No. 20-

In the United States Supreme Court

CHRISTOPHER HUDLER,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

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Question Presented

Whether petitioner's judgment of conviction was rendered in violation of the Sixth and Fourteenth Amendments to the United States Constitution, where petitioner resided in Oregon, no attempt was made to extradite him for trial in Pennsylvania, and he was tried and convicted in absentia.

List of All Proceedings

Commonwealth of Pennsylvania v. Christopher Elam Hudler
Court of Common Pleas, Docket No. : CP-60-MD-0000065-2018
Judgment 6/19/2018

Hudler v. Union County et al,
U.S. District Court, M.D. Pa., Docket No. 1:21-cv-00005-SES
Federal Habeas Corpus is Pending
(To be Stayed or Withdrawn if Certiorari is granted)

Table of Contents

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

MISCELLANEOUS

In the Supreme Court of the United States

Petition for a Writ of Certiorari

Petitioner requests that a writ of certiorari issue to review the judgment below.

Opinions Below

The opinion of the Superior Court is not reported and is reproduced in the Appendix at A1. The order of the Supreme Court of Pennsylvania denying review is not officially reported and may be found in the Appendix at A4.

Jurisdiction

The Superior Court's decision was filed on July 27, 2020. The Supreme Court of Pennsylvania denied review on December 2, 2020.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

Constitutional and Statutory Provisions Involved

U.S. Const., Amdt. VI:

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .

U.S. Const., Amdt. XIV:

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 laws.

23 Pa.Con.Stat. § 6114:

Contempt for violation of order or agreement.

(a) General rule.--Where the police, sheriff or the plaintiff have filed charges of indirect criminal contempt against a defendant for violation of a protection order issued under this chapter, a foreign protection order or a court-approved consent agreement, the court may hold the defendant in indirect criminal contempt and punish the defendant in accordance with law.

(a.1) Jurisdiction.--A court shall have jurisdiction over indirect criminal contempt charges for violation of a protection order issued pursuant to this chapter in the county where the violation occurred and in the county where the protection order was granted. A court shall have jurisdiction over indirect criminal contempt charges for violation of a foreign protection order in the county where the violation occurred.

(a.2) Minor defendant.--Any defendant who is a minor and who is charged with indirect criminal contempt for allegedly violating a protection from abuse order shall be considered to have committed an alleged delinquent act as that term is defined in 42 Pa.C.S. § 6302 (relating to definitions) and shall be treated as provided in 42 Pa.C.S. Ch. 63 (relating to juvenile matters).

(b) Trial and punishment.--

(1) A sentence for contempt under this chapter may include:

(i) (A) a fine of not less than $300 nor more than $1,000 and imprisonment up to six months; or

(B) a fine of not less than $300 nor more than $1,000 and supervised probation not to exceed six months; and

(ii) an order for other relief set forth in this chapter.

(2) All money received under this section shall be distributed in the following order of priority:

(i) $100 shall be forwarded to the Commonwealth and shall be appropriated to the Pennsylvania State Police to establish and maintain the Statewide registry of protection orders provided for in section 6105 (relating to responsibilities of law

enforcement agencies).

(ii) $100 shall be retained by the county and shall be used to carry out the provisions of this chapter as follows:

(A) $50 shall be used by the sheriff.

(B) $50 shall be used by the court.

(iii) $100 shall be forwarded to the Department of Public Welfare for use for victims of domestic violence in accordance with the provisions of section 2333 of the act of April 9, 1929 (P.L.177, No.175), known as The Administrative Code of 1929.

(iv) Any additional money shall be forwarded to the Commonwealth and shall be used by the Pennsylvania State Police to establish and maintain the Statewide registry of protection orders provided for in section 6105.

(3) The defendant shall not have a right to a jury trial on a charge of indirect criminal contempt. However, the defendant shall be entitled to counsel.

(4) Upon conviction for indirect criminal contempt and at the request of the plaintiff, the court shall also grant an extension of the protection order for an additional term.

(5) Upon conviction for indirect criminal contempt, the court shall notify the sheriff of the jurisdiction which issued the protection order of the conviction.

(6) The minimum fine required by subsection (b)(1) allocated pursuant to subsection (b)(2)(i) and (iii) shall be used to supplement and not to supplant any other source of funds received for the purpose of carrying out the provisions of this chapter.

