

ORIGINAL

No. _____

23-7640

FILED

MAY 22 2024

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

Devin Fischer — PETITIONER
(Your Name)

vs.

State Of North Dakota — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Supreme Court Of North Dakota
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Devin Fischer
(Your Name)

1309 26th St W
(Address)

Williston, ND, 58801
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

Is a defendant denied due process when the court ignores legal standards and relies solely on their discretion?

Does the defendant suffer double jeopardy when the Court, at the States request, over the defendant's objections, vacate the defendants accepted guilty plea for the sole purpose of reinstating a higher offense?

LIST OF PARTIES

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

State of North Dakota v. Devin Fischer, No. 53-2022-CR-00037

County of Williams In District Court,
Northwest Judicial District. Judgement entered
June 20, 2023

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STATUTES AND RULES

North Dakota Rule of Criminal Procedure 11

Federal Rule of Criminal Procedure 11

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

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

OPINIONS BELOW

For cases from **federal courts**:

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

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 is unpublished.

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

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 is unpublished.

For cases from **state courts**:

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

- reported at State v. Fischer, 2024 N.D. 29 (N.D. 2024); or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ court appears at Appendix ____ to the petition and is

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

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____(date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was 02/22/2024. A copy of that decision appears at Appendix A.

A timely petition for rehearing was thereafter denied on the following date: 03/15/2024, and a copy of the order denying rehearing appears at Appendix B.

An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____(date) in Application No. A .

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United State Constitution Fourteenth Amendment Section 1

United States Constitution Fifth Amendment

STATEMENT OF THE CASE

On the night of January 9th, 2022, defendant, Devin Fischer, (Mr. Fischer), went to the house of his estranged wife's parents' home where she was staying. Mr. Fischer fired bullets into the lock to try and open the door. Mr. Fischer was unsuccessful and left the property and started walking home. He was shortly arrested and charged with burglary, reckless endangerment, terrorizing, and tampering with physical evidence.

After many continued trial dates, January 17, 2023, was set for the trial. On the morning of trial, the State approached Mr. Fischer's council, Attorney Jeff Nehring, wanting to settle the case. The State was asking for the terrorizing charge to be amended to menacing, and all other charges to be dismissed, being sentenced to 2 years unsupervised probation. The court amended the terrorizing charge to menacing, the terrorizing charge was not pending, and conducted a full plea colloquy, with Mr. Fischer providing a true and correct admission to what he had done. The court acknowledged the "binding" nature of the agreement and accepted the plea of guilty to menacing and declared Mr. Fischer guilty of menacing. The court then released the jury pool and explained to them that the case had been settled. In the middle of this, an unknown person notified the State that the victims wanted to be at the sentencing to give statements.

They were not available at that time, so sentencing was continued for a later time. It was scheduled for the next day when they would be available. On January 18, 2023, sentencing took place. One of the victims played a video of the incident and all made statements.

REASONS FOR GRANTING THE PETITION

The North Dakota Supreme Court ignored accepted legal standards and instead used their discretion in upholding the district court's decision. In doing so, Mr. Fischer was denied his guaranteed rights to due process and the prohibition of being twice put in jeopardy.

In this case, the district court amended terrorizing to menacing and accepted Mr. Fischer's guilty plea to the amended charge of menacing, but then rejected the plea agreement. The district court and North Dakota Supreme Court stated that they did not believe that Mr. Fischer could unilaterally choose to enjoy his part of the bargained-for plea. North Dakota Rule of Criminal Procedure 11 is adopted from and is similar to the Federal Rule of Criminal Procedure 11. Specifically, Rule 11(c)(5) states

"if a court rejects a plea agreement the court must do the following in open court: (A) inform the parties that the court rejects the plea agreement; (B) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and (C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated."

Rule 11 clearly allows for the defendant to make the decision in withdrawing his plea.

