No. _____

23-6640

ORIGINAL

FILED
JAN 11 2024
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

GARLAND RAY GREGORY, JR. – PETITIONER

VS.

STATE OF SOUTH DAKOTA – RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI

SOUTH DAKOTA SUPREME COURT

OETITION FOR WRIT OF CERTIORARI

Garland Ray Gregory, Jr. #01566
Mike Durfee State Prison
1412 Wood St.
Springfield, SD 57062-2238

QUESTION PRESENTED

Did South Dakota Supreme Court abuse its discretion, affirming South Dakota Fourth Judicial Circuit Court's dismissal of Petitioner's Petition For Writ Of Error Coram Nobis, bringing Fifth, Sixth, Eighth, and Fourteenth Amendment violation claims, holding:

'barred by res judicata and collateral estoppel, error in an indictment or information inadequate to merit relief under coram nobis;

petitioner suffered no prejudice to a substantial right in State Supreme Court's failure to conclude the law[1] on its finding petitioner met the statutory burden of proof[2] on a constitutionally invalid plea;

Gregory v. State, 353 N.W.2d 777 (S.D. 1984) not overturned by later South Dakota Supreme Court decisions;

coram nobis does not cover issues of cruel and unusual punishment for petitioner being imprisoned in excess of the maximum penalty for his felony class conviction'?

---

[1] SDCL § § 15-24-1 / 15-6-52(a)
[2] Admission of violation of SDCL § 23A-7-4(1), Gregory, 353 N.W.2d at 779 (1984)

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

S.Ct.

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

The opinion of the highest court to review the merits appears at Appendix – A, and is reported at 2023 WL 7627896.

The opinion of the Fourth Judicial Circuit Court appears at Appendix – A, and is unpublished.

JURISDICTION

The date on which the final decision from the state court filed was, November 13, 2023. A copy of that decision appears at Appendix – A.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Supremacy Clause Art. VI, Cl. 2

U.S.C.S. Fifth, Sixth, Eighth, Fourteenth Amends.

28 U.S.C. § 1257(a)

Fed. Rules Crim. Proc. 11(c) (1)

SDCL § 15-6-52(a)

SDCL § 15-6-54(b)

SDCL § 15-24-1

SDCL § 22-3-8

SDCL § 22-6-1(4)

SDCL § 23A-7-2

SDCL § 23A-7-4(1)

SDCL § 23A-7-14

SDCL § 24-5-1

2005 S.D. SB43

STATEMENT OF THE CASE

The South Dakota Supreme Court abused its discretion affirming the South Dakota Fourth Judicial Circuit Court's dismissal of petitioner's Petition For Writ Of Error Coram Nobis.

INTRODUCTION & SUMMARY OF ARGUMENT

State v. Gregory, is characterized by the South Dakota Supreme Court, thusly:

"This is not to say we are fully satisfied with the record that was made by the trial court at both the December 12, 1979 arraignment, and the March 13, 1980 change of plea hearing... There is no reason to cut constitutional corners, especially in cases involving as serious a crime as that which petitioner was charged." Gregory v. State, 353 N.W.2d 777, 781 (S.D. 1984).

The record is not an abstract thing it is what occurred. About which the court found in its examination of petitioner's claims, "fairly supports the finding," "not clearly erroneous," etc. Of which they remarked, "cut constitutional corners."

Not found is, "we find no statutory violation." What is found conflicts with the United States Supreme Court, and South Dakota Supreme Court holdings in similar situations to petitioner's:

'Failure to establish a factual basis on the record'.

"A fair reading of the plea taking court's comments indicates the preliminary hearing transcript was noticed for the factual basis, which it clearly and fully established... the court

substantially complied with SDCL ch. 23A-7." Gregory v. State, 325 N.W.2d 297, 298 (S.D. 1982)

In conflict the South Dakota Supreme Court holds, "The fact the record at the time Quist entered his guilty plea contained the transcript of his earlier arraignment before Judge Berndt does not render the pleas valid for two reasons. First, the presence of the record of the transcript of the earlier arraignment in *Garritsen* did not save the validity of the subsequent guilty plea entered in that case. Second, allowing Judge Dobberpuhl to determine the intelligence of Quist's pleas based on testimony considered by Judge Berndt (i.e. Judge Berndt's canvassing of Quist's rights) would allow one circuit judge to enter a finding based upon testimony heard by another circuit court judge. This court condemned a similar practice in Hinman v. Hinman, 443 N.W.2d 660 (S.D. 1989)... This court held, "[a] successor judge[1] has no authority to render a decision in a case where he has not heard the testimony, unless the parties so stipulate." Id. at 661.

