20-16660

IN THE SUPREME COURT OF THE UMITED STATES

GARVESTER BRACKEM
Petitioner

v

STATE OF MISSOURI
Respondent

Case No.
The Honorable
Neil M. Gorsuch
Justice

ON PETITION FOR WRIT OF HABEAS CORPUS
TO THE SUPREME COURT OF THE UMITED STATES

GARVESTER BRACKEM
MISSOURI EASTERM CORRECTIONAL CENTER
18701 OLD HIGHWAY 66
(636) 257-3322

TABLE OF CONTENTS

QUESTIONS PRESENTED

WHETHER IN ABSENCE OF DEFENDANT AND DEFENSE COUNSEL HAVING NOT BEEN PERSONALLY PRESENT DURING ANY STAGE OF THE TRIAL PROCEEDINGS DID THE TRIAL COURT HAVE JURISDICTION TO PROCEED AND ENTER JUDGMENT AS A MATTER OF LAW?

WHETHER THE TRIAL COURT HAD POSSESSED JURIDICTION IN ABSENCE OF DEFENDANT AND DEFENSE COUNSEL HAVING NOT APPEARED BEFORE A MAGISTRATE COURT OF JUDGE TO HAVE A JUDICIAL DETERMINATION OF PROBABLE CAUSE ESTABLISHING THAT AN OFFENSE OR VIOLATION OF LAW HAD OCCURRED?

WHETHER THE TRIAL COURT HAD POSSESSED JURISDICTION IN ABSENCE OF DEFENDANT AND DEFENSE COUNSEL HAVING NOT BEEN ACCORDED A FORMAL ARRAIGNMENT IN ORDER TO PLEAD TO ANY CHARGES FOR WHICH HE STANDS CONVICTED?

WHETHER THE COURT BELOW HAVE JURISDICTION CONFERRED TO REMOVE AND TAKE COGNIZANCE OF AN ARTICLE III COURT ORIGINAL JURISDICTION WHEN A STATE IS NAMED PARTY?

PARTIES

MICHAEL L. PARSON
GOVERMOR

201 W. CAPITAL AVE.
JEFFERSON CITY MO. 65101
(573) 751-3222

ERIC SCHMITT
ATTORNEY GEMERAL

207 W. HIGH ST.
JEFFERSON CITY MO. 65101
(573) 751-0774

TABLE OF AUTHORITIES

CONSTITUTION OF THE UNITED STATES

ARTICLE I, SECTION 9, CLAUSE 2

THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS SHALL NOT BE SUSPENDED, UNLESS WHEN IN CASES OF REBELLION OR INVASION THE PUBLIC SAFETY MY REQUIRE IT.

ARTICLE III

THE JUDICIAL POWER OF THE UNITED STATES SHALL BE VESTED IN ONE SUPREME COURT...THE JUDICIAL POWER SHALL EXTEND TO ALL CASES IN LAW AND EQUITY, ARISING UNDER THIS CONSTITUTION...TO CONTROVERSIES TO WHICH THE UNITED STATES SHALL BE A PARTY...AND THOSE IN WHICH A STATE SHALL BE A PARTY, THE SUPREME COURT SHALL HAVE ORIGINAL JURISDICTION.

ARTICLE IV

FULL FAITH AND CREDIT SHALL BE GIVEN IN EACH STATE TO PUBLIC ACTS RECORDS, AND JUDICIAL PROCEEDINGS OF EVERY OTHER STATE.

ARTICLE V I

THIS CONSTITUTION AND THE LAWS OF THE UNITED STATES WHICH SHALL BE MADE IN PURSUANCE THEREOF, AND ALL TREATIES MADE, OR SHALL BE MADE, UNDER THE AUTHORITY OF THE UNITED STATES, SHALL BE THE SUPREME LAW OF THE LAND, AND THE JUDGES IN EVERY STATE SHALL BE BOUND THEREBY, ANYTHING IN THE CONSTITUTION OR LAWS OF ANY STATE TO THE CONTRARY NOTHWITHSTANDING.

FOURTH AMENDMENT

THE RIGHT OF THE PEOPLE TO BE SECURE IN THEIR PERSONS...AGAINST UNREASONABLE...SEIZURES, SHALL NOT BE VIOLATED...BUT UPON PROBABLE CAUSE SUPPORTED BY OATH OR AFFIRMATION.

SIXTH AMENDMENT

IN ALL CRIMINAL PROSECUTIONS, THE ACCUSED SHALL ENJOY THE RIGHT TO A SPEEDY AND PUBLIC TRIAL, BY AN IMPARTIAL JURY OF THE STATE AND DISTRICT WHEREIN THE CRIME SHALL HAVE BEEN COMMITTED, WHICH DISTRICT SHALL HAVE PREVIOUSLY ASCERTAINED BY LAW, AND TO BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION, TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM, TO HAVE COMPULSORY PROCESS FOR OBTAINING WITNESSES IN HIS FAVOR, AND TO HAVE THE ASSISTANCE OF COUNSEL FOR HIS DEFENSE.

FOURTEENTH AMENDMENT

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.

STATUTES

28 U.S.C. 1251

THE SUPREME COURT SHALL HAVE ORIGINAL JURISDICTION OF...ALL ACTIONS OR PROCEEDINGS BY A STATE AGAINST THE CITIZENS....

