Buffalo County. HR: 564. Fifty-three (53) jurors were Native Americans or approximately 22.5 percent of the jury pool. HR: 427; 564. The jury that was ultimately empaneled consisted of fourteen (14) persons. HR: 724-734. Thirteen (13) of those persons were residents of Brule County and one (1) was a resident of Buffalo County. HR: 724-734. Two (2) of those persons were Native Americans. HR: 724-734.

Gonzales was sentenced to 130 years for Manslaughter and fifteen (15) years (concurrent) for Aggravated Assault. Gonzales was committed to the penitentiary on July 1, 2014, by the Honorable Bruce V. Anderson, Circuit Court Judge. Gonzales appealed and the South Dakota Supreme Court affirmed Gonzales's conviction and sentence on February 22, 2016. HR: 102. On June 23, 2016, the trial court modified Gonzales's 130-year sentence for Manslaughter to ninety (90) years with fifty (50) years suspended.

On October 6, 2016, Gonzales filed a writ of habeas corpus. A habeas trial was held on May 19 and 20, 2021 and April 29, 2022. The following claims asserted in the Third Amended Petition became the central focus of the habeas trial:

- That Gonzales was deprived of her rights under the Sixth Amendment to the United States Constitution and Article Six, Section Seven of the South Dakota Constitution, **because the jury pool did not consist of a fair cross-section of the community in which the crime occurred and because she was not tried by a jury from the county in which the crime occurred.** (Emphasis added).
- That Gonzales was deprived of effective assistance of counsel during critical stages of her defense, in that her trial counsel:
    - Did not explain and inform Gonzales of the ramifications of the Court impaneling both Brule and Buffalo County Jurors; and
    - Did not object to the Court calling Brule County jurors.

On April 6, 2023, the Trial Court entered a Judgment and Order for Habeas Corpus Relief. HR: 1261-62.

STANDARDS OF REVIEW

The history of habeas corpus can be traced to the Habeas Corpus Act of 1679, which has been described as the "stable bulwark of our liberties" and was the model upon which the habeas statutes of the thirteen original American colonies were based. See *Boumediene v. Bush*, 553 U.S. 723, 742 (2008) (citing 1 W. Blackstone, Commentaries *134). SDCL § 21-27-1 states, "Any person committed or detained, imprisoned or restrained of his liberty, under any color or pretense whatever, civil or criminal, except as provided herein, may apply to the Supreme or circuit court, or any justice or judge thereof, for a writ of habeas corpus." However, habeas corpus is not a substitute for direct review and the scope of habeas review is limited. '" Habeas corpus can be used only to review (1) whether the court had jurisdiction of the crime and the person of the defendant; (2) whether the sentence was authorized by law; and (3) in certain cases whether an incarcerated defendant has been deprived of basic constitutional rights.'" *Loderman v. Class*, 1996 S.D. 134, ¶3 (quoting *Loop v. Class*, 1996 S.D. 107, ¶11 (citations omitted)). The habeas applicant has the burden of proving entitlement to relief by a preponderance of the evidence. *Hays v. Weber*, 2002 S.D. 59, ¶11 (citing *New v. Weber*, 1999 S.D. 125, ¶5 (citing *Lien v. Class*, 1998 S.D. 7, ¶11)).

ARGUMENTS

This is a case where a Native American defendant was charged with committing a crime against a Native American victim in a Native American community contained within an organized county consisting of approximately 84% Native American people. The State of South Dakota, through its various branches of government and elected

officials, created a jury district which allowed crimes committed within that county to be tried with a jury selected from a pool of residents chosen mostly from a neighboring, majority white county, such that the pool consisted of only 23% Native American people. Gonzales did not consent to using the altered jury pool. The utilization of a jury pool in this manner violated Gonzales' rights under both the State and Federal Constitutions to be tried by a jury selected from a pool of residents representing a fair cross section of the community where the crime occurred. The application of this systematic process had the effect of diluting members of her own community and minority race from that pool of prospective jurors. Under United States Supreme Court and South Dakota Supreme Court precedent, this systematic dilution of Gonzales' racial and communal peers from her jury pool was structural error which cannot be determined to be harmless, as a matter of law. Therefore, the habeas Court's decision should be affirmed.

I. THE HABEAS COURT WAS CORRECT IN ITS INTERPRETATION AND CONSTRUCTION OF THE UNITED STATES AND SOUTH DAKOTA CONSTITUTIONS.

Gonzales was deprived her Sixth Amendment rights under the U.S. Constitution and her rights under Article Six, Section Seven of the South Dakota Constitution because the jury pool did not consist of a fair cross-section of the community in which the crimes occurred, due to systematic legislative and judicial processes depriving her of a jury pool consisting of Buffalo County residents which, in turn, significantly diluted the Native American population of her jury pool. This was all done without Gonzales' consent.

The underlying crimes occurred in Buffalo County, South Dakota, which is 84% Native American. Gonzales, a Native American, was a resident of Buffalo County. However, by administrative order under the auspices of SDCL § 16-13-18.4, the jury trial was held in Brule County, South Dakota, which is much larger than Buffalo and overwhelmingly white. The jury pool for the case consisted of a pro rata allocation of residents of the two counties.

Article VI, Section 7 of the South Dakota Constitution provides:

> In all criminal prosecutions the accused shall have the right to defend in person and by counsel; to demand the nature and cause of the accusation against him; to have a copy thereof; to meet the witnesses against him face to face; to have compulsory process served for obtaining witnesses in his behalf, 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.**

(Emphasis added.) The Sixth Amendment to the United States Constitution also guarantees the right of the accused to an impartial jury, and that right has been applied to state prosecutions by incorporation into the Due Process Clause of the Fourteenth Amendment. *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 551 (1976) (citing *Duncan v. Louisiana,* 391 U.S. 145, 149 (1968) ("Because 'trial by jury in criminal cases is fundamental to the American scheme of justice,' the Due Process Clause of the Fourteenth Amendment guarantees the same right in state criminal prosecutions."). The right to an impartial jury under the 6th and 14th Amendments prohibits systematic dilution of the racial composition of a jury pool. *See Taylor v. Louisiana,* 419 U.S. 522 (1975); *Turner v. Fouche,* 396 U.S. 346 (1970); *Duren v. Missouri,* 439 U.S. 357 (1979); *United States v. Erickson,* 436 F. Supp. 3d 1242 (D.S.D. 2020); *St. Cloud* v. *Class,* 1996 S.D. 64, 550 N.W.2d 70.

"In all criminal prosecutions, the defendant has a constitutional right to be tried by a jury in the county where the crime was alleged to have been committed." SDCL § 23A-16-3 (Rule 18); *State v. Whistler*, 2014 S.D. 58, ¶ 12 (citing S.D. Const. art VI, § 7); *State v. Banks,* 319 N.W.2d 19, 21 (S.D. 1986); *State v. Sutton,* 317 N.W.2d 414, 415 (S.D. 1982) ("The term 'jury trial' . . . can only mean the full constitutional right of a 'speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed.'"). SDCL § 23A-16-11 provides that the venue of a prosecution for murder or manslaughter, "when the injury which caused the death was inflicted in one county and the person injured dies in another county or out of state, is in the county where the injury was inflicted." In this case the injury was inflicted in Buffalo County.

It is the duty of the court to advise the defendant of his fundamental right to trial by a jury of the county wherein the offense is alleged to have been committed, and failure is a denial of due process. *Application of Garritsen*, 376 N.W.2d 575, 577 (S.D. 1985) ("The record must indicate that the defendant was informed of his right to a jury trial in the county in which the crime was committed."). In this case, Gonzales was so advised at her Initial Appearance before Judge Kiner on March 5, 2013. She was subsequently advised at her arraignment on April 15, 2013, by Judge Anderson that she would be tried by a Buffalo County Jury.

SDCL § 16-13-18.4, first enacted in 1997, states:

> If any county within a circuit has a population of less than five thousand, the presiding circuit court judge may create a jury district by joining that county with one or more other counties within the circuit until the total population of the counties exceeds ten thousand. Each county within a jury district is entitled to pro rata representation upon the master jury list to be computed by the presiding judge upon the basis of the last

official census.

Pursuant to this legislation, the Presiding First Circuit Judge entered a Revised Order Creating a New Jury District on July 6, 2011. It stated that Buffalo County had a population of 1,912 according to the 2010 census. The Order joined Buffalo County with Brule County to form a jury district with a total population of 7,167. As provided by SDCL § 16-13-18.4, the Standing Order ordered that the master jury list drawn for the district would consist of 73.5% residents of Brule County and 26.5% residents of Buffalo County. It further ordered that, in such instances, the petit jury panel must be divided into two panels, Panel A consisting of jurors who are residents of Brule County and Panel B consisting of jurors who are residents of Buffalo County. The Order went on to mandate that trials venued in Brule County would summon jurors from Panel A and trials venued in Buffalo County would summon jurors from Panel B, *unless the judge presiding over the trial ordered that jurors be summoned from both panels.* In this case, both panels were summoned by Judge Anderson.

The use of the jury district with Panel A blended with Panel B in this case was unconstitutional because Gonzales had a fundamental constitutional right to be tried by a jury of Buffalo County residents, who are members of the community where the crime occurred, rather than jurors selected from a district which was constituted in such a way as to greatly dilute the jury pool of her neighbors, as well as members of her ethnicity. Of the 236 total jurors within the jury pool in her case, 182 jurors (77%) were residents of Brule County and 54 (23%) were from Buffalo County. HR: 724-734. Brule County is 8.5% Native American and Buffalo County is 84% Native American. HR: 739-742. As so constituted, overall the jury pool consisted of a similar breakdown, fifty-four (54)

Native Americans (23%) and 181 (77%) non-native jurors. Seven of the Native American Jurors were from Brule and eight of the non-natives were from Buffalo. HR: 739-742. The fourteen (14) jurors (including two (2) alternates) empaneled included only one Buffalo County Resident, who was one of two Native Americans total on the petit jury in the case[1]. HR: 739-742.

South Dakota's Constitution guarantees "a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed." When the South Dakota Constitution was drafted, there were no jury districts within the state (or the preceding territory). There were counties, and there were areas within the state boundaries that were yet to be organized into actual counties. *In re Nelson*, 19 S.D.

---

[1] Although no *Batson* challenge was raised in the case, and so there is no record establishing improper peremptory challenges, troubling revelations of the state prosecutor's mindset in jury selection regarding jurors from the community where the crime occurred are revealed where he asked Judge Anderson, during a telephonic pretrial conference, *outside the presence of Gonzales*, "Are we restricted in any fashion under the statutory scheme or otherwise from routinely striking, peremptorily striking people because they are Buffalo County members, from that pool?" He then rephrased, "Are we prohibited from routinely striking Buffalo County residents based solely upon the fact that they're from Buffalo County?" When Judge Anderson suggested that this approach may implicate *Batson*, the prosecutor responded, "And that's a side issue, Judge. It's a side effect. There's a good chance we would be striking people because they're from Buffalo County, but because they're from Buffalo County they very well may be Native American. We're not striking them based upon their race. We're striking them based on their residence." Judge Anderson's response was that "there's some very touchy issues there. We'll address that. And I'm not saying no." But the issue was never addressed. Of the 34 jurors passed for cause, only four were Buffalo County residents. One was stricken by the State, two by the defense, and one was seated who was Native American. *See* Voir Dire sheet filed in 08CRI 13-1 compared to Exhibit A herein. The other seated juror who was Native American was from Brule County. *Id.* Of the six Native Americans passed for cause, two were seated, the state struck three, and the defense struck one. *Id.* Although *Batson* issues were not raised in the case, clearly the dichotomy in the demographics of the jury panels from the two counties played a large role in how the State viewed its strategic advantages in having a jury consisting of mainly Brule County residents and gave an open invitation to manipulation to further that end.