Although Hinman is distinguishable in numerous respects from the present case, Judge Dobberpuhl was no less responsible for making a decision in accepting Quist's guilty pleas, i.e., whether the pleas were being intelligently entered. Judge Dobberpuhl had no testimony before him on which to base a decision or finding on the intelligence of the pleas. As a successor judge in the case, he couldn't look to testimony considered by Judge Berndt (i.e., Judge Berndt's canvassing of the Boykin rights with Quist) to decide to enter a finding on the intelligence issue. *Hinman,* supra; *Garritsen,* supra. Thus, his implicit finding of intelligence in accepting Quist's

[1] The trial judge in petitioner's disputed proceeding was a successor judge: Petitioner was arraigned on or about 6 November 1979, before Judge Timothy R. Johns; Preliminary Hearing held on or about 13-14 November 1979, before Judge R.E. Brandenberg; Change of Plea Hearing was held on or about 13 March 1980, Judge Robert A. Miller, 'a successor judge'.

pleas is unsupported by the record and the pleas are thereby rendered void under *Nachtigall*,[2] supra. Quist v. Leapley, 486 N.W.2d 265, 268 (S.D. 1992).

There has been no valid constitutional establishment of a factual basis for the guilty plea in Gregory v. State, 325 N.W.2d 297 (S.D. 1982). The 'manner' the court held did so, the court holds does not render the plea valid, and is a condemned practice (Quist, supra).

As stated by the court in their holding in State v. Nachtigall, 2007 S.D. 109, ¶14 "When a defendant equivocates while pleading guilty, the court must take extra care to ensure that the record demonstrates a clear factual basis. Although the court conducted a partial canvassing process, Nachtigall's equivocal statements gave an inadequate factual basis for the plea[3]. This constitutes a violation of SDCL 23A-7-2 (Rule 11(a)) and 23A-7-14 (Rule 11(f)). If a factual basis fails to meet the statutory standard, guilty plea must be set aside and the case must be remanded for another plea hearing. See State v. Sutton, 317 N.W.2d 414, 414 (S.D. 1982) (Stating a guilty plea shall not be accepted on a silent record)."

'Failure to address a *Boykin* canvassing requirement'.

"5. Appellant argues on appeal that his plea was invalid because he was not advised of his right to a trial "in the county in which the offense was alleged to have been committed," pursuant to our holding in Sutton Supra.[4] This issue is not before us as it was not raised in appellant's Petition or Supplemental and Additional Petition, it was not an issue at the post-conviction hearing, and it was not included in his proposed findings and conclusions." Gregory v. State, 325 N.W.2d 297, 300 (S.D. 1982).

---

[2] Nachtigall v. Erickson, 178 N.W.2d 198, 201 (S.D. 1970)

[3] [In Gregory, after the trial made the comment court identifies as taking judicial notice – in the particular manner the court holds is a 'condemned' practice – petitioner made his equivocal statement (325 N.W.2d 299), gave an inadequate factual basis for the plea].

[4] State v. Sutton, 317 N.W.2d 414, 415 (S.D. 1982)

In conflict, the claim being a plain error, South Dakota Supreme Court holds, "We must, then, analyze the error and determine whether it substantially affected the rights of appellant and thereby prejudiced him." State v. Brammer, 304 N.W.2d 111, 114 (S.D. 1981). The court's holding in Sutton, supra speaks to the nature and prejudicial character of the claim.

This Court holds, "Unreasonable application occurs when a state court " 'identifies the correct governing legal principle from the Court's decisions but unreasonably applies that principle to the facts' of petitioner's case." Cit. Omit. (See Rompilla v. Beard, 545 U.S. 374, 380 (2005)).

