No.

DECEMBER TERM, 2017

In the Supreme Court of the United States

KENNETH GREEN, Petitioner,

v.

STATE OF COLORADO, Respondent

On Petition for Writ of Certiorari to the

State of Colorado Supreme Court

PETITION FOR WRIT OF CERTIORARI

KENNETH GREEN
DOC # 156969
Unrepresented Inmate
Bent County Correctional Facility
11560 CO. RD. FF.75
Las Animas, CO 81054

QUESTION PRESENTED

The federal questions here presented were first specifically raised by written motion on March 7, 2014, by collateral attack (Appendix D, pp. 78-79), and again by written motion for trial pursuant to Colo. Crim. Proc. Rule 33 on June 30, 2014, (Appendix D, pp. 67-73), and still again by written petition for relief of judgment pursuant to Colo. Civ. Proc. Rule 60 (Appendix D, pp. 53-66), and finally in a motion for correction of illegal sentence, court lack of jurisdiction on March 27, 2017, (Appendix D, pp. 01-26). The first motion was not ruled upon for 570-days and only after petitioner moved for a demand for judgment motion threatening sanctions on trial judge (Appendix D, p. 42). In the second motion, trial court did not actually send petitioner an order reduced to writing, only afer requesting a registry of actions did he discover the denial order (Appendix E, ps. 5, 13). Further, in the order, trial court did not address any of the federal questions. In the relief of judgment petition, trial court passed on the federal questions and procedurally denied, (Appendix E, pg. 6, 14). And finally, the correction of illegal sentence motion, the trial court ignored the evidence, transcripts, decuments from the court file in its denial (Appendix B, pp. 03-06). When petitioner moved to appeal, the trial court denied transcripts at state expense in criminal appeal for indigent inmate (Appendix B, pp. 01-02). Petitioner sought review in the Colorado Supreme Court in Original Jurisdiction (Appendix C, pp. 02-18), and the court passed on the legal question without opinion)Appendix A, p. 01). This order petitioner is seeking certiorari review pursuant 28 U.S.C. 1257 (a).

The United States Constitution provides in pertinent part, "...[no] warrants shall issue, but upon probable cause supported by oath or affirmation," however, in case of warrantless arrest, this Court held a jurisdictional

determination is a right, because a search or seizure unsupported by probable cause is per se illegal. And the state bears the burden of reuting that presumption by showing on record the arrest fell within one of the recognized exceptions to the Fourth Amendment. **Gerstein v. Pugh**, 420 U.S. 103, 125, n.27, 95 S.Ct. 854, 863 43 L.Ed.2d 54 (1975). The due process clause of the Fourteenth Amendment dictates the courts strict adherence to the governmental prescriptions of this rule.

The provision of federal and state rules of criminal procedure 11 mandate for a constitutional waiver to be valid it must be voluntary, knowingly, and intelligently entered. Absent an affirmative showing contrary of this requirement, reversal is mandatory. **Boykin v. Alabama**, 396 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

In Colorado, the right to appeal a conviction is guranteed by statute, although no federal constitutional right to an appeal exists, when a state creates appeal as a right, appellate procedures must comport with the United States Constitution. **Evitts v. Lucey**, 469 U.S. 387, 393, 105 S.Ct. 830, 83 L.Ed.2d 821 (1956). Moreover, an indigent appellant is entitled to complete transcript without which meaningful review is impossible. **Griffin v. Illinois**, 351 U.S. 12, 19, 76 S.Ct. 585, 100 L.Ed. 891 (1956).

Two questions presented is:

1. Does state have a constitutional authority in the case of warrantless arrest with no probable cause determination by a neutral and detached magistrate to prosecute;and accept a guilty plea in Rule 11 hearing when plea was not voluntary, knowing, and intelligently entered on the record;

2. Does the state have the authority to deny transcripts at state expense in

criminal appeal to an indigent, unrepresented poor inmate?

LIST OF PARTIES

This petition involves the Colorado Supreme Court's affirmation of state court action of proceeding without constitutional authority under the Fourth Amendment, depriving the petitioner of due process and discriminating against him because he is unrepresented and poor.

Petitioner: Kenneth Green, inmate at Bent County Correctional Facility 11560 County Road FF.75 Las Animas, CO 81054

Respondent: State of Colorado; Cynthia Coffman, Attorney General, State of Colorado, 1300 Broadway, 10th Floor, Denver, CO 80203

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

Petitioner Kenneth Green requests this Court to grant his petition for writ of certiorari and vacate his convictions and sentence in this case, involving extreme and unusual factual circumstances that trial court proceeded without constitutional authority. At the time of arrest, law enforcement did not have a warrant, nor did a neutral and detached magistrate determine that probable cause existed. Further, the state did not refute the presumption that the warrantless arrest fell within one of the recognized exceptions to the Fourth Amendment as this Court mandated in **Gerstein v. Pugh**, supra. **County of Riverside v. McLaughlin**, 500 U.S. 44 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991)("A person arrested without a warrant must be promptly brought before a neutral magistrate for a judicial determination of probable cause..."). The Colorado Supreme Court upheld the same in **People v. Moreno**, 176 Colo. 488, 491 P.2d (1971). (... the existence of probable cause must be determined by a member of the judicial, rather than law enforcement officer who is employed to apprehand and bring charges). Because the above did not occur, state was without jurisdiction to accept petitioner's plea for two reasons; **(1)** the 'legal process' never began, result in juridictional defect, and **(2)** petitioner's plea entry was not voluntary, knowingly and intelligently made, thus unconstitutional. When petitioner moved for appellate review, district court denied transcripts at state expense in criminal appeal although it found petitioner indigent, adding to the deprivations imposed. The state has passed on the federal question multiple times, and it is clear that state is ruling contrary to the United States Constitution, this Court's ruling, and its own rulings. Green requests that this Court grant his petition for writ of certiorari because the facts show that the mandates of the Fourth and Fourteenth Amendments were not

adhered to throughout the duration of this case. Green requests this Court grant his petition for writ of certiorari to correct this fundamental miscarriage of justice.