28 U.S.C. 1654

IN ALL COURTS OF THE UNITED STATES THE PARTIES MAY PLEAD AND CONDUCT THEIR OWN CASES PERSONALLY OR BY COUNSEL AS, BY THE RULES OF SUCH COURTS, RESPECTIVELY, ARE PERMITTED TO MANAGE AND CONDUCT CAUSE THEREIN.

28 U.S.C. 2241

(A) WRITS OF HABEAS CORPUS MAY BE GRANTED BY THE SUPREME COURT, ANY JUSTICE THEREOF...WITHIN THEIR RESPECTIVE JURISDICTIONS. THE WRIT OF HABEAS CORPUS SHALL NOT EXTEND TO PRISONERS UNLESS HE IS IN CUSTODY IN VIOLATION OF THE CONSTITUTION OR LAWS OR TREATIES OF THE UNITED STATES.

28 U.S.C. 2243

A COURT, JUSTICE OR JUDGE ENTERTAINING AN APPLICATION FOR A WRIT OF HABEAS CORPUS SHALL FORTHWITH AWARD THE WRIT OR ISSUE AN ORDER DIRECTING THE RESPONDENT TO SHOW CAUSE WHY THE WRIT SHOULD NOT BE GRANTED

28 U.S.C. 3060

A PRELIMINARY EXAMINATION SHALL BE HELD...TO DETERMINE WHETHER THERE IS PROBBALE CAUSE TO BELIEVE THAT AN OFFENSE HAS BEEN COMMITTED AND THAT THE ARRESTED PERSON COMMITTED IT.

28 U.S.C. 459

EACH JUSTICE OR JUDGE OF THE UNITED STATES MAY ADMINISTER OATHS AND AFFIRMATIONS AND TAKE ACKNOWLEDGEMENTS.

RULES

RULE 5

IF A DEFENDANT IS CHARGED WITH AN OFFENSE OTHER THAN A PETTY OFFENSE A MAGISTRATE JUDGE MUST CONDUCT A PRELIMINARY HEARING UNLESS...THE DEFENDANT WAIVES THE HEARING.

RULE 10

THE ACCUSED IS TO BE BROUGHT BEFORE THE COURT TO PLEAD TO THE CHARGES BROUGHT AGAINST HIM AND ASKED TO ENTER A PLEA.

RULE 43

THE DEFENDANT MUST BE PRESENT AT: THE INITIAL APPEARANCE; THE INITIAL ARRAIGNMENT, AND THE PLEA; EVERY TRIAL STAGE, INCLUDING JURY IMPANELMENT AND THE RETURN OF THE VERDICT; AND SENTENCING.

CASES

OPIMIOM

THE OPIMIOM OF THE UMITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT IS REPORTED AT 18-2571. THE OPIMIOM FROM THE CIRCUIT BELOW CAMMOT BE EMTERTAIMED BECAUSE A STATE IS A PARTY IMVOKIMG THE UMITED STATES SUPREME COURT ORIGIMAL JURISDICTIOM UMDER ARTICLE III OF THE COMSTITUTIOM OF THE UMITED STATES. THEREFORE, JURISDICTIOM COULD MOT BE COMFERRED UPOM THE CIRCUIT COURT.

JURISDICTIONAL STATEMENT

THIS SUPREME COURT OF THE UNITED STATES BY ARTICLE III POWER HAVE AUTHORITY TO EXERCISE ITS ORIGINAL JURISDICTION BECAUSE OF THE RELEVANT FACT THAT A STATE IS NAMED A PARTY. "THE JUDICIAL POWER OF THE UNITED STATES SHALL BE VESTED IN ONE SUPREME COURT...AND THOSE IN WHICH A STATE SHALL BE PARTY THE SUPREME COURT SHALL HAVE ORIGINAL JURISDICTION." SEE CONSTITUTION OF THE UNITED STATES, ARTICLE III. AS THE TERM "ORIGINAL JURISDICTION" REFERS TO THE AUTHORITY OF A COURT TO HEAR AND DECIDE AND TO ENTER A FINAL CONCLUSION IN THE FIRST INSTANCE, IN OTHER WORDS, SUCH COURT HAVE THE RESERVE RIGHT BY LAW TO ADJUDICATE WITHOUT EXCEPTION TO ANY OTHER COURT. THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION TO HEAR AND DECIDE THIS "ORIGINAL WRIT OF HABEAS CORPUS PETITION" AS DECLARED IN FELKER V. TURPIN, 518 U.S. 651 (1996). THERE HAD BEEN NO ADJUDICATION ON THE MERITS IN BOTH FEDERAL AND STATE COURTS BELOW REGARDING THE JURISDICTIONAL CHALLENGE RAISED.

IN FELKER V. TURPIN, THE COURT MADE ABSOLUTELY CLEAR THAT "WE FIRST CONSIDER TO WHAT EXTENT THE PROVISIONS OF TITLE I, OF THE ACT APPLY TO PETITION FOR HABEAS CORPUS FILED AS ORIGINAL MATTERS IN THIS COURT PURSUANT TO 28 U.S.C. 2241 and 2254. WE CONCLUDED THAT ALTHOUGH THE ACT DOES IMPOSE NEW CONDITION ON OUR AUTHORITY TO GRANT RELIEF, IT DOES NOT DEPRIVE THIS COURT OF JURISDICTION TO ENTERTAIN ORIGINAL HABEAS PETITIONS." SEE FELKER V. TURPIN, 518 U.S. 651, 658 (1996).