204, 10 N.W. 885, 887 (1902). So, there was a potential need for jury districts to adjudicate state crimes as well as civil disputes arising outside of county boundaries. *Id.*

The idea of the county as a political and geographical subdivision and constituent of the concept of community, in 1889 and today, is fixed and certain. The meaning of a county is ubiquitous - "the largest territorial division for local government in a state." Black's Law Dictionary (Fifth Ed. 1979) at 316. "Community" is synonymous with "neighborhood," "vicinity" and "locality." *Id.* at 254. A "community" is a "body of people living in the same place, under the same laws and regulations, who have common rights, privileges or interests." *Id.* It "connotes congeries of common interests arising from associations-social, business, religious, governmental, scholastic, recreational." *Id.* A "district" has always been a much more pliable and amorphous term -- "One of the territorial areas into which an entire state or country, county, municipality or other political subdivision is divided, for judicial, political, electoral, or administrative purposes." *Id.* at 427. While counties and communities share many common elements, districts clearly are synthetic creatures of administrative convenience that can cross distinct communal borders for bureaucratic efficiency.

The South Dakota Supreme Court has explicitly held that both the Federal and State Constitutions guarantee that a petit jury will be selected from a "fair cross section of the **community**." *State v. Wright*, 2009 S.D. 51, ¶47; *St. Cloud v. Class*, 1996 S.D. 64, ¶9; *State v. Hall*, 272 N.W.2d 308, 310 (S.D. 1978) (emphasis added). S.D. Const. Art. VI, § 7 was copied verbatim from neighboring Nebraska. *See* NE Const. Art. I, § 11. Several other states admitted to the Union prior to South Dakota used identical language, as will be discussed below. The fact that, at the time of the drafting of S.D.

Const. Art. VI, § 7, the term "county" had a clear reference to an existing structure of geographically defined governmental subdivisions, while the term "district" did not, creates a critical ambiguity of constitutional dimension in this case, requiring inquiry into the source of this usage.

The South Dakota Constitution was ratified in 1889 and Article VI, § 7 has not been amended. In 1902, the Supreme Court of South Dakota discussed the import of the language of this section guaranteeing the right of the accused to trial by an impartial jury of the "county or district in which the offense is alleged to have been committed." *See In re Nelson*, 19 S.D. 214, 102 N.W. 885 (1902). The Supreme Court noted that this language is "found in numerous state constitutions." *Id.* at 887. Our Supreme Court posited that this right

> is simply declaratory of an incident of the common-law right of trial by jury. Sir William Blackstone says: "When, therefore, a prisoner on his arraignment has pleaded not guilty, and for his trial hath put himself upon the country, which country the jury are, the sheriff of the county must return a panel of jurors freeholders, without just exception, and of the visne or neighborhood, which is interpreted to be of the county where the fact is committed." 2 Cooley, Blackstone (3d Ed.) 491.

Id. The Supreme Court went on to declare that this right guaranteed by Article VI, § 7 to trial with a jury impaneled from the county or neighborhood "is ancient, sacred, and absolute," and "can neither be taken away nor abridged by the Legislature." *Id.*

The Supreme Court then considered the precise meaning of the word "district" within this clause of Article VI, § 7, noting that the term "judicial subdivision" would have "more accurately defined the right than the word 'district,'" because, at the time of ratification South Dakota included within its boundaries unorganized territory which would, by necessity, "be attached to a county for judicial purposes." *Id.* Where that is

not the case, according to the Supreme Court, "the clause may be considered as if the word 'district' were eliminated." *Id.* (Emphasis added.) As such, in *In re Nelson*, which was a habeas corpus case, the Supreme Court held:

> It is the relator's constitutional right to be tried by an impartial jury of Lyman County. The jury must not only be impartial. *It must be of the county in which the crime is alleged to have been committed.* Until the accused has been tried by such a jury, or shall have waived his right by consenting to a change of place of trial, he cannot be lawfully convicted. If such a jury cannot be secured, there will be no tribunal before whom he can be tried, and the ends of justice in an individual instance may be defeated. But however regrettable such a result might be, its possibility or even probability cannot be invoked to justify a disregard of *so plain a provision of the state Constitution.*

Id. (Emphasis added.)

A plain reading of *In re Nelson* stands for the proposition that in the modem era, where our entire state is subdivided into counties, any trial of an accused, without his or her consent, by a jury consisting of persons who are not residents of the county in which the crime is alleged to have occurred, is void as unconstitutional. That is the precise interpretation of identical language in the Kansas Constitution by the Kansas Supreme Court 29 years later.

In re Nelson was cited with approval by the Supreme Court of Kansas in the case of *In re Oberst*, 133 Kan. 364, 299 P. 959 (1931). Interpreting the exact same language, the Kansas Supreme Court held that, "as used in the Constitution, the ... word "district" in Section 10 was used to describe something that no longer exists in our state, and that the word at the present time is virtually obsolete...." *Id.* 299 P at 960. Specifically, the Kansas Supreme Court recounted how, at the time that their constitution was written, the Kansas Territory extended west "to the summit of the

Rocky Mountains," with few delineated counties within its exterior borders. *Id* at 961. Thus, the Kansas Supreme Court interpreted this identical language to that which was later used in S.D. Const. Art. VI, § 7 to mean that "one accused of a crime should be tried by a jury of the county, or, if the crime was committed in territory not included in any organized county, then by a jury of the district where the crime was alleged to have been committed." *Id.* at 962. In other words, the only purpose of the inclusion of the term "district" within this provision regarding criminal trial juries was "to provide for the administration of justice in all the vast domain not included in organized counties at the time that the Constitution was adopted." *Id. Accord, Dodge v. Nebraska*, 4 Neb 220 (1876).

To undergird this interpretation, the Kansas Supreme Court turned to the foundational principle of "vicinage." Citing to the Supreme Court of our mutual sister state Nebraska, the *Oberst* Court reasoned further:

> [T]he design of the provision of the bill of rights seems to be *to secure to the accused a trial by a jury from the vicinage where the crime is supposed to have been committed,* so that he may have the benefit of his own good character and standing with his neighbors, if these he has preserved, and also such knowledge as the jury may possess of the witnesses who give evidence before them.

Id. (Emphasis added.) Hence, the Court concluded that the term "district" was derived from, and thus synonymous with, the "vicinage." *Id.*

Preceding both *Oberst* and *Nelson* was *Olive v. State*, 11 Neb 1, 7 N.W. 444 (1880), *overruled on other grounds, Whitcomb v. State*, 102 Neb 236, 166 N.W. 533 (1918). The Nebraska Bill of Rights contains the exact same "county or district" language adopted by South Dakota and Kansas. NE Const. Art. I, § 11. *Olive* challenged a statute in Nebraska that allowed the District Judge to assign trial of a cause

arising in an unorganized county or territory to any organized county within that Judicial District. 7 NE at 445. Called upon to interpret the meaning of the word "district" within that section of the Bill of Rights, the Nebraska Supreme Court held that the term was used by the drafters "in a restrictive sense, to limit and control the exercise of both legislative and judicial power . . ." *Id.* at 446. The *Olive* Court expounded further that, although the generic word "district" has many meanings in various contexts, its usage in the Bill of Rights, "although not synonymous with the word 'county,' yet, by its connection with it, the intention evidently was that they should be taken in a similar sense, and as designating the precise portion of territory, or division of a state, over which a court at any particular sitting, may exercise power in criminal matters." *Id.* While unclear as to what circumstances would allow this, the opinion in *Olive* states that, although "the legislature may... create trial districts which shall include more territory than a single county," any such law must be in accord with the "grand design" of securing the fundamental right of the accused to "a trial by a jury from the vicinage where the crime is supposed to have been committed, so that he may have the benefit of his own good character and standing with his neighbors, if these he has preserved " *Id. But see, People ex rel Smith v. Rodenburg*, 254 Ill. 386, 392, 98 NE 764, 767 (1912) (holding, under identical provision for trial within the "county or district" that any subdivision forming a trial district must be wholly contained within the boundaries of the county where the crime occurred- "[A]ny district created by legislative action must be within the county and cannot extend beyond it. There would have been no reason for limiting the prosecution to the county... if the General

Assembly could enlarge such territory by creating a district and thereby destroy the limitation.")

Considering this context, particularly the penetrating observations in *In re Nelson*, the most cogent reasoning is that S.D. Const. Art. VI, § 7 requires trial by a jury drawn from the county where the crime allegedly occurred, and any trial division that can pass constitutional muster must be formed as a subdivision within the boundaries of a single county. An alternative, plausible interpretation would allow formation of a trial jury district which could exceed the boundaries of one county, so long as the district included the county where the crime occurred, and the additional area was contiguous and could be considered a common vicinage with the county in accordance with the traditional understanding of the term. Any district that isn't conformed to one of these two configurations is patently unconstitutional.

Gonzales expert witness, Attorney Phillip O. Peterson, testified that, in his legal opinion, the use of the jury district in this case violated Gonzales' constitutional right to trial within the vicinage where the crime occurred. While the Sixth Amendment to the U.S. Constitution does not guarantee the accused a trial within the vicinage where the crime occurred as part of its "fair cross-section of the community" requirement (*See Williams v. Florida*, 399 U.S. 78, 93, 35 (1970); *See generally, Taylor v. Louisiana*, 419 U.S. 522, 525 (1975); *Accord, Caudill v. Scott*, 857 F.2d 344, 345-46 (6th Cir. 1988); *Cook v. Morrill*, 783 F.2d 593, 595-96 (5th Cir. 1986); *Zicarelli v. Dietz*, 633 F.2d 312, 325-26 (3rd Cir. 1980), nonetheless, Mr. Peterson's analysis is spot-on with respect to Article VI, § 7 of the South Dakota Constitution. As noted above, the history of the legal concept of "vicinage" in general is fundamental to a proper understanding of S.D.

Const. Art. VI, § 7, and fully supports Mr. Peterson's opinions and testimony in that regard.

The Oxford English Dictionary defines "vicinage" as "[a] number of places lying near to each other taken collectively; an area extending to a limited distance round a particular spot; a neighborhood." *Oxford English Dictionary*, "Vicinage" (2d ed. 1989). The OED cites Thomas Fuller's Church History (1655): "King Ethelred . . . began the tryal of Causes by a Jury of twelve men to be chosen out of the Vicenage." *Id.* "Technically, 'vicinage' means neighborhood, and 'vicinage of the jury' meant jury of the neighborhood or, in medieval England, jury of the county."). *Williams v. Florida, supra*, at 93 n. 35 (citing 4 William Blackstone, Commentaries *350-51.)

The Declaration and Resolves of the First Continental Congress adopted on October 14, 1774, stated:

> That the respective colonies are entitled to the common law of England, and more especially to the great and **inestimable privilege of being tried by their peers of the vicinage,** according to the course of that law.

Journals of the Continental Congress 69 (1904) (emphasis added). On October 26, 1774, the Continental Congress approved an address to the people of Quebec, drafted by Thomas Cushing, Richard Henry Lee, and John Dickinson, arguing that:

> [One] great right is that of trial by jury. This provides, that neither life, liberty nor property, can be taken from the possessor, until twelve of his unexceptionable countrymen and peers of his vicinage, who from that neighbourhood may reasonably be supposed to be acquainted with his character, and the characters of the witnesses[.]

Journals of the Continental Congress 107 (1904). The United States Declaration of Independence (1776) accuses King George III of "transporting us beyond seas to be tried for pretended offences." The Declaration of Independence (U.S. 1776).

The omission of specific vicinage language from the United States Constitution was among the objections of the Anti-federalists to the ratification of the Constitution. *Crawford v. Washington*, 541 U.S. 36, 49 (2004) (citing R. Lee, Letter IV by the Federal Farmer (Oct. 15, 1787), reprinted in 1 B. Schwartz, The Bill of Rights: A Documentary History 469 (1971)). James Madison explained the omission of a vicinage clause to the Virginia Ratifying Convention as follows:

> It was objected yesterday, that there was no provision for a jury from the vicinage. If it could have been done with safety, it would not have been opposed. It might so happen that a trial would be impracticable in the county. Suppose a rebellion in a whole district, would it not be impossible to get a jury? The trial by jury is held as sacred in England as in America . . . It is a misfortune in any case that this trial should be departed from, yet in some cases it is necessary.

