

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

David McGowan,
Petitioner,

vs.

Commonwealth of Pennsylvania,
Respondent.

* * * *

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF PENNSYLVANIA

* * * *

PETITION FOR WRIT OF CERTIORARI

Pro Se Petitioner:

12 MAY 2018
(File/Mail Date)

David McGowan
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QUESTIONS PRESENTED

1. Is a state appellate court's unexplained refusal to allow a petitioner to file for state provided avenue of writ of habeas corpus releif on an unlitigated, meritorious, non-waivable claim an unconstitutional denial of Due Process under the 14th Amendment.

2. Is a sentence imposed under a statute declared unconstitutional for being violative of the 8th and 14th Amendments an illegal sentence imposed without authority an unconstitutional denial of Due Process under the 14th Amendment.

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PARTIES

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PRIOR OPINIONS AND ORDERS

May 06, 1981, Conviction Murder; Bucks County, PA; CP-09-CR-0000027-1981.

Dec 28, 1982, Motion For New Trial/Arrest In Judgment, denied; Bucks County, PA; CP-09-CR-0000027-1981.

Dec 08, 1986, Direct Appeal, affirmed; Commonwealth v. David McGowan, 603 PHL 1983; Allowance of Appeal to Supreme Court of Pennsylvania, denied.

Aug 03, 1993, Post-conviction, denied; Bucks County, PA; CP-09-CR-0000027-1981.

Feb 20, 2018, Leave to File Original Process, granted; Petition For Writ of Habeas Corpus (State), denied; Supreme Court of Pennsylvania; Commonwealth v. David McGowan, 215 MM 2017.

BASIS OF JURISDICTION

Seeking U.S. Supreme Court review of the denial of writ of habeas corpus (State) relief from illegal sentence under Pennsylvania Constitution Article I, Section 14; denial was by the Supreme Court of Pennsylvania on February 20, 2018.

Rehearing was not sought, which renders it final.

Jurisdiction is conferred on this Court by U.S. Sup. Ct. Rules 10(c) and 13(1). The state court decision was a final adjudication per Pa.R.A.P. No. 314(b), and the denial conflicts with the Due Process Clause of the U.S. 14th Amendment as read in Pennsylvania v. Finley, 481 US 551 (1987).

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Pennsylvania Constitution, Article I.

Section 14. All prisoners shall be bailable by sufficient sureties, unless for capital offenses or for offenses for which the maximum sentence is life imprisonment or unless no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community when the proof is evident of presumption great; and the privilege of the writ of habeas corpus shall not be suspended, unless when in case of rebellion or invasion the public safety may require it.

18 Pa.C.S. 1102 (Sentence for murder).

Subsection (a). Murder of the first degree - A person who has been convicted of a murder of the first degree shall be sentenced to death or to a term of life imprisonment in accordance with § 1311(d) of this title.

[Act of 1972, Dec. 6, P.L. 1482, No. 334, s. 1]

STATEMENT OF THE CASE

Petitioner, David McGowan, was sentenced to a term of life imprisonment under a law/statute that was declared unconstitutional by the Supreme Court of Pennsylvania following the United States Supreme Court's decision relating thereto holding same violative of the 8th and 14th Amendments. This detrimental fact made the sentencing statute, employed by the Bucks County Court of Common Pleas in Pennsylvania ("Bucks County Court"), dead; i.e., of no force or effect, depriving the Bucks County Court of authority to impose the sentence it did or to obtain a conviction thereunder.

When McGowan learned of this detrimental fact, and upon a substantial review of law, he sought leave to file original process in the Supreme Court of Pennsylvania. Upon McGowan being granted original process, he exercised his state constitutionally protected and guaranteed right to writ of habeas corpus; a constitutionally provided avenue for relief that shall remain available unless in time of rebellion or invasion, whereof, the Supreme Court of Pennsylvania denied without due process of law.

Wherefore, McGowan, now seeks writ of certiorari from the United States Supreme Court to review the Supreme Court of Pennsylvania's denial of the provided avenue for relief from the underlying illegal sentence of the Bucks County Court without due process of law.

ARGUMENT

Petitioner, David McGowan, has attempted to raise the non-waivable claim of serving an illegal sentence pursuant to original jurisdiction with the state Supreme Court Pa.R.A.P. No's. 1501(a)(3), 3309(a). McGowan's claim has never been litigated, at any level, and never been adjudicated on its merits. McGowan has achieved the standard of a "reasonable probability" of relief. McGowan's claim of illegal sentence is established by the record and meritorious. Penson v. Ohio, 488 US 75, 83-84 (1988) (a determination that arguable issues were presented by the record creates a constitutional imperative).