STATEMENT OF CASE

This case involve the single question to be decided is that of jurisdiction. A state court which the conviction and commitment rest commenced without the defendant and defense counsel having not being personally present during any stage of the trial proceedings and was without jurisdiction to render judgment as a matter of law. The court below had taken cognizance of but declined to decide the jurisdictional question leaving it open for review and decision in the Supreme Court of the United States and for the relevant fact that a State is named as a party.

STATEMENT OF FACTS

A dangerous precedent has been set by the courts below and is of general and national public interest, if upheld by the Supreme Court of the United States those constitutional order of liberty interest and freedoms accorded to all citizens of the United States of America will be jeopardized and cease to exist as would render the Constitution of the United States meaningless.

If the Supreme Court is to affirm the judgment of the courts below it would become the "supreme law of the land" that courts throughout the United States can arbitrarily hold trials of the Citizens of the United States without the accused citizen and legal counsel for the accused citizen being personally present during the trial proceedings as is the case brought before this Court. This is a case of first impression and must now be decided by the Supreme Court of the United States in the interest of justice.

Following the Supreme Court case Cohens v. Virginia, it was made absolutely clear that, "with whatever doubts, with whatever difficulties, a case may be attended, the Supreme Court must decide it, if it be brought before the Court." See Cohens, 19 U. S. 264, 404 (1821).

A writ of mandamus was filed in the Supreme Court assigned to Case No. 18-9107. (See App. 29-54). Notification was served on the Respondent. (See App. 55-56). Mandamus was dismissed without prejudice in forma pauperis denied. (See App. 57). Rehearing was filed and was denied. (See App. 57-68). Petitioner now file the original petition for writ of habeas corpus in the Supreme Court of the United States citing Felker v. Turpin, 518 U. S. 651 (1996).

REASONS FOR GRANTING THE WRIT

This case qualify as a case of first impression and must be decided by this court. There is no legal precedent on the subject and of general importance. The United States Constitution prohibits citizens of our country from loss of liberty interest in a manner contrary to law. What is ask to be considered is the indisputable fact that a trial was held absent the defendant and defense counsel having not been personally present during any stage of the trial proceedings. To this point there is no known case law to give any guidance to the set of facts presented.

Submitting to the relevant facts the question of jurisdiction is at issue and consequential in character. It would be that, it is the first order of business that the court see that it has jurisdiction conferred prior to taking cognizance of a disputed matter and to adjudicate. It is equally important that an inquiry is to be made by the courts once the jurisdictional challenge is raised the means by which the court is to provide the forum for redress upon filing a petition for writ of habeas corpus as a matter of law.

CONSTITUTIONAL ARGUMENT

The constitutional argument would be that the Sixth Amendment command for the accused and his counsel to be personally present at every stage of the trial proceedings. Absent their presence which is essential to constituting the court, jurisdiction is not present and all had under it in such case is void.

In Johnson v. Zerbst, this court declared that, "A court's jurisdiction at the hearing of trial may be lost in the course of the proceedings due to failure to complete the court as the Sixth Amendment requires. If this requirement of the Sixth Amendment is not complied with the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by habeas corpus. See Johnson v Zerbst, 304 U.S. 458, 468 (1938). Equally, important in Employers Reinsurance Corp. v Bryant, 299 U.S. 374 (1937) the court declared that, "By repeated decisions in this court it has been adjudged that the presence of the defendant...is an essential element of the jurisdiction of a court...and that in the absence of this element the court is powerless to proceed to an adjudication." Id. 382.

It is most important to emphasize that in Moore v. Dempsey, 261 86, 95 (1923), the court declared that "habeas corpus will lie if shown to be absolutely void for want of jurisdiction in the court that pronounced it, either because such jurisdiction was absent at the beginning or because it was lost in the course of the proceedings. If it shall appear that the court had no jurisdiction to render the judgment, which it gave, and under which petitioner is held...it is within the power and it will be the duty of this court to order his discharge."

The constitutional original jurisdiction invoked upon this Court for the relevant fact that a State is a party and for the relevant fact that the court below passed upon a jurisdictional issue without reaching the merits or adjudication as a matter of law.

On February 28, 2011, a four day trial commenced in absence of petitioner (defendant) and his attorney having not been personally present during any stage of the trial. The trial court permitted two non-party-attorneys to try the case which resulted in pronouncing of a judgment void on its face for want of jurisdiction.

TRANSCRIPT EVIDENCE

The trial began February 28, 2011, before the Honorable Bryant Hettenbach, Judge of Division No. 11 of the Circuit Court of City of St. Louis, State of Missouri. (App 1, Tr. 7, Lines 1-5) The defendant did not appear in person. (App 2, Tr. 7, Line ')

QUESTION BY THE PROSECUTOR

I realize Mr. Bracken's not in the courtroom today, but would you please tell us what he looks like. (App 3, Tr. 376, Lines 9-11)

BRACKEN'S ATTORNEY NOT PRESENT

Petitioner had retained a private attorney whose name as shown by the record was not present during the trial. (App. 4, Entry of Appearance); (App. 5, Court Order Signed By Judge); (App. 6, Docket Sheet). It is clear from the record that petitioner (defendant) and his attorney was absent during the entire trial proceedings in review of the transcript and by the absence of their signatures on the Judgment and Sentence Order. (App. 7, Judgment and Sentence Order).