(c) Notification upon release.--The appropriate releasing authority or other official as designated by local rule shall use all reasonable means to notify the victim sufficiently in advance of the release of the offender from any incarceration imposed under subsection (b). Notification shall be required for work release, furlough, medical leave, community service, discharge, escape and recapture. Notification shall include the terms and conditions imposed on any temporary release from custody. The plaintiff must keep the appropriate releasing authority or other official as designated by local rule advised of contact information; failure

to do so will constitute waiver of any right to notification under this section.

(d) Multiple remedies.--Disposition of a charge of indirect criminal contempt shall not preclude the prosecution of other criminal charges associated with the incident giving rise to the contempt, nor shall disposition of other criminal charges preclude prosecution of indirect criminal contempt associated with the criminal conduct giving rise to the charges

Statement of the Case

Petitioner was charged with indirect criminal contempt (23 Pa.Con.Stat. § 6114), for violation of a protection of abuse order. The call was made from Oregon, where he lives. It was made to a third-party, a member of the clergy, not the protected party. On March 6, 2018, he was served by mail with notice of a hearing set for April 10, 2018, at 8 AM.

Unable to attend in person, Petitioner hired counsel. The court tried Appellant in absentia, convicted him of indirect criminal contempt, and sentenced him to pay a $1,000.00 fine and serve a term of three to six months' imprisonment. No attempt was made to extradite him or otherwise secure his presence in court.

Following the conviction, Petitioner requested that counsel file a notice of appeal. Counsel either refused or was unable to do so. At that time, the attorney was under investigation by the State Attorney General and was arrested for pornography and committed to the County Jail on May 3, 2018– prior to the deadline for filing the notice of appeal– which may have rendered him unable to do so.

He subsequently sought to file a late notice of appeal. The Court of Common Pleas denied the application, but granted him a stay pending appeal. He filed an appeal to the Superior Court together with a petition for a writ of habeas corpus. A5. The Superior Court affirmed and denied the writ of habeas corpus. Its

unreported opinion stated that he could not file a late notice of appeal under the Pennsylvania Post Judgment Review Act and disposed of the petition for a writ of habeas corpus in a footnote, explicitly noting that the conviction was for a "crime." The Pennsylvania Supreme Court denied review.

Reasons for Granting the Writ

A criminal court obtains personal jurisdiction over the body of a defendant when an accusatory instrument is filed with a criminal court that has subject matter jurisdiction *and the defendant appears before that court, either by way of arrest or voluntarily.* See, e.g. *Ker v. Illinois*, 119 U.S. 436 (1886) (jurisdiction obtained even though arrest illegal); *United States v. Lussier*, 929 F.2d 25, 27 (1st Cir. 1991). If there is no arrest or voluntarily appearance, there is no jurisdiction and the judgment is void. See *Thiem v. Commonwealth*, 269 S.W.2d 195 (Ky, 1954) (per curiam); Wayne R. LaFave, Jerold H. Israel, Nancy J. King, Orin S Kerr, Criminal Procedure, § 16.4(a); LaFave, Substantive Criminal Law, § 4.1 (3d ed).

Thus, as this Court recognized in *Ford v. United States*, 273 U. S. 593, 620-621 (1927), "Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, *if the state should succeed in getting him within its power.*" (quoting *Strassheim v. Daily*, 221 U.S. 280, 285 (1911)) (Emphasis added). See also *Ex parte Hammond*, 59 F.2d 683 (9th Cir.

1932).

State court decisions outside Pennsylvania seem to recognize this principle.

"[T]he exercise of state power over the defendant—merely requires the physical presence of the defendant and can be accomplished through the defendant's arrest and extradition to the forum." *State v. Rimmer*, 877 N.W.2d 652, 662 (Iowa 2016). "'Unlike civil actions, criminal proceedings cannot take place in the absence of the defendant, because the confrontation clause of the Sixth Amendment bars criminal default judgments.'" *Id.* at 662-63 (quoting *Hageseth v. Superior Court*, 150 Cal.App.4th 1399, 59 Cal.Rptr.3d 385, 390 (1st Dist. 2007)).

In *State v. McCormick*, 273 N.W.2d 624, 628 (Minn.1978), the Minnesota Supreme Court was concerned with a similar issue. The Court made it clear that in an effects territorial jurisdiction case, it would not be able to exercise jurisdiction over a defendant based on "the refusal of the governor of that state to grant extradition."