OPINION

There was no formal opinion of the Colorado Supreme Court in the denial of this unpublished case affirming the lower court ruling; reproduced in Appendix A to this Petition. The orders of the district court are reproduced in Appendix B, unpublished.

JURISDICTION

The judgment of the District Court, City and County of Denver, were entered on February 16, 2011 (Appendix B, p. 18). Petitioner motioned for corrections of illegal sentencing, having been overruled on July 23, 2017. (Appendix B, pp. 03-06). Appeal Court granted review under state law (Colo. Rev. Stat. 16-12-101)(Appendix A, pp. 03-04). Trial Court denied transcript at state expense in criminal appeal after finding indigency (Appendix B, pp. 01-02). Petitioner sought relief in the nature of prohibition in the Colorado Supreme Court by reason trial court is proceeding without, or in excess, of its jurisdiction and abuse of discretion, resulting in Fourth and Fourteenth Amendment deprivations (Appendix C, pp. 02-21) It is appropriate to show that no meaningful appellate review of the merits of the federal claim is available in any Colorado court and that the Colorado Supreme Court is therefore the highest court of the state in which a decision can be had. State law established that original proceedings are authorized to test whether the trial court is proceeding without, or in excess, of its jurisdiction and to review a serious abuse of discretion where an appellate remedy would not be adequate. **Semental v. Denver**

Court, 978 P.2d 668 (Colo. 1999). The Colorado Supreme Court held, although questions involved on which the relief in jurisdiction is asked may be reviewed on appeal that is not conclusive against the right as to relief if in the jugement of the court, such remedies are not plain, speedy, and adequate. **People ex rel. Lackey v. District Court**, 30 Colo. 123, 69 P. 597 (1902). Additionally, the Colorado Supreme Court ruled it is proper to use original proceeding to test probable cause hearings. See also **White v. MacFarlane**, 713 P.2d 366 (Colo. 1986).

Petitioner, Kenneth Green, claims **(1)** that "no arrest warrant issued and no probable cause determination made, deprives him of his liberty and due process rights; **(2)** his guilty plea is invalid because it was not voluntarily, knowingly and intelligently given; and **(3)** trial court abused discretion by discriminating against him because he is an unrepresented poor inmate in violation of the Fourth and Fourteenth Amendments to the United States Constitution.

Petitioner has no remedy in the Colorado Courts. Denver District Court has effectively blocked any meaningful review by way of denial of transcripts in volation of state law which holds, an indigent defendant is entitled to obtain a free transcript when necessary to exercise the right of appeal. **People v. Shearer**, 181 Colo. 237, 508 P.2d 1249 (1973). Petitioner's only recourse is, therefore, to seek review on certiorari in the United States Supreme Court, for which he may petition within 90-days after the November 27, 2017, denial.(Appendix A, p01) Petitioner unrepresented, vigorously insists that there was no **'Gerstein'** determination hearing by a neutral and detached magistrate and the Rule 11 hearing was unconstitutional upon which conviction and sentence by the state could be based. Simply, the legal process never began. The highest court of Colorado has passed on the legal question despite the fact that serious federal

liberty and due process questions have been raised. By their failure, it has cleared the way for review here. This Court has statutory jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

A. Federal.

United States Constitution, Amend. 4

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath of affirmation ...

United States Constitution, Amend. 14 § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside, No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; 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 the law.

Federal Rules of Criminal Procedure Rule 11(b)(2)

Before accepting a plea of guilty or nolo contendre, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises.

Federal Rule of Criminal Procedure Rule 55

The clerk of the district court must keep records of criminal proceeding in the form prescribed by the Director of the Administrative Office of the

United States Courts. The clerk must enter in the records every court order or judgment and the date of entry.

B. State.

The statutory provisions involved are Colorado Revised Statutes (C.R.S.) §§13-5-135, 13-5-136, 16-12-101, 18-1-201; Colorado Rules of Civil Procedure Rule 60, Colorado Rules of Criminal Procdure(s) 5, 11, 35(a)/(c), 55; and Colorado Rules of Professional Conduct Rule 3.8(a), as they appear in the body of the petition.

STATEMENT OF THE CASE

a. Introduction.

1. On June 9, 2011, petitioner's arrest by Denver law enforcement was without a facially valid warrant, probable cause, or any exigent circumstance. The state did not refute the presumption that the arrest was unconstitutional. A neutral magistrate did not order that probable cause existed or the arrest fell within one of the recognized exceptions to the Fourth Amendment. On July 26, 2011, he was bound over to district court. Prior tothe November 17, 2011, Rule 11 hearing, court granted four continuances. (App. E, pp. 82-89).

2. During the hearing, petitioner stated he felt he had no other options, and he was afraid, very afraid, he did not know what to do, he did not want to plead guilty, and he reluctantly pled guilty before he actually entered a plea. (App. E, pp. 41-46).

3. On February 16, 2012, as a result of the arrest and Rule 11 hearing, state sentenced petitioner to 20-year state prison term, plus probation, additionally, state did not order restitution or court costs. (App. E, pp. 04-05, App. B, p. 18).

4. Petitioner insists that the state failed to hold a **Gerstein** hearing to validate the arrest, thus the 'legal process' never began. The court record reflects this, in addition, an invoice from Transcribing Solutions shows that "no hearing held in District Court on June 11, 2011, and July 26, 2011." (App. E, pp. 90-91). Green did not waive any constitutional rights in the Rule 11 hearing; he has brought these federal claims to the state court presenting evidence, court records, and transcripts; however, the state has ignored this.

b. Procedural History.

1. Petitioner filed a written postconviction motion listing these federal questions first on March 7, 2014, "PETITION FOR POSTCONVICTION RELIEF AND STAY OF EXECUTION, PURSUANT TO CRIM. P. 35(c)," (App. D, pp. 78-79, App. E, p. 05). And "SUPPLEMENTAL PETITION FOR POSTCONVICTION RELIEF AND STAY OF EXECUTION, PURSUANT TO CRIM. P. 35(c)" on May 2, 2014. (App. D, p. 77, App. E, p. 05), also a motion "FOR FREE FILES AND TRANSCRIPTS OR ON LOAN FROM THE DISTRICT COURT" on May 9, 2014. (App. E, p. 05, App. D, pp. 74-76). Trial judge advised petitioner and district attorney on May 23, 2014, that further orders will be issued by June 27, 2014. (App. E, pp. 5, 12).

