

No. \_\_\_\_\_

18-9561

IN THE

SUPREME COURT OF THE UNITED STATES

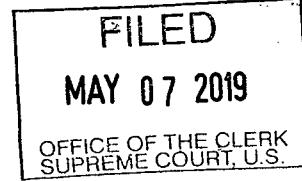
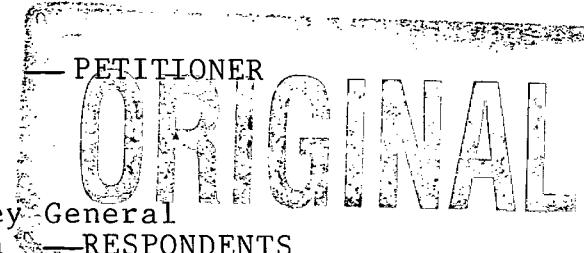
In re Benny Stewart

PETITIONER

vs.

Tim Fox, Montana Attorney General  
and the State of Montana

RESPONDENTS



PETITION FOR AN EXTRAORDINARY WRIT  
HABEAS CORPUS

Benny Stweart 3007159  
Cascade County Regional Prison  
3800 Ulm N. Frontage Rd.  
Great Falls, Mt 59404  
406-484-7685

## **QUESTION(S) PRESENTED**

The unconstitutional potential for bias and judge recusal when a felony is prosecuted by an information under state law when the same judge makes the probable cause determination in search warrant and probable cause determination in prosecution by an information and presides over all pretrial proceedings and trial and sentencing.

The Montana Supreme Court and the United States District Court for the District of Montana has decided an important question of federal law that has not been, but should be, settled by this court.

## LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

## INDEX TO APPENDICES

- A. Montana Supreme Court cases.
- B. United States District Court for the District of Montana cases.
- C. Search Warrant and Charge by an Information (exhibit 54, 55)  
(exhibit 2, 3, 4, 5)
- D. United States Court of Appeals for the Ninth Circuit.

## TABLE OF AUTHORITIES

### CASES

In re Murchison 99LED 942, 349 U.S. 133 (1955)  
Caperton V. A.T. Massey Coal Co.  
173 LED 2D 1208, 566 U.S. 868 (2009)  
Terrance Williams V. Pennsylvania  
136 S. CT. 1899; 195 L.ED 2D.132; 2016 U.S. (2016)  
Michale Damon Rippo V. Renee Baker  
137 S.CT. 905; 197 L.ED 2D 167; 2017 U.S. (2017)

### STATUTES AND RULES

46-11-301 through - 332 MCA  
46-11-101(3) and - 201 MCA

### JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1651 (a) and the petition is appropriate in aid of this Court's respected jurisdiction.

CONSTITUTIONAL AND STAUTORY PROVISIONS INVOLVED

United States Constitution

Amendment (5) Due Process of Law

Amendment (14) Equal Protection Under the Law

Supremacy Clause

Petitioner has exhausted available remedies in the State Courts and is in record in the United States District Court for the District of Montana, Butte Division, cause# CV 15-36-BU-DLC-JLC.

Reasons for not making application in the District Court of the district in which applicant is held:

Petitioner filed a motion in the United States Court of Appeals for the Ninth Circuit for an order authorizing the district court to consider a second or successive application for Habeas Corpus under section 28 USCS 2254 which was denied.

(Appendix D)

## STATEMENT OF THE CASE

Montana statutes allow commencement of the prosecution in District Court upon an indictment by a grand jury. Sections 46-11-301 through -332, MCA. a prosecutor also may apply directly to the District Court for permission to file an information. Section 46-11-201, MCA. The prosecutor's application must identify supporting evidence that demonstrates probable cause to believe that the named defendant has committed an offense. A District Court Judge views evidence and makes a probable cause determination of the named defendant's guilt or innocence. Then the District Court Judge issues an order granting leave to file the information and it triggers the commencement of the prosecution. Sections 46-11-101 (3) and - 201, MCA.

It is well settled by this court when a judge serves as both accuser and adjudicator in a case there exists an unconstitutional potential for bias in cases *in re Murchison* 99 LED 942, 349 U.S. 133(1955) *Caperton V. A.T. Massey Coal Co.* 173 LED 2D 1208, 566 U.S. 868(2009) *Terrance Williams V. Pennsylvania* 136 S.CT. 1899 ; 195 LED 2D 132; 2016 U.S. (2016).

*Michale Damon Rippo V. Renee Baker* 137 S.CT. 905; 197 LED 2D 167; 2017 U.S. (2017).

Petitioner was charged by an information. (Appendix C).

Second Judicial Court judge for the state of Montana, Brad Newman, presided over all proceedings in petitioner's case, search warrant, probable cause determination charging petitioner with the offense, all pretrial proceedings, trial and sentencing. The potential for bias is too high to be constitutionally tolerable. Judge Newman should have recused from trial proceedings and trial after having been a part of the accusatory process. (Appendix C).

An unconstitutional failure to recuse constitutes structural error that is not amendable to harmless-error review and due process requires it.

Prosecution by an information and prosecution by a one man grand jury is the same in structure and in substance and all United States Supreme Court case law applies to both to preserve the fairness, integrity and public reputation of judicial proceedings.

The Montana Supreme Court clearly states that the probable cause determination by an information is not a part of the accusatory process. There are fourteen Montana Supreme Court cases that clearly show this. (Appendix A). Three of the fourteen cases in (Appendix A) appealed to the United States District Court for the District of Montana. Chief Judge, Dana L. Christianson clearly states probable cause determination and the filing of an information does not make a judge part of the accusatory process. (Appendix B).

This court should settle this question to preserve the fairness, integrity and public reputation of judicial proceedings.

## **REASONS FOR GRANTING THE PETITION**

The following exceptional circumstances warrant the exercise of this court's discretionary powers.

Petitioner is innocent of the offense with which he is charged and a gross miscarriage of justice has been perpetrated.

Montana's blatant refusal to apply this court's decisions to Montana cases.

Adequate relief cannot be obtained in any other form or from any other court.

Petitioner has exhausted all other means of relief. (Appendix D).

Granting petition would preserve the fairness, integrity and public reputation of judicial proceedings.

Conclusion

The petition for an Extraordinary Writ (Habeas Corpus) should be granted and the judgement of the State of Montana vacated.

Respectfully submitted

Benny Stewart  
Date May 32, 2019