Williams, 399 U.S. at 94 n.35 (quoting 3 M. Farrand, Records of the Federal Convention 332 (1911)).

Before the adoption of the federal Constitution, two state constitutions provided an explicit vicinage right. D. Kershen, *Vicinage*, 29 Okla. L. Rev. 801, 815 (1976). The Virginia Constitution of 1776 provided: "in all capital or criminal prosecutions a man hath a right to ... an impartial jury of twelve men of his vicinage." *Id.* The Pennsylvania Constitution of 1776 read similarly but said "county" instead of "vicinage"; it was amended in 1790 to say "vicinage." *Id.* at 815-16. Two others, New Hampshire (1784), and Georgia (1777 and 1789), required crimes to be tried in the county where committed. *Id* at 807. Maryland (1776) and Massachusetts (1780) declared that "trial of crimes near where the crime occurred was essential." *Id.*

Due to the vicissitudes of political negotiation, the Federal Constitution does not require trial within a county or vicinage. Nonetheless, as made clear by the South

Dakota Supreme Court in *In re Nelson*, the undergirding of vicinage is elemental to an understanding of S.D. Const. Art. VI, § 7, as it is to many other similar or identical clauses in other states' Bills of Rights, as interpreted by such states' highest courts, because "vicinage" and "county" are linked conceptually to the ideas of neighborhood, peerage, locality, and community, and the participants in those state constitutional conventions desired that those attributes be fundamental to the criminal jury selection process in their respective states.

As noted by the many authorities cited above, the concept of a criminal trial "in the county where the offense was alleged to have occurred" is deeply imbedded in the constitutional history of England. *See* H. Hallam, Vol. I, *The Constitutional History of England from the Accession of Henry VII to the Death of George II* at p. 19 (A.C. Armstrong and Son ed.). In the case at bar, the creation of this jury district by administrative order and commingling of jury cohorts from Buffalo and Brule County for process efficiency crossed distinct communal lines that have existed long before SDCL § 16-13-18.4 was conceived.

While Buffalo and Brule Counties are contiguous, their residents are not common peers, localities, neighbors, or communities in any relevant sense of those critical concepts. They are, rather, literally worlds apart. This is a historical and sociological fact that simply cannot be ignored. Creation of this jury district in 2011 disregarded centuries of cultural and communal history and discord illustrating the vast gulf between these disparate communities and counties, and a jurisprudential foundation to our laws dating back to medieval times.

Gonzales was deprived her Sixth Amendment rights under the U.S. Constitution and her rights under Article Six, Section Seven of the South Dakota Constitution because the jury pool did not consist of a fair cross-section of the community in which the crimes occurred, due to systematic legislative and judicial processes depriving her of a jury pool consisting of Buffalo County residents which, in turn, significantly diluted the Native American population of her jury pool. This was all done without her consent. The habeas court correctly interpreted the South Dakota and United States Constitutions.

II. THE HABEAS COURT WAS CORRECT IN ITS APPLICATION OF THE *DUREN* TEST.

Buffalo County is comprised of approximately 84% Native Americans, and Brule County is comprised of 85% Caucasians and 9% Native Americans. Only 23% of the jury pool in Gonzales' case was Native American. Of the twelve (12) jurors deciding the case, only two (2) of them were Native American, roughly 17%. The small number of Native American jurors in the jury pool resulted from the jury district that was used, and thus was an unconstitutional systematic exclusion of Native American jurors under the 6th and 14th Amendments to the United States Constitution.

It is beyond question that Native Americans are a distinct ethnic community. Indeed, the South Dakota Supreme Court has so held. *Primeaux v. Dooley*, 2008 S.D. 22 at ¶13. *See also Alvarado v. State*, 486 P.2d 891 (Alaska 1971). *See generally, Fixico, D. L.* (2004). *Native Pathways: American Indian Culture and Economic Development in the Twentieth Century* (B. Hosmer & C. O'Neill, Eds.) University Press of Colorado. Native American history and the community relations between our Native

citizens vis-a-vis the European cohort that settled here in the 19th century demonstrates that these communities are distinct, and often at odds politically, socially, and in many other dimensions. *See generally* T. Holm, *The Great Confusion in Indian Affairs: Native Americans and Whites in the Progressive Era*, New York, USA: University of Texas Press, 2005; F. Bordewich, *Killing the White Man's Indian: Reinventing Native Americans at the End of the Twentieth Century*, Anchor Books, 1996; T. Biolsi, *Deadliest Enemies: Law and the Making of Race Relations on and off Rosebud Reservation*, Univ. of Minnesota Press, 2001.

Native American representation in Gonzales's jury pool certainly was not a fair cross-section in relation to the number of Native American residents in Buffalo County, which is the community where the offense occurred. This underrepresentation of Native Americans in the jury pool was, without question, due to systematic exclusion of that group from the jury selection process resulting from the creation of the jury district and the combining in this case of the two panels, the larger one being from Brule County. The issue is whether Gonzales was entitled to a jury pool consistent with the demographics of the county and community where the crime occurred, which was majority Native American, rather an administratively constructed district that, because of the joinder of the much larger and demographically different Brule County, has few of the hallmarks of the community or vicinage where the crime occurred.

"The Sixth Amendment to the United States Constitution guarantees that a petit jury will be selected from a panel of names representing a fair cross section *of the community*." *St. Cloud v. Class*, 1996 S.D. 64, ¶9, 550 N.W.2d 70, 73 (citing *Taylor v.*

Louisiana, 419 U.S. 522, 528 (1975) (emphasis added); *State v. Hall*, 272 N.W.2d 308, 310 (S.D. 1978)).

SDCL § 16-13-10.1 provides in part:

> It is the policy of the State of South Dakota that all litigants in the courts of this state entitled *to* trial by jury shall have the right to grand and petit juries selected at random from a fair cross-section of the community in the municipality, district, or county where the court convenes. It is further the policy of the State of South Dakota that all citizens of this state, qualified for jury duty, shall have the opportunity to be considered for service on grand and petit juries in the courts of this state, and shall have an obligation to serve as jurors when summoned for that purpose.

Indeed, the South Dakota Supreme Court has admonished "that the burden is now on the judiciary, not only to prevent purposeful discrimination against minorities but to insure that all identifiable groups in the community are fairly represented on jury panels. *State v. Hall*, 272 N.W.2d 308, 310 (S.D. 1978). "It is not important whether the discrimination was purposeful or not." *Id.*

Gonzales has shown that the creation of this blended district and the utilization of the blended panels amounts to an exclusion and:

(1) the group excluded is a "distinct" group in the community;
(2) the representation of this group in the jury pool is not fair and reasonable in relation to the number of such persons in the community;
(3) this underrepresentation is due to the systematic exclusion of the group from the jury-selection process.

St. Cloud, 1996 S.D. 64, ¶ 10 (citing *State v. Lohnes*, 432 N.W.2d 77, 83-84 (S.D. 1988) (citing *Duren v. Missouri*, 439 U.S. 357 (1979); *See also, Turner v. Fouche*, 396 U.S. 346 (1970).

There is no dispute that Native Americans are a "distinct" group. Clearly, the first prong is met. Indeed, in many aspects Native Americans are a community unto

themselves, and that is the overarching theme of this case; that is, Brule and Buffalo counties can in no valid sense be considered a single community for jury districting purposes.

Appellant argues that Gonzales didn't meet her burden of establishing the second prong because her basis for identifying the race of the 236 jurors was insufficient. To the contrary, the evidence and statistical data of record in this case is very similar in nature to that approved in *St. Cloud v. Class*, 1996 S.D. 64, where census data and unsworn letters from jurors self-reporting their ethnicity was admitted by the habeas court and affirmed on appeal, because the same was considered to be "more probative on the point for which [they are] offered than any other evidence which the proponent can procure through reasonable efforts." *Id.* at ¶15. In this case, it has been shown, as noted above, that of the 236 jurors called for the jury pool, 182 jurors (77%) were from Brule County, which is less than 9% Native, and 54 (23%) were from Buffalo County, which is 84% Native. These population and demographic statistics for the two counties are uncontroverted, and the letter attached to the Third Amended Petition from Christine Obago, a secretary who works for the Crow Creek Sioux Tribe, identifying the Native Americans listed in the jury venire, is entirely consistent with this. Ms. Obago indicates in her cover letter that she placed an asterisk by the names of the Native American people on the jury list "that I know of personally." There are 53 asterisks on that juror sheet. Of those Native American jurors, 7 are listed as Brule County residents and the other 46 are from Buffalo County. A simple math calculation for statistical probability will confirm the accuracy of these numbers. 9% of 182 Brule County jurors = 16 Native jurors; 54 Buffalo County Jurors x 84% = 45 Native jurors.

So, the proportion of the actual Buffalo County Juror panel that were Native Americans (46) was within a 2% variance from the proportional expectation (45). The Brule County number was a little lower than expected- 16 predicted and 7 identified Native American jurors.

Even if we assume, for the benefit of the doubt to the Appellant, that Ms. Obago missed some Brule County jurors that were Native Americans, and substitute the higher, predicted statistical average number of 16 for Brule County Native American Jurors, that brings the number of hypothetical Native American Jurors in the panel only up to 62 out of 236, which is 26%. Comparing that to the 84% Native American constituency in Buffalo County leaves us with, best case scenario, a 58% absolute disparity. (Using Ms. Obago's count gives us a 23% Native American pool, or 61% absolute disparity.)

Considering these uncontroverted demographics and populations of the two counties, and the proportions mixed to create the blended jury pool in this case, it is mathematically certain that the jury pool was diluted of Native Americans drastically by merging Buffalo County with Brule for purposes of jury selection in this case, and the exhibit from the tribal official is consistent with what the statistics objectively prove. The undisputed record reflects mathematical, statistical and direct evidence as to overall disparity calculations of at least 58%, and undoubtedly establishes a prima facie case of exclusion as discussed in *Rose v. Mitchell*, 443 U.S. 545 at 565 (1979.) This level of exclusion is dramatically beyond the 15% threshold recognized as an outer limit by the South Dakota Supreme Court in *Hall, supra. See also, St. Cloud v. Class*, 1996 S.D. 64 at ¶19; *Primeaux v. Dooley*, 2008 S.D. 22 at ¶15. Having done so, the burden shifted to Respondent to rebut that *prima facie* case, and Respondent didn't even attempt to do so.

Id; *Castaneda v. Partida*, 430 U.S. 482, 495 (1977). Gonzales has met her burden of proof on this issue.

The "absolute disparity calculation" is the established test used to evaluate whether there is prima facie evidence of underrepresentation of a distinct group. It was recognized by the South Dakota Supreme Court in *Hall* and *St. Cloud* and recently was applied in *United States v. Erickson*, 436 F. Supp. 3d 1242, 1254 (D.S.D. 2020). Both sides in this case agree it is the touchstone. "Under the absolute disparity calculation, the percentage of Indians on the list of persons eligible for petit jury service is subtracted from the percentage of Indians in the general population, resulting in a figure constituting the absolute difference." *Erickson*, 436 F. Supp. 3d at 1254.

"The Supreme Court of the United States in *Swain v. Alabama*, determined that an underrepresentation of as much as ten percent as calculated by the 'absolute disparity concept' does not constitute prima facie evidence of underrepresentation." *United States v. Erickson*, 436 F. Supp. 3d 1242, 1254 (D.S.D. 2020) (citing *Swain v. Alabama*, 380 U.S. 202, 208-09 (1965) (overruled on other grounds by *Batson v. Kentucky*, 476 U.S. 79 (1986))). The South Dakota Supreme Court has stated that an absolute percentage difference of 15% or more would require supplementation of the jury panel. *State v. Hall*, 272 N.W.2d 308, 310-11 (S.D. 1978) ("Although the United States Supreme Court has not indicated what percentage of underrepresentation on a single panel would constitute a violation of the fair cross-section requirement, it appears that an absolute percentage difference of fifteen percent or more would require supplementation of the jury panel."). Indeed, the *Hall* Court ruled that a 23% absolute disparity in the jury venire, women over men, is unconstitutional. *Id.* at 311, Thus, the established gray area,

or "margin of error" for absolute disparity, is established as being between 10-15%. In *Castaneda, supra*, 430 U.S. at 495-96, the historic grand jury venire averaged 39% Hispanic as compared to the county population at large being 79% Hispanic, and this 40% disparity was deemed by the United States Supreme Court to be beyond constitutional tolerances. A 37% to 60% comparison between jury venire and community population for African Americans (23% disparity) was likewise held unconstitutional in *Turner v. Fouche, supra*, 396 U.S. at 539. Comparing the disparity between the Native American constituency of the jury pool that was available in Buffalo County versus the constituency in the blended district used in this case is at least 58%. That level of disparity, based upon the caselaw cited above, is *per se* unconstitutional.