In analagous circumstances, it has been held "[w]here a defendant was convicted in absentia, the conviction is merely a charge . . . ." *Germany v. United States*, 2007 U.S. Dist. LEXIS 65676, at *20-21 (E.D.N.Y. Sep. 5, 2007); see *Argento v. Horn*, 241 F.2d 258, 259 n.1 (6th Cir. 1957); *Gallina v. Fraser*, 278 F.2d 77, 78-9 (2d Cir. 1960). Presence of counsel alone at a trial is insufficient to render an in absentia conviction valid and it remains a charge. See *In re*

Extradition of Ernst, 1998 U.S. Dist. LEXIS 10523, at *21-4 (S.D.N.Y. July 14, 1998); see also *United States v. Fernandez-Morris*, 99 F. Supp. 2d 1358, 1365 (S.D. Fla. 1999) (finding that relators were convicted in absentia despite having been represented by counsel).

Indeed, if that were not the rule, there would be no need to resort to extradition in most instances. It would suffice to simply send a notice to the proposed defendant, conduct a trial in absentia and then seek extradition. There would have been no need for the government to obtain the presence of Manual Noriega through a military invasion of Panama. See *United States v. Noriega*, 117 F.3d 1206 (11th Cir. 1997), cert. denied, 523 U.S. 1060 (1998). It would have been enough to send him notice and appoint an attorney and conduct a trial.

More important, it is settled beyond dispute that an accused has a constitutional right to be present at all stages of his trial. See *Pointer v. Texas*, 380 U. S. 400 (1965); *Lewis v. United States*, 146 U. S. 370 (1892). "[I]t is essential to the protection of one whose life or liberty is involved in a prosecution for felony, that he shall be personally present at the trial, that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution." *Hopt v. Utah*, 110 U.S. 574, 579 (1884).This Sixth Amendment right of presence may not be waived where the defendant has not obstructed the

proceedings and has not previously appeared in court and certainly not by counsel on counsel's own initiative. See *United States v. Gordon*, 829 F.2d 119, 125-127 (D.C. Cir. 1987) (personal on-the-record waiver of presence right required).

State courts have held that a telephone call from one state to another can confer territorial jurisdiction in the state where the call is received. See *State v. Aloi*, 458 N.J.Super. 234, 241 n. 4, 204 A.3d 297, 301 n. 4 (App. Div. 2019). Given that such cases are being more frequently prosecuted in the domestic abuse context, it seems evident that the use of the Pennsylvania procedures may be employed elsewhere. The question should thus be reviewed and the rule requiring a defendant's presence restated.

Two other matters should be briefly addressed. First, the fact that neither the Pennsylvania Supreme Court nor the Superior Court wrote an opinion addressing the issue is irrelevant to consideration on a petition for certiorari. See, e.g. *Franconia Assocs. v. United States*, 536 U.S. 129 (2002) (granting writ and reversing where Federal Circuit wrote no opinion); *Williamson v. United States,* 512 U.S. 594 (1994) (same); *Herring v. New York*, 422 U.S. 853 (1975) (state intermediate appellate court wrote no opinion and permission to appeal denied; certiorari granted and reversed). "[T]he fact that the Court of Appeals' order under challenge here is unpublished carries no weight in [this Court's] decision to review the case." *C.I.R. v. McCoy*, 484 U.S. 3, 7 (1987); see also *Smith v. United*

States, 502 U.S. 1017, 1020 (1991) (Blackmun, J., dissenting from denial of certiorari) ("The fact that the Court of Appeals' opinion is unpublished is irrelevant.")

Second, there is no adequate and independent state ground for the decisions below. Although the appeal from the judgment of conviction was deemed foreclosed, Applicant filed a writ of habeas corpus, which was denied by the Superior Court and permission to appeal from that denied was requested and denied. In Pennsylvania, it is "well settled that a judgment or decree rendered by a court which lacks jurisdiction of the subject matter or of the person is null and void and is subject to attack by the parties or may be collaterally attacked at any time." *Commonwealth v. Schmotzer*, 831 A.2d 689, 695 n.2 (Pa. Super. 2003) (quoting *Com. ex rel. Howard v. Howard*, 138 Pa.Super. 505, 508, 10 A.2d 779, 781 (1940)); see 18 Standard Pennsylvania Practice 2d § 98:13 (2020) ("The lack of jurisdiction over the person or over the subject matter of the offense with which a person is charged is a ground for discharge on habeas corpus.")

