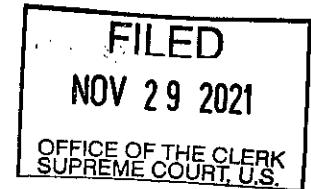


21-6959
No. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES



Kenneth J. Cox Pro Se — PETITIONER
(Your Name)

vs.

Eddie Caley, Warden C.T.C.F. — RESPONDENT(S)
Attorney General State of Colorado
ON PETITION FOR A WRIT OF CERTIORARI TO

10th. Circuit U.S. Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Kenneth J. Cox Pro Se

(Your Name)

C.T.C.F. P.O. Box 1010 (275 U.S. 50)
(Address)

Canon City, CO. 81215-1010
(City, State, Zip Code)

1-719-269-4002
(Phone Number)

QUESTION(S) PRESENTED

Whether the jurisdiction of this court is invoked under 28 U.S.C. §1257(a) concerning a state prisoners' claim(s) that was adjudicated on the merits in state must stand, 28 U.S.C. §2254(d), unless state court judgment resulted in a decision that was contrary to, or involved an unreasonable application of clearly established federal law,—"to be charged, tried, and convicted of a predicate offense", the governing count's 1 & 8 are sentence enhancers' as the Elements of SAOC (sex assault on a child) was not included in governing counts 1 & 8, "I cannot be charged with enhancer counts 'only'"...ie: Colorado Court of Appeals - People v. Torrez, 2013 COA 37 applies, or "[A] sentence enhancement factor...like the substantive predicate offense, must be proved beyond a reasonable doubt"; subsequent to governing counts 1 & 8 are charged sentence enhancers only, and are unreasonable determination of facts to the case in which Judge Colts' audit review exposed fraud upon an already faulty indictment, "denied the right to representation and/or be present at every step/stage of court proceedings in which Mr. Cox complains. Penny v. People, 146 Colo. 95, 360 P.2d 671 (1961) or

Whether a state prisoner must go through all avenues of relief in the state courts' before going to federal court, (total exhaustion rule) thus state courts chose not to fix the errors mentioned in all briefs in support 35(a)---U.S. 10th Circuit Court of Appeals *em passim* but leaned on procedural default claims, (time barr), which is not based on any Supreme Court case as this petitioner has always been very much active in all his timely filed pro se pleadings. Rose v. Lundy, 540 U.S. 509 (1982), all errors had substantial injurious affects' and influence in Mr. Cox trial determination. Dunn v. Madison, 138 S.Ct. 9 (2017).

QUESTION(S) PRESENTED

cont. (better luck with a DCR petition because the AEDPA forbade the Court from granting him any relief),(AEDPA's deferential standard no longer governs),Madison v. Alabama, 139 S.Ct. 718 (2019). or Whether a state district court plainly miscalculates Mr.Cox guideline range to eventual freedom of some meaningful opportunity to obtain parole during his lifetime must be analyzed separately and the mistakes' also affected Mr.Cox substantial rights to exercising discretion to resentence or to vacate the sentence. Miller v. Alabama, 567 U.S. 460 (2012),(life without parole equivilant) imposed without a finding that Mr.Cox was irreparably corrupt or permanently incorrigible. Montgomery v. Louisiana,577 U.S____,136 S.Ct. 718, 193 L.Ed.2d 599 (2016), (holding Miller supra retroactive).

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

28 U.S.C. §1257 (a)

28 U.S.C. §2254 (d)

Penny v. People, 146 Colo.95, 360 P.2d 671 (1961)

People v. Torrez, 2013 COA 37

Rose v. Lundy, 544 U.S.509 (1982)

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

[] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

reported at 10th.Cir.U.S.C.A.#21-1115 5/13/21; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

reported at U.S.D.C.#20-CV-03272-LTB-GPG 5/17/21; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

[] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix C to the petition and is

[] reported at C.S.C. #2020 SC 403 8/17/2020; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

The opinion of the C.C.A. 2018 CA 2061 8/25/2020 court appears at Appendix D to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

1.

