

April 15 2009

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 09-0161

FILED

APR 15 2009

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

JONATHAN SILVERSKY,

Petitioner,

v.

ORDER

STATE OF MONTANA,

Respondent.

Jonathan SilverSky (SilverSky) filed a petition for a writ of habeas corpus and moved for leave to proceed without paying the filing fee. SilverSky contends that he is illegally incarcerated because the District Court lacked authority to accept an Alford plea under § 46-12-204(4), MCA, to the incest charge under § 45-5-507, MCA. SilverSky alleges that in accepting the Alford plea, the District Court deprived him of due process of law and that he is entitled to release from prison.

SilverSky entered an Alford plea to one count of incest, for which he is serving a 35-year sentence, with 10 years suspended. The 1999 Legislature modified § 46-12-204, MCA, to prohibit pleas of nolo contendere to sex offenses. The sex offenses are specified in § 46-23-502, MCA, and incest is listed among the sex offenses.

We note that SilverSky has filed several petitions with this Court. In Cause No. 08-0539, *SilverSky v. Law*, the Attorney General filed a response which included as an exhibit, a statement made by SilverSky's stepdaughter. The statement reflects that SilverSky began having sex with her in late February of 1999, and continued to do so until mid-March of 2000. SilverSky's stepdaughter gave birth to a baby boy on March 29, 2000. Another exhibit to the Attorney General's response in Cause No. 08-0539 shows that genetic testing

demonstrated a 99.53 percent probability that SilverSky is the child's father.

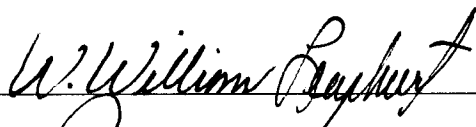
The legislative changes to § 46-12-204, MCA, and § 45-5-502, MCA, became effective on October 1, 1999. However, SilverSky's victim said in her statement that SilverSky had sex with her approximately every other day from late February of 1999, until mid-March of 2000. Since SilverSky committed repeated offenses both before and after the above statutes were amended, the District Court acted within its authority in accepting the plea. Whether SilverSky should have been allowed to enter an equivocal plea constitutes a collateral attack upon the validity of SilverSky's conviction, which would have been properly raised in a timely petition for postconviction relief, rather under habeas corpus. Section 46-21-101, MCA. Nevertheless, SilverSky is not illegally incarcerated, and his due process rights were not violated.

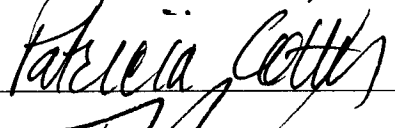
IT IS HEREBY ORDERED that the request for leave to proceed without paying the filing fee is GRANTED.

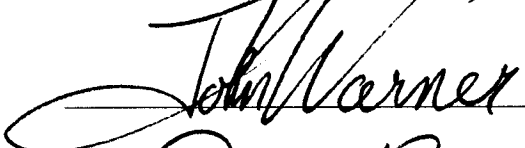
IT IS FURTHER ORDERED that the petition for habeas corpus is DENIED.

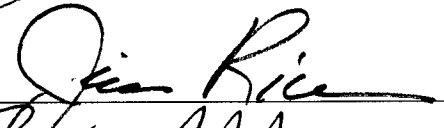
The Clerk is directed to mail a true copy hereof to counsel of record, and to SilverSky, personally.

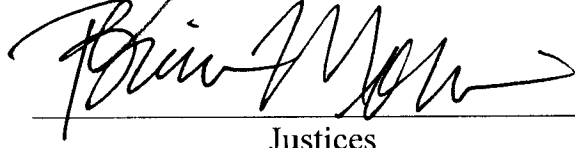
DATED this 15th day of April, 2009.











Justices