Conclusion

Petitioner respectfully requests that certiorari be granted.

Respectfully submitted

/s/ Eric Nelson
Counsel for Petitioner

COMMONWEALTH OF PENNSYLVANIA Appellee
v.
CHRISTOPHER ELAM HUDLER Appellant

J-S25043-20
No. 7 MDA 2020

SUPERIOR COURT OF PENNSYLVANIA

JULY 27, 2020

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

Appeal from the PCRA Order Entered September 27, 2019
In the Court of Common Pleas of Union County
Criminal Division at No(s): CP-60-MD-0000065-2018

BEFORE: LAZARUS, J., DUBOW, J., and KING, J.

MEMORANDUM BY KING, J.:

Appellant, Christopher Elam Hudler, appeals *pro se* from the order entered in the Union County Court of Common Pleas, which denied his first petition filed under the Post Conviction Relief Act ("PCRA").[1] We affirm.

The relevant facts and procedural history of this case are as follows. On or around February 6, 2018, Appellant violated the terms of a protection from abuse order. On March 5, 2018, the Commonwealth filed a complaint charging Appellant with indirect criminal contempt ("ICC") for the violation. The court scheduled a hearing for April 10, 2018. Appellant, who was living in Oregon at that time, did not attend the hearing but hired an attorney to represent

Page 2

him. The court tried Appellant in *absentia*, convicted him of ICC, and sentenced him to pay a $1,000.00 fine and serve a term of three to six months' imprisonment.[2] Appellant did not file a direct appeal.[3]

Appellant filed the current first PCRA petition *pro se* on July 25, 2019. Appellant argued, *inter alia*, that trial counsel had failed to file a requested direct appeal on Appellant's behalf. Appellant suggested counsel's failure to file the notice of appeal was because counsel had been arrested on child pornography charges and was in jail during the 30-day window in which to file Appellant's appeal. Thus, Appellant requested reinstatement of his direct appeal rights *nunc pro tunc*.

On September 6, 2019, the court issued notice of its intent to dismiss the petition without a hearing per Pa.R.Crim.P. 907.[4] Appellant did not respond, and the court denied Appellant's petition as untimely on September 27, 2019. This appeal followed.[5]

Page 3

Preliminarily, the timeliness of a PCRA petition is a jurisdictional requisite. ***Commonwealth v. Zeigler***, 148 A.3d 849 (Pa.Super. 2016). A PCRA petition shall be filed within one year of the date the underlying judgment of sentence becomes final. 42 Pa.C.S.A. § 9545(b)(1). A judgment of sentence is deemed final "at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review." 42 Pa.C.S.A. § 9545(b)(3). The statutory exceptions to the PCRA time-bar allow for very limited circumstances under which the late filing of a petition will be excused; a petitioner asserting a timeliness exception must also file the petition within the required statutory window. 42 Pa.C.S.A § 9545(b)(1-2).

Page 4

Instantly, Appellant's judgment of sentence became final on May 10, 2018, upon the expiration of the 30-day period to file a direct appeal in this Court. ***See*** Pa.R.A.P. 903(a). Appellant filed the current petition on July 25, 2019, which is patently untimely.[6] ***See*** 42 Pa.C.S.A. § 9545(b)(1). Significantly, Appellant did not allege or prove any timeliness exception. ***See id.*** Therefore, Appellant's petition remains time-barred. Accordingly, we affirm.[7]

Order affirmed.

Judgment Entered.

/s/_____
Joseph D. Seletyn, Esq.
Prothonotary

Date: 07/27/2020

Footnotes:

[1] 42 Pa.C.S.A. §§ 9541-9546.

[2] On June 19, 2018, the court entered an amended sentencing order to correct an error in the caption.

[3] On July 16, 2018, the court issued a bench warrant for Appellant's arrest after Appellant failed to report for sentencing on July 13, 2018.