2. On May 28, 2014, petitioner moved "MOTION FOR TRIAL" under Colo. Crim. P. Rule 33. (App. D, p. 67; App. E, p. 5, 13). And on June 10, 2014, he filed a "MOTION FOR RELIEF OF FINAL JUDGMENT" [sic] pursuant to Fed. R. Civ. Proc. 60 (b)(4) and Colo. R. Civ. Proc. 60 (b)(3), by reason of void judgment because trial court did not have constitutional authority, the motion included one Affidavit, and a memorandum brief. (App. D, pp. 53-66, App. E, p. 06).

3. On June 27, 2014, trial judge did not issue further orders; however, on July 3, 2014, she denied the motion for trial, not addressing any of the federal constitutional claims, only stating, "...[d]efendant had ample time to consult

with counsel and consider the terms of the plea agreement and therefore the defendant's motion is denied" [sic]. (App. E, p. 5). Interestingly, the court did not send petitioner an order reduced to writing. Only after requesting a registry of actions did he discover the order.

4. Petitioner moved for a "MOTION FOR EVIDENTIARY HEARING TO SUPPORT CLAIMS PRESENT IN MOTION FOR RELIEF FROM FINAL JUDGMENT W/ATTACHMENTS FILED ON JUNE 10, 2014" [sic] and "MOTION FOR HEARING TRANSCRIPTS AND OTHER FILES TO SUPPORT CLAIMS PRESENT IN MEMORANDUM BRIEF ATTACHED TO MOTION FOR RELIEF FROM FINAL JUDGMENT" [sic] on September 29, 2014. (App. E, ps. 5, 13; App. D, pp. 51-52).

5. Trial judge ordered People to respond to the above mentioned motion on September 3, 2014, again, without reducing the order to writing and providing petitioner a copy. (App. E, ps. 6, 13).

6. On September 24, 2014, Judge Starrs denied motion for relief from final judgment. (App. E, p. 6, 14). Trial court did not address any of the federal claims and procedurally denied the motion.

7. On September 25, 2014, trial court denied the Answer to People's Response to defendant's motion for evidentiary hearing to support claims present in motion for relief from final judgment as successive. (App. E, p. 6, 14).

8. On October 28, 2014, Judge Starrs denied the pro se motion to invoke Sixth Amendment right to self-representation and have conflict-free advisory standby counsel appointed, as successive. (App. E, p. 6, 14).

9. After saving state pay for about 2-years, petitioner requested to pay for transcripts from Transcribing Solutions, petitioner paid deposit on June 10, 2015, (App. E, p. 15), shortly thereafter, he received the transcripts of the Rule 11 and sentencing hearings. (App. E, pp. 7, 14-15).

10. After requesting a status update on the original Crim. P. 35(c) motion,

the Denver records department recommended that he seek legal assistance to move the court to move forward with ruling on the motion (App. E, p. 75).

11. On October 1, 2015, petitioner filed a "DEMAND FOR JUDGMENT" motion, demanding trial court to rule on the original 35(c) motion or he will seek sanction against trial judge pursuant to Colo. Rev. Stat. §§ 13-5-135, and 13-5-136. (App. D, p. 42). On October 13, 2015, after over **570 days**, Judge Kandece Gerdes denied the motion and the request for transcripts. (App. **B**, p. **16**).

c. State Habeas

1. In December 2015, petitioner moved to the Colorado Supreme Court for an original proceeding presenting the federal claims (App. **C**, p. **22**). The Colorado Supreme Court granted case number 2015SA343, and In Forma Pauperis on December 31, 2015.

2. On January 21, 2016, the court denied the petition without a hearing or opinion (App. A, p. 10).

3. On March 7, 2016, petitioner filed the very same petition in Denver District Court, case number 2016CV144, with transcripts and other attachments.

4. OnMarch 14, 2016, state denied the petition, citing, "does not set forth a prima facie case" without a hearing.

5. On March 28, 2016, petitioner sought appellate review in the Colorado Supreme Court. Subsequently, the court denied review without opinion. During briefing, the Colorado Attorney General did not submit a reply brief.

6. Prior to filing in Denver District Court or the Colorado Supreme Court, petitioner petitioned Crowley County District Court the very same writ for habeas corpus and the court cited, "the petitioner is not yet entitled to discharge ...", case number 2015CV31.

d. Correction of Illegal Sentence.

1. On March 27, 2017, petitioner filed a Colo. Crim. P. 35(a) motion for correction of illegal sentence, sentence imposed without jurisdiction. (App. D, pp. 01-15). Petitioner also filed a supplemental, alleging that sentence is illegal because the guilty plea did not meet constitutional requirements in Rule 11 hearing w/transcripts (App. D, pp. 01-20), and a second and final Colo. Crim. P. 35(a) motion, alleging that the sentence is illegal because imposition of state prison and county probation in same conviction in case number 11CR2366 is illegal and trial court did not order restitution. (App. D, pp. 21-26).

2. Petitioner filed the following motions in support of the 35(a) motions:

1). Defendant's Request for Reasonable Accommodations, Apr. 7, 2017;

2). Request For A Hearing, Apr. 25, 2017;

3). Good-Faith Hearing Witness List, May 12, 2017;

4). Notice to Court w/Attachment, May 12, 2017;

5). Defendant's Status Motion, May 12, 2017;

6). Motion to Incur Cost For Service of Subpoenas, May 12, 2017;

7). Subpoena for the following:
   a). Honorable Sheila Rapport;
   b). Honorable Edward Bronfin;
   c). D.D.A. Kerri Lombardi; and
   d). Clerk Sabra Millett.

8). Motion for Preliminary Injunction, May 23, 2017.

e. Court Order

1. Judge Gerdes review request for reasonable accomodations on April 7, 2017, (App. B, p. 11). Court advised petitioner that he must file a status motion stating that he would not file any more supplemental motions before court will consider the 35(a) motions. (App. B, pp. 09-10). Court also denied the request

for a hearing on April 27, 2017. (App. B, p. 09), and ruled that the request for issuance of subpoenas is premature on May 17, 2017. (App. B, p. 08).

