20110229

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA



COURT CASE NUMBER 20110229

APPELLANT'S BRIEF

STATE OF NORTH DAKOTA APPELLEE

v.

JOE R. BLURTON APPELLANT/DEFENDANT

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Appeal from MOTION TO WITHDRAWAL PLEA, before Judge McCollugh
East Central Judical District; 09-07-k-03531
Prepared by Criminal Defendant, "pro se" JOE R. BLURTON
J.R.C.C. 2521 Circle Drive Jamestown North Dakota 58401

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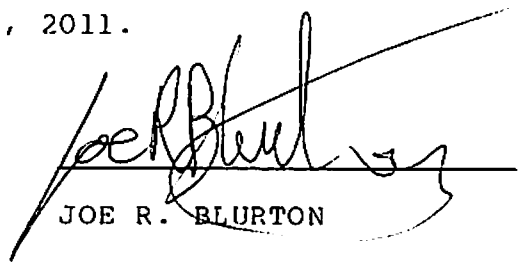
Pursuant to N.D.R. App. P. Rule 32, the appellant hearby certifies that this brief was prepared on a manual type-writer, no electronic version exist, an unbound copy is presented to the Clerk of the Supreme Court. In non-compliance the Appellant gives notice that no Blue Paper was available for the cover sheet.

Signed this 11th day of September, 2011.



JOE R. BLURTON

AUTHORITY

## STATE AUTHORITY

¶1 JURISDICTION

¶2 Petitioner filed NOTICE OF APPEAL, permitted by law as a right from district court ruling dismissing MOTION TO WITHDRAWAL PLEA, N.D.R.Crim. P. Rule 32(d). ORDER of Judge McCollugh denying MOTION was filed July 26, 2011. Notice of APPEAL was filed August 09, 2011; Supreme Court Case Number 20110229.

¶3 N.D.C.C.§ 29-23-11 allows"...amy error by the Court in or by decision, ruling, instruction, or other act, and appearing in the action may be taken advantage upon a motion for a new trial or in the Supreme Court on an Appeal."

CONTENTS OF BRIEF

¶4 STATEMENT OF ISSUES PRESENTED FOR REVIEW

¶5 "[O]nce an accused establishes a forfeited plain error does affect substantial rights, an appellate court has discretion to correct the error and should correct it if it seriously affect[s] the fairness, integrity or public reputation of judical proceedings." State v. Olander; 1998 ND 50, ¶16, 575 N.W. 2d 658 (internal quotations and citations omitted). This Court has explained it exercises it's "power to notice obvious error cautiously, and only in exceptional circumstances where the accused has suffered serious injustice." State v. Knowels; 2002 ND 62, ¶7; 643 N.W. 2d 20. "Only constitutional error that is 'egregious' or 'grave' is subject to the obvious error rule." State v. Parisien; 2005 ND 152, ¶17, 703 N.W. 2d 306.

¶6 **ISSUE 1**: Whether N.D.R. Crim. P. Rule 11 substantially enforced Blurton's Federal Constitutional Rights, particularly; "...the true nature of the charge against him, the first and most universally recognized requirement of due process." Smith v.O'Grady; 312 US 329, 334 (1941).

¶7 **ISSUE 2**: Whether U.S. CONST AMEND XIV & V requirements of due process are defined by N.D.C.C. § 29-01-07 "...as is provided by law for new trials" include N.D.R. Crim. P.Rule 32 MOTION TO WITHDRAWAL PLEA. That multifarious AMENDED INFORMATIONS and FINAL JUDGEMENTS have occurred without trial since JEOPARY attached in the May 05, 2008 CHANGE OF PLEA HEARING.

¶8 CAUSE AND NATURE OF APPEAL; WITH PREVIOUS DISPOSITIONS

¶9 On May 05, 2008 Joe R. Blurton pled guilty to a violation of N.D.C.C. § 12.1-20-03(1)(b) & (3)(c) as stated in AMENDED INFORMATION (R.A. -03531 # 69). Blurton then made MOTION TO WITHDRAW PLEA (R.A. -03531 #'s 82-90); realizing he had misunderstood the cause and nature of the offense while in PRE-SENTENCE INVESTIGATION interview by Parole and Probation (R.A. -03531 #'s 93-4).