[4] The record indicates that Appellant is not indigent. Thus, the court was not required to appoint counsel for Appellant. ***See*** Pa.R.Crim.P. 904(C) (explaining that when unrepresented defendant shows he is unable to afford or otherwise procure counsel, judge shall appoint counsel for defendant).

[5] Appellant's appeal was not docketed in this Court until December 2019. In response to this Court's rule to show cause why the appeal should not be dismissed as untimely, Appellant explained that he mailed his notice of appeal and voluntary concise statement of errors per Pa.R.A.P. 1925(b) to the Prothonotary's Office on October 9, 2019. The Prothonotary received Appellant's filings on October 15, 2019, but for some reason, returned them to Appellant without docketing the notice of appeal. Appellant subsequently mailed in a second notice of appeal on October 17, 2019, which was also

returned to him. Appellant mailed in a third notice of appeal on November 12, 2019, which was not docketed in this Court until December 31, 2019. Appellant said he was unsure why the notices of appeal were returned to him or why the Prothonotary's Office docketed his notice of appeal so late. Appellant attached proof of his receipts of mailing to his response to the rule to show cause. Under these circumstances, the record demonstrates a breakdown in the operations of the court, and we deem Appellant's notice of appeal as timely filed. ***See, e.g., Commonwealth v. Braykovich***, 664 A.2d 133 (Pa.Super. 1995), *appeal denied*, 544 Pa. 622, 675 A.2d 1242 (1996) (stating breakdown in operations of court enlarges appeal filing period).

[6] Even if the amended sentencing order entered June 19, 2018 constituted the date Appellant's judgment of sentence became final, his current PCRA petition would still be untimely.

[7] On April 8, 2020, the trial court granted Appellant's motion for stay pending appeal. Based on that order, Appellant subsequently filed an application for writ of *mandamus* in this Court requesting this Court to recall the bench warrant issued for Appellant on July 16, 2018. Due to our disposition, we deny Appellant's application for writ of *mandamus*.

Appellant has also filed in this Court an application for writ of *habeas corpus* challenging jurisdiction based on Appellant's belief that he did not commit a "crime" as defined in the Crimes Code. We deny this application as well.

COMMONWEALTH OF PENNSYLVANIA, Respondent
v.
CHRISTOPHER ELAM HUDLER, Petitioner

No. 427 MAL 2020

SUPREME COURT OF PENNSYLVANIA MIDDLE DISTRICT

December 2, 2020

Petition for Allowance of Appeal from the Order of the Superior Court

ORDER

PER CURIAM

AND NOW, this 2nd day of December, 2020, the Petition for Allowance of Appeal is DENIED.

In the Superior Court of Pennsylvania

COMMONWEALTH OF PENNSYLVANIA

v.

CHRISTOPHER ELAM HUDLER.

PETITION FOR A WRIT OF HABEAS CORPUS
TO VACATE A JUDGMENT OF CONVICTION
RENDERED WITHOUT JURISDICTION

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Defendant, CHRISTOPHER ELAM HUDLER, brings this petition for a writ of habeas corpus, pursuant to 42 Pa.Cons.Stat. § 741 and § 6501 *et seq.*, to vacate a void judgment of conviction rendered without jurisdiction and in support thereof respectfully alleges the following:

This petition is filed in conjunction with the pending appeal given the contention that defendant is not entitled to relief pursuant to the PCRA. Because defendant is not, and never has been, in custody, and, in addition, has not been convicted of a "crime," he has never had an effective remedy under the Act.

Defendant was charged with indirect criminal contempt (23 Pa.Con.Stat. § 6114), for violation of a order in Civil Case # 17-0646. He lives in Oregon and, as reflected on the docket sheet, he was served with notice of a hearing on March 6, 2018, for a hearing on April 10, 2018, at 8 AM.

Unable to attend in person, defendant hired counsel. Counsel requested that defendant be permitted to testify telephonically, which was denied. The hearing was conducted in his absence.

Following the conviction, defendant requested that counsel file a notice of appeal. Counsel refused to do so. At that time, the attorney was under investigation by the State Attorney General and was arrested and committed to the County Jail on May 3, 2018– prior to the deadline for filing the notice of appeal– which may have rendered him unable to do so. He has since pleaded

guilty to 11 counts of child pornography. Subsequent to the filing of the petition in the court below, counsel was sentenced to three to eight years imprisonment by Judge Leete in Potter County. CP-41-CR-0000803-2018.