2. Court denied preliminary injunction without fact finding on May 24, 2017. (App. B, p. 07). Finally, on July 23, 2017, trial court denied the 35(a) motions without an evidentiary hearing. (App. B, pp. 03-06).

f. Appellate Review.

1. Petitioner sought appellate review, Appeal Court granted case number 2017CA1385, on August 7, 2017. (App. A, pp. 03-09).

2. Petitioner moved for In Forma Pauperis on September 11, 2017. Court of Appeals waived docket fee, instructed petitioner he must first file In Forma Pauperis in district court, and supplied him with proper motion form. (App. A, p. 06).

3. Petitioner submitted to trial court the court-supplied form, and Judge Gerdes denied request stating, "... he is [not] entitled to postconviction relief.", although court made finding of indigency. (App. B, pp. 01-02).

A. Relevant Facts: Court Record Shows No Warrant Issued And No Probable Cause Determination By Neutral And Detached Magistrate.

1. In Colorado, pursuant to Criminal Procedure 55, which provides in part,

> (a) Register of Action (criminal docket). The clerk shall keep a record known as the registry of actions and shall enter therein those items set forth below. ***
> (4) ... A register of actions shall be prepared for each case or matter filed. ... All papers filed with the clerk, all process issued and returns made thereon, all cost, appearances, orders, verdicts, and judgments shall be noted chronologically in the registry of actions. These notations shall be brief but shall show the nature of each paper filed or writ issued and of the substance of each order or judgment of the court and of the returns showing execution of process. The notation of an order or judgment shall show the date the notation is made.

2. State and federal rule are similar in appearance and use, the federal rule

provides in part, "[f]ailure to give notice or reduce an order to written form and enter it into the court's docket makes an order null and void." Simply put, if it's not in the registry of actions, it did not happen. Fed. R. Crim. P. 55.

3. The June 9, 2011, arrest of petitioner by law enforcement was without warrant, lawful authority, or exigent circumstance. On page one of the registry of actions, **People v. Green**, 11CR2449; 11CR2366 (unpublished)(App. E, p. 02), the warrant input box is blank, warrant date blank, named party on warrant blank, and on page two there is no entry for affidavit in support of arrest/warrantless arrest, or is there an entry of ORDER determining probable cause by a magistrate judge. (App. E, p. 03). The state is treating petitioner differently from how it treats others; e.g., in **People v. Santiago-Rodriguez**, case number 14CR0890 (unpublished). His arrest pursuant to warrant with affidavit show on registry of actions, all warrant data is completed, and there is an ORDER determining probable cause. (App. E, pp. 28-30). In **People v. Ramos**, 16CR1676 (unpublished) (App. E, pp. 23-24); Arrest without warrant on August 30, 2016, next day affidavit in support of warrantless arrest on registry of actions, and determination of probable cause order. State met burden of refuting presumption that arrest fell within one of the recognized exceptions to the Fourth Amendment: And **People v. Esquibel**, case number 2017CR2736 (unpublished), his arrest on September 3, 2017, on September 4, 2017, affidavit in support of warrantless arrest in registry of actions, (App. E, pp. 23-24), and ruling that probable cause found.

4. The above examples show that the state knows how to apply federal and state constitution to person arrested, with, and without, warrat, except in this case, the state has deliberately not applied them to him or his case.

5. About two-years after sentencing, Green wrote the clerk of court, requesting a copy of warrant, clerk's response, "there are no search warrants in the case file." (App. E, p. 77). Interestingly, clerk sent Green a copy of probable cause document that does not show on registry of actions, this document is dated seven days after his arrest and it states that officer search was pursuant to search warrant. This alleged warrant does not show in registry of actions as ORDER or affidavit. (App. E, pp. 02-04, 08-10).

6. Around three-years after sentencing, Green again wrote clerk of court requesting a copy of any warrants in file, clerk response, "there are no arrest warrants in file." (App. E, p. 76). Clerk recommended that Green contact his attorney or the district attorney. Again, interestingly, clerk sent him a copy of a probable cause document dated just after his arrest, stating that his arrest was at home. (App. E, pp. 78-79). This document does not show on the registry of action and was not in his file a year earlier when he first made a request for warrants.

7. There are other inconsistencies with the registry of action, such as the entry ID number. Entry number 1 through 5 are out of order. (App. E, pp. 02-03, 08-09). The arrest date and court appearance are not in compliance with Colo. Crim. Proc. Rule 5, which provides that an arrested is to be brought before a judge without unnecessary delay.

8. The Courts have a responsibility to guard against police conduct which is overbearing or harassing in order to protect the constitutional rights of the individual. The Fourth Amendment protects the people from unreasonable search and seizures. It is a fundamental truth that a valid arrest must be based on probable cause and an arrest without warrant is presumed to have been unconstitutional, and the People have the burden of rebutting presumption by showing

both that the arrest was supported by probable cause, and that it fell within recognized exception to warrant requirement. In **Gerstein v. Pugh**, supra, this Court held, "[T]hat the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest." This result has historical support in the common law that has guided interpretation of the Fourth Amendment. See **Carrol v. United States**, 267 U.S. 132, 149, 45 S.Ct. 280, 283, 69 L.Ed. 543 (1925). At common law it was customary, if not obligatory for an arrested person to be brought before a justice of the peace shortly after arrest. **2 M. Hale, Pleas of the Crown**, 77, 81 95, 121 (1736); **2 W. Hawkins, Pleas of the Crown**, 116-117 (4th Ed. 1762). See also **Kurtz v. Moffitt**, 115 U.S. 487, 498-499, 6 S.Ct. 148, 151-152, 29 L.Ed. 458 (1885). The justice of the peace would 'examine' the prisoner and the witnesses to determine whether there was reason to believe the prisoner had committed a crim. If there was, the suspect would be committed to jail or bailed pending trial. If not, he would be discharged from custody. **1 M. Hale**, supra, at 583-586; **2 W. Hawkins**, supra, at 116-119; **1 J. Stephen, History of the Criminal Law of England** 233 (1883). This practice furnished the model for criminal procedure in America immediately following the adoption of the Fourth Amendment, see **Ex Parte Burford, 3 Cranch** 448, 2 L.Ed. 490 (1795), and there are indications that the Framers of the Bill of Rights regarded it as a model for 'reasonable' seizure. See **Draper v. United States**, 358 U.S., at 317-320, 79 S.Ct. at 335-336 (Douglas, J., Dissenting). The record in this case shows no Gerstein hearing to validate the warrantless arrest. Furthermore, "[i]n legal prosecution, all legal requisites must be complied with to confer jurisdiction on the court in criminal matters, as district attorney cannot confer jurisdiction by will alone." **People v. Page**, 667 N.Y.S.2d 689, 177 Misc.2d 448 (1998).