The United States Supreme Court has articulated an additional process to be considered in determining whether an established significant underrepresentation is unreasonable - that is, the existence of a "significant state interest" that *justifies and outweighs* the infringement of a defendant's constitutional right to a jury drawn from a fair cross section of the community. *Duren, supra*, 439 U.S. at 368-70; *Taylor v. Louisiana*, 419 U.S. 522, 533-34 (1975). At trial, the Respondent made no suggestion of an interest, other than administrative convenience, to justify its policy that has been shown to have diluted the minority composition of her jury venire, and administrative convenience can never trump a fundamental constitutional right. *See Duren, supra* at 367-68 ("The right to a proper jury cannot be overcome on merely rational [basis] grounds.") *See also, Garcia-Durantes v. Warren*, 978 F.Supp 2d 815, 835 (E.D. MI 2013) ("The burden shifts to the State to show a 'significant state interest [that is]

manifestly and primarily advanced by those aspects of the jury selection systems. . . that resulted in the disproportionate exclusion of a distinct group.' . . . The State makes no claim that any such interest exists in this case.") (*Quoting Duren*, 439 US at 367-68.) Better services for juror convenience in Chamberlain, which is not sufficient to trump a fundamental constitutional right, doesn't explain why the entire jury panel wasn't chosen from Buffalo County and the case tried in Chamberlain with the Buffalo County jurors, as the trial judge at one point said would be done. The trial court never even attempted to summon a full jury panel from Buffalo County in the case, and Appellant in this case has never suggested that it wouldn't have been possible to muster a jury from the approximately 1900 residents there. Gann Valley is the county seat, where there is a courthouse that was constructed at Buffalo County taxpayer expense for the specific purpose of trying Buffalo County cases with jurors who live there.

It is undeniable that the underrepresentation of Native American jurors in this case is due to systematic processes. The State Legislature authorized formation of jury districts by combining county jury pools, the Presiding Judge of the First Circuit created this particular district and the process for selecting this combined venire by entering a Standing Order, and the trial judge ordered it to be implemented in this case *sua sponte*. The trial judge first proposed that the trial be had in Chamberlain but with Buffalo County jurors only. Had that occurred, there would be no error. But, that proposal morphed, without reasoning, into that of holding the trial in Chamberlain with a blended jury from both counties. Oddly, the proposition later reverted to the original proposal of a Buffalo County jury picked in Gann Valley, and then a trial in Chamberlain. Then, at a hearing *outside the presence of Gonzales*, defense counsel effectively stipulated to the

blended jury panels and the judge said, "all right." The testimony at the habeas hearing confirms that Gonzales's right to a Buffalo County jury, or one at least that was drawn from a jury district blending Buffalo County jurors with jurors selected from other nearby communities with similar racial composition and community characteristics, was never explained to her. Nor did she ever state that she was waiving that right either to counsel or the trial court. This is not a proper record to predicate the denial of a fundamental constitutional right.

The gravamen of Gonzales' claim is the uncontested fact that Buffalo County is overwhelmingly a Native American community and Brule County is overwhelmingly not. So, the proportionality analysis must proceed from the perspective of how the jury pool actually used under SDCL § 16-13-18.4 in this case compares to how it would have looked had the jury been selected without resort to that law; that is, completely from the community where the crime occurred- Buffalo County (or, at least, a hypothetical Jury District created under SDCL § 16-13-18.4, but comprised of Buffalo County residents and supplemented, if necessary, by jurors from some other contiguous area consisting of people who could reasonably be identified as being from her own community or vicinage.) Therefore, the habeas court correctly applied the *Duren* test.

III. THE HABEAS COURT CORRECTLY DETERMINED THAT VIOLATIONS IN GONZALES'S CRIMINAL TRIAL CONSTITUTED STRUCTURAL ERROR.

The use of the blended jury panel in this case systematically diluted the ethnic composition of the jury venire in violation of the United States Constitution and also deprived Gonzales of a trial by jurors selected from within the county or community

wherein the crime occurred, in violation of the South Dakota Constitution. These errors rise to the level of structural errors.

It is well-established habeas corpus jurisprudence that, on collateral review, constitutional error in a case does not justify relief for the Gonzales unless she can show that the error resulted in "actual prejudice" to her. *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993). This standard has been articulated as whether Gonzales can show that the constitutional error "had substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 637 (quoting *Kolleakos v. United State*s, 328 US 750, 776 (1946)). This standard has been described by the South Dakota Supreme Court as a "showing that the jury's verdict would reasonably likely have been different" absent the constitutional error, *Guthmiller v. Weber*, 2011 S.D. 62, ¶l, or that the error has "undermined confidence in the outcome of the trial." *Neels v Dooley*, 2022 S.D. 4, ¶13.

"Structural error" is a limited category of errors that are so egregious that they are deemed, as a matter of law, to have "undermine[ed] the fairness of a criminal proceeding as a whole." *Neels, supra*, at 16. A structural error is an error that violates a constitutional right that is "so basic to a fair trial that [its] infraction can never be treated as harmless error." *Chapman v. California*, 386 U.S. 18, 23 (1967). Examples of such fundamental error include the total deprivation of the right to defense counsel in a criminal case, or a biased judge. *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991). The common thread in these cases is that "[t]he entire conduct of the trial from beginning to end is obviously affected" by these conditions. *Id.* at 309-10. *See also, State v. Evans*, 2021 S.D. 12, n. 13.

The systematic exclusion of an identified demographic group, such as by race or gender, is structural error. In *Vasquez v. Hillery*, 474 U.S. 254 (1986), the United States Supreme Court held that exclusion of members of the defendant's race from a grand jury is structural error. "When constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm." *Id.* at 263. *See also, Guthmiller, supra* at ¶16. Indeed, the *Vasquez* Court noted as another example of structural error, cases "where a petit jury has been selected upon improper criteria... because the effect of the violation cannot be ascertained." *Id. See also Rose v. Mitchell, supra*, 443 U.S. at 556 ("Since the beginning, the Court has held that where discrimination in violation of the Fourteenth Amendment is proved, '"[t]he court will correct the wrong, will quash the indictment[,] or the panel[;] or, if not, the error will be corrected in a superior court," and ultimately in this court upon review,' and all without regard to prejudice.") (Quoting *Neal v. Delaware*, 103 US 370, 394 (1881)); *Duren, supra*, 439 U.S. at 370 (exception of women from jury service required reversal of conviction without consideration of prejudice); *Taylor v. Louisiana, supra*, 419 U.S. at 438 (same); *Castaneda v. Partida, supra*, 430 U.S. at 500 (accord, Hispanic racial disparity.) The same result obtains under state court holdings for violation of their vicinage clauses. *See Alvarado v. Alaska, supra*, 486 P.2d at 906; *Olive v. Nebraska, supra*, 7 N.W. at 448; *Wheeler v. State*, 24 Wis. 52, 54 (1869); *State v. Denton*, 46 Tenn. 539, 543 (1869); *Osborne v. State*, 24 AR 629, 633 (1867). *See generally, U.S. v. McGill*, 815 F.3d 846 (D.C. Cir. 2016); *People v. Lopez*, 974 NE 2d 291, 362 Ill. Dec. 770 (2012).

Furthermore, Gonzales trial counsel admitted that they should have objected to the Trial Court using the presiding order because it violated state statute in that the jury district created was less than 10,000 persons. HR: 368.The errors in this case violated both the state and federal constitutions and are structural as a matter of law.

CONCLUSION

The Constitutions of both our state and nation forbid the use of jury districts that sever a defendant from trial by her communal peers and systematically dilute the racial composition of her jury pool. Gonzales was deprived of her right to be tried by a fair and impartial jury of her peers chosen from within the community where the crime occurred, and without a systematic dilution of Native American jurors. Application of the blended jury pool district concept in this case had the pernicious effect of excluding members of Gonzales' community and race from the process that determined her liberty. This violated both the Sixth Amendment to the United States Constitution and Article VI, Section 7 of the South Dakota Constitution, was structural error, and the Habeas Court's Judgment and Order should be affirmed.

Respectfully submitted this 21st day of November, 2023.

KENNEDY PIER LOFTUS & REYNOLDS, LLP

/s/ Thomas P. Reynolds
THOMAS P. REYNOLDS
322 Walnut Street
Yankton, SD 57078
(605) 665-3000
treynolds@yanktonlawyers.com
Attorney for Appellee

CERTIFICATE OF COMPLIANCE

I, Thomas P. Reynolds, hereby certify that the Brief in the above-entitled matter complies with the type volume limitations of SDCL § 15-26A-66(b) and that said Brief contains 45,859 characters not including spaces or 9,074 words and that said Brief was typed in Times New Roman font, 12 point.

/s/ Thomas P. Reynolds
THOMAS P. REYNOLDS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 21st, 2023, true and correct copies of Appellee's Brief were electronically served on:

Marty Jackley, Attorney General
Chelsea Wenzel, Assistant Attorney General
atgservice@state.sd.us

/s/ Thomas P. Reynolds
THOMAS P. REYNOLDS

APPENDIX

16-13-18.4. Creation of jury district for county with population of less than five thousand.

If any county within a circuit has a population of less than five thousand, the presiding circuit court judge may create a jury district by joining that county with one or more other counties within the circuit until the total population of the counties exceeds ten thousand. Each county within a jury district is entitled to pro rata representation upon the master jury list to be computed by the presiding judge upon the basis of the last official census.

Source: SL 1997, ch 119, § 1; SL 1998, ch 116, § 2.

FILED

MAY 27 2022

Charlene Miller

Clerk of Courts, Brule/Buffalo Counties
First Judicial Circuit Court of SD

EXHIBIT

C

5/15/2021 AC

STATE OF SOUTH DAKOTA COUNTY OF CLAY	) : ss)	IN CIRCUIT COURT FIRST JUDICIAL CIRCUIT
		CIV 11-01
IN REGARD TO ADMINISTRATION OF THE FIRST JUDICIAL CIRCUIT	))	REVISED ORDER CREATING A NEW JURY DISTRICT

Whereas SDCL § 16-13-18.4 authorizes the Presiding Circuit Court Judge of any circuit containing a county with a population of less than five thousand (5,000), to create a jury district by joining that county with one or more other counties within the circuit until the total population of the counties exceeds ten thousand (10,000); and

It appearing in the First Judicial District that according to the 2010 census, Buffalo County has a population of 1,912; now therefore

It is hereby ORDERED that Buffalo County be joined with Brule County to form a jury district as required by SDCL § 16-13-18.3, said district having a total population of 7,167; and that the master jury list drawn for said district shall consist of 73.5% residents of Brule County and 26.5% residents of Buffalo County; and

It is FURTHER ORDERED that after selecting the petit jury panel for the jury district as required by SDCL § 16-13-22, petit jury panel shall be divided into two (2) panels, Panel A shall consist of all jurors selected who are residents of Brule County and Panel B shall consist of all jurors selected who are residents of Buffalo County; and

It is FURTHER ORDERED that for trials venued in Brule County the Clerk of Courts of Brule County shall summon jurors from Panel A only; and that for trials venued in Buffalo County the Clerk of Courts of Buffalo County shall summon jurors from Panel B only, unless the circuit judge or magistrate judge presiding over a specific trial shall specifically order that jurors be summoned from both panels.

Dated this 6 day of July, 2011, at Vermillion, South Dakota.