Since defendant was never produced in court the trial in absentia was void and a violation of due process.

If the issue cannot be addressed on appeal, then he is entitled to relief on habeas corpus.

WHEREFORE, defendant respectfully requests that this Court issue a writ of habeas corpus and vacate the judgment of conviction as void.

Dated: March 28, 2020

/s/ Christopher Elam Hudler

Applicant Pro Se

In the Superior Court of Pennsylvania

COMMONWEALTH OF PENNSYLVANIA

v.

CHRISTOPHER ELAM HUDLER.

MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR A WRIT OF HABEAS CORPUS TO VACATE A JUDGMENT OF CONVICTION RENDERED WITHOUT JURISDICTION

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A. Introduction

It is "well settled that a judgment or decree rendered by a court which lacks jurisdiction of the subject matter or of the person is null and void and is subject to attack by the parties or may be collaterally attacked at any time." *Commonwealth v. Schmotzer*, 831 A.2d 689, 695 n.2 (Pa. Super. 2003) (quoting *Com. ex rel. Howard v. Howard*, 138 Pa.Super. 505, 508, 10 A.2d 779, 781 (1940)). This is such a case.

B. Habeas Corpus is an Available Remedy

Although habeas corpus relief is unavailable when relief would be available under the PCRA, see *Commonwealth v. Hall*, 565 Pa. 92, 771 A.2d 1232 (2001), if a defendant is ineligible for statutory collateral review, habeas corpus is available.. See *Commonwealth v. Delgros*, 183 A.3d 352 (Pa. 2018); *Commonwealth v. Green*, 204 A.3d 469, 487 (Pa. Super. Ct. 2019).

42 Pa.C.S. § 9543(a)(1) provides that, in order to be eligible for PCRA relief, the petitioner must plead and prove by a preponderance of the evidence:

> (1) That the petitioner *has been convicted of a crime* under the laws of this Commonwealth and is at the time relief is granted:
>
> (i) *currently serving a sentence of imprisonment, probation or parole for the crime*;
>
> (ii) awaiting execution of a sentence of death for the crime; or
>
> (iii) serving a sentence which must expire before the person may commence serving the disputed sentence.

(emphasis added).

The Statutory Construction Act, Act of May 28, 1937, P.L. 1019, as amended, formerly 46 P.S. § 601, repealed by the Act of Dec. 6, 1972, P.L. 1339 (now codified, as amended, at 1 Pa.C.S. § 1991), defines a "crime" as any "indictable offense" See *Ruppert v. Com., Crime Victim's Compensation Bd.*, 129 Pa.Cmwlth. 254, 258, 565 A.2d 221, 223 (1990), appeal denied, 525 Pa. 638, 578 A.2d 932 (1990). 23 Pa.Con.Stat. § 6114, providing that the offense is to be prosecuted by a complaint, is, on its face, not a crime.

In addition, although defendant charged with indirect criminal contempt "'is to be provided the safeguards which statute and criminal procedures afford,'" *Commonwealth. v. Brumbaugh*, 932 A.2d 108, 110 (Pa. Super. 2007) (quoting *Commonwealth v. Padilla*, 885 A.2d 994, 996-997 (Pa. Super. 2005)), 23 Pa.Con.Stat. § 6114 does not classify the offense as a crime, and also does not meet the criminal code definition as either a misdemeanor or a felony. See 18 Pa.Con.Stat. § 106.

More important, the defendant is not "currently serving a sentence of imprisonment, probation or parole for the crime." "The PCRA statute plainly states that to be eligible for PCRA relief, a PCRA petitioner must be 'currently serving a sentence of imprisonment, probation or parole for the crime' at issue. 42 Pa.C.S.A. § 9543(a)(1)(i)." *Commonwealth v. Tinsley*, 200 A.3d 104, 107

(Pa. Super. Ct. 2018); see also *Commonwealth v. Williams*, 977 A.2d 1174 (Pa.Super. 2009), appeal denied, 605 Pa. 700, 990 A.2d 730 (2010).

Defendant is not currently serving a sentence of imprisonment because the court never obtained jurisdiction over him. Consequently, he does not fit within the parameters of the PCRA.