McGowan's request for certiorari is due to the Supreme Court of Pennsylvania's arbitrary process for denying a state constitutionally protected right to habeas corpus causing McGowan to remain imprisoned under a sentence imposed pursuant to a law declared unconstitutional for violating the 8th and 14th Amendments: Furman v. Georgia, 408 US 238 (1972); Commonwealth v. Bradley, 295 A.2d 842 (Pa. 1972), and thus, "cannot be a legal cause of imprisonment". Fay v. Noia, 372 US 391, 408 (1963). If a law is invalid as applied to McGowan's conduct, he is entitled to go free. Bond v. United States, 564 US 211 (2011).

I. Is Unexplained Refusal To Allow State Writ of Habeas Corpus Relief An Unconstitutional Denial Of Due Process.

McGowan has personally demanded that his unlawful restraint be reviewed by the highest court in Pennsylvania via original process and writ of habeas corpus (state). The Court has not allowed McGowan to argue the claim of illegal imprisonment on

its merits. This process for review of McGowan's claim has been implemented by the people of this Commonwealth (Pa.Const. Art. I, § 14, cl. 2), which the Supreme Court of Pennsylvania applies arbitrarily. There is no Due Process protection, as required by the 14th Amendment, which is why the United States Supreme Court should grant certiorari.

When a state elects to provide an avenue for relief, the process must comport with the protections of the 14th Amendment. Yates v. Aiken, 484 US 211, 217-18 (1988); Pennsylvania v. Finley, 481 US 551, 588 (1987) ("when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution - and, in particular, in accord with the Due Process Clause").

While in Pennsylvania, the state did not necessarily opt to act in the field of habeas corpus, the people whom voted on our Constitution accepted it as a protected right and avenue for relief for those unlawfully imprisoned to "defend life and liberty" and obtain relief therefrom. Unlike that of the Federal Constitutional where the right to habeas corpus is located in the articles thereto and not the Bill of Rights, in this state's Constitution, it is located in the Declaration of Rights thereto, meaning it is to remain free from trespass except "in case of rebellion or invasion" (Pa.Const. Art. I, § 14, cl. 2), which neither this Commonwealth, nor, the United States are under.

Our Constitution protects the people's right to habeas corpus. It is a Fundamental Constitutional Right in this

Commonwealth, which cannot be limited by legislative enactments, nor, be restricted to situations prescribed in state statute. Commonwealth ex rel. Greevy v. Reifsteck, 115 A. 130, 132 (Pa. 1921) ("the legislature may not encumber access to habeas corpus in a fashion which results in a 'practical deprivation' of the right"); Commonwealth ex rel. Levine v. Fair, 144 A.2d 395, 400 (PA.Super.Ct. 1958), aff'd in pertinent part, 146 A.2d 834, 846 (Pa. 1958) ("relief from illegal restraint is not limited to cases falling within the scope of the criminal code"). The ultimate power of writ lies solely with the province of our judiciary: Fair, 146 A.2d at 846, and thus, requires due process protections of the 14th Amendment.

The procedure in Pennsylvania lacks due process protections. The Supreme Court of Pennsylvania rejected McGowan's petition for writ of habeas corpus without any opinion as to the perceived defects in the filing. McGowan does not know why the petition was denied. When a court "gave no reason at all for its decision" and "we do not know the basis for its action" it establishes that the court did not "provide [a] full consideration and resolution of the matter". Anders v. California, 386 US 738 (1967). A review of the record shows that the "Court did not give full consideration to the substantial evidence petitioner put forth in support of the prima facie case". Miller-El v. Cockrell, 537 US 332 (2003).

The remedy sought by McGowan, is elaboration of the right recognized in McCoy v. Court of Appeal of Wisconsin, 486 US 429, 433 (1988). The rationale of McCoy requires the same due process,

wherein the petitioner's claims are not reviewed by an attorney but only the Court. If the 14th Amendment is protected only by "requiring the attorney to assert the basis for this conclusion": *id.* at 441, then it reasons that absent the level of attorney review, then the Supreme Court of Pennsylvania should be required to "assert the basis for this conclusion".

WHEREFORE, David McGowan, prays thy Honourable Court shall grant certiorari.

II. Is Sentence Imposed Under An Unconstitutional Law An Unconstitutional Denial Of Due Process.

David McGowan has not waived his claim or challenge to the legality of his sentence imposed by the Bucks County Court without authority to impose same as such is a non-waivable premise. In this Commonwealth, every sentence imposed upon a criminal defendant must be in accordance with a statute that is enforceable at the time the sentence was imposed. The only way to determine if a particular sentence is imposed pursuant to an enforceable statute is to examine the "Judgment of Sentence" order: Greene v. United States, 358 US 326, 329 (1959); Hill v. United States ex rel. Wampler, 298 US 460, 464 (1939); Commonwealth ex rel. Marelia v. Hill, 110 A.2d 832, 833 (PA.Super.Ct. 1955), which related hereto, the record is silent.