¶10 Blurton fired his private attorney (R.A. -03531 #83), and was unable to hire a second attorney to respond in MOTION TO WITHDRAW PLEA (R.A. -03531 #90). Court appointed counsel in Mr. Mertz, who then took it upon himself to withdraw Blurton's MOTION (R.A. -03531 #108). Blurton wrote the district court requesting APPEAL and stating factual innocence (R.A. -03531 #'s 96-99).

¶11 On October 03, 2008 Judge Marquart sentenced Blurton to the "initialized" corrections (Sent. T. pg. 27 ) of N.D.C.C. § 12.1-20-03(1)(b) & (3)(b) (R.A. -03531 #102). The sentence record is silent in any act to "reaffirm" the AA Felony Plea; as Mr. Mertz states:

> The other thing is that 12.1-20-03, I want to make sure, Your Honor, that I'm very clear on the record, that Mr. Blurton is being sentenced for what he pled guilty to, not what he was originally charged with.

¶12 Defendant was denied counsel in direct appeal before this court (R.A. -03531 #138). Acting pro se State v. Blurton; 2009 ND 144, 770 N.W. 2d 231 was based upon N.D.R. Crim. P. Rule 52 error.

¶13 This court reviewed; "...notes from his first attorney..." id¶11 and determined; "...Blurton unconditionally pled guilty to an amended charge." id¶3 This court has ruled that the district court; "...complied with most of the requirements of N.D.R. Crim. P. 11(b)..."id¶11 and "... error[s] in the amended information did not affect Blurton's substantial rights and was harmless." id¶14

¶14 Blurton filed post-conviction relief in 09-2010-cv-00028, where most claims were summarily dismissed based upon the Supreme Courts decisions. Judge Marquart did review the same "...notes from his first attorney..." (States Exhibit 1) and reguarded them as hearsay (T. pgs. 40-4). Judge Marquart dismissed any ineffective assistance of counsel claims and made this statement, MEMORANDUM R.A. -0028 #22 pg. 11 :

> What Mr. Blurton seems to lose sight of is that he was originally charged with offenses that required a 20-year minimum mandatory sentencing. He does not want to give Mr. Haugen any credit for getting those charges reduced so that there was no minimum mandatory sentence.

¶15 Blurton blindly proceeded pro se into habeaus relief by 28 U.S.C. § 2254 in 3:11-cv-00028 after this court also summarily dismissed Blurton v. State; 2010 ND 223, 795 N.W. 2d 37. The Federal Court's response is very informative; "To satify the exhaustion requirements, [Blurton] must show that he either made a fair presentation of his claims to the state courts or that he has no other presently available remedies to pursue."

¶16 The issues of this appeal are put forth by letters of the North Dakota Attorney General, dated June 02, 2010 and May 13, 2011 (R.A. -03531 # XXX as attached Exhibits land 2). Here the North Dakota Attorney General determines Blurton to be guilty of "AA Felony Gros[s] Sexual Imposition". A "forcible rape of an intoxicated/passed out female".

¶17 Blurton put forth MOTION TO WITHDRAWAL PLEA, pursuant to N.D.R. Crim. P. Rule 32(d) with the district court. Here the argument is common sense; "...the plea is not intelligently made if the goverment misunderstands the charges." (¶17 of MOTION R.A. -03531 # XXX ). And; "...only by N.D.R. Crim. P. Rule 32 can a U.S CONST. AMEND. XIV due process of law address the first instance of error in 09-07-k-03531, both then and now." (¶ 15 RESPONSE R.A. -03531 # XXX ).

¶18 This court recognized the harmless error provision of N.D.R. Crim. P. Rule 52 in Blurton id ¶11, ¶12, ¶14 and at ¶15: "We conclude Blurton's guilty plea was knowingly and voluntarily entered, and any errors were harmless and do not rise to the level of obvious error."

¶19 At ¶ 8 this court stated; "To establish obvious error, a defendant must show (1) error, (2) that is plain, and(3) that affects substantial rights. Lium, 2008 ND 33, ¶9, 774 N.W. 2d 775. The error must be a clear deviation from an applicable legal rule under current law to constitute an obvious error. Id."

