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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

David Lynn Hieb,)
Petitioner and Appellant,)
vs.)
State of North Dakota,)
Respondent and Appellee.)

Supreme Court No. 20160019 STATE OF NORTH DAKOTA
Cass County No. 09-2015-CV-02634

RULE 24 SUPPLEMENTAL BRIEF

Appeal from Order Entered on January 14, 2016, In the District Court, Cass County, State of North Dakota The Honorable Douglas R. Herman.



David Lynn Hieb
James River Correctional Center, Inmate #28282
2521 Circle Drive
Jamestown, ND 58401

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[¶ 1] STATEMENT OF SUPPLEMENTAL ISSUES

[¶ 2] ISSUE #1: Whether the district court decision denying Petitioner – Appellant’s post-conviction relief was an arbitrary discrimination between similarly situated criminal defendants, which is prohibited by the Equal Protection Clause of the Fourteenth Amendment of The United States Constitution.

[¶ 3] ISSUE #2: Whether the district court abused its discretionary government powers by superintending the operation of law(s) without being an impartial independent judiciary, when it denied Petitioner – Appellant’s post-conviction relief, which is prohibited by the Due Process clause and Equal Protection of Laws under the Fourteenth Amendment of the United States Constitution.

[¶ 4] ISSUE #3: Whether the district court violated Petitioner – Appellant’s rights under Article I, Section 21 of the North Dakota Constitution, when it denied Petitioner – Appellant’s post-conviction relief on a well-settled North Dakota Supreme Court law.

[¶ 5] ISSUE #4: Whether Petitioner – Appellant was denied equality before the law, in violation of both the United States Constitution and the North Dakota Constitution.

[¶ 6] STATEMENT OF THE CASE

[¶ 7] Petitioner – Appellant (hereinafter referred to as “Appellant”) does hereby state and agree that the statement of the case as it appears in Brief of Petitioner – Appellant David Lynn Hieb, which was filed and served by and through appointed counsel Laura C. Ringsak (“Counsel”), is accurate to the best of Petitioner’s knowledge.

[¶ 8] STATEMENT OF FACTS

[¶ 9] Appellant does hereby state and agree that Statement Of Facts as it appears in Brief of Petitioner – Appellant David Lynn Hieb, which was filed and served by and through Counsel, is accurate to the best of Appellant’s knowledge.

[¶ 10] LAW AND ARGUMENT

I. Jurisdiction.

[¶ 11] This court has jurisdiction concerning this pro se Supplemental Rule 24 Brief, pursuant to N.D.R. App. P. 24.

II. The Standard of Review.

[¶ 12] Appellant does hereby state and agree that The Standard of Review as it appears in Brief of Petitioner – Appellant David Lynn Hieb, which was filed by and through Counsel, is accurate to the best of Petitioner’s knowledge except as to the following:

Appellant believes this Court should further review the district courts denial of his post-conviction relief under the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment of the United States Constitution and Article I, Section 21 and Article I, Section 12 of the North Dakota Constitution and all prevailing law and all United States and North Dakota Supreme Court law pertinent to such rights under both the North Dakota and United States Constitution.

[¶ 13] ISSUE #1: The district courts decision denying Appellant post-conviction relief was an arbitrary discrimination between similarly situated criminal defendants, which is prohibited by the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

[¶ 14] Appellant was charged with Conspiracy to Commit Murder under N.D.C.C. Section 12.1-06-04 and N.D.C.C. Section 12.1-16-01(1). (App 44).

[¶ 15] The Fourteenth Amendment to the United States Constitution provides that the states must give similarly situated persons or classes similar treatment under the law. (see, [Cases: Constitutional Law 209-250.05 C.J.S. Constitutional Law Section 700-733, Section 775-912, Section 916-917, and Section 919-944].).

[¶ 16] [T]he Equal Protection principle is exclusively associated with written Constitutions and embodies guarantees of equal treatment normally applied not only to the procedural enforcement of laws but also to the substantive content of their provisions. In other words the equal protection of the laws is invariably treated as substantive constitutional principle which demands that laws will only be legitimate if they can be described as just and equal. (See, Polyvios G. Polyviou, *The Equal Protection of Laws* 4 (1980)).

[¶ 17] In Frey v. State, 509 N.W. 2d 261 (N.D. 1993), the North Dakota Supreme Court held that:

The grading ^{phrase} ~~phase~~ "extreme indifference to the value of human life" is an understandable and distinct definition of the conduct prohibited by subsection 1 of N.D.C.C. Section 12.1-16-01, and is a reasonable and rational method of distinguishing the greater crime of class AA murder from the lesser crime of class B manslaughter under N.D.C.C. Section 12.1-06-02; therefore, there is no arbitrary discrimination between classes similarly situated that is prohibited by the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. (emphasis added).

It is clear from this Court's ruling in Frey v. State, that a person convicted of murder under N.D.C.C. Section 12.1-16-01(1) is in a class in of itself with other similarly convicted persons, under this statute.