The jurisdiction of this court is invoked under 28 U.S.C. §1257(a).

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* CORRECTED VERSION *

* APPENDIX A United States Court of Appeals, No: 21-1201 denied *

APPENDIX B United States District Court, No: 20-CV-03272-LTB-GPG denied

APPENDIX C Colorado Supreme Court, No: 2020 SC 403 denied

APPENDIX D Colorado Court of Appeals, No: 2018 CA 2061 denied

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STATEMENT OF THE CASE

Mr.Cox was convicted of (14) fourteen multiple sexual assault on a child poss. of trust / patt. of abuse involving Mr.Cox's step - daughters' [KC] & [SC]. Mr.Cox was denied right to cross examine witness [KC];denied the right of proof that a crime was committed where all the states evidence tended to show that allegedly a sex assault even occurred, no evidence in record shows that petitioner committed the acts' of cunnilingus (vaginal) or/of (anal) intercourse with either of the victims, no such evidence exists or was admitted to show intent/plan/or design on the part of the petitioner Mr.Cox, subsequently the trial court erred in failing to instruct on a lesser included offense of patt. of abuse / poss. of trust charge, denied the right of redress of fatal indictment[s], see Judge Colts' audit, as such, Mr.Cox also contends the trial court erred in failing to dismiss the charges.

The petitioners fatal variance includes the acts charged in the indictment[s] and the states proof at trial, as all the states evidence failed to show the commission of either victims' sexual offenses. Counts 1 & 8 are enhancer counts only and run consecutive to each other, as all remaining counts run concurrent to counts 1 & 8, subsequent to, SAOC (sex assault on a child) was never even proven first and foremost. The evidence in a criminal case must correspond to the material allegations of Mr.Cox indictments, as such, where the evidence tends to show the commission of an offense not charged in the indictment[s], there is a fatal variance between the allegations and the proof, requiring dismissal of charges.

STATEMENT OF THE CASE

The state may not offer proof of another crime independant of and distinct from the crime for which petitioner Mr.Cox is being prosecuted, even though the seperate offenses is of the same nature as the charged crime. (violation of fair sentencing act / reform corrections act). the court cannot enter judgment of conviction on the pattern of sexual abuse sentence enhancer.

The multiple interpretations of the many amended indictments, used when, by whom, in which post-relief motion, audit of sentence review by Judge Colt, subjecting constitutional violations to remove from the jury's assessments of facts and laws, thus altering the prescribed range of penalties to which Mr.Cox was exposed to in violation to a fair trial and impartial jury to examine all the evidence of the case.

Fatal variance exists with original indictment vs. amended indictment vs. internal audit change in sentence indictment,(not authorized) vs. 35(b) approved sentence reduction indictment vs. multiple mandates of which are all outside of Mr.Cox control as to the District Court; Appeal Court: State Supreme Court: U.S. 10th.Circuit and 10th. Circuit Court of Appeals.

The original problem was with the primary sentence issued...years later Judge Colt's internal audit was infused at the same time as the Direct Appeal was taking place, "accordingly the court will copy this order to trial counsel, appellate counsel, and the people and ask for a timely reply", (this never took place). Order re: Sentence Review June 14th.2013, the Audit went' into force and effect with the court having concern, "they did not have jurisdiction in this matter at this juncture", People v. Francis,630 P.2d 82 (Colo.1981).

STATEMENT OF THE CASE

In support see DA's order denying petitioners' motions' to correct illegal sentence, September 14th.2018, pg.4 (States highest possible charges for purpose of sentencing were (2) two counts,(counts 2 & 8 ?) thus exposing fraud upon the indictment at that time.

The statutory range is not what I disagree with directly, nor the 35(b) reduction of sentence, Mr.Cox was denied the right/opportunity of redress to challenge the laws interpretation of the audit and the fact of only being charged with enhancer(s) to counts 1 & 8, to assert his right to a legal sentence of equal proportionality.(to be charged with a predicate offense).