¶20 The "(1) error, (2) that is plain" id. becomes straightforward in chronological review:

| | | | |
|---|---|---|---|
| (a) | -03531 # 69 | AMENDED INFORMATION / CHANGE OF PLEA HEARING | 05/05/2008 |
| (b) | " # 89 | MOTION TO WITHDRAW PLEA | 06/12/2008 |
| (c) | " # 91 | STATE's RESPONSE TO DEFENDANT's MOTION TO WITHDRAW PLEA | 06/27/2008 |
| (d) | " # 96-7 | Letters from Defendant, request for relief | 08/25/2008 |
| (e) | " # 99 | Letter from Defendant, request for relief | 09/17/2008 |
| (f) | " # 101 | **CRIMINAL JUDGEMENT * FA** | 10/03/2008 |
| (g) | " # 108 | Letter from Court reguarding withdraw of plea | 11/21/2008 |
| (h) | " # 117 | **NOTICE OF APPEAL** | 01/09/2009 |
| (i) | " # 126 | MOTION TO CORRECT CLERICAL **ERROR** | 02/13/2009 |
| (j) | " # 127 | **SECOND** AMENDED INFORMATION | 02/13/2009 |
| (k) | " # 132 | MOTION TO CORRECT CLERICAL **ERROR** | 02/19/2009 |
| (l) | " # 138 | AFFIDAVIT OF JOE BLURTON REQUESTING REPRESENTATION OF COUNSEL W/ATTCH. | 03/13/2009 |
| (m) | " # 140 | **THIRD** AMENDED INFORMATION | 03/13/2009 |
| (n) | " # 141 | **SECOND** AMENDED CRIMINAL JUDGEMENT AND COMMITTMENT | 03/13/2009 |
| (o) | -03531 # 153 | MOTION TO CORRECT CLERICAL **ERROR** | 04/09/2009 |
| (p) | " # 154 | **FOURTH** AMENDED INFORMATION | 04/09/2009 |
| (q) | " # 156 | **THIRD** AMENDED CRIMINAL JUDGEMENT | 04/13/2009 |
| (r) | " # 172 | JUDGEMENT AFFIRMED FROM SUPREME COURT | 11/25/2009 |

| | | | |
|---|---|---|---|
| (s) | -00028 # 22 | MEMORANDUM; POST CONVICTION RELIEF DENIED | 05/27/2010 |
| (t) | n/a | Letter from Attorney General, Felony AA (Exhibit 1 of MOTION) | 06/02/2010 |
| (u) | 3:11-cv-00028 | Habeas Petition Filled | 03/07/2011 |
| (v) | n/a | Letter from Attorney General (Exhibit 2 of MOTION) | 05/13/2011 |
| (w) | 3:11-cv-00028 | ORDER Denied habeas relief | 05/23/2011 |

¶21 This Court has stated, Blurton ¶ 7:

> "After a plea has been accepted but before sentencing, the defendant may withdraw a guilty plea if it is necessary to correct a manifest injustice or, at the court's discretion, for any "fair and just" reason unless the prosecution has been prejudiced by relying on the plea.[id.] After a court accepts a guilty plea and imposes a sentence, the defendant cannot withdraw the plea unless the motion is timely and withdrawal is necessary to correct a manifest injustice. [Id.] The determination of a manifest injustice or the occurrence of a "fair and just" reason is within the court's discretion and will not be reversed on appeal unless the court abuses its discretion."

¶22 As well this Court stated, Blurton ¶ 10:

> Rule 11, N.D.R. Crim. P., provides a framework for determining whether a plea is knowingly and voluntarily entered into.[...] The rule does not require ritualistic compliance, but a court must substantially comply with rule's procedural requirements to insure the defendant is entering a voluntary and intelligent plea.

¶23 And quoting Blurton ¶ 14:

> The judgement states Blurton was convicted of violating N.D.C.C. § 12.1-20-03(1)(c) and (3)(b). Blurton knew what crime he was charged with committing.

¶24 LAW AND ARGUMENTS

¶25 Citing Chapman v. California, 386 US 18, 24 (1967) as a STANDARD OF REVIEW:

> "[B]efore a federal constitutional error can be held harmless, the court must declare a belief that it was harmless beyond a reasonable doubt."