[¶ 18] On September 28, 2005, the Cass County States Attorney filed and served a Second Amended Information Charging Appellant with the offense of: **(Count 1), Conspiracy To Commit Murder**, in violation of N.D.C.C. Section 12.1-06-04 and Section 12.1-16-01(1). (App. 4 at DOC. ID #62).

[¶ 19] Appellant pled guilty to Conspiracy To Commit Murder in violation of N.D.C.C. Section 12.1-06-04 and Section 12.1-16-01(1), without any distinction in the Information (App. 4 at DOC. ID #62), as to whether Appellant was charged out under subsection (a), (b) or (c) of N.D.C.C. Section 12.1-16-01(1).

[¶ 20] When looking at the language of subsection (a), (b) and (c) of N.D.C.C. Section 12.1-16-01(1), which states:

- 1. A person is guilty of murder, a class AA felony if the person:**
 - (a) Intentionally or knowing causes the death of another human being;**
 - (b) Causes the death of another human being under circumstances manifesting extreme indifference to the value of human life; or**
 - (c) Acting either alone or with one or more persons, commits or attempts to commit treason, robbery ... and, in the course of and in furtherance of such crime or of immediate flight therefrom, the person or any other participant in the crime causes the death of any person.**

It is clear that Appellant was not charged-out under subsection (a), because that would have required proof of: **“(1) an intent to agree, (2) an intent to cause death, and (3) an overt act.”** (See, State v. Borner, 2013 ND 141, ¶20, 836 N.W.2d 383 (Citing State v. Keller, 2005 ND 86, ¶51, N.W.2d 703)). During the sentencing hearing of December 7, 2005, Appellant did agree to

the factual basis that Appellant “was involved in a plan to rob the victim. But in the course of that plan the victim was injured, and now we know ultimately killed.” (App. 21; Tr. p.8, lines 20-25, Dec. 7, 2005 hearing), but as there was no “intent to cause the death” of the robbery victim by Appellant. Subsection (a) and the fact that the state offered no proof of an intent to cause the death of the robbery victim, subsection (a) could not have applied. Also, subsection (c) could not have applied because there can be no conspiracy to commit murder in the “course of” or in the “furtherance of” such crime because subsection (c) does not require an agreement to achieve the particular result and conspiracy under N.D.C.C. Section 12.01-06-04 which Appellant was charged-out, is a specific intent crime. Clearly the only subsection which could have possibly applied in November 2004, when the murder was to have been committed is subsection (b).

[¶ 21] The North Dakota Supreme Court has held in State v. Borner, 2013 ND 141, 836 N.W.2d 383, that conspiracy to commit murder under N.D.C.C Section 12.1-06-04 and Section 12.1-16-01(1) subsection (b) is not a cognizable offense.

[¶ 22] The holding in Borner has been applied by this court pursuant to N.D.R.Crim. P. 52(b) (“obvious error”) in State v. Whitman, 2013 ND 183, 838 N.W.2d 401. And further has been applied by this court in attempted murder under N.D.C.C. Section 12.1-06-01 and Section 12.1-16-01(1) subsection (b) (emphasis added) in Dominguez v. State, 2013 ND 249, 840 N.W.2d 596

and Coppage v. State, 2014 ND 42: Supreme Court No. 20130180, pursuant to obvious error.

And further the Stark County District Court applied the holding in Tyler Pelton v. State of North Dakota (case number unknown) in attempted murder under N.D.C.C. 12.1-06-01 and 12.1-16-01(1) subsection (b) (emphasis added), which conviction was pursuant to a plea-of-guilty, pursuant to an application for post-conviction relief proceeding filed after the new two-year time frame for post-conviction relief.

[¶ 23] This Court has held in Frey v. State, that persons convicted of murder under N.D.C.C. Section 12.1-16-01(1) are in a class of similarly convicted persons under the statute. There can be no question that Appellant, Borner, Whitman, Dominguez, Coppage, and, Tyler Pelton were all convicted either by jury or pleas-of-guilty of the same conduct under N.D.C.C. Section 12.1-16-01(1), and all of the above-mention criminal defendants have had their Class AA Felony for either conspiracy or attempted murder vacated except for Appellant.

[¶ 24] The district courts denial of Appellant's Application was an arbitrary discrimination between classes similarly situated and created a disproportionate impact upon Appellant and directly questions the integrity of the judicial system, and it would appear as if the district court had an improper motive, and such is prohibited by the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

[¶ 25] Appellants guarantee under the Fourteenth Amendment of the United States

Constitution that the State must treat Appellant the same as it treated other persons in like circumstances has been violated by the district court, and it must be determined that there is a definite conviction that a mistake has been made.

[¶ 26] ISSUE #2: The district court abused its discretionary governmental powers by superintending the operation of law(s) without being an impartial independent judiciary, when it denied Appellant post-conviction relief, which was prohibited by the Due Process Clause and Equal Protection of Laws under the Fourteenth Amendment of the United States Constitution.