The petitioner is being unconstitutionally detained by the state who is holding him in custody after he has brought this issue of constitutional defect to state's attention many times. Moreover, state has ignored the evidence in its own record ... this Court must intervene.

B. Fourth Amendment Deprivation Results In No Constitutional Authority.

1. Under the Fourth Amendment, a person has a right to a judicial determination of probable cause. **Gerstein v. Pugh**, supra, because arrest without warrant is presumed illegal. See **Carroll v. United States**, supra; **Jones v. City of Santa Monica**, 382 F.3d 1052, 1056 (9th Cir. 2004)("A post-arrest probable cause determination performs the same function for those arrested without warrants as a pre-arrest probable cause determination does for suspects with warrants."). In **County of Riverside v. McLaughlin**, this Court held that jurisdictions must hold hearing within forty-eight hours of arrest. Id 500 U.S. 44, 56 (1991); see also **Powell v. Nevada**, 511 U.S. 79, 80 (1994). In this case, the record shows none of the mandatory constitutional requirements occured since the People did not refute the presumption that the arrest was unconstitutional, thus arrest is unconstitutional. The Colorado Supreme Court in case of **People v. Fields**, 785 P.2d 611, 612 held that ... Denver Police had no authority to arrest Fields because no facially valid warrant issued. The court ordered him released from custody and supressed all evidence seized in the arrest.

2. An arrest warrant, after all, is a way of initiating legal process, in which a magistrate finds probable cause that a person committed a crime. See **Wallace v. Kato**, 549 U.S. 384, 389, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007) (explaining that the seizure of a person was "without legal process" because police officers "did not have a warrant for his arrest."); **W. Keeton, D. Dobbs, R. Keeton and D. Own, Prosser and Keeton on Law of Torts** § 199, pp. 871, 885

(5th ed. 1984)(similar). In **Gerstein**, the Court looked to the Fourth Amendment to analyze -- and uphold -- their claim that such a pretrial restraint on liberty is unlawful unless a judge (or grand jury) first makes a reliable finding of probable cause. See id., at 114, 117 n.19, 95 S.Ct. 854. The Fourth Amendment, establishes the minimum constitutional "standard and procedures." And a probable cause finding sufficient to initiate a prosecution for a serious crime is "conclusiv[e]," Id. In this case, Green's detention was not pursuant to "legal process" because no authorization by a judge's probable cause determination.

3. It is well known that a summons and complaint or by [lawful] arrest confer jurisdiction over the person of the defendant. **State v. Carlin**, 249 P.3d 752 (Alaska, 2011) and personal jurisdiction "is based on having legal authority over the [person]." **People In Interest of Clinton**, 762 P.2d 1381, 1386 (Colo. 1988)(quoting F. James, Jr. and G. Hazard, Jr., Civil Procedure § 2:15 (2d Ed. 1985). A state cannot exercise its adjudicatory authority over a party ... unless it has both statutory authority and the constitutionally recognized power to do so, Id. § 3.1 at 95 (footnote omitted). Without jurisdiction, the court does not have the power to subject a particular defendant to the decision of the court. U.S. Const. IV Amend., Colo. Rev. Stat. § 18-1-201; **People v. Jones**, 140 P.2d 325 (citation omitted).

4. Compliance with Fourth Amendment procedure in warrantless arrest is mandatory and jurisdiction is perfected only after probable cause is established by a neutral detached magistrate. "It is clearly established [law] that once jurisdiction over the person of the accused is established in a criminal case, the court before which he is arraigned has the power to adjudicate the question raised by the charge and the plea entered thereon." **De Baca v.**

Trujillo, 167 Colo. 311, 314, 447 P.2d 533, 535 (1968). Thus, State did not have constitutional authority and this Court must intervene. A jurisdictional claimant will face an argument that he waived his right by pleading guilty. **Brady v. United States**, 397 U.S. 742, 759 25 L.Ed.2d 767, 90 S.Ct. 1463 (1970) (citations omitted). When a defendant raises a jurisdictional claim, a guilty plea will constitute no such waiver. Moreover, petitioner's plea entry was not constitutional. ⅄ Infra.

C. Record Confirm State Constitutionally Barred From Accepting Plea During November 17, 2011, Hearing.

1. The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative course of action open to the defendant. See **Boykin v. Alabama**, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711, 23 L.Ed.2d 274 (1969), but also, in Colorado, the opportunity to challenge the validity of a plea is by Colo. Crim. Proc. Rule 35. The burden is on the petitioner to establish that his guilty plea was unconstitutional, that he did not deliberately bypass the orderly process privided to determine the validity of the plea. Cf. **Fay v. Noia**, 372 U.S. 391, 438-440, 83 S.Ct. 822, 848-849 9 L.Ed.2d 837 (1983). This Court held, to determine whether or not constitutional requirements were met can only be made by a consideration of the total circumstance surrounding the entry of the plea. **McMann v. Richardson**, 90 S.Ct. 1441, 1455 397 U.S. 759 (U.S.N.Y. 1970). During the Rule 11 hearing, petitioner and court engaged in the following colloquy:

[THE COURT]: I want to make sure, Mr. Green, just so that I satisfy myself personally, and also so that we have it clear on the record, I understand that the charges to which you're pleading guilty are serious charges. The sentencing is significant sentencing. I want to make sure, however, that you're doing this, as your own free and voluntary decision.

[MR. GREEN]: I feel I have no other options, Your Honor.