Under Pennsylvania Law, a challenge to the validity of a sentence is a challenge to its legality. Commonwealth v. Isabell, 467 A.2d 1287 (Pa. 1983). SEE ALSO: Commonwealth v. Mears, 927 A.2d 1210 (PA.Super.Ct. 2009); Commonwealth v. Arest, 734 A.2d 910 (PA.Super.Ct. 1999)(en banc). An illegal sentencing claim is one which implicates "the fundamental legal authority of the

court to impose the sentence it did". Commonwealth v. Robinson, 931 A.2d 15, 21 (PA.Super.Ct. 2007)(en banc). No judge can impose a sentence, order a sentencing condition, or impose a fine unless such is authorized by some law/statute enacted by our Legislature. The premise of whether a court possesses the authority to impose a particular sentence "is a matter of legality". Commonwealth v. Pinko, 811 A.2d 576, 577 (PA.Super.Ct. 2002), petition for allowance of appeal den., 833 A.2d 142 (Pa. 2003). If a court does not possess "statutory authorization to impose a particular sentence, then the sentence is illegal and must be vacated". Arest, 743 A.2d at 912. SEE ALSO: Commonwealth v. Rivera, 95 A.3d 913, 915 (PA.Super.Ct. 2014); Commonwealth v. Johnson, 873 A.2d 704, 708 n. 1 (PA.Super.Ct. 2005), petition for allowance of appeal den., 887 A.2d 231 (Pa. 2005); Commonwealth v. Stevenson, 850 A.2d 1268, 1271 (PA.Super.Ct. 2004)(en banc) ("if no statutory authorization exists for a particular sentence, that sentence is illegal and must be vacated"). A challenge to a sentence which is unlawful per se is not waived where it is raised for the first time on appeal: Commonwealth v. Norris, 446 A.2d 246 (Pa. 1982); Commonwealth v. Walker, 362 A.2d 227 (Pa. 1976), and courts may address legality of a sentence sua sponte.

McGowan's illegal sentence is not merely an appellate issue of the "want of statutory authorization", but is also a constitutional denial of Due Process as required by the 14th Amendment. McGowan has a constitutional guarantee to be provided with due notice of what statute the sentence being imposed falls under, which, McGowan was denied of, because the Bucks County

Court could not list the unconstitutional statute employed on the Sentencing Order.

Whenever a defendant is sentenced, the judge must follow specific laws that have already been enacted by our Legislature. Judges' do not possess the authority to impose a sentence that is not in accordance with existing law. Such an act would equate to a judge 'creating new laws in the courtroom' to validate imposing a sentence that cannot lawfully be imposed.

McGowan could not be properly sentenced pursuant to law because 18 Pa.C.S. 1102(a) did not direct the sentencing court to the procedures at 42 Pa.C.S. 9711. Rather, the court was, during this time which McGowan was sentenced, improperly directed to the unconstitutional 18 Pa.C.S. 1311(d), which was a statute that had already been repealed, and thus, no longer existed under Pennsylvania Law.

This equates to a violation of Due Process under the 14th Amendment, because from December 5, 1980 to May 8, 1995, 18 Pa.C.S. 1102(a) authorized and encouraged arbitrary sentencing for a 18 Pa.C.S. 2502(a) conviction by instructing the court to sentence McGowan to an unconstitutional, repealed statute that had no legal force; being incapable of fulfilling its governmental objective of directing the court towards the proper sentencing procedures. Thus, any and all sentences imposed for a 18 Pa.C.S. 2502(a) conviction during this period, namely McGowan's, must be vacated.

At the time McGowan was sentenced, there were only two statutes that governed sentencing for convictions under 18

Pa.C.S. 2502(a)¹. They were 18 Pa.C.S. 1102(a) and pursuant thereto 18 Pa.C.S. 1311(d) as § 1102(a) was not amended until March 15, 1995 to reflect 42 Pa.C.S. 9711 as the other statute. Howsoever, both § 1102 and § 1311 were declared unconstitutional depriving the sentencing judge of authority to impose the sentence he did and encouraging arbitrary sentencing.

Whenever a law/statute, or portion thereof, is declared unconstitutional, it remains so, creating no crime and imprisonment under such is illegal. Fay v. Noia, 372 US 391, 408 (1963). An unconstitutional law is void, not from the time it is declared, but from its enactment: Great Southern Fire Proof Hotel Co. v. Jones, 193 US 532 (1904), and neither the government, nor, the public, generally, can claim an interest in the enforcement of an unconstitutional law. K.A. v. Pocono Mtn. School Dist., 710 F.3d 99, 114 (3d Cir. 2012); ACLU v. Ashcroft, 322 F.3d 240, 247 (3d Cir. 2003).