¶26 Citing State v. Wicks; 1998 ND 76, ¶17, 576 N.W. 2d 518 and State v. Harmon; 1997 ND 233, ¶16, 571 N.W. 2d 815:

> "Our standard of review for a violation of a constitutional right is de novo."

¶27 Petitioner makes note in a denial of assistance of counsel in direct appeal, State v. Blurton; 2009 ND 144. A request for APPEAL was made to the district court (R.A.-03531 #'s 96, 97, and 99) and a request for counsel in APPEAL in R.A. -03531 # 138 as noted in chronological review of plain error ¶ 20.

¶28 Quoting "Defendant Response to State's Answer" at ¶23:

> "Blurton has been denied independant assistance of counsel, not being able to afford Mr. Brandborg (See Exhibit Five). Guaranteed by Gideon v. Wainwright; 372 US 335 (1963). As well a denial of counsel in the first direct appeal as a right, Douglass V. California; 372 US 353 (1963), and that such assistance must be effective, McMann v. Richardson; 397 US 759, 771 (1970).

¶29 Futhermore petitioner states, "...cause and prejudice for the default[1] or that a miscarriage of justice will result if the court does not address the merits of his procedurally defaulted claims.' McCall v. Benson, 114 F. 3d 754, 757 (8th Cir. 1997)".

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1 See ORDER Doc. 8 3:11-cv-00028-KKK filed 05/23/11 p. 8

¶30 **ISSUE 1**: Whether N.D.R. Crim. P. Rule 11 substantially enforced Blurton's Federal Constitutional Rights, particularly; "...the true nature of the charges against him, the first and most universally recognized requirement of due process." Smith v. O'Grady; 312 US 329, 334 (1941).

¶31 In similarity and historical to previous actions in this Court and the district court it can be reasonably quoted from North Carolina v. Alford; 400 US 25, 32 (1970): "...the defendant was represented by competent counsel whose advice was that the plea would be to the defendant's advantage." This is also echoed by Judge Marquart at ¶14 and Attorney Mertz at ¶ 11 . At issue is "the true nature of the charges", id.

¶32 A requirement is missing as shown in McCarthy v. United States; 394 US 459, 471 (1969); an "...understanding of the essential elements of the crime charged, including the requirement of specific intent..."

¶33 Mr. Mertz at SENTENCING (T. pg. 9 lines 8-11) states:

> "I would submit that what he pled guilty to is what it is, having sex with someone who's intoxicated, and couldn't consent."

¶34 This Court in Blurton ¶3 ruled "...Blurton unconditionally plead guilty to an amended charge". The United States Supreme Court in Boykin v. Alabama; 396 US 238, 244 (1969) has placed conditions upon any plea requiring a due process of law as required by U.S. CONST. AMEND. V & XIV. Here the Supreme Court stated:

"The three dissenting justices in the Alabama Supreme Court stated the law accurately when they concluded that there was reversible error, 'because the record does not disclose that the defendant voluntarily and understandingly entered his plea of guilty".

¶35 The STANDARD OF REVIEW from Boykin; 395 US 244 is the RECORD to define an "understandingly" entered plea; "to make sure he has a full understanding of what the plea connotes and of its consequence." id.

¶36 Reviewing the CHANGE OF PLEA transcript, page 4:

MR. HAUGEN: Judge, in this matter we contemplated this morning that we would have a change of plea to an amended Count 1. Count 1 is currently listed as a Gross Sexual Imposition under 12.1-20-03(1)(a). That would be amended to subdivision (1)(c), and that takes out the compulsion,force and the threat of imminent death or serious--
MS. CLARK : And (3) --
Mr. Haugen -- bodily injury.
Mr. haugen: Yeah.
MS CLARK: And we would amend on the Defendant's plea of guilty to that amended charge.

¶37 Reviewing the State's Factual Basis (T. pg. 6-7) and as reviewed by this Court, Blurton ¶17, "specific intent" is:

"He forces her to have oral sex with him."

