INDEX TO ATTACHED APPENDICIES

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

* * * *

STATE OF SOUTH DAKOTA, **Plaintiff and Appellee,** **vs.** **NICHOLAS STEWART HINES,** **Defendant and Appellant.**	**ORDER DIRECTING ISSUANCE OF JUDGMENT OF AFFIRMANCE** **#30302**

The Court considered all of the briefs filed in the above-entitled matter, together with the appeal record, and concluded pursuant to SDCL 15-26A-87.1(A), that it is manifest on the face of the briefs and the record that the appeal is without merit on the following grounds: 1. that the issues on appeal are clearly controlled by settled South Dakota law or federal law binding upon the states, and 2. that the issues on appeal are ones of judicial discretion and there clearly was not an abuse of discretion (SDCL 15-26A-87.1(A)(1) and (3)), now, therefore, it is

ORDERED that a judgment affirming the Judgment of the lower court be entered forthwith.

DATED at Pierre, South Dakota, this 13th day of November, 2023.

BY THE COURT:

ATTEST:

Janine M. Kern, Acting Chief Justice

Clerk of the Supreme Court
(SEAL)

(Chief Justice Steven R. Jensen disqualified.)

PARTICIPATING: Acting Chief Justice Janine M. Kern, and Justices Mark E. Salter, Patricia J. DeVaney and Scott P. Myren.

APPENDIX A., - pg. 1-2

APPENDIX A., - pg. 1-2, Judgment of Summary Affirmance: *State v. Hines,* 2023 WL 7628850, Appeal No. 30302, Supreme Court of South Dakota, *affirmed* November 11, 2023.

APPENDIX B., - pg. 3-7

APPENDIX B., - pg. 3-7, Judgment of Conviction: *State v. Hines,* Criminal Case No. 66C11000216A0, Yankton County, First Judicial Circuit of South Dakota, March 14, 2023

Appx p.4
(SR 1667)

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

* * * * * * * * * * * * * * * * * *

STATE OF SOUTH DAKOTA, DOCKET NO. CR. 11-216
Plaintiff,

JUDGMENT OF CONVICTION

vs.

NICHOLAS STEWART HINES,
Defendant.

* * * * * * * * * * * * * * * * * *

On or about the 19th day of April, 2011, an Indictment was filed in this Court charging the above named Defendant with Count 1, Homicide as Murder in the First Degree (SDCL 22-16-4) occurring on or about the 9th day of April, 2011, in Yankton County.

On the 8th day of March, 2012, the Defendant was arraigned on said Indictment. The Defendant appeared in person at said arraignment, together with the Defendant's attorney, Mr. Daniel L. Fox, South Dakota, and the State of South Dakota appeared by and through Mr. Erich K. Johnke, Yankton County Deputy State's Attorney. The Court advised the Defendant of all of the Defendant's Constitutional and Statutory rights pertaining to the charge that had been filed against the Defendant, including but not limited to the right against self incrimination, the right to confrontation, and the right to a jury trial. The Defendant pled guilty to the charge of Count 1, Homicide as Manslaughter in the First Degree (SDCL 22-16-15(3); SDCL 22-16-1) contained in the Information.

The Court having determined that the Defendant has been regularly held to answer for said offense; that the Defendant was represented by competent counsel;

The Court having determined that the Defendant has been regularly held to answer for said offense; that said plea was voluntary, knowing and intelligent; that the Defendant was represented by competent counsel; that the Defendant understood the nature and consequences of the plea at the time said plea was entered; and that a factual basis existed for the plea.

It was the determination of this Court that the Defendant has been regularly held to answer for said offense; that the plea was voluntary, knowing, and intelligent; that the Defendant was

Appx. p 5
(SR 1668)

represented by competent counsel, and that a factual basis exists for the plea.

On the 7th day of June, 2012, the Defendant Nicholas Stewart Hines appearing in person and with his attorney, Dan Fox, of Yankton, South Dakota, and the State of South Dakota appeared by and through Mr. Robert Klimisch, Yankton County State's Attorney. After hearing statements of individuals, counsel, and Mr. Hines, the Court sentenced Mr. Hines to 200 years in the South Dakota State Penitentiary, with 100 suspended. Mr. Hines timely appealed this Court's sentencing decision to the South Dakota Supreme Court. This conviction was upheld. On July 10, 2013, Mr. Hines filed a Petition for Writ of Habeas Corpus. A stipulation agreeing to vacate sentence was entered and the original sentence was vacated on July 26, 2022.

It is, therefore, the JUDGMENT of this Court that the Defendant is guilty of Homicide as Manslaughter in the First Degree (SDCL 22-16-15(3); SDCL 22-16-1).

SENTENCE

This matter having appeared before this Court on February 28th, 2023. After hearing statements from individuals and counsel, as well as the Defendant Nicholas Stewart Hines' statement, the Court asked whether any legal cause existed to show why a sentence should not be pronounced. There being no cause offered, the Court thereupon pronounced the following sentence:

ORDERED, ADJUDGED AND DECREED that the Defendant be imprisoned in the South Dakota State Penitentiary for a term of one hundred (100) years with twenty-five (25) years suspended, there to be kept, fed and clothed according to the rules and discipline governing said institution. It is further

ORDERED, ADJUDGED AND DECREED that the Defendant shall receive four thousand three hundred and thirty three (4,333) days credit for time served, which is from April 19, 2011 to February 28, 2023. It is further

ORDERED, ADJUDGED, AND DECREED that the Defendant shall pay no fine but the Defendant shall pay $104.00 in court costs to the Yankton County Clerk of Court. It is Further,

ORDERED, ADJUDGED AND DECREED that Defendant shall pay all court-appointed attorney's fees and expenses (including those

incurred before this court, as well as appellate fees and expenses to the Yankton County Auditor. The amount of those fees and expenses shall be determined by looking at the vouchers filed in this court file and which are also submitted to the Yankton County Auditor. It is further

ORDERED, ADJUDGED AND DECREED that the Defendant shall pay prosecution costs. Those costs include $6,937.23 for Avera Medical Group, $2,517.70 for Starr Enterprises, and $7,475.00 for Midwest Wellness Institute, which amount shall be paid to the Yankton County Clerk of Court. It is further

ORDERED, ADJUDGED AND DECREED that the Defendant shall pay the judgment ordered in 66CIV13-135. It is further

ORDERED, ADJUDGED AND DECREED that Defendant shall abide by the rules and regulations of the Board of Pardons and Paroles, shall sign the required parole agreements, and shall obey all conditions imposed by then even though the conditions may not have been specifically set out by the Court. It is further

ORDERED, ADJUDGED AND DECREED that Defendant shall obey all federal, state, tribal and local laws and be a good law-abiding citizen in all respects. It is further

ORDERED, ADJUDGED AND DECREED that Defendant shall pay all financial obligations as ordered by the court. Defendant shall work out a payment schedule with parole, and if requested, Defendant shall execute a wage assignment form. It is further,

ORDERED, ADJUDGED AND DECREED that Defendant shall remain in the custody of the Yankton County Jail until transported to the South Dakota State Penitentiary by the Yankton County Sheriff's Office.

THE DEFENDANT WAS ADVISED THAT THE DEFENDANT HAS A RIGHT TO APPEAL FROM THIS ORDER/JUDGMENT WITHIN 30 DAYS AFTER IT IS SIGNED, ATTESTED AND FILED, THAT IF THEY WAIT MORE THAN 30 DAYS IT WILL BE TOO LATE TO APPEAL, AND THAT IF THEY ARE INDIGENT, THIS COURT WOULD APPOINT AN ATTORNEY TO HANDLE THAT APPEAL FOR THEM.

Appx. p. 7
(SR 1670)

Dated this ___ day of March, 2023, at Yankton, South Dakota.

3/14/2023 11:14:40 AM

BY THE COURT:

Hon. Patrick Smith
Circuit Court Judge

Attest:
Fields, Susan
Clerk/Deputy

ATTEST:

Jody L. Johnson
Clerk of Court
(SEAL)

APPENDIX C., - pg. 8-9

APPENDIX C., - pg. 8-9, Order Denying Rehearing: Appeal No. 30302, Supreme Court of South Dakota, January 29, 2024.

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

* * * *

STATE OF SOUTH DAKOTA, Plaintiff and Appellee, vs. NICHOLAS STEWART HINES, Defendant and Appellant.	ORDER DENYING PETITION FOR REHEARING #30302

A petition for rehearing in the above cause having been filed November 27, 2023, and no issue or question of law or fact appearing to have been overlooked or misapprehended, and more than fifteen days having elapsed therefrom and no written statement having been filed with the Clerk of this Court by a majority of the justices requesting a rehearing, now, therefore, in accordance with the Rehearing Procedure Rule of this Court, the petition for rehearing is denied.

DATED at Pierre, South Dakota, this 29th day of January, 2024.

BY THE COURT:

Janine M. Kern, Acting Chief Justice

ATTEST:

Clerk of the Supreme Court
(SEAL)

(Chief Justice Steven R. Jensen disqualified.)