[THE COURT]: Well you do have options from this standpoint. And taht's, I, I noticed some hesitation on your part.

R. Tr. (Nov. 17, 2011), p.6 line 8-20. (App. E, p. 41).

[THE COURT: From discussions with Mr. Greyre, which I'm not going to ask you about, that's between you and Mr. Freyre, I assume you have some understanding of the risks and benefits of going to trial, that there are pros and cons to that. There are also pros and cons of going forward with the guilty plea. Do you have that understanding?

[MR. GREEN]: Yes Your Honor.

[THE COURT]: And what I need to understand is having the information that you have, and understanding the pros and cons, is that the decision that you've made, that is to go forward with the guilty plea?

[MR. GREEN]: I'm very afraid, Your Honor. I don't know what to do.

[THE COURT]: Well here's what the options are, Mr. Green, and that is I'm not going to accept the pleas unless you're prepared to go forward with them and tell me that's your decision.

R. Tr. (Nov. 17, 2011), p. 7, line 17-22 (App. E, p. 42).

[THE COURT]: All right. The record will reflect that Mr. Green's had an opportunity for further discussion with Mr. Freyre.

Mr. Green, again I want you to understand I need to get a decision from you, but I don't care what that decision is. I don't have any stake in terms of, what your decision is, as long as it's the decision that you're making freely and voluntarily.

Do you want to go forward with the guilty pleas, or do you want to go forward with the arraignments on both cases? If so, that's fine, we'll simply set them for trial.

[MR. GREEN]: I want to thank you for your patience, Your Honor. I'm very afraid, I'm really, this is a very difficult decision for me. I, I don't want to plead guilty to something I didn't do. I want to plead guilty to something I did.

R. Tr. (Nov. 17, 2011), p. 9, line 8-22 (App. E, p. 43).

[THE COURT]: ... Mr. Freyre, was there something further you'd like for the record?

[MR. FREYRE]: Your Honor, I, I think that the problem Mr. Green is having, and if I can make the record a little clear, perhaps he might feel better with proceeding.

On the charge of child abuse resulting in serious bodily injury, there is not a factual basis for that. The child did not suffer any type of injury in this case whatsoever.

R. Tr. (Nov. 17, 2011), p.10, line 18-25. (App. E, p. 44).

cont.' We came to the agreement of that charge because it was a class three, and provided some, something at least in the District Attorney's eyes related to the conduct here. Although, and I think that, as I've indicated, there is not factual basis, we're waiving the establishment of a factual basis.

And I think that Mr., to put Mr. Green at ease, I think Judge Habas, or actually I think it will be Judge Hoffman who will actually be doing the sentencing on this case, will understand that that is something that we entered a plea of guilty to for purposes of the sentencing range, and that it is not conduct in which Mr. Green engaged.

I think his reluctance comes with the, the entry of the plea of guilty to something that is conduct that he actually did not engage in.

R. Tr. (Nov. 17, 2011), p.11, line 1-17. (App. E, p. 45).

[THE COURT]: ... I need you to tell me either yes I want to go forward with these pleas as have been presented to me. Or that you don't want to do that. And either of those is perfectly acceptable.

[MR. GREEN]: Could you give me, could the Court give me one moment to ask Mr. Freyre something?

[THE COURT]: Certainly.

[MR. FREYRE]: Thank you Your Honor.

[THE COURT]: Mr. Green, what's it going to be?

[MR. GREEN]: I reluctantly plead guilty.

[THE COURT]: I don't, that wasn't my question. And I don't need any qualification of anything on this. I need a straight answer. Do you want to go forward with the disposition, yes? Do you not want to go forward with the disposition, no? That's all I need to know.

[MR. GREEN]: No.

[THE COURT]: Okay. We'll go ahead and proceed with the arraignment on both cases ....

[MR. GREEN]: No, Your Honor, I'm sorry. Yes, yes. I'll take the deal.

[MR. FREYRE]: He misspoke, Your Honor.

[THE COURT]: All right. Are you doing that as your own free and voluntary decision?

[MR. GREEN]: Yes.

R. Tr. (Nov. 17, 2011), p.12, line 1-24. (App. E, p. 46).

[THE COURT]: Any other questions that you have about any of the information in these documents?

[MR. GREEN]: What are my options to change my plea if any?

[THE COURT]: Well your options are, if we go forward with the pleas today, Mr. Green, then there are very, very, there's a very limited grounds, I'm not going to sitting here giving legal advice, that's for you to discuss with your lawyer. But if you go forward on these counts entered today, if you was to withdraw your guilty pleas before sentencing there's a very narrow reason, legal grounds for you to do that. I wouldn't count on it.

R. Tr. (Nov. 17, 2011), p.15, line 11-22. (App. E, p. 49).

2. Colorado Criminal Procedure Rule 11 and Federal Criminal Procedure Rule 11 both provide that a court satisfy itself that the defendant understands what he or she is doing when pleading guilty. The record in this case affirmatively shows this did not occur, thus, state court was constitutionally barred from accepting his plea, because it was not knowingly or voluntarily given. A waiver is voluntary if it is "not coerced ... either physically or psychologically."

3. The entry of a guilty plea is, essentially, a waiver, or the intentional relinguishment or abandonment of a known right. **Johnson v. Zerbst**, 304 U.S. 458, 464, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938). By pleading guilty, the defendant gives up not only his right to a jury trial but a host of other constitutional rights. **Boykin v. Alabama**, supra: Green's statement that, "he felt he had no other options, that he was afraid, and very, very afraid" before and after given time to speak with his attorney, coupled with both he and his

attorney stating in open court that he did not want to plead guilty, assuredly removes any doubt that he did **not** voluntarily enter a guilty plea. Further, by stating that he did not "know what to do," then saying, "I reluctantly plead guilty." The excoriation by Judge Hoffman for use of the word 'reluctantly' browbeat Green who agreed to go to arraignment, then changed plea to guilty. Even though when asked if the plea was voluntary, saying 'yes' does not remove what occurred prior to plea entry. The record affirmatively shows constitutional mandates not met in any meaningful way. The hearing only served prosecution and state interests in covering over the Fourth and Fourteenth Amendment deprivations by use of more constitutional violations in justification of a conviction. Furthermore, after pleading guilty, Green inquired about option to withdraw his plea. Trial judge quite literally said, "I wouldn't count on it."