The court's action on the *Boykin* claim violation is an abuse of discretion; their holding on the lack of factual basis establishment on the record, not supported by the record, and contrary to their holdings in similarly situated circumstances.

'Failure to address a *Boykin* canvassing requirement / failure to inform on the nature of the charge'.

"At the outset, we must agree with petitioner that the record does not reveal that the trial court ever specifically outlined to petitioner the elements of the offense of conspiracy to commit murder. Accordingly, we must determine whether the record indicates that defendant was aware of the nature of the offense to which he entered a guilty plea and, if so, whether such a showing satisfies the requirements of SDCL 23A-7-4(1)... 780...the record in the instant case, when viewed in the totality of the circumstances, fairly supports the finding that the petitioner understood the nature of the charges against him... we conclude that the post-conviction court's finding... 781 ...is not clearly erroneous." Gregory v. State, 353 N.W.2d 777, 779-781 (S.D. 1984).

In conflict this Court holds, "By entering a plea of guilty the accused is not simply stating that he did the discrete acts described in the indictment; he is admitting guilt of a substantial crime. That is why the defendant must be instructed in open court on the "nature of the charge to which the plea is offered," Fed. Rule Crim. Proc. 11(c) (1), and why the plea "cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts," McCarthy v. United States, 394 U.S. 459, 466, 89 S. Ct. 1166, 1171, 22 L.Ed.2d 418 (1969). United States v. Broce, 488 U.S. 563, 570 (1989).

Subsequent South Dakota Supreme Court holdings ["Under Monette, however, the totality of the circumstances analysis in un-applicable when the record reflects that no canvassing regarding a Boykin waiver ever took place. In the absence of a Boykin canvassing, a "critical step"[5] is missing and the reviewing court does "not consider the additional factors under the totality of the circumstances analysis." Monette, 2009 S.D. 77, ¶16." Rosen v. Weber, 2012 S.D. 15, ¶11. (See also State v. Bilben, 2014 S.D. 24, ¶14).] overturn[6] their ruling in Gregory, where they did exactly what the subsequent holdings pronounce un-applicable. They did so after petitioner had met the burden of proof.

'Failure to inform on the consequences of the plea'.

"We follow those decisions which have held it is not necessary for a court to inform a defendant of the collateral consequences of a guilty plea." Gregory v. State, 353 N.W.2d 777, 781 (S.D. 1984).

---

[5] "A plea of guilty is constitutionally valid only to the extent it is "voluntary" and "intelligent." Brady v. United States, 398 U.S. 742, 748, 90 S. Ct. 1463, 1469, 25 L.Ed.2d 747 (1970). We have long held that a plea does not qualify as intelligent unless a criminal defendant first receives real notice of the nature of the charge against him, the first and most universally recognized requirement of due process." Smith v. O'Grady, 312 U.S. 329, 334, 61 S. Ct. 572, 574, 85 L.Ed. 859 (1941). Bousley v. United States, 523 U.S. 614, 618 (1998).

[6] Applicable to petitioner, "New substantive rules generally apply retroactively," (Welch v. United States, 136 S. Ct. 1257, 1264 (2016)), "That narrow the scope of the criminal statute by interpreting its terms." Schriro v. Summerlin, 542 U.S. 348, 351-352 (2004).

In conflict the State Supreme Court holds, "That is not to say a trial court should not inform a defendant of the provisions of SDCL 24-15-4." Gregory v. State, 353 N.W.2d 777, 781 (S.D. 1984).

This Court holds, "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within a State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by expressed terms or by its improper execution though duly constituted agents." Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000).

Here the South Dakota Supreme Court admits it defies the will of the South Dakota Legislature, violates the United States Constitution's Equal Protection Clause of the Fourteenth Amendment, denying petitioner equal protection of the law, by an intentional and arbitrary discrimination, as a standard practice.

'Defective information charging conspiracy to commit murder'.

"Was not brought up in prior proceedings...we do not believe it was fundamental...ordinarily inadequate to merit relief under coram nobis." Gregory v. Class, 1998 S.D. 106, ¶21.