PARTICIPATING: Acting Chief Justice Janine M. Kern, and Justices Mark E. Salter, Patricia J. DeVaney and Scott P. Myren.

APPENDIX D., pg. 10-20

APPENDIX D., pg. 10-20, Appellant's Petition for Rehearing: Appeal No. 30302, Supreme Court of South Dakota,

Appx. p.11

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

NO. 30302

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

vs.

NICHOLAS STEWART HINES,
Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT
YANKTON COUNTY, SOUTH DAKOTA

HONORABLE PATRICK SMITH
Circuit Court Judge

APPELLANT'S PETITION FOR REHEARING

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PRELIMINARY STATEMENT

Throughout this Petition for a Rehearing under *SDCL § 15-25-3* the Defendant/Appellant, Nicholas Stewart Hines is referred to as "Defendant". Plaintiff/Appellee is referred to as "State". The Defendant's July 10th, 2023 Appellant's Brief is denoted as "*Def.B.*". The State's August 14th, 2023 Appellee's Brief is denoted as "*St.B.*", The Defendant's September 6th, 2023 Reply Brief is denoted as "*Def.Rply.B.*". The Defendant will refer to the settled record as "SR" wherever possible (as the pro se Defendant does not have "SR" case file access) or will cite the document source.

JURISDICTIONAL STATEMENT[1]

Defendant filed a Petition for Writ of Habeas Corpus in Yankton County Civil File No. 66CIV13-000262 entitled *Nicholas Stewart Hines v. Douglas Weber, SR:1066.* On May 21, 2021 the Defendant's habeas attorney, Ashley Miles-Holtz, negotiated a plea agreement and stipulation with the State. *Def.B., Appx. F p55-57.* On May 24, 2021 the habeas court, Hon. Jerome Eckrich, was notified the Defendant and the State had reached an agreement *Def.B., Appx. F p58-59.* On June 18, 2021 the habeas court entered an Order Granting Habeas Relief and Vacating Sentence. *SR:1066-68.* The Hon. Patrick Smith was appointed to resentence the Defendant in reopened Criminal File No. *66C11000216A0. SR:1109.* On September 29, 2022 the circuit court took "judicial notice" of the habeas file as it had "looked at the whole file because [it] was directed to do so." *SR: 1731-57, MT 12:6-13:8,*

[1] No 'NEW facts' are being asserted -- All of the facts here are/were within the parties appeal briefs or part of the SR. **Critically**, since the circuit court gave an "oral order" taking "judicial notice" of the Defendant's entire Habeas File *66CIV13-000262* (see *Def.Rply.B., p. 3-7)* -- this Court has/had jurisdiction to consider all of the filed habeas documents appendix'd to the *Def.B.* and arguments made from them – again no NEW facts are being asserted.

14:15-15:7; Def.Rply.B. p. 3-6. The State, Defendant and the circuit court unanimously agreed that the circuit court's oral order taking "judicial notice" of the habeas file *CIV 13-262* was sufficient for the record and no written order was needed. *SR:1731-57, MT 12:6-13:8, 14:15-15:7; Def.Rply.B. p 3-6.* On February 28, 2023 the Defendant appeared before the circuit court for sentencing. The State argued the crime was "murder", the Defendant was a "murderer" and repeatedly asked the circuit court to impose a 200 year sentence. *St.B p 11; Def.B. p 17-18; SR: 1894-907; ST 109:21-24, 110:6-9; 121:7-23; 122:19-22.* The circuit court imposed a 100 year sentence. *SR: 1664.* On March 14, 2023 the circuit court entered its written Judgment of Conviction and Sentence *SR 1663-66.*[2] On March 24, 2023 the Defendant filed a notice of appeal. *SR:1672.* On July 10th, 2023 Defendant's appellate counsel, Mr. Whalen, filed a *Korth* brief *Def.B.* and raised no issues – the Defendant raised 6 issues in Part B of the brief *Def.B. p 5-27.* On August 14th, 2023 the State filed its brief *St.B.* On September 6th, 2023 the Defendant filed his reply brief *Def.Rply.B.* On November 7th, 2023 this Court was scheduled to review the Defendant's appeal. On November 13th, 2023 this Court summarily affirmed the pursuant to *SDCL § 15-26A-87.1(A)(1) and (3); State v. Hines,* 2023 WL 7628850. This Court has jurisdiction to hear the Defendant's petition for a rehearing pursuant to *SDCL § 15-25-3.*

LEGAL STANDARD

"Any party may petition for a rehearing upon a decision, in the event that any issues or question of law or fact appears to have been over looked or misapprehended by the Court . . ." *SDCL § 15-25-3; 15-30-4.* This Court determined the Defendant's appeal was without merit on the grounds: 1. that the issues raised on appeal are clearly controlled by South Dakota law or federal law binding upon the states, and 2. that the issues on appeal are ones of judicial discretion and

[2] On March 13, 2023 an Order Denying Motion of Probable Cause (in the Defendant's habeas action *CIV 13-262*) was entered by this Court in *Case No. 30182.*

there clearly was not an abuse of discretion and affirmed pursuant to *SDCL § 15-26A-87.1(A)(1) and (3).*

CAUSE FOR REHEARING – ARGUMENT

The Defendant asks the Court find cause within the following issues.

ISSUE 1. Whether the State Violated the Terms of the 2012 Plea and 2021 Plea Agreement and Stipulation

Intro.

All facts, law and citations of hearings or documents herein this argument are affirmatively contained within the Defendant and State's appellate briefs at: ***Def.B. p 14-18, Appx C., E., F.; St.B. p 15-21; Def.Rply.B. p 3-6.***

This was a remanded case. It was remanded due to a 2021 stipulation of constitutional errors with **two** existing 'plea agreements' – one in 2012 and one in 2021. ***Def.B. p 14-18, Appx F. p 55-57; Def.Rply.B. p 3-4.*** The stated plea agreements and stipulation preceded 2022-23 remanded criminal and the circuit court's jurisdiction. ***Def.B. p 14-18, Appx F. p 55-57; Def.Rply.B. p 3-4.***

The Defendant will affirmatively show that as a factual matter the State materially breached the plea and stipulation agreements within the **SR** - (1) is contrary to well established law of South Dakota and federal law binding upon the state and, (2) the State's breaches have nothing to do with judicial discretion.

1. Potentially Over Looked FACTS

(1) The Settled Record Contains the Habeas File CIV 13-262

*This is a crucial fact that may have been over looked affecting the scope of the *SR.*

The *St.B. p 15-21* argued that this Court *did not* have jurisdiction to consider documents in the *Def.B. Appx* originating from the habeas file *CIV 13-262.*

St.B. p 17 states, "Notably, Defendant's arguments regarding habeas negotiations should be rejected. During Defendant's statements to the circuit court *at sentencing* and *throughout his brief on appeal,* he argues that the State violated a stipulation that *included an agreed to sentencing cap."*

Def.Rply.B. p 3-4 stated, "At the September 29th, 2022 motions hearing the circuit court took *"judicial notice of the whole file [CIV 13-262] because it was directed to do so." MT 12:6-13:4, 14:15-15:6. St.B. 15-19* also fails as – the State- repeatedly agreed with the circuit courts oral order which took "judicial notice" of the habeas file *MT 12:6-13:8* – and agreed that- no written order was needed. *MT 14:15-15:7. See Mendenhall v. Swanson,* 2017 SD 2, P9 regarding the dynamics of judicial notice and its application."

The documents within the *Def.B. Appenxdix* from *CIV 13-262* are clearly part of the **SR** – and specifically relevant here- ***Def.B. Appx. P 55-57*** which is screenshots of emails and text messages the 2021 plea deal negotiations and terms - agreed to by the State.

(2) No Procedural Bars to Review Exist Regarding the States 2022-23 Agreement Breach(s).

*This is a crucial issue that may have been over looked or misapprehended.

The *St.B. p 15-21* cited all kinds of legal and factual bars in an attempt to prevent review of the Defendant's appeal issues and his appendixes. However the State's assertions did not apply as a matter of fact and law.

Def.Rply.B. p 3 states, "The St.B 15-21 arguments are not legally or factually relevant. (1) the SR contains the entire habeas file (2) the Def.B. does not ask the Court to directly 'rule' on any habeas issues (3) the Def.B. involve issues arising in *remanded direct proceedings* –after- the

habeas (4) the circuit court's jurisdiction originated from the habeas court SR 1066-68 (5) habeas issues were relevant sentencing considerations as "it is well settled the range of evidence that may be considered at sentencing is extremely broad." *State v. Arabie,* 2003 SD 57, P21."