In *United States v. Hyde*, this court said "the Rules nowhere state that the guilty plea and the plea agreement must be treated identically." *United States v. Hyde*, 520 U.S. 670, 677 (1997). North Dakota has adopted this standard in *Froistad v. State*.

"The portion of Klein relying on *Cordova-Perez* is overruled, and we accept the standard set forth in *Hyde*. *Id.*" *Froistad v. State*, 641 N.W.2d 86, 90 (N.D. 2002)

The court relies on Hyde to explain their reasoning as to why they believe the plea agreement was not accepted, explaining that the plea and the agreement can be separate. However, in upholding the district courts vacating the plea itself, they “bind up” the rejection of the plea and the agreement together. Instead of applying settled federal law, they use their discretion and ruled that they do not believe Mr. Fischer could retain his plea after the agreement was rejected. This is exactly opposite of Hyde.

In Sampson v State the court has also accepted that jeopardy attaches at the acceptance of the plea.

“The State argues that, when Sampson earlier entered an unconditional plea of guilty in Towner County, jeopardy attached when the trial court accepted his plea. We agree.” Sampson v State, 478 N.W.2d 566, 568 (N.D. 1991).

This very issue regarding the courts or the state’s authority to withdraw a defendant’s guilty plea has been contemplated by multiple federal and state courts. They all have the same conclusion. After the rejection of the agreement the status of the plea lies in the defendants’ hands

In United States v. Bell, 37 F.4th 1190 (6th Cir. 2022), the court held that “the defendant has control over his guilty plea, stating that Federal Rule of Criminal Procedure 11 vests the district court with final authority to approve or reject plea agreements, and following the rejection of a plea agreement, the defendant retains final authority over the status of the guilty plea. Rule 11 does not give the government the authority to withdraw its previously given consent for a defendant’s guilty plea to a lesser included offense.”

In re Ellis, 356 F.3d 1198, 1207 (9th Cir. 2004) (holding that the district court’s rejection of a plea agreement allows the defendant, not the court, to withdraw the plea).

U.S. v. Patterson, 381 F.3d 859, 865 (9th Cir. 2004) (“although the district court is free to reject the plea agreement after accepting a guilty plea, it is not free to vacate the plea either on the government’s motion or sua sponte. Instead, when the court accepts a guilty plea but rejects the plea agreement, it becomes the defendant’s choice whether to stand by the plea or to withdraw the plea.... Nowhere does Rule 11 provide that the district court may dictate this choice.”

Morris v. Reynolds, 264 F.3d 38, 49 (2d Cir. 2001) (“Thus, a trial court may not sua sponte reinstate a dismissed felony following acceptance of a guilty plea to a lesser offense. Nor may it sua sponte vacate the defendant’s plea in order to reinstate the greater offense.”)

U.S. v. Fagan, 996 F.2d 1009, 1013 (9th Cir. 1993) (“once the district court accepts a guilty plea, absent fraud or breach of the plea agreement by the defendant, the court has no authority to vacate the guilty plea”).

“We agree with our sister courts that once a trial court accepts a guilty plea, it may not sua sponte withdraw the plea under Crim.R. 32.1. Accordingly, we conclude that the trial court erred by withdrawing the plea absent a motion filed by Miller.” State v. Miller, 200275, 4 (Ohio Ct. App. 2021)

“Other jurisdictions have uniformly held that courts do not have the authority to vacate a defendant’s guilty plea over his objection.” State v. Spraggins, 742 N.W.2d 1, 5 (Minn. Ct. App. 2007)

Section 1 of the Fourteenth Amendment of the Constitution in part says that

“nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of law.”

The Fifth amendment of the Constitution in part guarantees that

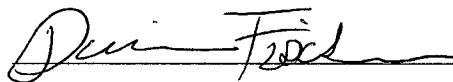
“nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.”

The majority of cases are settled with a plea agreement. The defendants in North Dakota will be denied the protections afforded by settled federal law and standards if the courts and the state are free to disregard them, and instead rely on their discretion.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Dennis F. Fisher

Date: 05/20/2024