In conflict this Court holds, "Consequently, defects in subject matter jurisdiction require correction regardless of whether the error was raised in district court." United States v. Cotton, 535 U.S. 625, 630 (2002), "Reversing judgment for plain error on the basis of insufficient indictment." (See Rosales-Mireles v. United States, 138 S. Ct. 1897, 1907 (2018).

The State Supreme Court's Associate Justice wrote, "The error presented in this case is of the fundamental nature contemplated by coram nobis." Gregory v. Class, 1998 S.D. 106, ¶32.

'South Dakota Supreme Court committed a plain error finding the trial court in petitioner's circumstances (validating a South Dakota Supreme Court condemned practice,

"allow one circuit court judge to enter a finding based on testimony heard by another circuit court judge," (See Quist v. Leapley, 486 N.W.2d 265, 268 (S.D. 1992)), could take judicial notice of records in the file for establishing a factual basis for guilty plea ('holding such as done' Id. at 325 N.W.2d 299 (S.D. 1982)) / That post conviction counsel rendered ineffective assistance of counsel for failing to raise the improper taking of judicial notice'.

"Gregory next claims in points two and five that the criminal trial court erred in taking judicial notice on the records in the file to establish a factual basis for his plea, and that his post-conviction attorney rendered ineffective assistance in failing to raise the issue before.

We concluded that even though the court did not make the preliminary hearing transcript a part of the record, the transcript was part of the case file of which the court had judicial notice.

As there was no error in the taking of judicial notice, there can be no claim of ineffective assistance of counsel. Our decision in Gregory I will not permit reexamination of points two and five under coram nobis." Gregory v. Class, 1998 S.D. 106, ¶22.

As illustrated earlier, there was error in the taking of judicial notice. What they base their holding on is a condemned action, condemned by the South Dakota Supreme Court. See Quist, supra at 268.

This Court holds, "Although we hold the "law of the case [a]s an amorphous concept... this doctrine directs a courts discretion, it does not limit the tribunals power. Accordingly, the doctrine does not apply if the court is convinced that [its prior decision] is clearly erroneous and would work a manifest injustice." Pepper v. United States, 562 U.S. 625, 630 (2002).

The court's "Our decision in Gregory I will not permit re-examination of points two and five," (1998 S.D. 106, ¶22), is clearly erroneous. As illustrated, the court's decision in

in Gregory I is an abuse of discretion (see Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990)), a plain error, not valid grounds for denying the constitutional examination of petitioner's claims. 'Error of taking judicial notice in the manner it did'; and 'ineffective post-conviction counsel pursuant to the court's holding in Jackson v. Weber, 2001 S.D. 30, ¶16 "We agree with those court's that have held that an independent right to effective assistance of counsel arises by statute in post-conviction hearings."

These plain errors and constitutional violations of due process addressed in this certiorari meet the standard for collateral proceedings failing the harmlessness requirement of federal constitutional error[7], and deprivation of the petitioner's constitutional rights under the cumulative error doctrine.[8]

Petitioner is not asking the Court to re-evaluate the evidence that has proven his claims, but illustrating the plain errors and constitutional violations of due process that meet the standard for collateral proceedings failing the harmlessness requirement of federal constitutional error. In a process where there has been a "failure to observe that fundamental fairness essential to the very concept of justice (see Lisenba v. California, 314 U.S. 219, 236 (1941)), that petitioner's certiorari claims were spawned from.

Is American Jurisprudence supposed to look like what has happened to petitioner? United States Supreme Court decisions, states being bound by their interpretation (see Cooper v. Aaron, 358 U.S. 1, 18 (1958)), and the Constitution's Supremacy Clause (see U.S. Const. Art. VI, cl.2), say no.

---

[7] Yates v. Evatt, 500 U.S. 391, 403 (1991) "Requirement that harmlessness of federal constitutional error be clear beyond a reasonable doubt embodies the standard requiring reversal if "'there is a reasonable possibility that the evidence complained of might have contributed to the conviction.'" Cit. Omit.

[8] Montana v. Egelhoff, 518 U.S. 37, 53 (1996) "Erroneous evidentiary rulings can, in combination, rise to the level of due process violation."

Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007) "The cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal." Chambers, 410 U.S. at 290 n.3, 93 S. Ct. 1038.