(3) Factual Merits States Material Breaches of the 2012 Plea and 2023 Plea and Stipulation

*The factual merits of the State's material breaches may have been overlooked.

i. 2012 Plea Breach (Def.B. p 14-16)

The Defendant read verbatim - his 2012 manslaughter plea's factual basis of an *"accidental"* shooting at the 2023 sentencing hearing **Def.B. p 13, ST 150:20-152:8.** The State breached the factual basis of an *"accidental"* shooting and the basic elements of the offense when it argued the crime was "murder" and that the Defendant was a "murderer". **Def.B. p 14-16; ST 109:21-24, 110:6-9.** The circuit court also disregarded the factual basis and elements of the 2012 plea to manslaughter by stating "Who takes a gun to a confrontation with the *intent* to win an argument, as opposed to the *intent* to use it?"[3] **Def.B. p 16; ST 204:5-22.**

ii. 2021 Plea and Stipulation Breaches (Def.B. p 17-18, Appx p 55-57; Def.Rply.B. p 4-5)

Def.B. p 17 states, "The stipulation and agreement included the following:

1. A stipulation granting the habeas for the limited purpose of a resentencing hearing.
2. Nick would agree to waive his appeal rights, except as to an appeal of the new sentence, including, any illegal sentence, any constitutional violation, and any jurisdictional issue.
3. The parties agree to a new PSI with the old PSI being disregarded by the Court.
4. The prosecution agrees to not argue, claim, nor insinuate that Nick is a cold-blooded murderer.
5. The current cap is 40-60 years with credit for time served."

[3] The **Def.B p 4-6,** Issue 1.- also argued that these comments made by the circuit court questioning "intent" was an 'abuse of discretion' a sentencing citing ***State v. Mitchell, 2021 SD 46,*** ¶*32* "A sentencing court *may not* disregard the factual basis statement or overlook the established conduct supporting the essential elements of the offense."

Material breaches of the agreement:

(1) The State contradicted the stipulation order. **Def.B. p18, Appx C p15-18; Def.Rply.B. p 5-6.**

(2) The State argued against a new PSI. **Def.B. p 18; Def.Rply.B. p 5-6.**

(3) The State stated the crime was "murder" and the Defendant was a "murderer". **Def.B. p 15, 18; ST ST 109:21-24, 110:6-9**

(4) The State repeatedly asked the circuit court to impose a 200 year sentence, far in excess of the agreed cap of 40-60 years. **Def.B. p 18, Appx. F. p55-57.**

(4) The Defendant Objected to the State's Material Breaches During 2023 Sentencing

*This Court may have over looked the sentencing record and objections within it.

St.B. p 17 states, "During Defendant's statements to the circuit court at sentencing and throughout his brief on appeal, he argues that the State violated a stipulation that included an agreed to sentencing cap. DB; SR:1963."

Def.Rply.B. p 4-5 states, "To preserve a claim for appeal that the prosecution breached the terms of a plea agreement, a defendant *must* make a timely objection at sentencing. *State v. Jones,* 2012 SD 7, ¶7 (citing *Puckett v. U.S.,* 556 US 129, 142-43 (2009)). The Defendant did. *ST 171:14-181:8.*

The Defendant asked the court if it would take "notice of Ms. Holtz last affidavit in the [habeas]case that was filed" and then read the 'screenshots' regarding the *terms* of the "new plea agreement" she negotiated with the State –and that- all those *terms* were violated. *ST 172:181:8, Def.B 17-18 Appx F. p 55-57*

St.B 17-18 misconstrues the "new plea agreement", the State's "sustained objection" and judge's comments at *SR:1964.* After the State's "objection" the Defendant stated his "*point*" was related to "*direct proceedings*" and "*relevant*". *SR:1964.* The court replied "Make your *point.*" *ST*

179:25. The Defendant stated, "In criminal proceedings before this Court, Mr. Klimisch argued against *all the terms* of the plea deal. Like you said you are not ruling on that, including agreeing to a new PSI." *ST 180:1-4.*

The State did not object to that –or- the *23 times* the plea 'deal' was mentioned. *ST 172:6-181:6.* Notably, the State did not object when the Defendant quoted –verbatim- its testimony from a prior hearing – where *after* the Defendant filed a Affidavit for Relief *Def.B. Appx E. p23-29* – it argued to keep the plea deal and stipulation. *ST 176:19-178:8 (see CIV 13-262, June 28, 2022 hearing MT 8:4-9:17).*"

2. Potentially Over Looked or Misapprehended LAW

*The Court may have misapprehended the state and federal law and constitutional violations applicable to the above facts cited within the appellate briefs.

Def.B. p13 states, ""Once an accused pleads guilty in reliance upon a prosecutor's promise to perform a future act, the accused's due process rights demand fulfillment of the bargain." *State v. Waldner,* 2005 SD 11, ¶13, 692 NW 2d *at 191.* The State must fulfill its obligations under the express terms of the plea agreement and its implied obligation of good faith. *See State v. Morrison,* 2008 SD 116, ¶11, 759 NW 2d *at 121-22.* "When the government fails to fulfill a material term of a plea agreement, the defendant may seek specific performance or may seek to withdraw his plea." *State v. Bracht,* 1997 SD 136, ¶6, 573 NW 2d 176, 178. "In order to restore him to the position he would have been in before the State's breach, [the Defendant] must be sentenced by another judge." *Id.¶13.* Failure of one party to substantially perform its contractual obligations may excuse the other party's performance. *Lepi Enterprises Inc. v. National Service Corp.,* 440 3d 937 (8th Cir. 2006)."

Def.B. p. 16 stated that the State arguing "murder rather than manslaughter" . . . "violated the Defendant's Fifth, Sixth and Fourteenth Amendment rights to due process and a jury trial to the basic elements of the charge."

Def.B. p. 16 states the Defendant seeks to withdraw his plea due to repeated bad faith breaches of his 2012 and 2023 and violations of his constitutional rights.

Def.B. p. 17 argued that the State had forfeited any kind of appellate waiver pursuant to *Garza v. Idaho,* 139 S. Ct. 738, 744-45 (2019).

Def.Rlpy.B. p 4 states, ""To preserve a claim for appeal that the prosecution breached the terms of a plea agreement, a defendant *must* make a timely objection at sentencing. *State v. Jones,* 2012 SD 7, ¶7 (citing *Puckett v. U.S.,* 556 US 129, 142-43 (2009))."

ISSUE 2. The Defendant's Other Issues on Direct Appeal

The Defendant's other issues involve facts and law that are contrary to the law of this state and federal law that is binding upon this state. There are numerous constitutional issues asserted. Many have nothing to do judicial discretion, such as vague laws or jurisdiction. The Defendant hopes this Court will look at his issues and reference their cited law and facts within the **SR** as the Court may have overlooked the fact that the Defendant's habeas case *CIV 13-262* was part of the **SR.**

One such issue is the Defendant's jurisdictional issue in **Def.B. p 21-22.** *Wharton v. Vaughn,* 371 F.Supp.3d 195 (3d Cir. 2019) found that habeas relief – constitutional errors- cannot be stipulated. *Id.* cited numerous authorities from the US Supreme Court, Federal Courts of Appeals, Federal District Courts and a state court – which all held that habeas relief cannot be stipulated. This highly prejudicial due process issue is structural to the entire remanded criminal proceedings as they originated from an illegal order. That is relevant to this appeal.

As this Court has affirmed pursuant to *SDCL § 15-26A-87.1(A)* the Defendant has exhausted his direct appellate claims in state court and persevered them for *§2254* federal habeas review of their merits.

CONCLUSION

The Defendant has shown cause that this court may have misapprehended or over looked facts and law within the existing record that are contrary to state law and federal law binding on the states and had nothing to do with the circuit court's discretion. The Defendant respectfully asserts that a rehearing is appropriate.

WHEREFORE,

The Defendant respectfully requests this Court grant a rehearing.

Respectfully submitted to the Court via SDDOC legal mail this 20 day of November 2023.

Nick Hoe

Defendant

Tyler Tycz

Notary

Subscribed and sworn to me this
20 day of November, 2023

TYLER TYCZ
NOTARY PUBLIC
SOUTH DAKOTA
SEAL SEAL

My Commission Expires June 10, 2025

APPENDIX E., - pg. 21-56

APPENDIX E., - pg. 21-56, January 16, 2023 Sentencing Memorandum (SR 1547-1581): *State v. Hines,* Criminal Case No. 66C11000216A0, Yankton County, First Judicial Circuit of South Dakota.

*This Document has two parts:

(1) Trial Counsel's Arguments **Appx pg. 22-30, SR 1547-1555**

(2) Petitioner's Pro Se Sentencing Argument **Appx. pg. 31-56, SR 1556-1581**

STATE OF SOUTH DAKOTA) :SS	IN CIRCUIT COURT
COUNTY OF YANKTON)	FIRST JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, Plaintiff,	FILE NO. 66C11000216A0
vs.	SENTENCING MEMORANDUM
NICHOLAS STEWART HINES, Defendant.	