¶38 Citing Shafer v. Bowersox; 168 F. Supp. 2d 1055 (8thD. 2001):

A guilty plea is valid if it represents a "voluntary and intelligent choice among the alternative courses of action open to the defendant." North Carolina v. Alford, 400 US 25, 31 27 L. Ed. 2d 162, 91 S.Ct. 160 (1970). If a defendant's plea is not "voluntary and knowing, it has been obtained in violation of due process and is therefore void." McCarthy v.United States, 394 US 459, 466, 22 L. Ed. 2d 418, 89 S. Ct. 1166 (1969). "MOREOVER, BECAUSE A GUILTY PLEA IS AN ADMISSION OF ALL THE ELEMENTS OF A FORMAL CRIMINAL CHARGE, IT CANNOT BE TRULY VOLUNTARY UNLESS THE DEFENDANT POSSESSES AN UNDERSTANDING OF THE LAW IN RELATION TO THE FACTS." id."

¶39 "A State court "unreasonably applies" clearly established federal law when it "identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." "A case cannot be overturned merely because it incorrectly applies federal law, for the application must also be "unreasonable". Shafer v. Bowersox 329 F. 3d. 637, 646-47 (8th Cir 2003) (quoting Williams v. Taylor; 529 US 362, 405, 210 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)).

¶40 Here this Court in Blurton ¶ 3 claims; "...Blurton unconditionally pled guilty to an amended charge." Then at ¶23 this Court states; "We conclude Blurton's guilty plea was knowing and voluntary." This is an "unreasonable" conclusion, an oxymoronic statement. Clearly established federal law does not support a "voluntarily and understandingly entered" "plea of guilty" id Boykin; as unconditional.

¶41 **ISSUE 2**: Whether U.S. CONST. AMEND XIV & V requirements of due process are defined by N.D.C.C. § 29-01-07 "... as is provided by law for new trials" include N.D.R. Crim. P. Rule 32 MOTION TO WITHDRAWAL PLEA. That multifarious AMENDED INFORMATIONS and FINAL JUDGEMENTS have occurred without trial since JEOPARDY attached in the May 05, 2008 CHANGE OF PLEA HEARING.

¶42 As STANDARD OF REVIEW U.S.v. Davis; 452 F. 3d 991, 994 (8th Cir. 2006) reviews denial of motion to withdraw plea, either pre or post plea, under abuse of discretion.

¶43 Upon PRE-SENTENCE investigation Blurton recognized obvious error. "The court also decieded to delay making a decision on Blurton's motion to withdraw his guilty plea until Blurton has an opportunity to consult with a new attorney and decide whether he still wanted to withdraw the plea." Blurton ¶4

¶44 Submitted to the district court attached to MOTION TO WITHDRAWAL PLEA OF GUILTY is AFFIDAVIT OF JOE BLURTON REGUARDING PLEA WITHDRAWAL with AFFIDAVIT OF CHERIE CLARK, and letters from Mr. Mertz to defendant dated Aug 13 and 25 2008. As well R.A.-03531 # 96,97, & 99 support the affidavit and make claims of factual innocence.

¶45 N.D.C.C. § 29-01-07 states:

> No person can be twice put in jeopardy for the same offense, nor can any person be subject to a second prosecution for a public offense for which that person has once been prosecuted and convicted, or acquitted, or put in jeopardy, except as is provided by law for new trials."

¶46 Blurton was in JEOPARDY at CHANGE OF PLEA. The court recognized a motion to withdraw plea, the State responded (R.A. -03531 #89 & #91). Any action by Mr. Mertz to deny Blurton's request to withdraw plea is in denial of N.D. CONST ART. 1 § 12 right "to appear and defend in person with counsel."

¶47 It can not be denied at sentence that Blurton felt "remorse" for the female, and the situation. This is not a due process of law to "reaffirm[ed]" the plea, or "specific intent". id¶32.

¶48 Blurton entered a guilty plea, moved to withdraw the plea (R.A. -03531 #'s 82-90) and the State resisted the MOTION TO WITHDRAW (R.A. -03531 # 90). In letters to the Court Blurton maintains factual innocence. Similar to North Carolina v. Alford; 400 US 25, 37 -38 (1970) the Supreme Court finds a plea only constitutionally acceptable if there is a strong evidence of guilt. A federal question is presented beyond this Court's determination Blurton ¶18, "[b]ecause Blurton pled guilty and admitted the factual basis proposed by the State was correct, he waived the right to argue the evidence was insufficient to support the factual basis (citing McMorrow v. State; 2003 ND 134, ¶5, 667 N.W. 2d 577). Here Blurton demonstrates cause and prejudice for procedural default[1], that a miscarriage of justice will result if this Court fails to address the Alford id. plea.