JUDICIAL NOTICE TAKEN

Judicial notice was taken by the court prior to pronouncement of the judgment and sentence over objection made. (App. 8, Tr. 849, Lines 24-25); (App. 8, Tr. 850, Lines 1-9). The court directed and permitted two non-party-attorneys to try the case without implied

or informed consent. (App. 9, Tr. 853, Lines 11-17); (App. 10, Tr. 855, Lines 17-25); (App. 11, Tr. 863, Lines 10-15); (App. 11, Tr. 865); (App. 11, Tr. 866, Lines 11-14); (App. 12, Tr. 868, Lines 5-9); (App. 12, Tr. 869, Lines 10-12); (App. 12, Tr. 870, Lines 18-23).

Federal statute 28 U.S.C. 459 provides, "each Justice or Judge of the United States may administer oaths and affirmations and take acknowledgements. Under Federal Rules of Evidence, Rule 201 (a) provides, "The court (1) may take judicial notice on its own or (2) must take judicial notice if a party request it and the court is supplied with the necessary information. The court may take judicial notice at any stage of the proceedings. Section (b) of this Rule provides, "the court may judicially notice within the trial court's territorial jurisdiction or can be accurately and readily determine from sources whose accuracy cannot be reasonbly be questioned.

The cumulative effect concludes that ultimately, the court was without jurisdiction and authority to proceed and impose judgment and sentence, the trial court proceedings is void as a matter of law.

SUBSEQUENT PROCEEDINGS

On June 18, 2013, Petitioner again made an objection to the proceedings being held. (App. 13, Tr. 2, Lines 16-20). Judicial notice was taken and the following exchange were had:

DEFENDANT: I believe you did this once before, Judge, You interfered with my counsel of choice at the trial, didn't you?

COURT: Well--

DEFENDANT: When those-- when that information came forward to you that those guys weren't my attorney and you had a full out blown trial.

COURT: We did. (App. 14, Tr. 4, Lines 5-12)

The court acknowledged that he permitted the trial to commence knowing from the record that petitioner's attorney was not present and had not participated at any stage of the trial proceedings and had directed non-party-attorneys to try the case without implied or informed consent from petitioner.

PETITIONER INJECTS THE JURISDICTION ISSUE

On June 18, 2013, again an objection was made to the proceedings held:

DEFENDANT: These are illegal proceedings.

COURT: All right. You believe the proceeding here that I've got in front of me is illegal?

DEFENDANT: I believe you don't have any jurisdiction, yes. (App. 15, Tr. 5, Lines 15-19)

DEFENDANT: ...I have not been represented by my counsel from the first time till now. And that was due to interference by the courts. Not my attorneys.

COURT: On your motion pending before me, do you know what the standard or the burden of proof is to prove that motion?

DEFENDANT: I have no idea. I know that you don't have jurisdiction in this matter. That, I do know. (App. 16, Tr. 6, Lines 17-25)

COUNSELOR: ... regardless of whether or not you think the judge has jurisdiction, whether or not this is all legal... would you allow me to represent you...

DEFENDANT: Again, if there is no jurisdiction, there's no legal proceedings. (App 17, Tr. 8, Lines 10-15)

Petitioner maintains his innocence and seeks redress in the United States Appeals Court by petition for writ of habeas corpus. By declining to review a petition for writ of habeas corpus where a state court was without jurisdiction to try and prosecute a case without an offense or violation of law having been committed and having not had occurred violates the Constitution and laws of the United States and he is entitled to habeas corpus relief as a matter law.

In review of the transcript and record as a whole, judicial notice was taken of the state's witnesses sworn testimony, and the following exchange was had:

TRIAL TESTIMONY OF SARAH MOSLEY-BRACKEN

Q. Did you tell the police officer that you was sexually assaulted?

A. No.

Q. Okay. You just told him you were physically assaulted, correct?

A. I didn't tell the police I was physically assaulted.

(App. 18, Tr. 270, Lines 19-25)

Q. Did you tell that Detective that you indicated to the office who visited your home on April 1st that you was physically and sexually abused by Mr. Bracken?

A. I never told him that I was physically and sexually abused.

(App. 19, Tr. 295, Lines 18-22)

NO OFFENSE COMMITTED OR OCCURRED

Q. Okay. So on April 23rd is that the day you filed for the full protection order?

A. That was the date the hearing was set for, yes.

Q. Is that the same date Mr. Bracken came and got arrested?

A. Yes. (App. 20, Tr. 288, Lines 16-25)

Q. And he was sitting in the court that date, correct?

A. Yes

Q. Did Judge Clark ask you a series of questions in front of him?

A. Yes

Q. He asked you whether or not you received any medical attention for your injuries?

Q. What did you say?

A. No.

Q. All right. He asked you did you have any visible injuries. What did you say?

A. Yes.

Q. Are you sure about that?

A. Yes.

Q. Okay. He asked whether or not you filed a report with the police?

A. I'm sorry, when you said visible, do you mean visible to me or visible to anyone else to see?

Q. His exact question to you was "Did you have any visible injuries? What did you say to him?

A. No.

Q. Okay. He also asked you did you file a complaint with the Police Department about the alleged incident. What did you answer?

A. I did not.

Q. You did not answer, Okay. You sure about that?

A. I didn't say I did not answer. I did not file a complaint. If he asked me that question then I answered no, I did not.