BY THE COURT:

Steven R. Jensen
Presiding Circuit Judge

FILED
JUL 07 2011
Jessica Bosse
Clay County Clerk of Courts
1st Judicial Circuit Court of South Dakota

ATTEST:

Jessica Bosse
CLERK OF COURTS

STATE OF SOUTH DAKOTA
First Judicial Circuit Court
I hereby certify that the foregoing instrument is a true and correct copy of the original as the same appears on file in my office on this date:

JUL 07 2011

Jessica Bosse
Clay County Clerk of Courts

By: _____

EXHIBIT
B

CROW CREEK SIOUX TRIBE

P.O. Box 50
Fort Thompson, SD 57339

FAX TRANSMITTAL SHEET

To:	Thomas P. Reynolds	**From:**	Christine Obago
Fax:	605.665.2670	**Dept:**	Personal
Phone:	605.665.3000	**Fax:**	605.245.2789
Re:	Donika R. Gonzales	**Phone:**	605.245.2221
Pages:	1 of 11	**Date:**	02/11/2019

☒ **Urgent** ☐ **For Review** ☐ **Please Comment** ☐ **Please Reply**

MESSAGE

Greetings Thomas:

I apologize for the delay in getting this information to you. I have placed a asterick * by the names of Native American people that I know of personally.

I hope this is helpful. Have a nice day.

Christine Obago 2/11/19

IF YOU DO NOT RECEIVE ALL PAGES PLEASE CALL AS SOON AS POSSIBLE

EXHIBIT tabbies C

1	Derick Zastro	Buffalo
2	Mary Friedel	Brule
3	Robert Holly	Brule
4	Matt Menzie	Brule
5	Phyllis Comes Flying	Buffalo X
6	Gabriel Mohnen	Brule
7	Tracy Douville	Brule
8	Heather Comstock	Brule
9	Trudy Peas	Buffalo X
10	Douglas Foley	Brule
11	Teresa Broadcorb	Brule
12	Alberta white	Brule
13	Nicole Zigler	Buffalo X
14	Deborah Odens	Brule
15	May Bely	Brule
16	John Hagenlock	Brule
17	Terry Wulff	Buffalo
18	James Hanig	Brule
19	Jennifer Renner-Meyer	Brule
20	Delilah Mayer	Brule
21	Frederick Greycloud	Buffalo X
22	Tory Engel	Brule
23	Michael Kotch	Brule
24	Michelle Soulek	Brule
25	Peter Lengkeek	Buffalo X

26	Jacqueline Myers	Brule
27	Carla Thomson Thompson	Brule
28	Ruth Lomica	Brule
29	Dorene Bagola	Buffalo
30	Kelly Holzer	Brule
31	Tammy Ibersen Iverson	Brule
32	Daniel Cummings	Brule
33	Tina Grey Owl	Buffalo
34	Stacy Juhnke	Brule
35	Dave Marone	Brule
36	John Lenz	Brule
37	Marcus Rabbit	Buffalo
38	Sondra Zingler	Brule
39	Wendy Ley	Brule
40	Tina Lein	Brule
41	Karl Howe	Buffalo
42	Ardis Osterberg	Brule
43	Jerome Feltman	Brule
44	Joseph Donbraska	Brule
45	Farley Hawk	Buffalo
46	Lorri Swenson	Brule
47	Ronald Falor	Brule
48	Kerry Waugh	Brule
49	Tate Von Eye	Buffalo
50	Warren Hickey	Brule

51	Rita Pick	Brule
52	Timothy Johnson	Brule
53	Darlene Medicine Crow	Buffalo
54	Allan Renner	Brule
55	David Kott	Brule
56	Brittany Hantke	Brule
57	Lyndsie Steckelberg	Buffalo
58	Jessica Fredderick	Brule
59	Diane Goldston	Brule
60	Shawn Andera	Brule
61	Scarlet Drapeau	Buffalo
62	Deborah Selland	Brule
63	Charles Butzin, III	Brule
64	Gerald Kistler	Brule
65	Theodore Metcalf	Buffalo
66	Timothy Sherman	Brule
67	Rodney Peterson	Brule
68	Joan Kelly	Brule
69	Ronald Kirkie	Buffalo
70	Linda Smith	Brule
71	Gary McQuistion	Brule
72	Troy Lester	Brule
73	Robyn Thompson	Buffalo
74	Bruce Cozine	Brule
75	Clayton Walsh	Brule

76	Delilah Hawk	Brule
77	Victor Sitting Crow	Buffalo
78	Robert Lentz	Brule
79	Melissa Kunzweiler	Brule
80	Elaine Reimer	Brule
81	Faye Richard	Buffalo
82	Seth Carsten	Brule
83	Herman VandenHul	Brule
84	Marsha Zeman	Brule
85	Philander Ross	Buffalo
86	William Picek	Brule
87	Cali Adamson	Brule
88	David Troll	Brule
89	Monica Wind	Buffalo
90	Weston Waugh	Brule
91	Roger Steckelberg	Brule
92	William Lomica	Brule
93	Glenda St. John	Buffalo
94	Desirae Gunnare	Brule
95	Jessica winter	Brule
96	Amanda Olson	Brule
97	Lisa Johnson	Buffalo
98	Suzanne Parkinson	Brule
99	Charles Selland	Brule
100	Jeanette Spreckels	Brule

101	Casey Good	Buffalo X
102	Alva Haugen	Brule
103	Judy King	Brule
104	Preston Chmela	Brule
105	Bonny McGhee	Buffalo X
106	Lana Steele	Brule X
107	Barbara Powell	Brule
108	David Hieb	Brule
109	Michael Phillips	Buffalo
110	Timothy Pazour	Brule
111	Ryan Randall	Brule
112	Michelle Cumberland	Brule
113	Marlys Miller	Buffalo X
114	Connie Fatland	Brule
115	Timothy Solberg	Brule
116	Janice DeSloover	Brule
117	Michelle Comes Flying	Buffalo X
118	Kelly Trenkle	Brule
119	Joyce Webik Wevik	Brule
120	Richard Hopkins	Brule X
121	Marcella Big Eagle	Buffalo X
122	Jenna Lopez	Brule
123	Jason Blasius	Brule
124	Marlyn Leiferman	Brule
125	Ronald Hendricks	buffalo

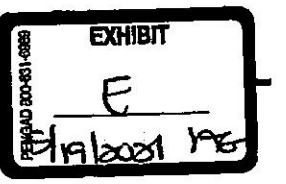
126	Lydia Hauke	Brule
127	Charles Lyden, Jr	Brule
128	Marvin Kroupa	Brule
129	Linda Pomani	Buffalo ✗
130	Janice Mosel	Brule
131	Loretta Blasius	Brule
132	William Tyrell	Brule
133	Christopher Rabbit	Buffalo ✗
134	Leanne Piskule	Brule ✗
135	Jeraldine Dominlack	Brule
136	Nikki Kroupa	Brule
137	Agatha Obago	Buffalo ✗ (Deceased)
138	Gail Leheska	Brule
139	Alyssa Holm	Brule
140	Jeanette ~~Brabek~~ Bravek	Brule
141	John Daly	Buffalo
142	Dixie Lloyd	Brule
143	Angelique Hickey	Brule
144	Lisa Larson	Brule
145	Rory Bishop	Buffalo ✗
146	Jason McGee	Brule
147	Connie Speckels	Brule
148	Steven Wellner	Brule
149	Myra Isburg	Buffalo ✗
150	Lowell Swanson	Brule

51	Lillian Hunter	Brule
152	Teresa Schulte	Brule
153	Oscar Taylor	Buffalo
154	Julie Soulek	Brule
155	Blain Hieb	Brule
156	Melissa Hall	Brule
157	Lana Drapeau	Buffalo
158	Ryan Smith	Brule
159	Grace Warren	Brule
160	Gary Konechne	Brule
161	Natalie Voice	Buffalo
162	Jeffrey Thomas	Brule
163	Deborah Winter	Brule
164	Merrill Ellis	Brule
165	Lovetta Fallis	Buffalo
166	Thomas Selland	Brule
167	Cynthia Wolf	Brule
168	Richard Pazour	Brule
169	Brent Wells	Buffalo
170	Robert Spier	Brule
171	Amy Thomas	Brule
172	Daniel Dobesh	Brule
173	Erin Hislaw	Buffalo
174	Nancy Robert	Brule
175	Bradley Donald	Brule

176	Richard Helton	Brule
177	Curt Fleury	Buffalo
178	Darrin Canaan	Brule
179	Megan Donaldson	Brule
180	Amber Wilson	Brule
181	Rozelle Lockwood	Buffalo
182	Lachelle Olivier	Brule
183	Patricia Ross	Brule
184	Patricia Tishmack	Brule
185	Brigette Howe	Buffalo
186	John Wall	Brule
187	Gary Feltmar	Brule
188	Denise Meyerink	Brule
189	Carlton Whitemouse	Buffalo
190	John Ekstrum	Brule
191	Michelle Janish	Brule
192	Edna Scott	Brule
193	Renae Gonzales	Buffalo
194	James Rybak	Brule
195	Megan Priebe	Brule
196	Kristi Nelson	Brule
197	Mary Long Crow	Buffalo
198	James Stebbins	Brule
199	Cleone Cozine	Brule
200	Steve Pazour	Brule

201	Chauncey Long Crow	Buffalo
202	Clarence Soulek	Brule
203	Nancy Deboer	Brule
204	Christopher Thompson	Brule
205	Donald Pickner	Buffalo
206	Julie Pickner	Brule
207	Scott Biskeborn	Brule
208	Michael Hauke	Brule
209	Nicole His Law	Buffalo
210	Hildegarde Blue Hair	Brule
211	Tracy Hayes	Brule
212	Steven Rosenberger	Brule
213	Catherine Sazue	Buffalo
214	Chad Brabek–b needs	Brule
215	Dwain Blackwell	Brule
216	Robert Schoenfelder	Brule
217	Maci Burke	Brule
218	Shelly Dorman	Brule
219	Anita Harmon	Brule
220	Todd Priebe	Brule
221	Zeke Rogers	Brule
222	Virginia Broussard	Brule
223	Shannon Dolezal	Brule
224	Michael Chilson	Brule
225	Nancy Miedema	Brule

16	Craig Rosenberger	Brule
227	Leonard Thomas	Brule
228	Marsha Dozark	Brule
229	Cody Korzan	Brule
230	Gary Dozark	Brule
231	Jay Benda	Brule
232	Kim Dougherty	Brule
233	Nicole Walker	Brule
234	Bradley Barth	Brule
235	Regina McManus	Brule
236	Billy Pinkerton	Brule



State & County QuickFacts

Brule County, South Dakota

People QuickFacts	Brule County	South Dakota
Population, 2010	5,255	814,180
Population, percent change, 2000 to 2010	-2.0%	7.9%
Population, 2000	5,364	754,835
Persons under 5 years old, percent, 2009	7.0%	7.3%
Persons under 18 years old, percent, 2009	27.6%	24.6%
Persons 65 years old and over, percent, 2009	16.9%	14.5%
Female persons, percent, 2009	51.8%	50.0%
White persons, percent, 2010 (a)	88.4%	85.9%
Black persons, percent, 2010 (a)	0.2%	1.3%
American Indian and Alaska Native persons, percent, 2010 (a)	8.5%	8.8%
Asian persons, percent, 2010 (a)	0.2%	0.9%
Native Hawaiian and Other Pacific Islander, percent, 2010 (a)	0.0%	0.0%
Persons reporting two or more races, percent, 2010	2.4%	2.1%
Persons of Hispanic or Latino origin, percent, 2010 (b)	1.4%	2.7%
White persons not Hispanic, persons, 2010	87.8%	84.7%
Living in same house 1 year ago, pct 1 yr old & over, 2005-2009	86.5%	83.2%
Foreign born persons, percent, 2005-2009	0.4%	2.2%
Language other than English spoken at home, pct age 5+, 2005-2009	4.5%	6.4%
High school graduates, percent of persons age 25+, 2005-2009	84.3%	88.8%
Bachelor's degree or higher, pct of persons age 25+, 2005-2009	23.5%	24.6%
Veterans, 2005-2009	479	71,811
Mean travel time to work (minutes), workers age 16+, 2005-2009	12.6	16.4
Housing units, 2009	2,380	365,563
Homeownership rate, 2005-2009	70.6%	68.6%
Housing units in multi-unit structures, percent, 2005-2009	16.8%	18.6%
Median value of owner-occupied housing units, 2005-2009	$85,300	$115,400
Households, 2005-2009	2,057	314,674
Persons per household, 2005-2009	2.31	2.43
Per capita money income in past 12 months (2009 dollars) 2005-2009	$19,272	$23,445
Median household income, 2009	$40,113	$45,048
Persons below poverty level, percent, 2009	14.6%	14.2%