4. Trial court was on notice from the onset of Green's hesitancy, under federal and state constitution this sentence and conviction cannot stand, as the state violated and deprived Green of guaranteed constitutional protection in the face of its own court documents and transcripts, that it has, and continues to ignore.

D. State Court Discriminated Against Petitioner By Denying Transcripts At State Expense In Criminal Appeal.

1. A state is not required by federal constitution to provide appellate courts or a right to appellate review at all; however, in Colorado, the right to appeal a criminal conviction is guaranteed by state law. Colo. Rev. Stat. section 16-12-101 provides in pertinent part, "Every person convicted of an offense under the statutes of this state has the right of appeal ...". By the state grant of appellate review, it cannot discriminate on account of petitioner being unrepresented, poor inmate, by reason appellate review is used for finally

adjudicating the guilt or innocense of a defendant in Colorado. Consequently, at all stages of proceedings, the due process and equal protection clauses protect inmates like Green from invidious discriminations. **Cole v. Arkansas**, 333 U.S. 196, 201, 68 S.Ct. 514, 517, 92 L.Ed.2d 644; **Dowd v. United States ex rel. Cook**, 340 U.S. 206, 208, 71 S.Ct. 262, 263, 95 L.Ed.2d; **Cochran v. Kansas**, 316 U.S. 255, 257, 62 S.Ct. 1068, 1069, 86 L.Ed.2d 1453. This Court held, "State must provide either a free transcript or other means of affording adequate and effective appellate review to indigent defendant." **Griffin v. Illinois**, 351 U.S. 12, supra.

2. It can only be assumed that because state court denied transcripts at state expense of appeal of its order denying relief and the motion included transcripts proving claims the real reason state denied transcripts is errors and constitutional defects were committed before, during and after conviction would merit reversal and that petitioner will not adequately receive appellate review of those allegations, solely because he is too poor to by a transcript. when necessary to exercise the right of appeal. **People v. Shearer**, supra.

3. It appears state courts have made common practice to deny transcripts to unrepresented, poor inmates on appeal contrary to the provisions of section 16-12-101, C.R.S., e.g., **People v. Santiago-Rodriguez**, supra, (unpublished), trial judge granted in part, transcripts for appeal of Appeal Court case number 2017CA1529 stating, "[n]ormally a defendant is not entitled to a free transcript when his appeal lacks arguable merit." (App. E, pp. 11-12; App. B, p. 16). Mr. Santiago-Rodriguez is appealing the very judge's denial of postconviction appeal who is saying that his appeal lacks merit. This district court judge is taking on the role of appeal court justice, and by asserting control over whether he can receive transcripts violates Mr. Santiago-Rodriguez's due process

rights; **People v. Jones**, 2008CR119 (unpublished), Mr. Jones lost at trial, then lost on direct appeal, when he filed for postconviction relief, trial court denied transcripts at state expense in criminal appeal stating, "Since he is requesting transcripts from hearing where he received legal sentence, the motion is denied." (App. B, p. 17). Again, state is denying transcripts in state appeal summarily ruling that appeal has no merit.

4. Because state is usurping court of appeal authority by deciding that defendant's appeal lacks merit by denying transcripts at state expense in a criminal appeal, this Court has a duty to intervene as this Fourteenth Amendment violation cannot stand. The Constitution does not allow a state to grant a right such as appealing a criminal conviction on one hand, and deprive a person the tools to meaningfully pursue right because he is too poor to buy transcripts on the other. When a state creates appellate courts as an integral part of the adjudication of guilt or innocence, appellate procedures must comport with the United States Constitution. **Evitts v. Lucey**, 469 U.S. 387, supra.

REASONS FOR GRANTING THE PETITION

While this case is important to the petitioner, in that Kenneth Green will have to continue to serve this sentence in violation of the constitution in state prison if the writ is not granted, yet there are matters which are more important. First, the protection of the rights of other citizens involved, and second, the obedience of the states to the mandates of this Court and the United States Constitution is involved.

I. Certiorari Review Is Warranted Due To The Colorado Supreme Court's Failure To Apply This Court's Settled Law To A Case Involving Unusual Facts That Created Unacceptable Constitutional Deprivations Of Liberty And Due Process By The State.

1. It is clearly established law that a person have the right to be free from arrest except upon probable cause supported by oath or affirmation and when a warrantless arrest occurs, the right to a prompt judicial determination by a neutral and detached magistrate is absolute as mandated by the Consitution and this Court. When these constitutional requirements are not met, the 'legal process' does not begin and jurisdiction is not perfected. Certiorari is necessary to correct the state court's clear error on a matter of public importance.

2. The state court's decision is directly contrary to the provisions of the United States Constitution and the rulings of this Court.

A. Constitution.

Amendment IV United States Constitution provides, "... no warrant shall issue, but upon probable cause..." and the XIV Amendment prohibits the government from unfairly or arbitrarily depriving a person of life, liberty, or property and requires the state to give similarly situated persons similar treatment under the law and the due process clause guarantees that the state's conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights. "The words 'due process' have a precise technical importance and are only applicable to the processes and proceedings of the Courts of Justice." **Alexander Hamilton,** remarks on an Act for Regulating Elections, New York Assembly; 6 Feb. 1787, in 4 papers of Alexander Hamilton 34, 35 (Harold C. syrett ed., 1962).

B. Case Law.

This Court in **Gerstein v. Pugh**, supra, and **Riverside v. McLaughlin**, supra, mandate procedure that a neutral and detached magistrate determines that probable cause exists and not law enforcement officials. See **Whiteley v. Warden**,

401 U.S. 560, 91 S.Ct. 1031, 28 L.Ed.2d 305 (1971), The Colorado Supreme Court also held, "that the existence of probable cause must be determined by a member of the judicial, rather than by a law enforcement officer who is employed to apprehend and bring charges." **People v. Moreno**, supra.