Q. He also asked you that day whether of not you took pictures of your injuries. What did you say?

A. No, I did not. (App. 21, Tr. 289-290)

TRIAL TESTIMONY OF MITCHEL SIMPHER (POLICE OFFICER)

Q. Do you recall speaking with a Sarah Bracken that day?

A. No.

Q. That's fine. Did you make a report that day?

A. No, I did not. (App 22, Tr. 402, Lines 11-12)

Q. Okay, when you left there did you have to give a summary back to your supervisor?

A. No.

Q. Did you have to give a summary of what happen once you left there? Did you have to make a report of anything when you left there?

A. No. (App. 22, Tr. 402, Lines 19-25)

Q. Okay. If you were dispatched to a location... would you have had to make a report of it?

A. If a crime was committed?

Q. Yes.

A. If they reported a crime to us then, yea, I would have to write a report.

Q. Okay... April 1st, 2008, when you were dispatched...was a crime reported to you?

A. No. (App. 22, Tr. 406, Lines 11-23)

Q. Officer, on April 1st, 2008, when you were dispatched.. do you recall making an arrest that day?

A. No. (App. 23, Tr. 412, Lines 7-10)

Q. If a crime would have been broken that day... would you have made an arrest?

A. If it was told to me, yes. (App. 23, Tr. 412, Lines 17-19)

OBJECTION

A reasonable objection was made on the ground that the court was without jurisdiction as a matter of law. "Where the court has no jurisdiction, the general rule in all legal proceedings is that the defendant may avail himself of the objection in any stage of the proceedings. " Peale v. Phipps, 55 U.S. 368, 376.

FULL FAITH AND CREDIT OF PROCEEDINGS AND RECORDS

In Shuttlesworth v. Birminham, 394 U.S. 147, 157 (1969), held "we may properly take judicial notice of the record in that litigation between the same parties who are now before us." "It is settled, of course, that the courts, trial and appellate, take notice of their own respective records... both as to matters occurring in the immediate trial, and in previous trials and hearings." McCormick On Evidence 330 (Kenneth S. Brown, ed. 6th ed. 2006).

Federal Statute 28 U.S.C. 459 provides, "Each Justice or Judge of the United States may administer oaths and affirmations and take acknowledgements. "Records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States, as they have by law and usage in the courts of the States from which they are taken." Huntington v. Attrill, 146 U.S. 657, 685.

Article IV, Section 1, United States Constitution:

> Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State

Reviewing the transcript and judicial records the trial court took judicial notice of Sarah Mosley-Bracken sworn testimony that she had not been a victim of crime corroborated by Mitchel Simpher (Police Officer) who testified to the same, thus, in and of itself, provides for the explanation as to why petitioner had neither been brought before a magistrate court and accorded a preliminary hearing to have a judicial determination of probable cause establishing that an offense or violation of law had been committed or having had occurred nor had petitioner had been formally arraigned.

Sarah Mosley-Bracken sworn testimony was that she had not been a victim of crime constitute a judicial confession because it was made in open court and the proceedings were recorded as well as judicial notice had been taken by the trial court. Judicial confessions are those made in conformity to law before a court in the coarse of legal proceedings, the trial court took judicial notice of this relevant fact and is to be accepted as true because it was under sworn oath or affirmation when given.

Therefore, it must be concluded that the judicial confession found in the transcript is evidence that no offense or violation of law had been committed nor had occurred to initiate the prosecution and trying of this case because neither the magistarte court or trial court could have acquired nor possess jurisdiction as a matter of law.

The Fourth Amendment probable cause requirement commands that petitioner and counsel were to be personally present before a magistrate and accorded a preliminary hearing to have a judicial determination of probable cause that an offense was committed by the accused person in order to gain jurisdiction and to proceed in the matter before it and necessary to pass jurisdiction by and through to courts in succession.

In Bryant, 299 U.S. 374, 382 (1937), the Supreme Court held, "the presence of the defendant...is essential element of the jurisdiction of a court and in the absence of this element the court is powerless to an adjudication." As the court announced in Bigelow v. Sterns, "If a court of limited jurisdiction issues a process which is illegal...undertakes to hold cognizance of a cause, without having gained jurisdiction of the person, by having him before them, in the manner required by law, the proceedings are void." Bigelow, 19 Johns 39, 40.

Rule 43. Defendant's Presence

> (a) When Required. Unless this rule, Rule 5 or Rule 10 provides otherwise, the defendant must be present at:
>
> (1) the initial appearance; the initial arraignment, and the plea;
> (2) every trial stage, including jury impanelment and the return of the verdict; and
> (3) sentencing.

Additionally, "A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner." See Lewis v. United States, 146 U.S. 370, 372 (1892).

To give any validity to the judgment it is essential that the magistrate court have acquired jurisdiction, this question can only be answered by reviewing the Court below proceedings and records to determine had a judicial determination of probable cause had been established by legal process and by conducting a preliminary hearing.

The Fourth Amendment command, "the right of the people to be secured in their persons...against unreasonable...seizures shall not be violated...but upon probable cause supported by oath or affirmation." A violation occurs as soon as the prohibited act or conduct taken deprive or deny a person of a Constitutional right. "A violation is not simply an act or conduct, it is an act or conduct that is contrary to law." Richardson v. United States, 526 U.S. 813, 818.

> 28 U.S.C. 3060 provides "a preliminary examination shall be held...to determine whether there is probable cause to believe that an offense has been committed and that the arrested person committed it.
>
> Rule 5 provides "if a defendant is charged with an offense other than a petty offense a magistrate judge must conduct a preliminary hearing unless... the defendant waives the hearing.