ARGUMENT

What the state court held on important federal questions, and the South Dakota Supreme Court affirmed, conflicts with the United States Supreme Court, and South Dakota Supreme Court holdings, an abuse of discretion, "basing its ruling on an erroneous view of the law, or on a clearly erroneous assessment of evidence." Cooter & Gel v. Hartmarx Corp., 496 U.S. 384, 405 (1990).

1st claim: The information filed in State v. Gregory, CR. 790-520 is insufficient. The court never acquired subject matter jurisdiction, resulting in a void judgment, "without force or effect whatever," (State v. Haase, 446 N.W.2d 62, 64 (S.D. 1989)), "a legal nullity." United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 270 (2010).

The circuit court held, "Barred from bringing up the claim by res judicata or collateral estoppel."

This Court holds, "One general limitation the Court has repeatedly recognized is that the concept of collateral estoppel cannot be applied when the party against whom the decision is asserted did not have a full and fair opportunity to litigate the issue in the earlier case." Allen v. McMurry, 449 U.S. 90, 95 (1980).

The State Supreme Court examined the claim in Gregory v. Class, 1998 S.D. 106, holding:

At ¶21 "Gregory's first claim of error, regarding a defective information charging conspiracy to commit murder, was not brought up in prior proceedings. Even if we agreed for arguments sake that this was a jurisdictional error we do not believe it was fundamental. Errors in indictments and information are ordinarily inadequate to merit relief under coram nobis. Cit. Omit.

Furthermore both points should have been raised in Gregory's earlier proceedings... Under South Dakota law, an indictment or information is sufficient if it employs the language of the appropriate statute or its equivalent."

The State's positions appear to be:

Petitioner forfeited the claim by not bringing it up in prior proceedings. This is clearly erroneous. This Court holds, "Defects in subject matter jurisdiction require correction regardless of whether the error was raised in district court." United States v. Cotton, 535 U.S. 625, 630 (2002).

The South Dakota Supreme Court holds:

"Subject matter jurisdiction cannot be conferred by agreement, consent, or waiver. Cit. Omit. A reviewing court is required to consider the issue of subject matter jurisdiction even where it was not raised below in order to avoid an unwarranted exercise of judicial authority. Cit. Omit. ...subject matter jurisdiction cannot be acquired by estoppel." Cit. Omit. Honomichl v. State, 333 N.W.2d 797, 799 (1983).

The State infers it is not a jurisdictional error, and they don't believe it's a fundamental error. This is clearly erroneous. This Court holds it is fundamental, "Reversing judgment for plain error as a result of insufficient indictment." See Rosales-Mireles v. United States, 138 S. Ct. 1897, 1907 (2018).

As does the South Dakota Supreme Court:

"Without a formal and sufficient indictment or information, a court does not acquire subject matter jurisdiction and thus an accused may not be punished for a crime." Albrecht v. United States, 273 U.S. 1, 47 S. Ct. 250, 71 L.Ed. 505 (1927). Honomichl v. State, 333 N.W.2d 797, 798 (S.D. 1983).

A concurring State Supreme Court Justice pronounced it fundamental in the underlying case, "The error presented in this case is of the fundamental nature contemplated by coram nobis." Gregory v. Class, 1998 S.D. 106, ¶32.

The State Supreme Court holds the 'information' (App. - B) is sufficient because it employs the language of the statute. This is erroneous. This Court holds:

"As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357 (1983)

"It must at least in substance contain the necessary elements of the offense." Hamling v. United States, 418 U.S. 87, 117-118 (1974) (See also State v. Wilson, 297 N.W.2d 477, 481 (S.D. 1980))

Particularly the Supreme Court holding:

"It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as "those words fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished... 118 ...Where guilt depends so crucially upon a specific *identification of fact*, our cases have uniformly held that an indictment must do more than simply repeat the language of the criminal statute. 369 U.S. at 764, 82 S. Ct. at 1407." Hamling, supra.