PRELIMINARY MATTERS

The Defendant in the above entitled matter submits this Sentencing Memorandum in an effort to aid the Court in its determination of a fair, impartial, and judicious sentence for the above named Defendant. This memorandum is intended to be a supplement to any evidence and testimony heard by the Court and to the written evidence, testimony, letters of support, and/or argument to be provided to the Court at the time of the sentencing in this matter. As this Court is aware, the Defendant entered his plea of guilty to one count of first degree manslaughter in connection with the death of Brianna Knoll (Brianna) and was previously sentenced by the Honorable Glen Eng, Circuit Court Judge, First Judicial Circuit, State of South Dakota. Subsequent to that plea and sentencing, the Defendant successfully pursued habeas corpus relief as to the sentencing portion of his case. *Hines v. Young, 66CIV13-262.*

SENTENCING CONSIDERATIONS

As this Court is very much aware, there are a number of aspects to the creation and imposition of a fair, impartial, and judicious sentence in any given criminal case. A sentencing court is required to give fair and impartial consideration to a number of factors in

accomplishing the above task. Further, such consideration must be free from emotion and not be the product of inflamed passions due to certain evidence or experiences which are personal in nature and removed from the legally permitted considerations.

The Defendant in this case plead guilty to one count of first degree manslaughter in connection with the death of Brianna. During the plea hearing, the Defendant admitted certain relevant facts regarding his case to establish the factual basis for the plea. The factual basis facts, however, were insufficient to support a conviction of first or second degree murder. At the time of the Defendant's plea, Judge Glen Eng accepted a factual basis for the plea of guilty to a first degree manslaughter charge and relied upon sufficient evidence to support that charge, rather than a charge of either first or second degree murder. Further, the Defendant was adamant when he entered his plea to the first degree manslaughter charge that the shooting of Brianna was accidental. In addition, there is substantial evidence to show that the Defendant was suffering from mental health conditions and self-imposed mitigating factors at the time he committed the manslaughter. The State may advocate that the Defendant has not accepted culpability and responsibility for the death of Brianna, but this assertion is simply wrong in all respects. This is so because the Defendant has accepted his responsibility herein by his admissions in open court, by his plea of guilty, and has thereby acknowledged his criminal conduct. Previously, as shown by the habeas corpus proceedings, the Defendant was wholly unprepared to

proceed to his sentencing hearing. Now, however, after having the opportunity to prepare for sentencing, the Defendant is ready to stand before the Court to accept the consequences of his actions based upon a full and complete consideration of the circumstances associated with his case, rather than the emotionally driven and charged circumstances surrounding his previous sentencing hearing.

A. Governing law.

A sentencing court is obligated to consider many factors when fashioning an appropriate sentence, but the South Dakota Supreme Court has made it abundantly clear that "... [i]t is the duty of a sentencing court to insure that the punishment 'fit[s] the offender and not merely the crime.' ..." *State v. Beckley*, 2007 SD 122, ¶32, 742 NW2d 841. Furthermore, the Supreme Court has directed that the "...[t]he primary criterion in sentencing is good order and protection of the public and society, and all other factors must be subservient to that end." *Id.*, at ¶32. It is well settled law that "... [s]entencing courts possess broad discretion within constitutional and statutory limits to determine the extent and kind of punishment to be imposed ..." and in exercising this discretion the sentencing court "... should consider the traditional sentencing factors of retribution, deterrence—both individual and general—rehabilitation, and incapacitation, without regarding any single factors as preeminent over the others." *State v. Deleon*, 2022 S.D. 21, ¶17, — N.W.2d. —. Moreover, it is paramount that the above factors "... are 'weighed 'on a case-by-case basis' depending on the

circumstances of the particular case." *Id.*, at ¶17.

In order to comply with the above duties and impose an appropriate sentence in this case, the Court is obligated to acquire a thorough and complete knowledge and acquaintance with the character and history of the Defendant. *Beckley*, 2007 SD at 122, ¶32. In this respect, the Supreme Court has held that

> ... a sentencing court should consider both the defendant appearing before it as well as 'the nature and impact of the offense. ... [I]n this regard, ... 'the sentencing court should acquire a thorough acquaintance with the character and history' of the defendant by studying the 'defendant's general moral character, mentality, habits, social environment, tendencies, age, aversion or inclination to commit crime, life, family, occupation, and previous criminal record.' ... Additionally, a sentencing court must consider 'evidence tending to mitigate or aggravate the severity of a defendant's conduct and its impact on others.'

Id., at 18. Again, at least on a par with all other sentencing criteria and, perhaps, an over-arching factor, is the apparent principal that the punishment should fit the offender and not merely the crime. *Beckley*, 2007 SD at 122, ¶32.

Additionally, although the case law permits the Court broad discretion in rendering a sentence, that discretion is not unfettered. Statutory law limits victim impact statements, whether oral or written, to a person who fits the statutory definition of a "victim." *SDCL 23A-27-1.1.* A victim is defined as

> ... the actual victim or the parent, spouse, next of kin, legal or physical custodian, guardian, foster parent, case worker, victim advocate, or mental health counselor of any actual victim who is incompetent by reason of age or physical condition, who is deceased, or whom the court finds otherwise unable to comment.

Id. "Next of kin" is defined as "... [t]he person or persons most closely related to a decedent by blood or affinity." *Black's Law Dictionary, 8th Ed.*, p. 1070. Consequently, any person who is not related to Brianna by blood is prohibited under the law from providing an oral or written impact statement or testimonial evidence at sentencing. The statutory limitations clearly extend to spouses of relatives and appear to also exclude even blood-related cousins. See, *State v. Charles*, 2017 S.D. 10, ¶34, 892 N.W.2d. 915.

B. Habeas corpus support for sentencing.

As this Court knows, the Defendant successfully pursued habeas corpus relief and was ordered to be re-sentenced. It is the Defendant's position that one of the major reasons for the relief secured in the habeas corpus proceedings was the sentencing errors committed by the original sentencing court. At the original sentencing the court allowed numerous and sundry comments and statements from people who were unrelated to Brianna or her family and who had only a friendship or work relationship with her. This action by the sentencing court was clearly in contravention of SDCL 23A-27-1.1. Moreover, the habeas corpus court clearly viewed the sentencing court's action as error because it approved the relief regarding sentencing proposed by the parties. Furthermore, the State admitted the sentencing errors made by the original sentencing court in its various responses to the Defendant's Second Amended Petition for Writ of Habeas Corpus and in the resolution of the habeas corpus proceeding. In spite of this error, the State seeks, yet again, to

offer to this Court comments and statements that are not permitted under SDCL 23A-27-1.1. There are approximately 22 persons who have submitted written statements or whom the State intends to solicit oral statements from at the re-sentencing hearing who are statutorily prohibited from making such statements. These people were not permitted to provide oral or written statements at the first sentencing and nothing has changed that would permit them to do so now. While the State may seek to perpetuate a costly sentencing error, this Court should not follow suit.

In addition, the Defendant's Second Amended Petition for Writ of Habeas Corpus recites numerous grounds for relief from his conviction. Such grounds include ineffective assistance of counsel claims, claims as to the inappropriateness of the PSI report prepared by the assigned court services officer, errors in the award of restitution, evidentiary issues from the sentencing hearing, errors relative to the content of the PSI report, use of uncharged or unproven evidence at sentencing, breach of the plea agreement claim, loss of material and essential evidence since the initial charges against the Defendant, and other constitutional and due process claims relative to the prosecution of the Defendant. These claims, while not all litigated, are considerations which are relevant to the Court in fashioning a fair sentence in this case. - Sentencing recommendation -

C. PROPORTIONALITY OF SENTENCES.

In the Second Amended Petition for Writ of Habeas Corpus, counsel for the Defendant analyzed the various sentences for persons convicted

of first degree manslaughter as shown by a South Dakota Unified Judicial System Sentencing History Report (UJSSHR) between the years of 2008 and 2012. *Hines v. Young, 66CIV13-262, Second Amended Petition for Writ of Habeas Corpus, p. 35, ¶53.* During the aforesaid time frame there were 32 sentences for first degree manslaughter which ranged from 6 years to approximately 80 years with the average sentence being 40 years. *Id.* Subsequent to 2012, the UJSSHR shows that there were approximately 36 sentences for first degree manslaughter with sentences ranging from 15 years to 110 years, without accounting for the suspended portions of at least 16 sentences, with the average sentence being 54.08 years. Sixteen of the post 2012 sentences for first degree manslaughter were sentences ranging from 20 years to 99 years with suspended sentences from 7 to 49 years. Based upon the UJSSHR, it appears that the average sentence in first degree manslaughter cases ranges from 40 to 54 years. It is also manifestly clear from the UJSSHR that the historical sentences for first degree manslaughter are not the equivalent of life sentences. The Defendant does not dispute that each of the cases in the UJSSHR were judged on their own facts, circumstances, and sentencing criteria pursuant to the authority cited herein. The Defendant is confident that this Court will do likewise in this case and impose a sentence that fits him as well as his crime.

D. Defendant's Arguments.

Attached hereto and incorporated herein are copies of the legal arguments made by the Defendant in regard to his sentencing.