Business QuickFacts	Brule County	South Dakota
Private nonfarm establishments, 2008	220	25,689[2]
Private nonfarm employment, 2008	1,592	337,816[2]
Private nonfarm employment, percent change 2000-2008	-12.8%	10.1%[2]
Nonemployer establishments, 2008	420	57,094
Total number of firms, 2007	559	77,036
Black-owned firms, percent, 2007	F	0.3%
American Indian and Alaska Native owned firms, percent, 2007	F	2.2%
Asian-owned firms, percent, 2002	F	0.4%
Native Hawaiian and Other Pacific Islander owned firms, percent, 2007	F	0.0%
Hispanic-owned firms, percent, 2007	F	0.8%
Women-owned firms, percent, 2007	29.9%	22.2%
Manufacturers shipments, 2007 ($1000)	0[1]	13,051,128
Merchant wholesaler sales, 2007 ($1000)	46,815	11,400,476
Retail sales, 2007 ($1000)	78,462	12,266,218
Retail sales per capita, 2007	$15,191	$15,390
Accommodation and food services sales, 2007 ($1000)	9,870	1,622,751
Building permits, 2009	9	3,691
Federal spending, 2008	56,492	8,552,188[2]

Geography QuickFacts	Brule County	South Dakota
Land area, 2000 (square miles)	818.96	75,884.64
Persons per square mile, 2010	6.4	10.7
FIPS Code	015	46
Metropolitan or Micropolitan Statistical Area	None	

1: Counties with 500 employees or less are excluded.
2: Includes data not distributed by county.

(a) Includes persons reporting only one race.
(b) Hispanics may be of any race, so also are included in applicable race categories.

D: Suppressed to avoid disclosure of confidential information
F: Fewer than 100 firms
FN: Footnote on this item for this area in place of data
NA: Not available
S: Suppressed; does not meet publication standards
X: Not applicable
Z: Value greater than zero but less than half unit of measure shown

Source U.S. Census Bureau: State and County QuickFacts. Data derived from Population Estimates, Census of Population and Housing, Small Area Income and Poverty Estimates, State and County Housing Unit Estimates, County Business Patterns, Nonemployer Statistics, Economic Census, Survey of Business Owners, Building Permits, Consolidated Federal Funds Report
Last Revised: Friday, 03-Jun-2011 15:34:00 EDT

State & County QuickFacts

Buffalo County, South Dakota

People QuickFacts	Buffalo County	South Dakota
Population, 2010	1,912	814,180
Population, percent change, 2000 to 2010	-5.9%	7.9%
Population, 2000	2,032	754,835
Persons under 5 years old, percent, 2009	13.8%	7.3%
Persons under 18 years old, percent, 2009	39.0%	24.6%
Persons 65 years old and over, percent, 2009	7.1%	14.5%
Female persons, percent, 2009	49.4%	50.0%
White persons, percent, 2010 (a)	14.8%	85.9%
Black persons, percent, 2010 (a)	0.2%	1.3%
American Indian and Alaska Native persons, percent, 2010 (a)	84.0%	8.8%
Asian persons, percent, 2010 (a)	Z	0.9%
Native Hawaiian and Other Pacific Islander, percent, 2010 (a)	0.0%	0.0%
Persons reporting two or more races, percent, 2010	0.9%	2.1%
Persons of Hispanic or Latino origin, percent, 2010 (b)	1.8%	2.7%
White persons not Hispanic, persons, 2010	14.8%	84.7%
Living in same house 1 year ago, pct 1 yr old & over, 2005-2009	87.8%	83.2%
Foreign born persons, percent, 2005-2009	2.1%	2.2%
Language other than English spoken at home, pct age 5+, 2005-2009	17.2%	6.4%
High school graduates, percent of persons age 25+, 2005-2009	74.4%	88.8%
Bachelor's degree or higher, pct of persons age 25+, 2005-2009	5.2%	24.6%
Veterans, 2005-2009	136	71,811
Mean travel time to work (minutes), workers age 16+, 2005-2009	10.9	16.4
Housing units, 2009	629	365,563
Homeownership rate, 2005-2009	32.3%	68.6%
Housing units in multi-unit structures, percent, 2005-2009	10.5%	18.6%
Median value of owner-occupied housing units, 2005-2009	$62,500	$115,400
Households, 2005-2009	526	314,674
Persons per household, 2005-2009	3.98	2.43
Per capita money income in past 12 months (2009 dollars) 2005-2009	$9,820	$23,445
Median household income, 2009	$18,860	$45,048
Persons below poverty level, percent, 2009	43.6%	14.2%

http://quickfacts.census.gov/qfd/states/46/46017.html 6/13/2011

Business QuickFacts	Buffalo County	South Dakota
Private nonfarm establishments, 2008	8	25,689[2]
Private nonfarm employment, 2008	154	337,816[2]
Private nonfarm employment, percent change 2000-2008	185.2%	10.1%[2]
Nonemployer establishments, 2008	32	57,094
Total number of firms, 2007	91	77,036
Black-owned firms, percent, 2007	F	0.3%
American Indian and Alaska Native owned firms, percent, 2007	S	2.2%
Asian-owned firms, percent, 2002	F	0.4%
Native Hawaiian and Other Pacific Islander owned firms, percent, 2007	F	0.0%
Hispanic-owned firms, percent, 2007	F	0.8%
Women-owned firms, percent, 2007	S	22.2%
Manufacturers shipments, 2007 ($1000)	0[1]	13,051,128
Merchant wholesaler sales, 2007 ($1000)	0	11,400,476
Retail sales, 2007 ($1000)	D	12,266,218
Retail sales per capita, 2007	D	$15,390
Accommodation and food services sales, 2007 ($1000)	D	1,622,751
Building permits, 2009	0	3,691
Federal spending, 2008	35,636	8,552,188[2]

Geography QuickFacts	Buffalo County	South Dakota
Land area, 2000 (square miles)	470.59	75,884.64
Persons per square mile, 2010	4.1	10.7
FIPS Code	017	46
Metropolitan or Micropolitan Statistical Area	None	

1: Counties with 500 employees or less are excluded.
2: Includes data not distributed by county.

(a) Includes persons reporting only one race.
(b) Hispanics may be of any race, so also are included in applicable race categories.

D: Suppressed to avoid disclosure of confidential information
F: Fewer than 100 firms
FN: Footnote on this item for this area in place of data
NA: Not available
S: Suppressed; does not meet publication standards
X: Not applicable
Z: Value greater than zero but less than half unit of measure shown

Source U.S. Census Bureau: State and County QuickFacts. Data derived from Population Estimates, Census of Population and Housing, Small Area Income and Poverty Estimates, State and County Housing Unit Estimates, County Business Patterns, Nonemployer Statistics, Economic Census, Survey of Business Owners, Building Permits, Consolidated Federal Funds Report
Last Revised: Friday, 03-Jun-2011 15:34:00 EDT

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30400

DONIKA RAE GONZALES,

Petitioner and Appellee,

v.

WANDA MARKLAND, Warden, South Dakota Women's Prison

Respondent and Appellant.

APPEAL FROM THE CIRCUIT COURT
FIRST JUDICIAL CIRCUIT
BUFFALO COUNTY, SOUTH DAKOTA

THE HONORABLE DOUGLAS HOFFMAN
Circuit Court Judge

APPELLANT'S REPLY BRIEF

Thomas P. Reynolds
322 Walnut Street
Yankton, SD 57078
Telephone: (605) 665-3000
Email:treynolds@yanktonlawyers.com

ATTORNEY FOR PETITIONER
AND APPELLEE

MARTY JACKLEY
ATTORNEY GENERAL

Chelsea Wenzel
Assistant Attorneys General
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215
Email: atgservice@state.sd.us

ATTORNEYS FOR RESPONDENT
AND APPELLANT

Notice of Appeal filed July 11, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES CITED: **PAGE**

CASES CITED:

CONSTITUTIONAL PROVISIONS CITED:

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30400

DONIKA RAE GONZALES,

Petitioner and Appellee,

v.

WANDA MARKLAND, Warden, South Dakota Women's Prison

Respondent and Appellant.

PRELIMINARY STATEMENT

In this brief, Donika Rae Gonzales is referred to as "Gonzales" or "Petitioner." Wanda Markland, Warden of the South Dakota Women's Prison, will be referred to as "Respondent." Citations to the settled records for the underlying criminal jury trial ("JT") and habeas trial ("HR") are followed by the corresponding page number(s).

JURISDICTIONAL STATEMENT

On April 6, 2023, the Honorable Douglas Hoffman, Circuit Court Judge, First Judicial Circuit,[1] entered a Judgment and Order For Habeas Corpus Relief. HR:1261-62. Respondent moved for a Certificate of Probable Cause on May 3, 2023. HR:1282-83. Judge Hoffman issued a Certificate of Probable Cause on June 13, 2023, and

[1] Judge Hoffman, a circuit court judge from the Second Circuit, presided over this case per an Order from this Court. HR:15.

Respondent filed a Notice of Appeal on July 11, 2023. HR:1292, 1300.

This Court has jurisdiction under SDCL 21-27-18.1.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I. DO THE UNITED STATES AND SOUTH DAKOTA CONSTITUTIONS REQUIRE A CRIMINAL JURY TO BE DRAWN FROM THE COUNTY WHERE THE CRIME WAS COMMITTED?

The habeas court determined that Article VI, Section 7 of the South Dakota Constitution and the Sixth Amendment to the United States Constitution require a criminal jury to be drawn from the county where the crime was committed, or in a district that is demographically representative of that county.

Breck v. Janklow, 2001 S.D. 28, 623 N.W.2d 449

Ibrahim v. Dep't of Pub. Safety, 2021 S.D. 17, 956 N.W.2d 799

Kneip v. Herseth, 214 N.W.2d 93 (S.D. 1974)

Williams v. Florida, 399 U.S. 78 (1970)

II. DID GONZALES ESTABLISH A VIOLATION OF THE FAIR CROSS-SECTION REQUIREMENT UNDER THE *DUREN* TEST?

The habeas court determined Gonzales established a prima facie violation of the fair cross-section requirement.

Duren v. Missouri, 439 U.S. 357 (1979)

St. Cloud v. Class, 1996 S.D. 64, 550 N.W.2d 70

State v. Faust, 678 A.2d 910 (Conn. 1996)

United States v. Erickson, 436 F. Supp. 3d 1242 (D.S.D. 2020)

III. DO THE ALLEGED VIOLATIONS IN GONZALES'S CRIMINAL TRIAL CONSTITUTE STRUCTURAL ERROR?

The habeas court determined that Gonzales was not required to show prejudice because the violations the court found constituted structural error.

United States v. Young, 618 F.2d 1281 (8th Cir. 1980)

STATEMENT OF THE CASE AND FACTS

The State relies on its Statement of the Case and Facts included in its Appellant brief.

ARGUMENTS

I. THE HABEAS COURT ERRED IN ITS INTERPRETATION AND CONSTRUCTION OF THE UNITED STATES AND SOUTH DAKOTA CONSTITUTIONS.

This case is the perfect example of why the rules of constitutional interpretation exist. Article VI, Section 7 of the South Dakota Constitution guarantees those accused of crimes the right to "a speedy public trial by a fair and impartial jury of the county or district" where the crime occurred. S.D. Const. Art. VI, Section 7; *see also* U.S. Const. amend. VI (guaranteeing an accused "the right to a speedy and public trial, by a fair and impartial jury of the State and district" where the crime occurred). As it relates to vicinage, Article VI, Section 7 guarantees the right to have a jury pool drawn from a defined geographic area—i.e. the county or district.