¶49 At SENTENCE Attorney Mertz (T. Pg.12 ) noted defects in the State's case. Clearly a disputable presumption of law by N.D.C.C. § 31-11-03 (25) exist in identity of the complainant by given name only, either in Depositions, formal COMPLAINT or FACTUAL BASIS the State only presumes Blurton's knowledge of the female. Questions of credibility exist as the Factual Basis denotes trespassing and claims public intoxication. Petitioner claims the State Courts have "unreasonably applied" established federal law.

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[1] McCall v. Benson, 144 F. 3d 754, 757 (8th Cir. 1997) Cited.

¶50 On October 03, 2008, in district court, Blurton was sentenced to "initialized" corrections. The record is silent to a "knowingly and voluntarily" made plea at sentence. Chronological review at ¶ 20 gives plain review of errors to AMEND the INFORMATIONS and FINAL JUDGEMENTS. Quoting Crist v. Bretz; 437 US 28, 33 (1978):

> The Fifth Amendment guarantee against double jeopardy derived from English common law, which followed then, as it does now, the relatively simple rule that a defendant has been put in jeopardy only when there has been a conviction or an acquittal- after a complete trial. A primary purpose served by such a rule is akin to that served by the doctrines of res judicata and collateral estoppel- to preserve the finality of judgements.

¶51 In ORDER DENYING MOTION TO WITHDRAW GUILTY PLEA, July 26, 2011 upon which this APPEAL is based; Judge McCullough states: "In the instant motion, Mr. Blurton provides no legal or factual basis indicating a manifest injustice occurred."

¶52 This Court, at Blurton ¶ 3, clearly ruled a conviction of "...N.D.C.C. § 12.1-20-03(1)(c), a Class A Felony." The North Dakota Attorney General, in Exhibit 1 and 2 rule a "Forcible rape of an intoxicated/passed out female", a AA FELONY. "The Attorney General is the principle law officer of the State and his authority is coextensive with public affairs of the whole community." McCue v. Equity Coop. Publishing Co.; 39 N.D. 167 N.W. 225 (1918). Neither the district court, the Supreme Court or the Attorney General seem to recognize the finality of judgements.

¶53 Judge McCullough claims; "these arguments are barred by res judicata and do not rise to the Standard of Rule 11. Sysverson v. State; 200 ND 185, ¶16, 620 N.W. 2d 362 (holding that when a claim has been fully and finally determined in a previous proceeding, such claim may be denied based on res judicata.)"

¶54 U.S. CONST. AMEND XIV guarantees a due and equal process of law. Blurton was convicted and imprisoned, "fully and finally determined in a previous proceeding" id. October 03, 2008 by Judge Marquart. Judge McCollough's statements are without Constitutional Support of the Double Jeopardy Clause as determined by Crist v. Bretz; 437 US 28, 33 (1978), U.S.CONST. AMEND V.

¶55 STANDARD OF REVIEW, as set forth by U.S. v. Davis; 452 F. 3d 991, 994 (8th Cir. ):

> Because Mr. Davis did not make a timely objection to the condition [condition of probation], we review it for plain error. UNITED STATES v. Ristine, 335 F. 3d 692, 694 (8th Cir. 2003). Plain error exist if the district court deviates from a legal rule, the error is clear under current law, and the error affects substantial rights. id. In most cases, for an error to affect substantial rights it must affect the outcome of the proceedings. United States v. Olano; 507 US 725, 734, 113 S.Ct. 1770, 123 L. Ed. 2d 508 (1993). We will correct such errors when they "'seriously affect the fairness, integrity or public reputation of judical proceedings'" id. at 736 (quoting United States v. Atkinson, 297 US 157, 160, 56 S.Ct 391, 80 L Ed 555 (1936)).

¶56 Petitioner argues all the conditions above have been met or exceeded. A manifest injustice has occurred. N.D.C.C. §39-01-01 "..shocking to the conscience of a reasonable person."