Under United States v. Du Bo, 186 F.3d 1177 (9th.Cir.1999), an indictment missing an essential element challenged before trial must be dismissed regardless of whether the omission prejudiced the petitioner.

There is no dispute that pro se petitioner Mr.Cox indictment was missing a required element, (predicate offense of S.A.O.C.) throughout Mr.Cox has properly challenged his indictment, thereby triggering Du Bo rule. Mr.Cox indictment is/was vaguely worded and deficient for failing to include the essential element of the charged offense.

The question of specificity is informed by the requirement that it is to construe pro se pleadings liberally. United States v. Santiago, 466 F.3d 801,803 (9th.Cir.2006), F.R.C.P.12(b)(3)(B).

In support see AG's order denying petitioners' motions', Answer Brief July 25th.2019 pgs.3/4, "The amended mittimus incorrectly reflects that the convictions on counts 5,9, and 14"...the District differs this response..."but it appears that the 16 yrs. to life sentence was changed to 6 yrs to life sentence after the trial court did an internal audit".

STATEMENT OF THE CASE

...Ag's answer brief pg.19..."the prosecution elected the specific acts that formed the basis of the predicate offenses' for the pattern counts", end quote. Subjecting Mr.Cox with multiple pattern counts (1-2-7-8) and no predicate count(s) of S.A.O.C. again exposing fraud upon the indictment subjecting multiple interpretations.

Mr.Cox argued under 35(a) to a fair and impartial trial as to the (14) fourteen alleged charged counts that were manifested from the same single offense, for purpose of special findings that are similar or same in nature and statute counts' directly culminating the multiple punishments, given the variance between the multiple indictments and there singlar interpretations vs. evidence used at trial.

Mr.Cox petitions' that counts 1 & 8 are merely sentence enhancers and not to be construed as a substantive offenses. S.A.O.C. (sex assault on a child) the predicate portion of the count must be supported first prior to the enhancer endorsement being used. People v. Torrez,2013 COA 37, 316 P.3d 25 (Colo.App.2013);Opening Brief,pgs.18-24 ; Reply Brief, pgs.1b-3d. A sentence enhancer is a pattern finding only, therefore counts 1 & 8 are charged sentence enhancers without the predicate offense. Torrez supra, Sattazahn v. Pennsylvania,537 U.S. 101,111 (2003); "(constitutionally illegal at both State and Federal levels')"; see also People v. Bowerman,2010 COA, 258 P.3d 314,316 ; People v. Everett, 2010 COA, 250 P.3d 649,663 in support 35(a) pgs.25-27.

Mr.Cox was not given the opportunity of correct disclosure to form a defense (audit)(concurrent vs. consecutive disparitys')(enhancer vs. predicate statute disparitys') this cannot be excused as a clerical mistake as stated in Answer Brief pg.3. To dismiss the appeal as moot does not apply because the legal question was not an issue submitted to the jury. People v. Moore,2013 COA 86 (Colo.App.2011).

STATEMENT OF THE CASE

Mr.Cox jurisdiction of proper venue was violated with the 2nd. victim [SC] as secondary supporting claims originated in Saguach County, 12th. District, re: Deer Camp, 35(a) pgs.31-35, removed my right to cross examine the primary accuser victim [KC], systematically merged for increased punishment without proof, shackling the statutory test as prejudice, a fair and impartial jury was compromised.

Reyna-Abarca v. People, 2017 CO 15 violation of §18-1-408 (5)(a)(c), creating a shift from statutory to evidentiary. People v. Fierro, 651 P.2d 416 (Colo.App.1982).

It is not the statutory range in question here, the elements' of S.A.O.C. was never proven, creating sentence factor manipulation-grave doubt-shackling. Schmuck v. United States, 489 U.S. 705, Oneal v. McAninch, 115 S.Ct.992, [elemental jury instructions and accompanying verdict forms were never mandated as matter of positive law].