[¶ 27] Under the Due Process Clause of the Fourteenth Amendment no state shall deprive any person of life, liberty or property, without due process of law. The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights.

[¶ 28] The Due Process Clause of the United States Constitution requires definiteness of all State statutes, including N.D.C.C. Section 12.1-16-01(1), so that the language, when measured by common understanding and practice, gives adequate warning of the conduct prescribed and marks boundaries sufficiently distinct for judges and juries to fairly administer the law. (See, Olson v. City of West Fargo, 305 N.W.2d 821, 828 (N.D. 1981); State v. Woodworth, 234 N.W.2d 243, 245 (N.D. 1975); Kolender v. Larson, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983)). In State v. Johnson, 417 N.W.2d 365, 368 (N.D. 1987), this Court went on to point out that there are two requirements of the vagueness doctrine. "(1) that the statute provide adequate warning as to the conduct prescribed, and (2) that the statute establish minimal guidelines to govern law enforcement. (See, Kolender v. Larson; State v. Hagge, 211 N.W.2d

395, 397 (N.D. 1973); State v. Woodworth; see also, 21 Am. Jur.2d Criminal Law [Section] 17).

[¶ 29] The circumstance employed by the district court were arbitrary, unreasonable and unwarranted, as the district court violated Appellant's Due Process rights and Equal Protection of Laws by failing to vacate Appellant's sentence of incarceration under a criminal law that was so standardless that it invites an arbitrary enforcement, and for which this Court had prior holdings in Borner to rectify. The prohibition of vagueness in criminal laws is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law and the district court's flouting of it violates the first essential of Appellant's right to Due Process and Equal Protection of Laws.

[¶ 30] **ISSUE #3:** The district court violated Appellant's rights under Article 1, Section 21 of the North Dakota Constitution, when it denied Appellant post-conviction relief on a well-settled North Dakota Supreme Court law.

[¶ 31] Article 1, Section 21 of the North Dakota Constitution, which guarantees all individuals will be treated alike, states in pertinent part:

“... nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens.”

[¶ 32] There is no question that Appellant must be granted the same immunities which the courts have granted upon Borner, Whitman, Dominguez, Coppage, and Tyler Pelton, because

each had been charged-out under N.D.C.C. Section 12.1-16-01 and this Court has held in Frey v. State that N.D.C.C. 12.1-16-01 is a reasonable and rational method of distinguishing Class AA murder and such is a class.

[¶ 33] Article 1, Section 12, the Immunities Clause of the North Dakota State Constitution requires that Appellant's underlying criminal charge in this matter be vacated, and the district failure to vacate was an arbitrary discrimination and a clear abuse of the judicial system, and must have been based on an improper motive, because the Borner decision was well-settled law.

[¶ 34] **ISSUE #4: Appellant was denied equality before the law, in violation of both the United States Constitution and the North Dakota Constitution.**

[¶ 35] The North Dakota Constitution guarantees that Appellant's status or condition of being treated fairly according to regularly established norms is a right and that the notion that all persons are subject to the ordinary law is a right. (See, North Dakota Constitution Article 1, Section 12 and Section 21).

[¶ 36] The United States Constitution guarantees that Appellant will receive equal treatment of the laws. (See, United States Constitution Fourteenth Amendment)

[¶37] One of the meanings that are normally given to the provision that there is equality before the law, is borne by declarations that all are equal before the law. (See, Polyvios G. Polyviou, The Equal Protection of Laws 1-2 (1980)).

[¶ 38] CONCLUSION

[¶ 39] Appellant respectfully requests that this Court reverse his conviction in this case as he has been denied his United States Constitutional rights and denied even greater protection under the North Dakota Constitution, because he has been convicted of a crime which is not a cognizable offense, and other person's similarly situated have received relief under the law.

[¶ 40] Dated this 29th day of March, 2016.



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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

David Lynn Hieb,)	Supreme Court No. 20160019
Petitioner and Appellant,)	
)	Cass County No. 09-2015-CV-02634
vs.)	
)	
State of North Dakota,)	
Respondent and Appellee.)	

 CERTIFICATE OF SERVICE

[¶ 1] I hereby certify that I served, by United States Mail (Prison Mail Box System) a true and accurate copy of the **RULE 24 SUPPLEMENTAL BRIEF**, upon the following parties:

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[¶ 2] Dated this 29th day of March, 2016



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Petitioner and Appellant,)	
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vs.)	
)	
State of North Dakota,)	
Respondent and Appellee.)	

CERTIFICATE OF NON-COMPLIANCE

[¶ 1] The above-named Petitioner-Appellant ("Appellant"), hereby certifies that because he is incarcerated at the James River Correctional Center at Jamestown, North Dakota, and such Correctional Center does not provide any means for the electronic filing of his Supplemental Rule 24 Brief, Appellant must file by United States Mail (Prison Mail Box System) only.

[¶ 2] Dated this 29th day of March, 2016.



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