In Director General Railroads v. Kastenbaum, 363 U.S. 25, 28 (1923), held "Probable cause is a mixed question of law and fact." "There is no dispute of fact, the question of probable cause is a question of law, for the determination of the court." Stewart v. Sonneborn, 98 U.S. 187, 194 (1878). "The probable cause must be that those inferences be by a neutral and detached magistrate." Johnson v. United States, 333 U.S. 10, n3 (1948).

Judicial notice was taken prior to pronouncement of judgment and sentencing that Petitioner had not been accorded a preliminary hearing where the magistrate would have gained jurisdiction. "If a

court of limited jurisdiction issues a process which is illegal... undertakes to hold cognizance of a cause, without having gained jurisdiction of the person by having him before them, in the manner required by law, the proceedings are void." Bigelow v. Sterns, 19 Johns 39, 40 (1821).

NO PRELIMINARY HEARING EXAMINATION

THE DEFENDANT: Never received a preliminary hearing...I never knew what the charges were the whole while. (App. 10 Tr. 856, Lines 4-6)

THE COURT: Did you have enough time while this case was pending to discuss the charges and discuss the case with your lawyers?

THE DEFENDANT: No.

THE COURT: How do you think you need more time? In what way?

THE DEFENDANT: The charges themselves were never raised. I never knew what the charges were...Neither attorney had never talked to me what the charges were... I was never even booked on the charges that was in these proceedings. (App. 11 Tr. 864, Lines 4-25; Tr. 865 Lines 1-2.

THE COURT: So, I've got your charges read to you or not read to you.

THE DEFENDANT: I never knew about these charges or the case. (App. 11, Tr. 865, Lines 7-10)

THE DEFENDANT: I never knew what the charges were, period. Never knew it... (App. 11 Tr. 867, Lines 3-4)

THE DEFENDANT: Never knew it. Never seen the police report. Never seen it. (App. 11 Tr. 867. Lines 6-7)

POST CONVICTION PROCEEDINGS

On October 11th, 2011, Petitioner filed a post-conviction relief application in the Twenty-Second Judicial Circuit, State of Missouri and assigned Case No. 1122-CC10123 in the trial court which judgment and sentence was rendered. (App. 24). Petitioner asserts in the application that:

> Trial Judge proceeded to trial absent the presence of the defendant and his attorney in violation of United States 6th and 14th Amendments; Missouri Constitution Article I, Section 10 and 18(a); Missouri Supreme Court Rule 31.02 and 31.03; and Revised Statute of Missouri 546.030. (App. 25)

Petitioner further asserts that he had not been accorded a preliminary hearing or an arraignment nor had his attorney appeared before a magistrate court.

> 15. Were you represented by an attorney at any time during the course of:
> (a) your preliminary hearing? NO
> (b) your arraingment and plea? NO
> (c) your trial, if any? NO
> (d) your sentencing? NO (App. 26)

Petitioner had not been brought before a magistrate court, notwithstanding, judicial notice had been taken but the hearing court did not address nor inquire into those matters. "It is the duty of the government to inform him of the accusation against him. This is done by arraingment and requiring the defendant to plea." This court further held, "the arraingmnet and plea are a necessary part of the proceeding without which there can be no valid trial and judgment." Crain v. United States, 162 U.S. 625, 640, 643.

> Rule 10 provides, "the accused is to be brought before the court to plead to the charges brought against him and asked to enter a plea."

JUDICIARY DUTY AND FINAL ARBITER

By the very power and authority under Article III, the Supreme Court is made the final arbiter within the jurisdiction and judicial hierarchy. As it is settled law and declared, "It is emphatically the province and duty of the judicial department to say what the law is." See Marbury v. Madison, 5 U.S. 137 (1803). However, "The decision of an inferior court within the U.S. Const. Article III hierarchy is not the final word of the judicial department...it is the obligation of the last court in the hierarchy that rules on the case to give effect even when that has the effect of overturning the judgment of an inferior court. See Miller v. French, 530 U.S. 327, 344 (2000).

It would then follow that the original jurisdictional authority of this Court would invoke by the fact that a State is named as a party, as commanded by its Article III power, "and those in which a State shall be party, the Supreme Court shall have original jurisdiction." In United States v. Texas, 143 U.S. 621-643-644 (1892), the court made absolutely clear that, " In which a State shall be party, the Supreme Court shall have original jurisdiction, refers to all cases...in which a State may be made of right, a party defendant or in which a State may of right, be a plaintiff." See also Marbury v Madison, 5 U.S. 137, 174 (1803); Rhode Island v. Massachusetts, 37 U.S. 657, 720 (1838); State of Florida v. State of Georgia, 58 U.S. 478, 505 (1854) and Chisholm v. Georgia, 2 U.S. 419, 431 (1793).

In Cohens v. Virginia, 19 U.S. 264 (1821), the Supreme Court declared that " The mere circumstance that a State is a party, gives jurisdiction to the Court. The Constitution gave to every person having a claim upon a State, a right to submit his case to the Court of the nation."

WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

As it is settled law before a state petitioner can proceed to file a federal habeas corpus petition in the federal court, he or she must first file a writ of certiorari in the United States Supreme Court, only after and not before the highest court of last resort of a state has renedered a final judgment or decree. As here, a petition for writ of certiorari was filed in the United States Supreme Court pursuant to 28 U.S.C. 1257, after filing a petition for writ of habeas corpus in a state court of last resort which was denied without requiring the respondent to answer, without reaching the merits, and without opinion. See Bracken v. State of Missouri and Missouri Department of Corrections, SC93689.