In such an instance, a petition for a writ of habeas corpus "lies to correct void or illegal sentences or an illegal detention, or where the record shows a trial or sentence or plea so fundamentally unfair as to amount to a denial of due process or other constitutional rights, or where for other reasons the interests of justice imperatively required it." *Commonwealth ex rel. Butler v. Rundle*, 407 Pa. 535, 180 A.2d 923, 924 (1962). See also *Chadwick v. Caulfield*, 834 A.2d 562, 566 (Pa. Super. Ct. 2003).

If the Court believes that Pa.R.Crim.P. 108 applies, it may transfer the writ to the proper court pursuant to 42 Pa.C.S.A. § 2756.

C. The Court of Common Pleas Lacked Jurisdiction

Although the issue has not been comprehensively discussed, it seems to be taken as a given that a criminal court obtains personal jurisdiction over the body of a defendant when an accusatory instrument is filed with a criminal court that has subject matter jurisdiction and the defendant appears before that court, either byway of arrest or voluntarily. See, e.g. *Commonwealth ex rel. DiDio v.*

Baldi, 176 Pa.Super. 119, 106 A.2d 910 (1954) (jurisdiction obtained even though arrest illegal). "[T]he exercise of state power over the defendant—merely requires the physical presence of the defendant and can be accomplished through the defendant's arrest and extradition to the forum." *State v. Rimmer*, 877 N.W.2d 652, 662 (Iowa 2016). "'Unlike civil actions, criminal proceedings cannot take place in the absence of the defendant, because the confrontation clause of the Sixth Amendment bars criminal default judgments.'" *Id.* at 662-63 (quoting *Hageseth v. Superior Court*, 150 Cal.App.4th 1399, 59 Cal.Rptr.3d 385, 390 (1st Dist. 2007)).

In *State v. McCormick*, 273 N.W.2d 624, 628 (Minn.1978), the Minnesota Supreme Court was concerned with a similar issue. The Court made it clear that in an effects territorial jurisdiction case, it would not be able to exercise jurisdiction over a defendant based on "the refusal of the governor of that state to grant extradition."

In analagous circumstances, it has been held "[w]here a defendant was convicted in absentia, the conviction is merely a charge . . . ." *Germany v. United States*, 2007 U.S. Dist. LEXIS 65676, at *20-21 (E.D.N.Y. Sep. 5, 2007); see *Argento v. Horn*, 241 F.2d 258, 259 n.1 (6th Cir. 1957); *Gallina v. Fraser*, 278 F.2d 77, 78-9 (2d Cir. 1960). Presence of counsel alone at a trial is insufficient to render an in absentia conviction valid and it remains a charge.

See *In re Extradition of Ernst*, 1998 U.S. Dist. LEXIS 10523, at *21-4 (S.D.N.Y. July 14, 1998); see also *United States v. Fernandez-Morris*, 99 F. Supp. 2d 1358, 1365 (S.D. Fla. 1999) (finding that relators were convicted in absentia despite having been represented by counsel).

Indeed, if that were not the rule, there would be no need to resort to extradition in most instances. It would suffice to simply send a notice to the proposed defendant, conduct a trial in absentia and then seek extradition. There would have been no need for the government to obtain the presence of Manual Noriega through a military invasion of Panama. See *United States v. Noriega*, 117 F.3d 1206 (11th Cir. 1997), cert. denied, 523 U.S. 1060 (1998). It would have been enough to send him notice and appoint an attorney and conduct a trial.

More important, it is settled beyond dispute that an accused has a constitutional right to be present at all stages of his trial. See *Taylor v. United States*, 414 U.S. 17 (1973). This Sixth Amendment right of presence may not be waived where the defendant has not obstructed the proceedings and has not previously appeared in court and certainly not by counsel on counsel's own initiative. See *United States v. Gordon*, 829 F.2d 119, 125-127 (D.C. Cir. 1987) (personal on-the-record waiver of presence right required).

In short, the Court lacked jurisdiction over the Defendant and could not convict him in absentia.

C. Conclusion

Defendant was unconstitutionally tried in absentia. A writ of habeas corpus should be issued and the conviction vacated.

Respectfully submitted,

/s/ Christopher Elam Hudler
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CERTIFICATE OF SERVICE

I certify that a true copy of the Defendant's Petition for a writ of habeas corpus was served herewith through the PAC file system herewith.

/s/ Christopher Elam Hudler