Mr.Cox Trial Court failed to prove what charge (element) was committed that established a relationship with the victims [KC and/or SC] primarily for victimization, in complete violation of CRS §18-3-414.5 (1)(a)(III) (2012), as he maintained a stepparent like relationship.

People v. Carlos A.Gallegoes, 09 SC 1084 (2013), 35(a) pg.24.

Mr.Cox reasons for granting this petition is there was no procedural evidence, no decisive physical evidence, no corroboration from expert witness', and no essential element of a crime of sexual penetration. Violation of CRS §18-3-407(1)(a), see Gersten v. Senkowski, 426 F.3d 588 (2005)(remand permitting introduction of evidence showing victim(s) were not sexually assaulted, thus constitutional proportionality is focus on evidence actually presented at trial. Solem v. Helm, 463 U.S. 277 (1983).

STATEMENT OF THE CASE

These errors deprived Mr.Cox of basic constitutional protections, which without, a criminal trial cannot reliably serve its functions for the determination of innocence and/or guilt, no punishment in Mr.Cox trial proceedings may be regarded as fundamentally fair, no appeal may be considered correct to the many interpretations as to the audit by Judge Colt. see Washington v. Recuenco, 548 U.S. 212,213 (2006):'Needer', 527 U.S. at 8-9,(quoting 'Rose',478 U.S. at 577-78);E.g.,Deck v.Missouri, 544 U.S. 622 (2005)(shackling the prisoner in front of the jury); see 'Needer',527 U.S. 1,(ommission of an element of the offense from jury instructions)(use of vague or imprecise aggravating factor in the sentencing procedure),'Rose" supra (jury instruction that contains an unconstitutional conclusive presumption); Lee v. Illinois, 476 U.S. 530 (1986)(admission without benefit of cross examination);Rushen v. Spain, 464 U.S. 114 (1983)(violation of confrontation clause).

REASONS FOR GRANTING THE PETITION

Respectfully the lower courts erroneously and reversibly overlooked or declined to consider the following reasons for granting the petition. Mr. Cox seeks review of the decision from the 10th Circuit Court of Appeals denying his motion for Certificate of Appealability.

The sentencing range within the statutory provisions for an individual who was convicted on an enhancer is itself illegal. CRS §§ 18-3-405(2)(d), and 18-3-405.3(2)(b)...legislative intent is to create a single offense of sexual assault first with varying consequences based on separately enumerated classifications and sentencing factor(s). [this did not happen]

The Court of Appeals precedent case, People v. Torrez, 2013 COA 37 was avoided (overlooked) to keep from addressing the enhancer arguments of counts 1 & 8. Not only did legislation combine in a single section of the code and under the single title of sexual assault what had been previously clearly distinct sexual offense(s) found in separate sections of the code and specifically distinguished by name [but], the classifications and sentencing factors through the remainder of the section are also applied uniformly to all *alternate* sets of qualifying circumstances, all referred to simply as sexual assault.

The lower courts declined to consider whether however, they were meant to encompass alternate additional descriptions of criminal behavior that are disjoined within a single section of the code, and bears the same criminal substantive offense name. (relevant statutory language is the same as in versions of sections §§ 18-3-405 & 18-3-405.3).

The legislative intent to create different offenses and permit separate convictions and sentences for each is not apparent and must be given the assurance.

REASONS FOR GRANTING THE PETITION

The lower courts declined to consider that nothing in the charging documents indicate counts 1-2-7-8 are intended to include any one or more substantive offenses in addition to the charged counts, notably identical acts supported the verdicts for [each] pattern of abuse counts in violation of CRS §18-1-408(3), §408(3) applies only to evidence of all the elements of the offense that Mr.Cox committed that crime twice (2x) against the victim [KC] and then again the victim [SC] subsequently applied the same elements doctrine to resolve the double jeopardy claims of multiple designators.