CONCLUSION

In the end, the sentence imposed by the Court herein must be based upon evidence and the circumstances associated with the events that occurred before, during, and after the criminal conduct. The crime committed by the Defendant is serious, but he has accepted responsibility for same by virtue of his plea of guilty. The sentence cannot be the product of inflamed passions or emotion, but must be based not only upon the events that transpired, but also upon the persons involved, the circumstances associated with the crime, and the Defendant's character and other personal attributes.

Dated this 16th day of January, 2023.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the above and foregoing SENTENCING MEMORANDUM on the attorneys for the Plaintiff as their e-mail addresses as follows:

Robert Klimisch
Yankton County State's Attorney,
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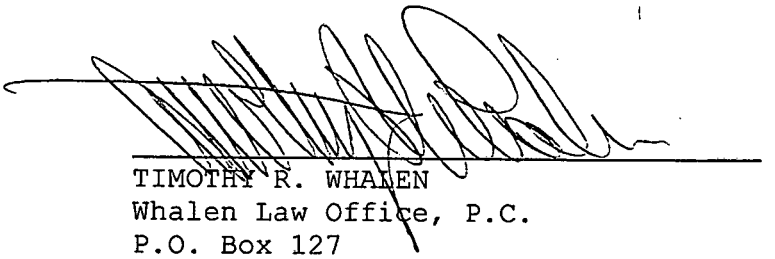
by the UJS Odyssey System on the 16th day of January, 2023, at Lake

Appx. p. 30
(SR 1555)

Andes, South Dakota.



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ISSUE

South Dakota's Homicide Scheme Violates Due Process and Sixth Amendment Rights.

This is a multi faceted error with two parts

1. A. Factual Basis of Manslaughter can be prosecuted and sentenced Identically to Murder.

1. B. SDCL 22-6-1 is vague and does not sufficiently specify the range of sentences for a Class C Felony. (the punishment for Manslaughter)

INTRO

Mullaney v. Wilbur, 421 U.S. 684 (1975)

703-704 "It is an intolerable result in a society where, it is far worse to sentence one guilty only of manslaughter as a murderer than to sentence a murderer for the lesser crime of manslaughter."

South Dakota's homicide scheme arbitrarily produces this result for those guilty of Manslaughter

In South Dakota First-Degree Manslaughter and First and Second-Degree Murder all statutorily authorize punishment of a life sentence. Only First-Degree Manslaughter (can) carries a sentence of less than life.

Under this homicide scheme, regardless of whether a defendant is found guilty by a jury or pleads guilty to First-Degree Manslaughter up to First-Degree Murder the defendant can by statute receive a life sentence. Since there is NEVER an INCREASE in the AUTHORIZED STATUTORY PUNISHMENT a "defendant has no right to a jury determination of the FACTS a judge deems relevant" at SENTENCING.

U.S. v Booker, 543 U.S. 220 (2005)

HN5 If a state makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact-- no matter how the state labels it -- must be found by a jury beyond a reasonable doubt. The characterization of a fact or circumstance as an "element" or a "sentencing factor" is not determinative of the question who decides judge or jury.

HN8 The U.S.S.Ct. has never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range.

HN9 [when] a trial judge exercises his discretion within a defined range, the defendant has **no right** to a jury determination of the facts the judge deems relevant.

South Dakota's homicide scheme evades DUE PROCESS and SIXTH AMENDMENT jury determination of ELEMENTS because **all homicides** can carry a life sentence, there is NEVER an "INCREASE" in the "AUTHORIZED STATUTORY PUNISHMENT

If South Dakota was to 'grade' the maximum authorized Statutory punishments for First and Second Degree Murder and First-Degree Manslaughter so that each lesser included offense had a lesser maximum penalty; then a defendants right to DUE PROCESS and SIXTH AMENDMENT right to a jury determination of facts (not a judge) that "increased a defendants authorized punishment" would be restored.

Again, if each homicide statute contained a progressively greater maximum penalty, then any fact that "increased a defendants authorized punishment" (whether the "fact" be an "element" or "Sentencing factor") would have to be found by a jury prior to Sentencing rather than, a judge during the Sentencing phase of proceedings.

All South Dakota would have to do to accomplish the above is lower the maximum penalty for First-Degree Manslaughter. In 2021 H.B. 1185 attempted to lower First-Degree Manslaughter to a 25 year Maximum penalty.

ISSUE 1.A.

Factual Basis of Manslaughter can be Prosecuted and Sentenced Identically to Murder.

1561

ACCIDENTAL DISCHARGE

FACTUAL BASIS

PURSUANT TO RULE 11(f) A "COURT MAY NOT DISREGARD THE FACTUAL BASIS" STATE V. MITCHELL AT 33.

THE "FACTUAL BASIS" IN THIS CASE, WAS AN ACCIDENTAL DISCHARGE OF A WEPON. (See. Plea Transcript 2012)

The State DID NOT OBJECT to the "Factual Basis" (Plea TR, 2012)

DURING HABEAS PROCEEDINGS, THE STATE MADE NO OBJECTION to my Habeas Petition, thereby implicitly making no disargeement with its contents. (See June 1, 2021 Habeas Hearing Transcripts) This includes my "Factual Basis".

During Habeas proceedings, the State DID NOT OBJECT to the appointment of an Accidental Discharge Expert, Dr. Enoka.

Therefore,

The State should be "Collaterally Estopped" from making any assertions at sentencing regarding my "Factual Basis" because it did not object to it in prior litigation (Habeas)

AND

Any "contradiction" to my "Factual Basis" would Violate my Plea.

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FACTUAL BASIS

1562

~~failure prejudiced Petitioner to the extent that he did not receive a fair sentence. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984).~~

~~29. Petitioner's trial counsel was ineffective for failing to object to the trial court's vague order of substantial restitution.~~

~~30. Petitioner's trial counsel was ineffective for failing to request a restitution hearing.~~

~~31.~~ Petitioner's trial counsel was ineffective for failing to object to the sentence based on the breach of plea agreement by the trial court and prosecution, was error.

- "Plea agreements are contractual in nature and should be interpreted according to general contractual principles." *U.S. v. E.V.*, 500 F.3d 747, 751 (8th Cir. 2007).
- "The disposition of criminal charges by agreement between the prosecution and the accused, sometimes loosely called 'plea bargaining' is an essential component of the administration of justie. Properly administered, it is to be encouraged." *Santobello v. New York*, 404 U.S. 257, 260 (1971).
- At the change of plea hearing, Petitioner, in open court, provided the following factual basis to support his guilty plea: *See* PT 12:1-25; 13:1-19.

STATE V. MITCHEL AT *33 ELEMENTS

AT PLEA HEAR * NO OBJECTION WAS MADE BY THE STATE. TO THIS FACTUAL BASIS

i. The Court: And were you in Yankton County on April 9, 2011?

ii. The Defendant: Yes, Your Honor.

iii. The Court: And did you have a dangerous weapon?

iv. The Defendant: Yes, Your Honor.

v. The Court: And what was that?

vi. The Defendant: It was a gun.

vii. The Court: And as a result of you using that gun, what happened?

viii. The Defendant: May I speak freely, Your Honor?

ix. The Court: Pardon?

x. The Defendant: May I speak freely?

xi. The Court: Yes, you may.

xii. The Defendant: There was an accidental discharge of a weapon, but then I - - a moment after that, I took a few steps and attempted on my own life. I was not aware of that it was a mortal wound until I woke up in the hospital a few days later. As a result - - and I was informed that my girlfriend, Brianna, was no longer with us. And that's what I understand to be as far as what happened.

xiii. The Court: And you understand that it was that discharge of that weapon that killed Breanna?

xiv. The Defendant: Yes, Your Honor.

xv. The Court: That even though that that was accidental, it was your action that resulted in her death?

xvi. The Defendant: Why I decided to go forward today was that I understand that I need to be responsible for what has happened regardless of my intent. It was very irresponsible to, you know, go forward to have a weapon out, and that fact that it went off incidentally (sic) no matter what the odds are or whatever that took her life, I need to accept responsibility for it, and I also want to say

that I feel this charge is appropriate due to the fact that I just have to put my trust in the court with deciding what is necessary for me from here on out.

xvii. The Court: The court will find that there is a factual basis for the plea and the plea will be entered, and the admission will be filed. You may be seated.