The statute (SDCL § 22-3-8) language (App. – C) is not sufficient, it does not "state the species," (see Russell v. United States, 369 U.S. 749, 765 (1962)), the 'agreement element'. It doesn't "descend to particulars," (Russell, supra), violating the Sixth Amendment. Petitioner, unaware of the agreement element, a "distinct evil," (see United States v. Jimenez-Recio, 537 U.S. 270, 274 (2003)), to his prejudice made an unintelligent, unknowledgeable plea, while openly in court saying:

"I dispute the fact that I did not shoot Michael Young, and I did not make an open agreement to shoot Michael Young to John Archambault. But I did carry on a conversation with him about that. But I didn't agree to it. But I was involved in the conversation where it was mentioned." Gregory v. State, 353 N.W.2d 777, 7790 (S.D. 1984).

denying the agreement element. To which the State Supreme Court held:

"The juxtaposition of a guilty plea and a denial of acts constituting the crime does not necessarily invalidate the plea..." Gregory v. State, 325 N.W.2d 297, 299 (S.D. 1982).

That is not the context of petitioner's claim. It is the ambiguity, uncertainty, ignorance demonstrated by petitioner's words, the insufficiency of the information caused. In contrast, the jury instructions on a conspiracy charge (App. – B) require the jury to find an 'agreement', no generic term is used, but states the species.

Res judicata and collateral estoppel cannot apply petitioner did not have a full and fair opportunity to litigate the issue. Had petitioner known that an agreement was an element of the crime, he would not have plead guilty, and insisted on going to trial.

2nd claim. State Supreme Court failed to conclude the law on its specific affirmative finding of petitioner meeting the burden of proof on one of petitioner's habeas claims, leaving the habeas un-terminated, resulting in a void judgment.

The circuit court held, "May not be grounds for reversal if no prejudice to a substantial right is caused. The fact that the South Dakota Supreme Court affirmed the order is indicative that it did not find such findings and conclusions to be clearly erroneous."

Petitioner is not contesting what the circuit court found or did not find. Petitioner, prejudiced by the State Supreme Court's due process violation, affecting substantial rights, seriously affecting fairness, integrity, and public reputation of the judicial process (see United

States v. Young, 470 U.S. 1, 15 (1985)), not concluding the law on its finding:

"At the outset we must agree with the petitioner that the record does not reveal that the trial court ever specifically outlined to petitioner the elements of the offense." Gregory v. State, 353 N.W.2d 777, 779 (S.D. 1984).

a violation of SDCL § 23A-7-4(1) / Fed. Rules Crim. Proc. 11 (c)(1). See Broce, supra.

The circuit court infers no prejudice resulted from the trial court's failure to inform petitioner to this Rule 11 (SDCL § 23A-7-4(1)) context, or the South Dakota Supreme Court not concluding the law on their finding that the violation occurred. Petitioner contends they are wrong, and the prejudice is inherent, and the South Dakota Supreme Court holds such.

The court in State v. Schultz, 409 N.W.2d 655, 658 (S.D. 1987) held: "The factual basis requirement, codified at SDCL 23A-7-2, is very closely patterned after Federal Rule of Criminal Procedure 11(f). Thus, to guide our interpretation of SDCL 23A-7-2, we look to federal courts' interpretation of Rule 11(f)," where they quote from United States v. Dayton, 604 F.2d 931, 939 (5th Cir. 1979), from a section ending, "These are core considerations, requirements that manifestly must lie at the heart of any respectable system for (settling as opposed to trying) criminal charges." At Schulz, supra 658.

Yes, they distinguish their interest as guidance in a Rule 11 factual basis conceptualization, but what is examined spoke to the fundamental constitutional truth:

"As we have noted above, the Court held in McCarthy that "prejudice inheres" in failure to comply with Rule 11 in its form at the time of that opinion. It happens, as we have also noted, that all the rule then treated were the values lying at the heart of the rule's concerns: absence of coercion, understanding of the accusation, and knowledge of the direct consequences of the plea. The Court was presented there with an entire failure to address the second of these basic pillars of the rule, and it held the omission fatal. We could not, even if we would, alter that holding. Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967), had gone before

McCarthy, but the Court showed no disposition to apply its "harmless beyond a reasonable doubt" formula for a review of constitutional error to that rule 11 context. Nor, logically can we see how an error inherently prejudicial can be viewed as harmless under any standard of review... Dayton, supra at 939.