In Flynt v. Ohio, the Supreme Court made clear that, "Consistent with the relevant jurisdictional statute 28 U.S.C. 1257, the jurisdiction of the Supreme Court of the United States to review a state court decision is generally limited to a final judgment rendered by the highest court of the state in which a decision may be made." Furthermore, federal statute 28 U.S.C. 1257 provides, "Final judgment or decree rendered by the highest court of a state in which a decision could be had may be reviewed by the Supreme Court by writ of certiorari.

The United States Supreme Court declined to consider the certiorari petition filed and denied without consideration. Accordingly, " A denial of certiorari, by the United States Supreme Court imports no expression of opinion upon the merits of a case." See House v. Mayo, 324 U.S. 42, 48 (1945) HN5. In Darr v. Burford, "Though the Supreme Court denial of certiorari carries no weight in the subsequent federal habeas corpus proceedings, a petition for certiorari should nevertheless be made

before an application may be filed in another federal court by a state petitioner. See Darr, 339 U.S. 200 (1950).

HABEAS CORPUS IS A WRIT OF RIGHT

Petitioner has a constitutional right and is entitled to have the benefit of this Court's attention to hear and decide whether the court which rendered the judgment against him, had or had not jurisdiction to do so, as a matter of law. Jurisdictional challenges are questions of law and must be decided by a court of the United States, and is not that of nor subject to discrectionary consideration. As a constitional argument the First Amendment command that, " Congress shall make no law...abridging free speech...and to petition the government for a redress of grievances." The right to have redress incorporates the right to petition the courts by writ of habeas corpus, in such cases where persons who are unconstitutionally held in state or federal custody in violation of the Constitution and laws of the United States.

The mode by which redress is obtainable, is by writ of habeas corpus as to remedy a jurisdictional challenge. The writ of habeas corpus is a writ of right, the writ is a constitutional and statutory protected right as well as a common-law right. By the Constitution, "The privilege of the writ of habeas corpus shall not be suspended, unless in cases of rebellion or invasion the public safety may require it." By federal statute, The Supreme Court, a justice thereof, a circuit judge, or a district judge shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court on the ground that he is in custody in violation of the Constitution or laws, or treaties of the United States. SEE 28 U.S.C. 2254.

As declared by the Supreme Court case Holmes v. Jennison, 39 U.S. 540, 565 (1840), "In cases...like those upon a habeas corpus are summary...the construction of the Act of Congress has been settled, and settled according to the true import of its words. The construction gives to it...entitles a petitioner for habeas corpus relief, as a matter of right to have a judgment rendered against him...re-examined in the United States Supreme Court."

STANDARD OF REVIEW

The writ of habeas corpus is a civil action to be decided by the preponderance of the evidence standard as a matter of law. "It is, of course true that habeas corpus proceedings are characterized as civil." See Harris v. Nelson, 394 U.S. 286, 293 (1969), and "Where proof is offered in a civil action, a preponderance of the evidence will establish the case." See Herman v. Huddleston, 459 U.S. 375, 388 (1983).

WRIT OF HABEAS CORPUS APPROPRIATENESS

Petitioner is entitled to have the benefit of a Court of the United States attention to hear and decide whether the court which rendered judgment against him, had or had not jurisdiction to do so, as a matter of law. Recognizing this, it was declared in Arbaugh, 546 U.S. 500, 514 (2006) that "Jurisdiction is a question of law for the courts to determine, because it involves the court power to hear and decide a case, can never be forfeited or waived." As settled law, a jurisdictional challenge is absolutely within the province of the judiciary, the mode by which redress is obtainable, is to be had by petition for writ of habeas corpus. The courts must provide petitioner with the forum for judicial review and a final decision in regard to this matter. As declared in Adam, 180 U.S. 28, 34 (1901), "Jurisdiction is always an open question for the courts throughout the United States

inquired into once raised." Courts in our judicial system are courts of limited jurisdiction, as such can do no more than the law require of them. All inferior courts are courts of limited jurisdiction and their judgments are always subject to further judicial review and final determination in regard to this issue as a matter of law. As declared in Adam,180 U.S. 28, 34 (1901), "Jurisdiction is always an open question for the courts throughout the United States to be inquired into once raised." In Maine v. Thiboutoy, 448 U.S. 1 (1980), "Jurisdiction once challenged cannot be assumed and must be decided."

INTERVENING AUTHORITY

As settled law, the Supreme Court intervening authority as declared in In Re Mayfield, 14 u.S. 107, 116 (1891), "The Supreme Court of the United States has power to inquire with regard to the jurisdiction of the inferior court...even it such inquiry involves an examination of facts outside of but not inconsistent with the record." Furthermore, in the case of In Re Lennon, 150 U.S. 393, 400 (1893) declared that "of those cases, in which the jurisdiction of the court is in issue, in such case, the question of jurisdictional alone shall be certified from the court below to the Supreme Court of the United States for decision."

It is of no disrespect to the courts below which declined to exercise their jurisdiction to decide this federal question of law all of which passed upon this question of law leaving the question open to this court for a final decision. Recognizing this the Supreme Court made it absolutely clear that, "Our practice permits review of an issue not pressed below so long as it has been passed upon." See Citizen United v. FEC, 558 U.S. 310, 330 (2010)

DISPOSITION OF HABEAS CORPUS

In federal court section 28 U.S.C. 2243 governs the disposition of habeas corpus which requires the court to grant the petition or direct the respondent to show cause for not granting it. The proper is that a judicial review and decision is to be made by the habeas court after respondent make a return on the merits, then, and only then, is the habeas court to dispose of the writ as law and justice require.