¶57 REQUEST FOR RELIEF

¶58 Quoting the Federal Court, ORDER, 3:11-cv-00028, Document 8 May 23, 2011 at page 8:

> The procedural bar prevents this court from reviewing Blurton's defaulted claims unless Blurton demonstrates cause and prejudice for the default, or that a miscarriage of justice will result if the court does not address the merits of his procedurally defaulted claims. McCall v. Benson; 114 F. 3d 754, 757 (8th Cir. 1997). Blurton states in his federal habeas petition that he exhausted his claims "to the best of [his]'pro se' abilities." (Doc. #2 p. 12). Blurton cannot make the threshold of showing of cause. Pro se status and lack of familiarity with the court system does not constitute cause. Vasquez v. Lockhart, 867 F. 2d 1056, 1058 (8th Cir. 1988). Blurton also has not demonstrated that this court's failure to consider his claims will result in a fundamental miscarriage of justice.

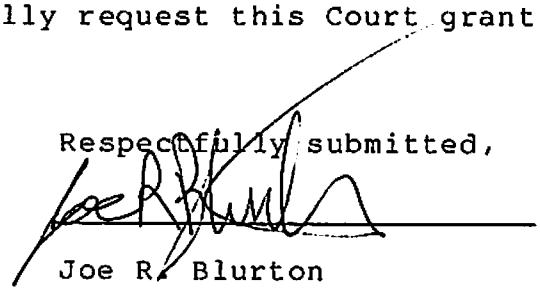
¶59 Pursuant to N.D.R. App. P Rule 35(b)(2) the petitioner request review of APPEAL, that a "fundamental miscarriage of justice" id. has been demonstrated. "Cause and prejudice" id. for failure to adequately "exhaust remedies in accordance with state procedure " Welch v. Lund, 616 F. 3d 756, 758 (8th Cir. 2010) have not been reviewed in dismissal of Blurton v. State; 2010 ND 223, 795 N.W. 2d 37. Two issues presented as "cause" (1) a denial of counsel in MOTION TO WITHDRAW of June 12, 2008 as reviewed in AFFIDAVIT, and (2) a denial of counsel in DIRECT APPEAL (R.A. -03531 # 138) as reviewed by AFFIDAVIT.

¶60 "Prejudice" as shown by the Attorney General's determination of AA FELONY, preceeding the ruling of Habeaus Petition, however not presented to State Court in 09-2010-cv-00028 or Blurton v. State, 2010 ND 223,759 N.W. 2d 37.

¶61 Therefore the petitioner states that only by a U.S. CONST. AMEND XIV DUE PROCESS OF LAW recognized by the State as N.D.R. Crim. P. Rule 32(d) PLEA WITHDRAW can the "true nature of the charges against him, the first and most universally recognized requirement of due process [occur]" Smith v. O'Grady; 213 U.S. 329, 334 (1941).

¶62 The petitioner respectfully request this Court grant WITHDRAW OF PLEA.

¶63 Respectfully submitted,



Joe R. Blurton

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

| | | |
|---|---|---|
| **STATE OF NORTH DAKOTA,** Appellee, | ) | Supreme Court Case No. 20110229 |
| v. | ) | |
| | ) | AFFIDAVIT OF SERVICE BY |
| **JOE R. BLURTON,** Defendant/Appellant. | ) | J.R.C.C. INMATE LEGAL MAIL |

Appellant Joe R. Blurton under penality of perjury states that he placed the following items into an envelope postage paid by Inmate Reciept No. 628149 & 628150 for delievery to the undersigned addresses:

UNBOUND COPY OF BRIEF WITHOUT APPENDIX
NOTICE OF NON-COMPLIANCE

To be delievered to these addresses:

Clerk of the Supreme Court
Supreme Court of North Dakota
600 E. Boulevard
Bismarck North Dakota
58505-0530

States Attorney Office
Cass County Courthouse
Post Office Box 2806
Fargo North Dakota
58108-2806

Signed this 12 day of September, 2011.

STATE OF NORTH DAKOTA )
) SS
COUNTY OF STUTSMAN )

Joe R. Blurton
J.R.C.C. # 33767
2521 Circle Drive
Jamestown North Dakota
58401

Signed and Sworn this 12 day of September 2011.

(NOTARY SEAL)

JULIE MUNKEBY
Notary Public
State of North Dakota
My Commission Expires June 11, 2015

NOTARY PUBLIC