All this said, to the end, that court's knowledge is, that the violation is 'inherently prejudicial'. Furthermore, the South Dakota Supreme Court has held, "Where the Legislature adopts the law of another state[9], it is "the general presumption that the South Dakota Legislature intended to enact [the] law with the meaning that [the other state] had previously placed upon [it]." Hubanks v. Dooley, 2016 S.D. 76, ¶19.

The South Dakota Supreme Court failing to conclude the law, per statutory (SDCL § 15-6-52(a)) requirement, is a deprivation of procedural due process affecting the framework within which the Constitutional review proceeds, a plain error. When a state elects to provide appellate review, "The terms on which it does so must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution." Evits v. Lucey, 469 U.S. 387, 393 (1985).

Petitioner was prejudiced by, " the (i) deprivation of a protected interest in life, liberty, or property, and (ii) inadequate state process," (see Reed v. Goertz, 598 U.S. 230, 236 (2023)), the South Dakota Supreme Court not concluding the law on its finding, denying equal protection, "by its arbitrary discrimination...its improper execution of statute through duly constituted agents." See Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000).

Admitting the violation occurred, the burden of proof met, the "guilty plea obtained in violation of the Constitution is void." (See United States v. McCarthy, 394 U.S. 459, 466 (1969)). Petitioner entitled to re-plead and insist on trial.

[9] In this instance adopting the Federal Procedure.

The statutes violated (SDCL §§ 15-6-52(a), 15-6-54(b)) defining the nature of the violation and the consequences of the violation, the legislative will and mandate expressed in unambiguous terms, this Court holds, "Courts presume that a legislature says in a statute what it means and means in a statute what it says there. Cit. Omit. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete. Cit. Omit. See Connecticut Nat. Bank v. Germain, 503 U.S. 249, 253-254 (1992).

The court has left petitioner's habeas petition un-terminated (SDCL § 15-6-54(b)), after finding petitioner met his burden of proof on the Rule 11 violation claim of an 'inherently prejudicial' core concern of the guilty plea procedure.

3rd claim: Gregory v. State, 353 N.W.2d 777 (S.D. 1984) has been overturned by subsequent South Dakota Supreme Court holdings applicable to petitioner.

The circuit court held, "Fails to cite any such cases. Fails to state what was overturned and why relief is appropriate.

"Real notice of the true nature of the charge...the first and most universally recognized requirement of due process..." (Smith v. O'Grady, 312 U.S. 329, 334 (1941)), is inherently and un-separable, part of the right to trial. If you don't have a knowledge and understanding of the charge, competent understanding to aid in one's defense, you don't have a trial as defined by the Constitution. Which the court acknowledges the trial court failed (353 N.W.2d779), to convey to petitioner.

This Court agrees, holding, "We have long held that a plea does not qualify as intelligent unless a criminal defendant first receives real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process." Bousley v. United States, 523 U.S. 614, 618 (1998).

Notice of the nature of the charge, by Constitutional import, an un-separable part of the right to trial, the South Dakota Supreme Court in Monette v. Weber, 2009 S.D. 77, ¶16; Rosen v. Weber, 2012 S.D. 15, ¶11; State v. Bilben, 2014 S.D. 24, ¶14, holds, "In the absence of a *Boykin* canvassing, a "critical step" is missing and the reviewing court does "not consider the additional factors under the totality of the circumstances analysis." Monette, 2009 S.D. 77, ¶16... Rosen v. Weber, 2012 S.D. 15, ¶11.

The totality of the circumstances analysis inapplicable, "new substantive rules generally apply retroactively," (see Welch v. United States, 136 S. Ct. 1257, 1264 (2016)), "that narrow the scope of the criminal statute by interpreting it terms," (see Schriro v. Summerlin, 542 U.S. 348, 351 (2004). The court holds it cannot apply the 'analysis' after its acknowledgement at Gregory, supra 779.

The deciding court had no basis from a silent record from the sentencing court to determine by a preponderance of the evidence that the plea was voluntary. Gregory, supra has been overturned by subsequent South Dakota Supreme Court holdings, the guilty plea invalidated.