EVIDENTIARY HEARING

Regarded as settle law in the case of Holiday v. Johnston, 313, U.S. 342, 351 (1941), the court held that, "the statute first requires that the person to whom the writ is directed shall certify to the...justice or judge before whom it is returnable the true cause of the detention of such party, and second that the person making the return shall at the time bring the body of the party before the judge who grants the writ. The third provides that the... justice or judge shall proceed in a summary way to determine the facts of the cause, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require." This being true, "the federal court in habeas corpus must hold an evidentiary hearing if the habeas application did not receive a full and fair hearing in a State court." See Townsend v. Sain, 372 U.S. 293 (1963).

As to disposition of habeas corpus the court held that "the court or justice or judge shall proceed in a summary way to determine the facts of the case by hearing the testimony and arguments and thereupon to dispose of the party as law and justice require." See Shorti v. Massachusetts, 183 U.S. 138, 143 (1901).

JURISDICTIONAL ISSUE REVIEWED BY CERTIORARI

Jurisdictional issues are such a character which are reviwable by the Supreme Court of the United States on a petition for writ of certiorari when the court below decline to address whether it exist or not once raised. As the Supreme Court announced in Hagans v. Lavine "The jurisdictional question being an important one, we grant certiorari. See Hagans v. Lavine, 415 U.S. 528, 530 (1974). The court below had declined to exercise its jurisdiction to determine whether the court which rendered a judgment and sentence against petitioner had lawful authority to do so as a matter of law. In the case Citizens United v. FEC, the court made clear that "Our practice permits review of an issue not pressed below so long as it has been passed upon." See Citizens United v. FEC, 558 U.S. 310, 330 (2010).

It is settled law that "Of those cases in which the jurisdiction of the court is in issue, in such case, the question of jurisdiction alone shall be certified for the court below to the Supreme Court of the United States for decision." See In re Lennon, 150 U.S. 393, 400 (1893). The Arbaugh court held that " Jurisdiction is a question of law for the courts to determine because it involves the court power to hear and decide a case can never be forfeited or waived. See Arbaugh v. Y & H Corps., 546 U.S. 500, 514 (2000). In another case Mayfield the court held "The Supreme Court of the United States has power to inquire with regard to the jurisdiction of the inferior court." See Ex Parte Mayfield, 14 U.S. 107, 116 (1891).

Jurisdictional issues cannot be waived by discrectionary acts. It has been long recognized and settled that questions involving jurisdictional issues effecting a judgment belongs to the courts. It cannot be presumed when the record is to the contrary as to demand judicial inquiry. The Supreme Court has always concluded that "Where an action is brought to recover upon a judgment, the jurisdiction of the court rendering the judgment is open to inquiry. See Wetmore v. Karrick, 205 U.S. 141, 149 (1907). A final judgment made by a court is always subject to further judicial review by a higher court, justice or judge and if found to be in violation of the Constitution and the laws of the United States must be rejected as a matter of law.

As the Supreme Court declared in Fay v. Noia, 372 U.S. 391, 409 (1963), "Personal liberty is so great moment in the eye of the law that the judgment of an inferior court affecting it is not deemed so conclusive but that...the question of the court's authority to try and imprison the party may be reviewed on habeas corpus..."

To a further extent in Bonner the court declared that " To deny the writ of habeas corpus...is the virtual suspension of it... it should be constantly borne in mind that the writ was intended as a protection of the citizens from encroachment upon his liberty." See Bonner, 151 US 242, 259 (1893). In Pointdexter it was declared "To take away all remedy for the enforcement of a right, is to take away the right itself." See Pointdexter v. Greenhow, 114 US 270, 303 (1885).

Regarded as settled law fraud nullify all had under it and is unreliable to sustain any judgment a court may reach to such extent will have a negative effect on the judgment. Therefore any form of fraud proven to be in the procurement of a judgment voids the judgment because unreliablity is certain. Following the Supreme Court decision in Tyler v. Magwire, the court made absolutely clear that by "repeated decisions of this court have established the rule that a final judment or decree of the Supreme Court of the United States is conclusive upon the parties and cannot be re-examined at a subsequent term, except in cases of fraud." See Tyler, 84 U.S. 253, 283 (1872).

The state trial court from which the jurisdiction and commitment in question rest had commenced without the defendant and defense counsel having not been personally present during any stage of the trial proceedings and on presentment under a fraudulent charging instrument under Cause No. 0822-CR06710 known to be fraudulent on its face. When fraud is found to have been an inducement in the record upon which the court relied upon in reaching its final conclusion in the judgment which it rendered absolutely voids the judgment. On review of the record as a whole shows that false docket entries and court filed documents were found throughout the record compromised the authenticity of the record made. As the Supreme Court announced, "There is no question of the general doctrine that "fraud" vitiates documents and even judgments." See United States v. Throckmorton, 98 U.S. 61, 65 (1878). The court also announced that, "A clerk of the court has no authority to alter the record of his certificate of the ackownledgment of...the record made." See Elliot v. Piersol, 26 U.S. 328, 341 (1828).

CONCLUSION

For the foregoing reasons given this writ should be granted.

Respectfully Submitted,

Garvester Bracken
Petitioner