3. The facts of this case affirmatively show, **(1)** there is no warrant, **(2)** the state did not show the arrest fell within one of the recognized exceptions to the Fourth Amendment, **(3)** A magistrate did not issue an Order that probable cause existed, **(4)** the Rule 11 hearing was unconstitutional, and **(5)** the state has disallowed the petitioner to proceed to meaningful appeal. This was all done by the state through deliberate due process violations without constitutional authority and by proceeding in this manner, not only did the state deprive Green of his constitutional rights, it endangered all citizens, simply because the state will be emboldened to repeat this over and over again with little to no thoughts of the consequences.

4. Petitioner has no remedy in the Colorado Courts. The state has passed on federal question in violation of state law. "an indigent defendant is entitled to obtain a free transcript when necessary to exercise the right of appeal." **People v. Shearer**, supra. Even though, through law these convictions could be tested by Habeas Corpus since jurisdiction is questioned, the State passed on the question. Petitioner's only recourse is, therefore, to seek review on Certiorari in the United States Supreme Court and this court must intervene as a matter of constitutional duty.

II. Colordo Supreme Court Allows State To Proceed Without Constitutional Authority In The Face Of Overwhelming Evidence.

1. Under the McLaughlin's 48-hour rule, "... delay of longer than 48-hours between warrantless arrest and judicial probable cause determination was unconstitutional absent extraordinary circumstances. **Powell v. Nevada**, at 511

U.S. 79, supra. Then how much more in this case is the presumption unreasonable, **id** [511 U.S. 84], when there is no determination at all?

2. The Colorado Supreme Court held, probable cause to arrest must exist before arrest is made in order for the 'arrest to be legal.' An arrest without warrant must stand on firmer ground than mere suspicion. **People v. Weinert**, 482 P.2d 103, 104-105 (Colo. 1971). Additionally, Colorado Rules of Professional Conduct, 3.8(a) states in pertinent part,

> "... a prosecutor in a criminal case shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause. A prosecutor's duty is to seek justice, not merely to convict." **People v. Walker**, 1972, 504 P.2d 1098, 180 Colo. 184.

3. Petitioner, three times without evidence, and two times with evidence has presented these federal claims to the state, every single time, the state has denied without a hearing or meaningful inquiry into the allegations. In total disregard to the clerk citing, "no warrant in court file" or that over 570 days to rule lapsed, or what the transcripts contained. The law is well settled concerning guilty plea. The record speaks for itself, and the prejudice by the State of Colorado is quite clear. State actions, allow this Court to intervene and vacate this case forthwith.

III. The Decision Below Affirms A Criminal Conviction Not Based Upon A Facially Valid Warrant, Not Validated By A Magistrate, No Probable Cause And No Evidence That The 'Legal Process' Began Pursuant To The U.S. Constitution.

1. This Court held, "[a]as reflected in **Albright's** tracking of **Gerstein's** analysis, pretrial detention can violate the Fourth Amendment not only when it precedes, but also when it follows, the start of legal process in a criminal case." **Manuel v. City of Joliet, Ill.**, 137 S.Ct. 911, 920 (U.S. 2017); **Gerstein v. Pugh**, supra, at 917. That can happen when the police hold someone without any reason before the formal onset of a criminal proceeding. But it can also

occur when legal process itself goes wrong--when, for example, a judge's probable cause determination is predicated on a police officer's false statements, or in this case, no judge ordered that probable cuase existed to validate the arrest. Then, too, a person is confined without constitutionally adequate justification. Legal process has gone forward, but it has done nothing to satisfy the Fourth Amendment's Probable Cause requirement. And for that reason, it cannot extinguish the petitioner's Fourth Amendment violation. See **Manuel v. City of Joliet, Ill.**, supra. Similar to **Manuel**, consider the facts of this case. Denver Police Officer initially arrested Green without warrant or probable cause, then proceeded to search his home without warrant or consent. No judge validated the arrest at all, and that means Green's ensuing pretrial detention, no less than his original arrest, violated his Fourth Amendment right. State's failure to hold **Gerstein** hearing deprived him of his due process rights. Legal process did not expunge Green's Fourth and Fourteenth Amendment claims because the process he received failed to establish what those Amendments make essential for pretrial detention --probable cause to believe he committed a cdrim. See Id.

2. Moreover, Green did not waive any constitutional protections in the Rule 11 hearing, simply because the hearing was unconstitutional.

3. The decision below affirms a criminal conviction based upon constitutional violations, deprivations, and therefore conflicts with this Court's decisions and cannot as a rule of law stand.

CONCLUSION

The decision below is palpably erroneous. It is illustrative of persistent and serious deprivation of the law by the Colorado Supreme Court for the Second Judicial District Court, City and County of Denver in connection with important phase(s) of judicial mandates of the United States Constitution and

both that court and this Court.

It cannot be argued that state actions are not discriminatory, justified or constitutional for the reasons stated, e.g., **People v. Esquibel** (App. E, p. 20)(Affidavit in support of warrantless arrest appear on record); **People v. Ramos** (App. E, p. 24)("Ruling: PROBABLE CAUSE FOUND," appear on record.).

For the foregoing reasons, this Court should summarily reverse the decision of the court below. There decision merely reaffirms a procedure that has already been ruled by this Court to be unconstitutional on its face. Summary reversal is appropriate in this case. It is consistent with this Court's practice in cases not only where the law is settled by a prior decision. **Fed. R. Crim. P. 11(g)**; **Bradshaw v. Stumpf**, 545 U.S. 175, 183 (2005)(using record as factor to establish validity of plea); **Gerstein v. Pugh**, 420 U.S. at 113-14 ("Officers "on-the-scene assessment of probable cause provides legal justification for arrest, once the suspect is in custody, however, the reason that justifies dispensing with the magistrate's neutral judgment evaporates"); **Carroll v. United States**, 267 U.S. 132, 155-156 (1925)(A search or seizure unsupported by probable cause is unlawful.); **Griffin v. Illinois**, 351 U.S. at 19 ("The state must provide either a free transcript or other means of affording adequate and effective appellate review to indigent defendants"), but also where the action of the lower court was clearly improper.

Completed this 25th day of November 2017.

Respectfully submitted,

/s/ _____

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