Article VI, Section 7, and the Sixth Amendment to the United States Constitution, guarantee, as a separate and distinct right, that

the jury be fair and impartial. To ensure the jury is fair and impartial, the jury pool from which the petit jurors are selected must represent a fair cross-section of the geographic area defined in the Constitution. This Court applies the *Duren* test to determine whether the jury pool represented a fair cross-section of that geographic area—i.e. the "community." Where the habeas court's analysis went awry is when it put the cart before the horse and used the fair cross-section requirement to ascertain the proper geographic area from which the jury pool must be drawn. HR:1227; *see also* HR:1228-34.

In SDCL 16-13-18.4, the Legislature provided a method for creating jury districts from which to select jurors and prescribed statutory parameters. SDCL 16-13-18.4. Because Article VI, Section 7 allows for the use of "districts" in jury selection, and the Legislature may do anything not otherwise prohibited by the Constitution, use of a jury district that is consistent with SDCL 16-13-18.4 is not a violation of the South Dakota Constitution. *Breck v. Janklow*, 2001 S.D. 28, ¶ 9, 623 N.W.2d 449, 454. Thus, the Buffalo/Brule jury district in this case was authorized by the Constitution and served as the geographic area—i.e. "community"—for purposes of the fair cross-section requirement.

This straightforward interpretation follows this Court's rules of interpretation and should have been the end of the interpretation inquiry. *Ibrahim v. Dep't of Pub. Safety*, 2021 S.D. 17, ¶ 12, 956 N.W.2d

799, 803 (explaining that, when the language of a provision is "clear, certain and unambiguous, there is no occasion for construction, and the court's only function is to declare the meaning" of the provision as clearly expressed); *Breck*, 2001 S.D. 28, ¶ 9, 623 N.W.2d at 454 ("A presumption in favor of constitutionality is also accorded any legislative act and that presumption is not overcome until the act is clearly and unmistakably shown to be unconstitutional and no reasonable doubt exists that it violates constitutional principles."). The habeas court's failure to heed these rules led its analysis and interpretation of Article VI, Section 7, and the fair cross-section requirement, astray.

Rather than relying on the plain language of the provision and the presumptions that govern constitutional and statutory provisions, the habeas court declared that "while counties and communities share many common elements, districts clearly are synthetic creatures of administrative convenience that can cross distinct communal borders for bureaucratic efficiency." HR:1227. This was based on the court's strained connection of the words "community" and "county." *Ibrahim*, 2021 S.D. 17, ¶ 12, 956 N.W.2d at 803. The court explained that:

> The idea of the county as a political and geographical subdivision and constituent of the concept of community, in 1889 and today, is fixed and certain. The meaning of a county is ubiquitous - "the largest territorial division for local government in a state." Black's Law Dictionary (Fifth Ed. 1979) at 316.
>
> "Community" is synonymous with "neighborhood," "vicinity" and "locality." *Id.* at 254. A "community" is a "body of people living in the same place, under the same laws and

> regulations, who have common rights, privileges or interests." *Id.* It "connotes congeries of common interests arising from associations-social, business, religious, governmental, scholastic, recreational." *Id.*
>
> A "district" has always been a much more pliable and amorphous term -- "One of the territorial areas into which an entire state or country, county, municipality or other political subdivision is divided, for judicial, political, electoral, or administrative purposes. *Id.*

HR:1226-27 (alternative spacing provided). The court then professed that, because the term "county" clearly had "an existing structure of geographically defined governmental subdivisions" in 1889, and districts did not, "an ambiguity of constitutional dimension" existed that required "inquiry into the source of its usage." *Id.* HR:1227.

The court's determination that counties and communities share common elements, to the exclusion of districts, is unsupported by the dictionary definitions the court provided. HR:1226-27. In this case, counties and districts are both territorial divisions of a state. Other than the court's unsupported opinion, nothing in the record or in law requires, or even suggests, that counties are formed based on "common interests arising from associations [such as] social, business, religious, governmental, scholastic, [or] recreational." *See State v. Faust*, 678 A.2d 910, 917-18 (Conn. 1996) (noting that county lines and federal district lines do not "magically determine the parameters for a community."). Rather, just as in a county, people in a district live "in

the same place, under the same laws and regulations, [and] have common rights, privileges or interests."

In this case, the habeas court's strained attempt to connect the words "county" and "community" and its disregard for the rules of interpretation amounted to a solution in search of a problem.[2] *Ibrahim v. Dep't of Pub. Safety*, 2021 S.D. 17, ¶ 13, 956 N.W.2d 799, 803 (stating that courts should not construe a provision "to arrive at a strained, impractical, or illogical conclusion."). The habeas court's proposed solution, however, is exceedingly problematic in that it requires this Court and other courts to engage in judicial gerrymandering in the creation of jury districts.

Historical Analysis

Based on the "traditional" definition of "vicinage" and a misreading of dicta in *In re Nelson*, the court determined that the word "district" in Article VI, Section 7 no longer has meaning, and that an accused has a right to be tried by jurors of the county where the crime was committed.

---

[2] During the September 24, 2018, motions hearing, the habeas court greatly expanded the breadth of the issues initially presented in the case and strongly suggested habeas counsel amend the petition to include the new and expanded issues. MH:14-33, 40; *compare* HR:32-33 (Second Amended Petition) *with* HR:239-42 (Third Amended Petition). The habeas court continued to act as an advocate during the hearings, fleshing out the issues it was concerned with and directing the parties to brief the same. HR:304-05, 309-16, 359-70, 464-66, 508-16, 525-32, 563-70, 1310; HR:695 (recounting Respondent's standing objection to the issues the court raised *sua sponte*, namely the constitutionality of SDCL 16-13-18.4). This Court has advised against this type of conduct. *See Ally v. Young*, 2023 S.D. 65, ¶¶ 49-50 & n.14, ---N.W.2d---; *Ibrahim*, 2021 S.D. 17, ¶ 22, 956 N.W.2d at 804-05.

HR:1226-31 (citing *In re Nelson*, 102 N.W. 885 (S.D. 1902) and other out of state cases from the early twentieth century); s*ee* AB at 17-19 (discussing *In re Nelson*).

Both Gonzales and the habeas court rely primarily on *In re Oberst*, 299 P. 959 (Kan. 1931) and *Olive v. State*, 7 N.W. 444 (Neb. 1880) to support their reading of Article VI, Section 7. The court's analysis in *Oberst*, like the habeas court's analysis, relies too heavily on the common law concept of vicinage rather than the plain language of the provision and the other rules of interpretation cited in this brief. *See e.g. Oberst*, 299 P. at 960 (determining that the word "district" in the Kansas Constitution no longer had meaning).

Furthermore, even though the court in *Oberst* recognized that the framers of the Kansas Constitution were familiar with the history of the adoption and ratification of the Federal Constitution, the court still confined the words "county or district" in the Kansas Constitution to the common law definition of "vicinage"—the word and concept that was expressly rejected by the framers of the Sixth Amendment. *See* 299 P. at 962; *Williams v. Florida*, 399 U.S. 78, 93-97 (1970). The *Oberst* court also tied the "vicinage" to the portion of the territory where the court could exercise power in criminal cases—i.e. the county. *See Oberst*, 299 P. at 962. In South Dakota, circuit courts may exercise power throughout the circuit. *State v. Wilson*, 2000 S.D. 133, ¶¶ 11-12, 618 N.W.2d 513, 517-18. And, prior to 1972, circuit courts could exercise

power outside of their circuits. *Id.* Thus, *Oberst* does not provide any assistance in this case.

Interestingly, while the court in *Olive* also relied on the common law concept of vicinage, it correctly concluded that the legislature could create trial districts that included more territory than a single county. *Olive*, 7 N.W. at 446. However, at the time, the Nebraska Legislature had not properly exercised that discretion with regard to the county at issue, so the conviction was reversed. *Id.* at 448. If the *Olive* case has any applicability, it is in Respondent's favor.

While understanding the "traditional"—i.e. English common law—concept of "vicinage" may help with interpreting this clause, it is not for the reasons the habeas court and Gonzales offer. The phrase "county or district" is not synonymous with the traditional concept of "vicinage." If the framers of the South Dakota Constitution wanted to codify the traditional concept of vicinage, they would have done so and used the word "vicinage." *Williams*, 399 U.S. at 93, 95-97. The omission of the word from the clause is a conclusive indication that the framers did not intend the clause to be interpreted synonymously with the English common law concept of vicinage. *Id.*; *Kneip v. Herseth*, 214 N.W.2d 93, 102 (S.D. 1974). Again, adhering to the rules of interpretation would have prevented the need for the habeas court's foray into the history of the word "vicinage." *Kneip*, 214 N.W.2d at 102 ("The framers of the

Constitution use words in their natural sense and fully intend what they say.").

The framers of the South Dakota Constitution used the phrase "county or district" to provide flexibility. The word "district" was used in many different contexts in the Constitution and the Framers allowed the Legislature to determine the boundaries of most of those districts. *See* AB at 20-21. Importantly, the flexibility to create jury districts existed both before and after the South Dakota Constitution was ratified. Before ratification, jury districts within the judicial districts were called "subdivisions." These subdivisions could include more than one organized county and could also include unorganized counties or territory. *The Annotated Revised Codes of the Territory of Dakota*, 2nd Edition (1885) at 336-37, 350-51.[3] This same structure was utilized in the judicial circuits after the Constitution was ratified. 1 *Statutes of the State of South Dakota*, 268, 280, 286-87 (1899).[4] In 1899, like today, judges of the circuit court had the authority to create subdivisions within their circuits. *Id.* at 268. There is no doubt that the framers of the South Dakota Constitution, like the framers of the United States Constitution, rejected the word "vicinage" in the Constitution in the interest of flexibility. *Williams*, 399 U.S. at 95-97.

---

[3] Accessed at https://babel.hathitrust.org/cgi/pt?id=mdp.35112104865342&seq=13.

[4] Available at: https://books.google.com/books?id=WMxNAQAAIAAJ&printsec=frontcover#v=onepage&q&f=false.

Amendments to the Constitution

In the early 1970s, the idea of flexibility was still favored, but the execution at the time was lacking. To combat the overlapping jurisdiction and multiple layers of courts that had been created in the first ninety years of statehood, the Constitutional Revision Commission recommended centralizing the court system into one unified judicial system and granting the Supreme Court with the authority to respond to the changing needs of the judiciary. *Wilson*, 2000 S.D. 133, ¶ 8, 618 N.W.2d at 516; 1 R*ecommendations of the Constitutional Revision Commission* 34-35, 39 (1971).[5]

If there was any doubt that the word "district" in Article VI, Section 7 was meant to provide flexibility, the Constitutional revision in the 1970's quashed that doubt. If the word "district" no longer had meaning "in modern times"—i.e. after all counties were organized—as the habeas court and Gonzales assert, the word "district" would have been removed from Article VI, Section 7. Indeed, the Revision Commission proposed deletion of the word "district," but that proposition was rejected, and the word "district" remained in Article VI, Section 7. 3 *Recommendations of the Constitutional Revision Commission* 12-36 (1975); *Kneip*, 214 N.W.2d at 102. Flexibility, again, prevailed.

---

[5] Available at: https://babel.hathitrust.org/cgi/pt?id=umn.31951d02413555h&seq=11.

The habeas court's overreliance on the "traditional" concept of vicinage and its determination that the word "district" no longer has meaning is an error of law that must be reversed. *Kneip*, 214 N.W.2d at 102 (directing that, when interpreting a constitutional provision, no word should be found to be surplus).