- "A factual basis is required before a circuit court can enter a judgment on a guilty plea." *State v. Berget*, 2013 S.D. 1, ¶ 39, 826 N.W.2d 1, 15. *See also* SDCL § 23A-7-2.
- "Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned." *Santobello v. New York*, 404 U.S. 257, 261 (1971).
- This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. ~~Those circumstances will vary, but a constant factor is that when a plea rests in~~

U.S. v. Boatner, 966 F. 2d 1575 (11th Cir. 1995); Pursuasive Presedent

"The solemnization of a plea agreement does not preclude the government from disclosing pertinent information to the sentencing court. See U.S. v. Jimenez, 928 F. 2d 356 (10 th Cir. 1991). That rule notwithstanding, government can enter into a binding agreement with a defendant to restrict the facts upon which the substansive offense is based. See U.S. v. Nelson, 837 F. 2d. at 1522-1525. Thus the plea agreement's stipulation that only two ounces of cocaine would serve as the factual predicate for determining Boatner's sentence obligates the government to strict compliance. Because the presentence investigation report "establishes the factual and legal backdrop "for the sentencing hearing," U.S. v. Jones, 899 F. 2d 1097, 1102 (11th Cir. 1990) quoting U.S. v. Wise, 881 F. 2d 970, 972 (11th Cir. 1989)). We conclude that the stipulation limiting the amount of cocaine involved in Boatner's offense was violated and the plea agreement breached when e government introduced evidence throughout the PSR showing that Boatner's drug dealings had involved over three kilograms of cocaine." And "Consequently, the government violated its agreement at the sentencing hearing when it attempted to bolster the presentence investigation report. See U.S. v. Jefferies, 908 F. 2d 1520 (11th Cir. 1990).

★ State v. Apple, 2008 SD 120 (SD 2008); ★

"Establishing a factual basis for each element of an offense is essential to a knowing and voluntary plea. State v. Nacthgall, we reversed because the defendant did not understand the elements of the charges against him as related to the facts. Id. P9, 749 N.W. 2d at 220 [***17] we explained the importance of establishing a factual basis for a guilty plea as follows: it is essential that this suggested colloquy between the judge and the defendant be meaningful. Simple affirmative or negative answers or responses which merely mimic the indictment or the plea agreement cannot fully elucidate the defendant's state of mind. For this reason [***290] the trial court should question the defendant in a manner that requires the accused to provide narritive responses. Questions concerning the setting of the crime, the precise nature of the defendant's actions, or the motives of the defendant, for instance, will force the defendant to provide the factual basis in his own words. The court should not be satisfied with coached responses, nor allow a defendant to be unresponsive. Id. P. 13, 741 N.W. 2d at 221 (quoting State v. Schulz, 409 N.W. 655, 659 (SD 1987))(emphasis added) the court may not solely rely on "uncertain answers to incomplete questions." Id. P12, 741 N.W. 2d at 221."

U.S. v. Harris, 70 F. 3d 1001 (8th Cir. 1995); Pursuasive Presedent

"The circuit courts are divided, however, on the question of whether conduct from dismissed counts may be used as a basis for an upward departure under section SK2.0. Although we note that each case implicates a different constellation of variables under the guidelines, our holding is generally consistent with the third and ninth circuits. See U.S. v. Thomas, 961 F. 2d 1110, 1120-21 (3rd Cir. 1992)(holding that the district court erred by departing upward to compensate for the government's decision not to charge the defendant with a more serious crime); U.S. v. Falkner, 952 F. 2d 1066, 1069-71 (9th Cir. 1991) ("It would be patently unfair if the court were allowed to hold [the defendant] to his part of the bargain -his plea of guilty to five counts- while simultaneously denying him the benefits promised him from the bargain by relying on the uncharged and dismissed counts in sentencing him."); U.S. v. Castro-Cervantes, 927 F. 2d 1097, 1082 (9th Cir. 1990) ("For the court to let the defendant plead to certain charges and then be penalized on charges that have, by agreement, been dismissed is not only unfair; it violates the spirit if not the letter of the bargain.")"

at STATE V. MITCHELL, 2021 SD 46

[*32] INDEED, WE RECENTLY STATED THAT A COURT COULD RELY UPON AN "EXTENSIVE SENTENCING RECORD" TO ASSESS THE NATURE OF A DEFENDANT'S OFFENSE AND WAS NOT LIMITED TO THE INFORMATION CONTAINED IN A *STIPULATED FACTUAL BASIS STATEMENT USED TO SUPPORT A DEFENDANT'S GUILTY PLEA. STATE V. KLINETOBE.

> HOWEVER, A SENTENCING COURT MAY NOT DISREGARD THE FACTUAL BASIS STATEMENT OR OVERLOOK THE ESTABLISHED CONDUCT SUPPORTING THE ESSENTIAL ELEMENTS OF THE OFFENSE, INCLUDING, AS IS THE CASE HERE, THE ACTIONS OF THE VICTIM.

at *33 "THE COURT MUST FIND A FACTUAL BASIS FOR EACH ELEMENT OF THE OFFENSE" BEFORE ACCEPTING A DEFENDANT'S GUILTY PLEA. STATE V. ROEDDER; SEE ALSO SDCL 23A-7-14 (RULE 11(f)) and see. State v. Apple, 2008 SD 120 (SD 2008). supra.

My Factual Basis 'may not be disregarded' by the court or the prosecution without violating my plea, Due Process and my Sixth Amendment right to a determination of the essential elements and facts of the offense by a jury.

STATE V. MITCHELL, 2021 SD 46

CONCUR [¶47] AS NOTED IN THE MAJORITY OPINION, THERE IS NO QUESTION THAT A SENTENCING COURT CAN CONSIDER FACTS OF RECORD SUPPORTING THAT THE DEFENDANT COMMITTED A GREATER OFFENSE, EVEN THOUGH THE DEFENDANT PLED TO A LESSER OFFENSE. SUCH WAS THE CASE IN KLINETOBE, WHERE THE DEFENDANT'S FACTUAL BASIS STATEMENT FOR A PLEA TO MANSLAUGHTER WOULD ALSO HAVE ESTABLISHED THE ELEMENTS OF FIRST-DEGREE MURDER.

The South Dakota Supreme Court's position is clear. A Court may shift the prosecution for any homicide to the penalty phase of lesser included and easier-to-prove offenses.

A court may accept a plea for Manslaughter and then, after the Manslaughter plea is accepted, the court may then find by a "preponderance of evidence" that the defendant's conduct establishes the elements of Murder and Sentence identically to a defendant actually convicted of Murder by a jury.

This practice creates wide disparities of Sentences under our Manslaughter statute based upon extremely different conduct. Regardless of a defendant's conduct they can arbitrarily receive a life sentence for any kind of homicide.

STATE V. MITCHELL, 2021 SD 46

[FOOTNOTE 7] THIS IS NOT TO SAY THAT A CIRCUIT COURT MUST NECESSARILY TREAT A GUILTY PLEA TO MANSLAUGHTER AS AN UNINTENTIONAL KILLING WHERE, AS IN CASES LIKE KLINETOBE THE STATE REDUCES A MURDER CHARGE TO A FIRST DEGREE MANSLAUGHTER THEORY THAT CONTEMPLATES THE KILLING WAS "WITHOUT DESIGN TO EFFECT DEATH" SEE SDCL 22-16-15(1). PLEA AGREEMENTS OF THIS SORT MAY SIMPLY REPRESENT THE PARTIES' AGREEMENT TO ALLOW THE DEFENDANT AN OPPORTUNITY TO ADMIT TO A LESSER MENTAL STATE. SEE TIM DALLAS TOKLEY, STATE V. BLACK: CONFUSION IN SOUTH DAKOTA'S DETERMINATION OF LESSER INCLUDED OFFENSES IN HOMICIDE CASES, 41 S.D. L. REV. 465, 498 (1996) ("FIRST-DEGREE MANSLAUGHTER DOES CONTAIN LESSER MENTAL STATE OR CULPABILITY [THAN FIRST OR SECOND DEGREE MURDER] SINCE IT IS COMMITTED 'WITHOUT DESIGN TO EFFECT DEATH'").

* ACCORDINGLY, A CIRCUIT COURT CAN ACCEPT THE REDUCED MANSLAUGHTER PLEA AS PROVIDENT AND STILL RELY UPON ADDITIONAL EVIDENCE ADDUCED AT SENTENCING TO DETERMINE THE ACTUAL LEVEL OF CULPABILITY IN ORDER TO FORMULATE AN APPROPRIATE SENTENCE.

The U.S. Supreme Court does not support the South Dakota Supreme Court's position in State V. Mitchell, in fact the U.S. Supreme Court finds this practice infringes upon "the providence of the jury."

1569

Blakely v. Washington, 542 U.S. 296 (2004) at *307

[A] jury could not function as a circuit-breaker in the State's machinery of justice if it were regulated to making a determination that the defendant did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the state actually seeks to punish.

*332-33 Under indeterminate systems, the length of the sentence is entirely or almost entirely within the discretion of the judge, When such systems were in vouge, they were criticized, and rightly so, for producing unfair disparities in the punishment of similarly situated defendants.

The lengths of time a person spent in prison appeared to depend on "What the judge ate for breakfast on the day of sentencing", on which judge you got or other factors that should not have made a difference to the length of the sentence.

1370

Blakely v. Washington, 542 U.S. 296 (cont.)

*333 Under the indeterminate system, the judge could vary the sentence greatly based upon his findings about how the defendant had committed the crime--findings that were not made by the "preponderance of evidence," much less "beyond a reasonable doubt."