A conviction obtained under an unconstitutional law warrants habeas relief, as "[a]n unconstitutional law is void, and is no law". Ex parte Siebold, 100 US 371, 376 (1880). There is no grandfather clause that permits a state to enforce punishments the Constitution forbids. To conclude otherwise would undercut the Constitution's substantive guarantees. Where a state lacked the power to proscribe McGowan's conduct, "it could not constitutionally insist that he remain in jail". Desist v. United

1. 18 Pa.C.S. 2502, does not provide statutory authorization for a life sentence. This statute only defines the offense of murder; it does not authorize any punishment/sentence.

States, 394 US 244, 261 n. 2 (1969) (Harlan, J. dissenting opinion).

If a state collateral proceeding is open to a claim controlled by federal law, the state court "has a duty to grant the relief the federal law requires". Yates v. Aiken, 484 US 211, 218 (1988). No resources marshaled by a state could preserve a conviction or sentence that the Constitution deprives the state of power to impose. Mackey v. United States, 401 US 667, 693 (1971) ("There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose").

18 Pa.C.S. 1102 was repealed pursuant to Commonwealth v. Bradley, 295 A.2d 842 (Pa. 1972), for being violative of the 8th and 14th Amendments, in light of the United States Supreme Court's decision in Furman v. Georgia, 408 US 238 (1972). SEE: Commonwealth v. Mckenna, 383 A.2d 174, 177, 178 (Pa. 1987). Following the Mckenna decision, our Legislature was suppose to enact new legislation to amend/repeal § 1102(a), howsoever, this was not done, and thus, § 1102 became a dead letter statute. Therefor, any sentence, such as, McGowan's under § 1102 is pursuant to an unconstitutional law, which, no judge can write on the Sentencing Order to justify/authorize the sentence as required by law. Greene, 358 US at 329; Wampler, 298 US at 464.

18 Pa.C.S. 1311, to satisfy the state Supreme Court adjudication in Bradley, requiring sentencing procedures to regulate how juries arrive at death penalty or life imprisonment, was declared unconstitutional in Commonwealth v. Moody, 382 A.2d

442 (Pa. 1977), cert. den., 438 US 914 (1978). Section 1311 was amended, placing "Aggravating" circumstances at § 1311(d) and "Mitigating" circumstances at § 1311(e). Thus, juries, at the time McGowan was sentenced, could only deliberate "aggravating" circumstances pursuant to 18 Pa.C.S. 1102(d), resulting in arbitrary sentencing procedures violative of 14th Amendment Due Process.

While 42 Pa.C.S. 9711 was enacted in 1980 with the transfer of 18 Pa.C.S. 1311 thereto, § 9711 was incapable of providing statutory authorization to impose McGowan's sentence. It does not even matter if the sentencing judge (or court) claims to have sentenced McGowan pursuant to the procedures at § 9711 as 18 Pa.C.S. 1102(a) did not direct the court thereto, and to so act would equate to the judge breaking the law by not staying within the boundaries set-forth by our Legislature. Section 1102(a) was not amended until 1995 to reflect this change.

Thus, during the time McGowan was sentenced, juries were directed to deliberate only aggravating circumstances pursuant to an unconstitutional repealed statute (18 Pa.C.S. 1311(d)) pursuant to the unconstitutional dead letter statute (18 Pa.C.S. 1102(a)), which equates to an illegal sentence with serious merit, a denial of 14th Amendment Due Process, and an unlawful restraint on liberty under the color or pretense of state law as there was no sentencing procedures enacted that could legally warrant a conviction or sentence thereunder.

Wherefore, the sentencing judge, being aware of these detrimental facts, elected to list neither statute on the

Sentencing Order as authority for McGowan's sentence as the one (42 Pa.C.S. 9711) would be evidence the judge violated procedure, and the other (18 Pa.C.S. 1102(a)) would be evidence the judge used an unconstitutional law, and thus, the record being silent on this supports same creating a constitutional imperative.

WHEREFORE, David McGowan, prays thy Honourable Court shall grant certiorari.

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CONCLUSION

WHEREFORE, David McGowan, prays thy Honourable Court shall issue certiorari to review the Supreme Court of Pennsylvania's denial of the provided avenue for relief from the underlying illegal sentence of the Bucks County Court, without due process of law; and will ever pray, etc..

Respectfully submitted this 12th day of May, 2018.

12 MAY 2018
(File/Mail Date)

/s/ David McGowan
David McGowan; AM4580
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WORD COUNT CERTIFICATE

I verify that this Petition contains no more that 3500 words, according to manual count.