

SOUTH DAKOTA SUPREME COURT

<p>JULIET YACKEL ON BEHALF OF RODNEY BERGET,</p> <p>Petitioner,</p> <p>v.</p> <p>STATE OF SOUTH DAKOTA, SOUTH DAKOTA DEPARTMENT OF CORRECTIONS and DENNY KAEMINGK, SECRETARY, SOUTH DAKOTA DEPARTMENT OF CORRECTIONS,</p> <p>Defendants.</p>	<p>Cause No. _____</p> <p>REPLY IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION OR FOR ANY OTHER APPROPRIATE RELIEF</p>
--	---

No one doubts that a competent petitioner can waive a right to appeal if he is advised by a competent lawyer. That is simply not what happened here. In this case, post-conviction counsel’s decision not to file a notice of appeal was based not upon the merits of the lower court’s order, but upon advice from his spiritual adviser. Thus, assuming that Mr. Berget was competent, he was undoubtedly deprived of the right to a competent post-conviction attorney as ensured by South Dakota statutory law. *Jackson v. Weber*, 637 N.W.2d 19, 2001 S.D. 30, ¶ 14 (“We will not presume that our legislature has mandated some ‘useless formality’ requiring the mere physical presence of counsel as opposed to effective and competent counsel.”) This arbitrary deprivation of a statutory right resulted in a constitutional violation. *See e.g., Logan v. Zimmerman Brush Co.*, 455 US 422 (1982).

Having granted Mr. Berget the right to competent counsel, the state cannot just take it away. Nor can the state use his incompetent habeas counsel as a shield from

litigation. *See* Reply at 5. The statutory right to counsel means nothing if it cannot be litigated.

This Court should grant the relief requested in the Petition.

DATED: October 26, 2018

/s/ Lisa M. Agrimonti
Lisa M. Agrimonti (SD Bar #3954)
FREDRIKSON & BYRON, P.A.
200 South Sixth Street, Suite 4000
Minneapolis, MN 55402
lagrimonti@fredlaw.com
Telephone: 612.492.7000

CERTIFICATE OF SERVICE

Undersigned counsel certifies that a true and correct copy of the foregoing document was served upon the persons below on today, October 26, 2018, and that two copies were sent postage prepaid to the following addresses:

PAUL S. SWEDLUND
ASSISTANT ATTORNEY GENERAL
1302 East Highway 14, Suite 1
Pierre, SD 57501
Paul.Swedlund@state.sd.us
atgservice@state.sd.us

RODNEY BERGET
No. 12975
SD State Prison
Jameson Annex
1600 North Drive
Sioux Falls, SD 57117

DATED October 26, 2018

/s/ Lisa M. Agrimonti
Lisa M. Agrimonti (SD Bar #3954)
FREDRIKSON & BYRON, P.A.
200 South Sixth Street, Suite 4000
Minneapolis, MN 55402
lagrimonti@fredlaw.com
Telephone: 612.492.7000