II. THE HABEAS COURT ERRED IN ITS APPLICATION OF THE *DUREN* TEST.

In order to establish a fair cross-section claim, Gonzales was required to prove: "(1) the group excluded is a 'distinct' group in the community; (2) the representation of this group in the jury pool is not fair and reasonable in relation to the number of such persons in the community; (3) this under representation is due to the systematic exclusion of the group from the jury selection-process." *State v. Wright*, 2009 S.D. 51, ¶ 48, 768 N.W.2d 512, 529 (applying the test in *Duren v. Missouri*, 439 U.S. 357 (1979)). Gonzales claimed that her jury was not selected from a fair cross-section of the community. She based this claim on the alleged exclusion of Native Americans. Nevertheless, like the habeas court, Gonzales treats Buffalo County as a distinct group, confuses the *Duren* test with the test to determine if an equal protection violation occurred, and applies an incorrect version of the absolute disparity calculation (*Duren* test) without any citation or support.

Respondent concedes that Native Americans are a distinct group in the community, under the first prong of the *Duren* test. *St. Cloud v.*

Class, 1996 S.D. 64, ¶ 11, 550 N.W.2d 70, 74. This Court adopted the "absolute disparity calculation" to determine the second prong of the *Duren* test. *Id.* at ¶ 13 n.7; *United States v. Erickson*, 436 F. Supp. 3d 1242, 1254 (D.S.D. 2020). To calculate the absolute disparity, the percentage of Native Americans on the list of persons eligible to serve on the petit jury is subtracted from the percentage of Native Americans in the general population—resulting in the "absolute difference." *Id.*

For purposes of *Duren*, the general population—i.e. "community"—is the geographical region from which the jurors are selected. *See supra*, Section I; *Mallett v. Bowersox*, 160 F.3d 456, 461 (8th Cir. 1998); *Johnson v. Norris*, 537 F.3d 840, 852 (8th Cir. 2008); *United States v. Grisham*, 63 F.3d 1074, 1080 (11th Cir. 1995). It is the general population of that community that must be used as a measure when calculating absolute disparity, not necessarily the specific county where the crime occurred. *Hobbs v. State*, 617 S.W.2d 347, 353 (Ark. 1981); *Johnson*, 537 F.3d at 852. Indeed, even when the location of a trial is moved, or when a jury district is utilized, the defendant does not have the right to have the jury pool be a fair representation of the county where the crime was committed. *Faust*, 678 A.2d at 917-19; *Bowersox*, 160 F.3d at 461.

The absolute disparity calculation in this case is as follows:

Percentage of Native Americans in General Population of Jury District

- Population of Brule County (5,255) x Percentage of Native Americans in Brule County (8.5%) = 447 Native Americans in Brule County;

- Population of Buffalo County (1,912) x Percentage of Native Americans in Buffalo County (84%) = 1,606 Native Americans in Buffalo County;

- Number of Native Americans in Brule County (447) + Number of Native Americans in Buffalo County (1,606) = 2,053 Native Americans in the Jury District;

- Population of Brule County (5,255) + Population of Buffalo County (1,912) = 7,167 People in the Jury District;

- Native Americans in the Jury District (2,053) / People in the Jury District (7,167) = 29% Native Americans in the Jury District;

Percentage of Native Americans in the Jury Pool

- Number of Native Americans in the Jury Pool (53)[6] / Number of People in the Jury Pool (236) = 22% Native Americans in the Jury Pool.

Absolute Difference

- Percentage of Native Americans in the Jury District (29%) – Percentage of Native Americans in the Jury Pool (22%) = 7% Absolute Difference.

HR:726-29, 732. An absolute difference of 7% is below the constitutional threshold limit of 15%. *St. Cloud*, 1996 S.D. 64, ¶ 13,

[6] Respondent maintains that Gonzales's method of identifying the Native Americans in the jury pool was insufficient. Nevertheless, even with her insufficiently proven numbers, she cannot establish the second prong of *Duren*. AB at 36-37.

550 N.W.2d 70, 74; *Erickson*, 436 F. Supp. 3d at 1254 (accepting a 7.4% disparity).

The habeas court's interpretation of "district" and its determination that jurors must be selected solely from the county detrimentally affected its analysis of the fair cross-section requirement and application of the *Duren* test. Rather than using the numbers provided by the parties and the calculation adopted by this Court, the habeas court relied on a "predicted percentage of Native Americans" on the qualified jury list from each county and utilized the percentage of Native Americans in Buffalo County as the measure. The court's calculation was as follows:

- Percentage of Native Americans in Brule County (9%) x Number of Brule County Jurors (182) = 16 Predicted Native American Jurors from Brule County;
- Percentage of Native Americans in Buffalo County (84%) x Number of Buffalo County Jurors (54) = 45 Predicted Native American Jurors from Buffalo County;
- Predicted Native American Brule County Jurors (16) + Predicted Native American Buffalo County Jurors (45) = 62 Predicted Native American Jurors in the Jury Pool;
- Number of Predicted Native American Jurors in the Jury Pool (62) / Total Number of Jurors in the Jury Pool (236) = 26% Native American Jurors in the Jury Pool;
- Percentage of Native Americans in Buffalo County (84%) – Percentage of Native Americans Jurors in the Jury Pool (26%) = 58% Absolute Disparity.

HR:1237-38. To defend its novel application of the *Duren* test, the court relied on its strained comingling of the words "vicinage," "county," and

"community." HR:1226-27, 1231-34. According to the court, "'vicinage' and 'county' are linked conceptually to the ideas of neighborhood, peerage, locality, and community." HR:1234. In the court's view, when a jury district is created, the jury pool of the combined counties must be a fair representation of the county where the crime occurred and the additional county must be contiguous and "considered a common vicinage with the county [where the crime occurred] in accordance with the traditional understanding of the term." HR:1227-34.

The habeas court's interpretation of the constitutional provisions at issue and its unsupported adaptation of the absolute disparity calculation are incorrect. Both the United States Constitution and the South Dakota Constitution rejected the "traditional" concept of vicinage in the interest of flexibility. Further, the right to an impartial jury selected from a fair cross-section of the community is not rooted in the common law, but in our country's own history and purpose. *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975) ("[T]he *American* concept of the jury trial contemplates a jury drawn from a fair cross section of the community.") (emphasis added).

According to the English common law, one had to be a "freeholder"—i.e. a landowner—to participate on a jury and the jurors were selected by the Sheriff. *See In re Nelson*, 102 N.W. at 887 (citing 2 Cooley, Blackstone (3d Ed.) 491); *Black's Law Dictionary* 808 (11th ed. 2019). In the American system, "[r]estricting jury service to only special

groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial." *Taylor*, 419 U.S. at 530. Rather, "[t]rial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case. . . . (T)he broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility." *Id.* (other citations omitted). The English common law is instructive when understanding the development of the American legal system, but its tenants are not binding or universally adopted.

Finally, the court determined that the jury district in this case was unconstitutional because "the creation of this jury district by administrative order and commingling of jury cohorts from Buffalo and Brule Counties for process efficiency crossed distinct communal lines that have existed long before SDCL 16-13-18.4 was conceived."[7] HR:1234. The court noted that "Buffalo and Brule Counties are contiguous" but determined that "their residents are not common peers, localities, neighbors, or communities in any relevant sense of those critical concepts." *Id.* Instead, "they are, rather, literally worlds apart

[7] A form of SDCL 16-13-18.4 existed after the ratification of the South Dakota Constitution—the same time that counties within the State were being formed. *See*, *supra*, Section I. Thus, the idea of jury districts actually did exist at the time that the alleged "distinct communal boundaries" were formed.

[which] is a historical and sociological fact that simply cannot be ignored." In the court's view, "[c]reation of this jury district in 2011 disregarded centuries of cultural and communal history and discord illustrating the vast gulf between these disparate communities and counties, and a jurisprudential foundation to our laws dating back to medieval times." *Id.*[8]

These overgeneralized findings and conclusions are not supported by law or the record. While Native Americans are no doubt a "distinct group" for purposes of the *Duren* test, Buffalo County is not. *Zicarelli v. Dietz*, 633 F.2d 312, 318-19 (3rd Cir. 1980); *United States v. Canfield*, 879 F.2d 446, 447 (8th Cir. 1989) ("A distinctive group is one that is characterized by a clearly identifiable factor such as gender or race and shares common attitudes or experiences."). Residents of Fort Thompson (Buffalo) and Chamberlain (Brule) may have experienced racial discord in the past, but there is nothing in the record that suggests the same was true of residents in Gann Valley (Buffalo) or Kimball (Brule). "Communities differ at different times and places.

---

[8] Both Gonzales and the habeas court suggested that jury districts are permissible if the additional jurors are from a "common vicinage." HR:1231; Gonzales Brief at 28. At the habeas trial, Hughes and Hyde Counties—both in the Sixth Judicial Circuit—were offered as counties that may be of a common vicinage. HT2:94. However, Buffalo County is in the First Judicial Circuit and a circuit court judge is not permitted to act outside the boundaries of the circuit unless the Chief Justice assigns the judge to assist in that circuit. *Wilson*, 2000 S.D. 133, ¶ 11, 618 N.W.2d at 517. This is consistent with SDCL 16-13-18.4, which requires counties within a jury district to be from the same circuit.

What is a fair cross section at one time or place is not necessarily a fair cross section at another time or a different place." *Taylor*, 419 U.S. at 537. In its haste to point out the differences between certain portions of Brule and Buffalo Counties, the court failed to consider the different experiences and groups within Buffalo County. *Canfield*, 879 F.2d at 447. The court's proposed limits/test for jury districts is not in compliance with *Duren* or the purpose of the fair cross-section requirement and it cannot stand.

III. THE HABEAS COURT ERRED IN DETERMINING THAT THE ALLEGED ERRORS IN GONZALES'S TRIAL CONSTITUTED STRUCTURAL ERROR.

Because Gonzales failed to fulfill the second and third prongs of the *Duren* test, the determination of whether fair cross-section violations amount to structural error is not necessary in this case. Otherwise, with regard to the application of structural error, Respondent relies on its arguments and authorities in its Appellant brief. AB at 40-42; *see also Gray v. State*, 159 S.W.3d 95, 97 (Tex. Crim. App. 2005).

Nevertheless, Respondent must point out the irony in Gonzales's argument. In this case, of the fifty-three individuals on the qualified juror list Gonzales identified as Native American, twenty-four were either pre-excused by the trial court or not otherwise mentioned in the jury-trial record on roll-call; twenty-three were excused or struck by Gonzales; and only four individuals were excused or struck by the

State. JT:2269-2364, 2424-60, 2617-34, 2806-15. In an unusual turn of events, during strike down, Respondent made a *Batson* challenge regarding Gonzales's use of preemptory strikes against Native Americans. JT:2806-11. Two Native Americans were selected for the jury. JT:2818.

Considering Gonzales excused or struck Native Americans at a rate of over five times that of the State, her argument that there was not enough Native Americans on the jury is insincere. *United States v. Young*, 618 F.2d 1281, 1287 (8th Cir. 1980) (noting that the defendant's actions in striking prospective jurors that were from the geographical area he said was underrepresented "flies in the face" of his fair cross-section claim). Gonzales has not, and cannot, show that she is entitled to the relief she seeks.

CONCLUSION

Respondent respectfully requests this Court reverse the habeas court's order granting habeas corpus relief and direct the court to dismiss the petition.

Respectfully submitted,

MARTY JACKLEY
ATTORNEY GENERAL

/s/ Chelsea Wenzel
Chelsea Wenzel
Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215
Email: atgservice@state.sd.us

CERTIFICATE OF COMPLIANCE

1. I certify that the Petitioner's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Petitioner's Brief contains 4,322 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2016.

Dated this 21st day of December 2023.

/s/ Chelsea Wenzel
Chelsea Wenzel
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 21, 2023, a true and correct copy of Appellant's Reply Brief in the matter of *Donika Rae Gonzales v. Wanda Markland, Warden of the South Dakota Women's Prison*, was served by using Odyssey File and Serve upon Gonzales through her attorney, Thomas P. Reynolds, at treynolds@yanktonlawyers.com.

/s/ Chelsea Wenzel
Chelsea Wenzel
Assistant Attorney General