In fact "sentencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all."

This infringes on the providence of the jury since "the judge's authority to sentence" would formally derive from the jury's verdict. The jury's verdict would only decide the defendant's guilt, a finding with no effect on the duration of the sentence.

340 Congress and State legislatures might, for example, rewrite their criminal codes, attaching astronomically high sentences to each crime.[336] States may make this choice, it simply fails to understand why any State would want to exersise it.

Blakely V. Washington, 542 U.S. 296 (cont.)

323 Adherance to such a principle fails to retain a built-in political check preventing lawmakers from shifting the prosecution for crimes to the penalty phase proceedings of lesser included and easier-to-prove offenses -- e.g., the hypothesized prosecution of a murder in the guise of a traffic offense proceeding.

Conclusion

326 "Such administration of the criminal justice system disregards fundamental principles under our constitutional system as different branches of government have collaberated" in a manner which violates the participants within the criminal justice systems 'rights' in South Dakota.

South Dakota's homicide scheme, as is established in State V. Mitchell, infra., clearly allows a court to 'functionally' violate a defendants Due Proce and Sixth Amendment right to a jury determination of element

ISSUE 1.B.

SDCL 22-6-1 is Vague and does not sufficiently specify the range of sentences for a Class C Felony (the punishment for Manslaughter)

BRADSHAW V. STUMP, 545 U.S. 175 (2005)

"A guilty plea operates as a waiver of important rights, and is valid only if done voluntarily, knowingly, and intellegently, with sufficient awareness of the relevant circumstances and likely consequences."

- When I pledguilty to Manslaughter and gave my factual basis of an accidental shooting I had ZERO clue that I was subject to the possibility of receiving a sentence of 200 years. I did not know that a life sentence was until death.
- Between "SDCL 22-16-15 Manslaughter in the First Degree - Penalty Class C Felony" and "SDCL 22-6-1 Felonies - Classification - Penalties" a person cannot derive what their sentence will be in a term of years, because a Class C Felony merely states "Life imprisonment in the state Penitentiary"
- "Constructive Notice" thru South Dakota State Caselc is the only way a defendant can discover that a "life sentence" is until death, and that First-Degree Manslaughter Sentences vary by hundreds of year

SDCL 22-6-1 FELONIES - CLASSIFICATION - PENALTIES

First Degree Murder — (1) CLASS A: DEATH OR LIFE IMPRISONMENT IN THE STATE PENITENTIARY. A LESSER SENTENCE THAN LIFE OR DEATH MAY NOT BE GIVEN FOR A CLASS A FELONY. A FINE OF $50,000

Second Degree Murder — (2) CLASS B: LIFE IMPRISONMENT IN THE STATE PENITENTIARY. A LESSER SENTENCE MAY NOT BE GIVEN FOR A CLASS B FELONY. A FINE OF $50,000

First Degree Manslaughter — * (3) CLASS C: LIFE IMPRISONMENT IN THE STATE PENITENTIARY. IN ADDITION A FINE OF FIFTY THOUSAND DOLLARS MAY BE IMPOSED.

- IF ONLY "MAXIMUM" LISTED, IS "MINIMUM" ALWAYS "ZERO," creates FALSE HOPE EXPECTATIONS
- NOTHING STATES A SENTENCE LESS THAN LIFE MAY BE IMPOSED.
- NOTHING STATES A LIFE SENTENCE IS "WITHOUT PAROLE", UNTIL DEATH; NOT "LIFE" AS IN A TERM OF YEARS. (ie 25 years to life)
- NOTHING STATES THE AMOUNT OF YEARS A PERSON IS SUBJECT TO IF A "LIFE SENTENCE" IS NOT GIVEN. (0 - 999.99 YRS State v. Asmussen)
- IT DOES MENTION "IF THE DEFENDANT IS UNDER THE AGE OF EIGHTEEN YEARS AT THE TIME OF THE OFFENSE AND FOUND GUILTY OF A CLASS A, B, OR C FELONY, THE MAXIMUM SENTENCE MAY BE A TERM OF YEARS IN THE STATE PENITENTIARY.

*NO INDICATION WHAT "A TERM OF YEARS" ENCOMPASSES.

SDCL 22-16-15 MANSLAUGHTER IN THE FIRST DEGREE - PENALTY

MANSLAUGHTER IN THE FIRST DEGREE IS A CLASS C FELONY (0-10 MAX YRS)

1575

BECKLES V. UNITED STATES, 137 S. CT. 886 (2017)

THIS COURT HAS HELD THAT THE DUE PROCESS CLAUSE PROHIBITS THE GOVERNMENT FROM "TAKING AWAY SOMEONE'S LIFE, LIBERTY, OR PROPERTY UNDER A CRIMINAL LAW SO VAGUE THAT IT FAILS TO GIVE ORDINARY PEOPLE FAIR NOTICE OF THE CONDUCT IT PUNISHES OR SO STANDARDLESS THAT IT INVITES ARBITRARY ENFORCEMENT." JOHNSON, 576 U.S., AT ___, 135 S. CT. 2551, 192 L. Ed. 2d 569, 577 (CITING KOLENDER V. LAWSON, 461 U.S. 352, 357-35 103 S. CT. 1855, 75 L. Ed. 2d 903 (1983)).

APPLYING THIS STANDARD, THE COURT HAS INVALIDATED TWO KIN OF CRIMINAL LAWS AS "VOID FOR VAGUENESS": LAWS THAT DEFIN CRIMINAL OFFENSES AND LAWS THAT FIX THE PERMISSIBLE SENTE FOR CRIMINAL OFFENSES.

[HN 2] "THE VOID-FOR-VAGUENESS DOCTRINE REQUIRES THAT A PENAL STATUT 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." Id., AT 3 103 S. CT. 1855, 75 L. Ed. 2d 903.

[HN 3] "STATUTES FIXING SENTENCES," JOHNSON, SUPRA, AT ___, 13 S. CT. 2551, 192 L. Ed. 2d 569, 578 (CITING UNITED S V. BATCHELDER, 442 U.S. 114, 123, 99 S. CT. 2198, 6 Ed. 2d 755 (1979)), MUST SPECIFY THE RANGE OF AVAIL SENTENCES WITH "SUFFICIENT CLARITY." Id. AT 123, 99 S 2198, 60 L. Ed. 2d. 755.

TALK ABOUT HOW PROPORTIONALITY IS SKEWED BY THE VAGUENESS STATE V. MITCHELL STATE/OUDERS STATE V. KLIENTOBE.

RULE 11(E)

1576

BUTLER V. O'BRIEN, 663 F3d 514 (1st Cir 2011)

[HN5] AS THE SUPREME COURT STATED IN UNITED STATES V. BATCHELDER, 442 U.S. 114, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979), "SO TOO VAGUE SENTENCING PROVISIONS MAY POST CONSTITUTIONAL QUESTIONS IF THEY DO NOT STATE WITH SUFFICIENT CLARITY THE CONSEQUENCES OF VIOLATING A GIVEN CRIMINAL STATUTE." Id. at 123 (CITING GIACCO V. PENNSYLVANIA, 382 U.S. 399, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966); UNITED STATES V. EVANS, 333 U.S. 483, 68 S.Ct. 634, 92 L.Ed. 823 (1948); UNITED STATES V. BROWN, 333 U.S. 18, 68 S.Ct 376, 92 L.Ed 442 (1948); SEE ALSO LAFAVE, SUBSTANSIVE CRIMINAL LAW § 2.3 (2d ed. 2003) ("UNDUE VAGUENESS IN THE STATUTE WILL RESULT IN IT BEING HELD UNCONSTITUTIONAL, [WHERE] THE UNCERTAINTY GOES TO... THE PUNISHMENT WHICH MAY BE IMPOSED.").

1577

Before I pled guilty to First-Degree Manslaughter in March of 2012, I only had access to the First-Degree Manslaughter statute itself SDCL 22-16-15.

However, even if I would have had access to South Dakota Statutes and case law back in 2011-2012, I still would not have been able to determine that I would/could be subject to a 200 year sentence for First-Degree Manslaughter plea with a Factual Basis of an 'Accidental Shooting'.

I was very naive and unknowledgeable back in 2011-2012 when I pled guilty to First-Degree Manslaughter and received a 200 year sentence.

Now, years later in 2023, I still cannot perceive what my sentence will be to a plea of First-Degree Manslaughter with a Factual Basis of an "Accidental Shooting" will it be 10, 20, 50, 100, 150, 200 years ???

I cannot know, nor can any other person regardless of legal knowledge. Sentence disparities abound.

This is because our sentencing laws are Vague and judges have unlimited discretion in our indeterminate System.