The double jeopardy clause was erroneously overlooked as it clearly does not immunize Mr.Cox from being separately punished for successive commissions of the same offense thus, determining precisely when conduct supporting one commission of a particular offense is factually distinct from conduct supporting another commission of the same offense is not clear.

The lower courts refusal to consider the precise manner in which an indictment is drawn, 'cannot be ignored', to insure that proceedings against Mr.Cox for a similar offense, the record will show with accuracy to what extent he may plead a formal acquittal or conviction.

The Jury nor the Jury Verdict never found Mr.Cox committed the Element of S.A.O.C., amounts to structural error when ambiguity regarding the nature of the Jurys' determination. The action of the sentencing Judge Colt in changing an original sentence without notice to Mr.Cox and without opportunity for a hearing is improper and illegal, while Rule 35 permits the Judge to correct a sentence of his own motion, it does not permit him to do so without notice and an opportunity afforded for a hearing, subsequent violation of due process.

REASONS FOR GRANTING THE PETITION

The amendments done by Judge Colt on June 14th.2013, to the original mittimus, during direct appeal, was not legal to Mr.Cox original mittimus sentence of September 20th.2010, changed again in October 1st.2010. Mr.Cox became aware of re: Sentence Review upon record request to prepare 35(a) Opening Brief. The review concerned itself with concurrent vs. consecutive to which Mr.Cox complains he has raised, in part, but not limited to his determination of whether the sentence was illegal, as such, would have a practical effect on this case.

Mr.Cox was not afforded the right of redress to argue points of law that are associated to the sentence change, viably would have led into the discussion of the enhancer vs. predicate offense theory of which in large part is the crux of the 35(a) illegal sentence motion[s],(multiple violations of the same statute as the rule of lenity requires only one punishment). Mr.Cox was charged under multiple statutory alternatives and he experiences jeopardy of its own kind, begs questions of what the punishments are constitutionally permitted vs. punishments that the legislative branch intended to be imposed.

Where (2)two statutory provisions proscribe the same offense,Courts must harmonize them to give effect to their purpose, §§18-3-405(1)(2)(d) and 18-3-405.3(1)(2)(b) are Mr.Cox charged sentence enhancers' only as the predicate offense of §18-3-405 was not proven first, as such,they are not to be construed to authorize cumulative punishments in the absence of a clear indication of legislative intent.

C.R.S.§18-3-405 predicate offense must be proven without the support of the enhancer endorsements. (merely sentence enhancers) People v. Torrez, supra, also People v. Melillo,25 P.3d 769 (a trial court may not enter a seperate conviction or sentence on a count that is only a sentence enhancer).

REASONS FOR GRANTING THE PETITION

Equal Protection of the law assures those who are similarly situated be afforded like treatment (People v. Torrez), thus when two statutes provide different penalties for identical conduct, Mr.Cox was denied protection when he was convicted under the harsher sentence statute. C.R.S. §§18-3-405 (2)(d) and 18-3-405.3 (2)(b) deny equal protection as the underlying evidence does not support factually distinct offenses' which convictions are based on identical evidence. No predicate offense was ever charged to Mr.Cox, just enhancer counts.

IN SUM

Mr.Cox seeks judicial notice of undisputable facts that exist in the record, direct violations of due process and liberty. The convictions are supported by an illegal indictment/information, identical evidence, failed to prove underlying predicate offense of S.A.O.C., as well the sufficiency of separate incidents as the evidence of support originated from the same act, multiple convictions do not evidence themselves... except upon a precise manner in which an indictment is drawn...amounts to structural error...defined as evidence necessary to convince a trier of fact beyond a reasonable doubt...of every Element of Each Offense.

Accordingly, Mr.Cox prays this court to authorize the merits for relief, grant such relief as law and justice require, and take judicial notice in support of petitioners records.

CONCLUSION

Mr.Cox motion[s] are in support of the issues and facts raised in this request for 'writ of certiorari' to the United States Supreme Court as the petition for a writ should be granted.

Respectfully Submitted


Date: October 18th, 2021

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