4th claim: Petitioner's life sentence inadvertently made a violation of the plea bargain, by a 2005 South Dakota Legislative Action capping the penalty (imprisonment) at fifty years. Applicable to petitioner, with time off for good behavior, petitioner discharged the sentence no later than 21 October 2006, and continued imprisonment violates the United States Constitution's Eighth Amendment.

The circuit court held, "In Gregory v. Class, 1998 S.D. 106, ¶26 the South Dakota Supreme Court held that petitions for coram nobis do not cover issues of cruel and unusual punishment as defined by the Eighth Amendment of the United States Constitution."

In Gregory v. Class, the court held, at ¶26 "We do not believe coram nobis covers issues of cruel and unusual punishment."

That claim was based on the court's holding in Bult v. Leapley, 507 N.W.2d 325, 327 (S.D. 1983), where they held, "A life sentence ...completely eschews the goal of rehabilitation..," and reversed and remanded for re-sentencing. There were similarities in 'age, etc.' component of that claim, and petitioner made an equal protection, similarly situated argument.

In this claim, petitioner is incarcerated in excess of the good time (SDCL § 24-5-1) discharge date of the felony's class maximum imprisonment of fifty years. 'Mistakenly' classified as an Eighth Amendment claim, petitioner did classify it as violating the Fifth, Eighth, and Fourteenth Amendments in the argument section of the initial circuit court filing, and a Fourteenth Amendment violation in the State Supreme Court filing.

The nature of the claim plainly discernable, and, "a pro se filing being liberally construed," (see Erickson v. Pardus, 551 U.S. 89, 94 (2007), "court should have acted in doing justice, the record making plain a right to relief." United States v. Morgan, 346 U.S. 502, 505 (1954).

Petitioner's plea agreement, "subject to interpretation under general contract principles," (see Pucket v. United States, 556 U.S. 129, 137 (2009)), was breached by the Legislative action 2005 S.D. SB43. "That the breach was inadvertent does not lessen its impact." See Santobello v. New York, 404 U.S. 257, 262 (1971).

"The ordinary meaning of the language expresses the legislative purpose," (see Hardt v. Reliance Std. Ins. Co., 560 U.S. 242, 251 (2010)), the legislative action is ameliorative, capping the maximum imprisonment for a Class 1 Felony at fifty years (SDCL § 22-6-1(4)). The

Constitution "does not prohibit applying lower penalties," (see Dorsey v. United States, 567 U.S. 260, 275 (2012)), South Dakota's sentencing complexities affected by "what could happen," (see State v. Reeves, 2008 S.D. 105, ¶11), "the unequivocal and inflexible import of the terms, and manifested intention of the legislation," (see Greene v. United States, 376 U.S. 149, 160 (1964)), is a Class 1 Felony is maximally punishable by a prison term of fifty years, "its language requires this result." See Republic of Austria v. Altman, 541 U.S. 677, 692 (2004).

This Court holds:

"Our precedents make clear that the starting point for our analysis is the statutory text. Cit. Omit. And where, as here, the words of the statute are unambiguous, the "'judicial inquiry is complete'" Cit. Omit. Desert Palace, Inc. v. Costa, 539 U.S. 90, 98 (2003).

The legal maxim sentence with time off for good behavior was discharged. Petitioner's continued confinement violates the Constitution – Fourteenth Amendment – et. al.

CONCLUSION

Petitioner's state post conviction review process dismissed and treated particular claims and errors as non-fundamental, and harmless, that the Court holds can never be treated as such. South Dakota Supreme Court holding there was no error in giving validation to actions the South Dakota Supreme Court condemns, invalidating claims as forfeited when the highest Court holds these particular claim can never be forfeited and require correction. State Supreme Court admitting as a standard practice they violate and ignore statutes.

These are the due process and equal protection violations proven herein State v. Gregory, CR. 7952, Gregory v. State, et. al., where they, "cut constitutional corners," (353 N.W.2d 781), to fairly support their not clearly erroneous findings and conclusions.

For the foregoing reasons, the holding of the South Dakota Supreme Court should be reversed, and petitioner remanded for further proceedings consummate with the Court's decision.

The petition for a writ of certiorari should be granted.

Respectfully, submitted,

_____

Garland Ray Gregory, Jr. - pro se

Dated this _____ day of _____, 2024.