HARMELIN V. MICHIGAN, 501 U.S. 957 (1991)

[*1007] MANDATORY SENTENCING SCHEMES CAN BE CRITICIZED FOR
DEPRIVING JUDGES OF THE POWER TO EXERCISE INDIVIDUAL
DISCRETION WHEN REMORSE AND ACKNOWLEDGEMENT OF GUILT,
OR OTHER EXTENUATING FACTS, PRESENT WHAT MIGHT SEEM A
COMPELLING CASE FOR DEPARTURE FROM THE MAXIMUM. ON
THE OTHER HAND, BROAD AND UNREVIEWED DISCRETION
EXERCISED BY SENTENCING JUDGES LEADS TO THE PERCEPTION
THAT NO CLEAR STANDARDS ARE BEING APPLIED, AND THAT
THE RULE OF LAW IS IMPERILED BY SENTENCES IMPOSED
FOR NO DISCERNIBLE REASON OTHER THAN THE SUBJECTIVE
REACTIONS OF THE SENTENCING JUDGE. THE DEBATE ILLUSTRATES
THAT, AS NOTED AT THE OUTSET, ARGUMENTS FOR AND AGAINST
PARTICULAR SENTENCING SCHEMES ARE FOR LEGISLATURES TO
RESOLVE.

There is no due process at all for factors"
Maximum sentence for manslaughter is life without Parole"..

Does it make sense that a burglar defendant has a better idea what to expect than a manslaughter

CAMPBELL V. OHIO, 138 S. CT. 1059 (2018)
"IN RECENT YEARS, THIS COURT HAS RECOGNIZED THAT ALTHOUGH DEATH
IS DIFFERENT, "LIFE WITHOUT PAROLE SENTENCES SHARE SOME CHARACTERISTICS
WITH DEATH SENTENCES THAT ARE SHARED BY NO OTHER SENTENCES."
GRAHAM V. FLORIDA, 560 U.S. 48, 69, 130 S. CT. 2011,
176 L. Ed. 2d 825 (2010). "IMPRISONING AN OFFENDER UNTIL HE
DIES ALTERS THE REMAINDER OF HIS LIFE BY A FORFEITURE THAT
IS IRREVOCABLE." MILLER V. ALABAMA, 567 U.S. 460, 474-75,
132 S. CT. 2455, 183 L. Ed. 2d 407 (2012) (QUOTING
GRAHAM, 560 U.S. at 69, 130 S. CT. 2011, 176 L. Ed. 2d 825).
A LIFE-WITHOUT-PAROLE SENTENCE "MEANS DENIAL OF HOPE; IT MEANS THAT GOOD
BEHAVIOR AND CHARACTER IMPROVEMENT ARE IMMATERIAL; IT MEANS [*1060] THAT
WHATEVER THE FUTURE MAY HOLD IN STORE FOR THE MIND AND SPIRIT OF THE
CONDUCT, HE WILL REMAIN IN PRISON FOR THE REST OF HIS DAYS." Id., at 70
130 S. CT. 2011, 176 L. Ed. 2d 825.

BANKERS LIFE & CASUALTY CO. V. CRENSHAW, 486 U.S. 71 (1988)

↓ [+88] "[THIS] A GRANT OF WHOLLY STANDARDLESS DISCRETION TO DETERMINE THE SEVERITY OF PUNISHMENT APPEARS INCONSISTENT WITH DUE PROCESS. THE COURT HAS RECOGNIZED THAT "VAGUE SENTENCING PROVISIONS MAY POSE CONSTITUTIONAL QUESTIONS IF THEY DO NOT WITH SUFFICIENT CLARITY STATE THE CONSEQUENCES OF VIOLATING A GIVEN CRIMINAL STATUTE." UNITED STATES V. BATCHELDER, 442 U.S. 114, 123, 60 L. Ed. 2d 755, 99 S. Ct. 2198 (1979)

An "average person" cannot determine a Manslaughter sentence with "Sufficeint clarity"

On November 15, 2021, "Keloland Investigates" featured the disparities of Manslaughter Sentences in South Dakota

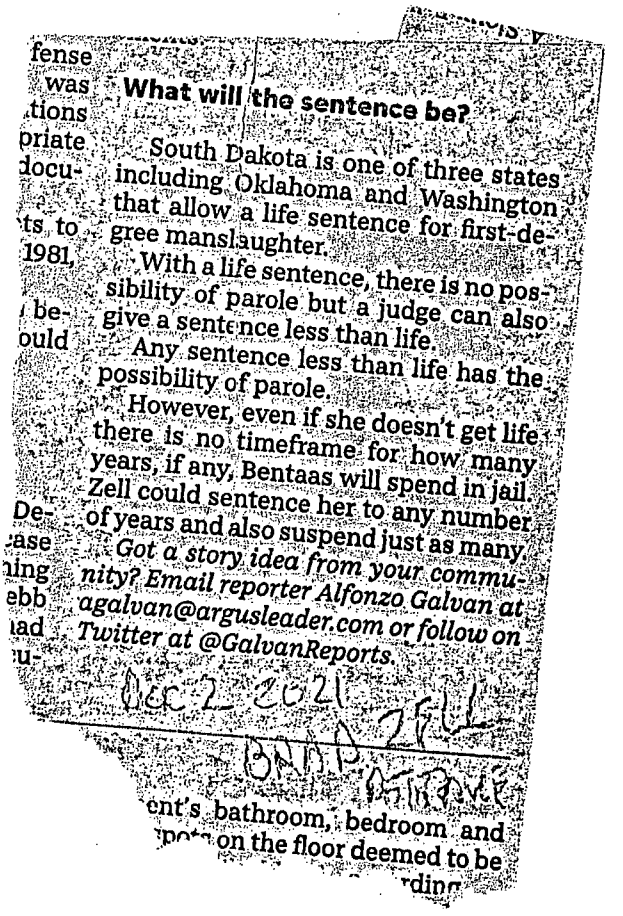
Story: "Manslaughter: Unequal time"

see. www.keloland.com/news/investigates/manslaughter-unequal-time/amp/

In State v. Mitchell, supra. the defendant made a plea deal of 60 years for First-Degree Manslaughter. The circuit court sentenced the defendant to 124 years with NO time suspended. On Remand, the circuit court sentenced the defendant to 45 years with 15 suspended. Same 60 year plea deal, same facts and P.S.I.

The fact that the judge sentenced the defendant, Mitchell, to 124 years on a 60 year plea deal was within the court's discretion. The remand was due to the courts unjustifiable reasoning in formulating the defendants 124 year Sentence.

- On November 15, 2021 'Keloland Investigates' with Angela Kennecke, featured the great disparities in South Dakota Manslaughter sentences "Manslaughter: Unequal time" www.keloland.com/news/investigates/manslaughter-unequal-time/amp/
- Here is an example of a First-Degree Manslaughter case prior to sentencing. The reporter knows the vague statutory language but is clueless to any amount of years that the defendant could receive. Maybe "life."



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What will the sentence be?

South Dakota is one of three states including Oklahoma and Washington that allow a life sentence for first-degree manslaughter.

With a life sentence, there is no possibility of parole but a judge can also give a sentence less than life.

Any sentence less than life has the possibility of parole.

However, even if she doesn't get life there is no timeframe for how many years, if any, Bentaas will spend in jail. Zell could sentence her to any number of years and also suspend just as many.

Got a story idea from your community? Email reporter Alfonzo Galvan at agalvan@argusleader.com or follow on Twitter at @GalvanReports.

Dec 2 2021

ent's bathroom, bedroom and
on the floor deemed to be

The prosecution in the case requested a sentence of 40 years, the judge then sentenced the defendant to 10 years with 9 suspended.

~~was also ordered to "pay restitution through the Yankton County Clerk of Courts pursuant to the restitution sheet on file." SDCL 22-6-1(6), 23-3A-27.1.~~

~~65. Pursuant to both the South Dakota Unified Judicial System as well as the Petitioner's Accounting Ledgers provided by the South Dakota State Penitentiary, Petitioner was required to pay $9,999,999.99 in restitution.[3] See Exhibit Doc. C.~~

~~66. Restitution is considered a portion of the punishment imposed pursuant to SDCL § 23A-27-25.2.~~

~~69. Failure of Petitioner to comply with a plea of restitution may result in the Petitioner being held in contempt of the vague court's order. See SDCL §§ 23A-27-25.1, 23A-27-[illegible], 23A-27-7.1, 23A-27-28.5, 23A-27-25.6, 23A-47-6~~

Of the thirty-two other manslaughter sentences imposed between the years of 2008 and 2012, only one defendant was given a higher sentence than the petitioner of life without the possibility of parole. Most cases ranged from approximately six years to approximately eighty years with an average sentence of forty years' incarceration.

The Petitioner's punishment is "grossly disproportionate" to the circumstances of his case. In comparing his sentence to those " 'imposed on other criminals in the same jurisdiction' as well as those 'imposed for commission of the same crime in other jurisdictions[]' " the Petitioner's sentence was approximately one and a half times higher sentence than the average case. *State v. Hauge*, 2019 S.D. 45, ¶ 34, 932 N.W2d 165, 174 (citing

[3] On May 1, 2018, the restitution amount of $9,999,999.99 was removed from his DOC paperwork.