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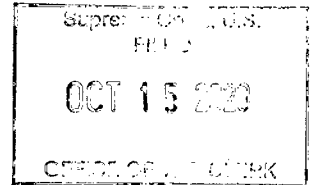
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ORIGINAL

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IN THE  
SUPREME COURT OF THE UNITED STATES

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In re DALE MCKENZIE, PETITIONER,

VS.

DAVID VANDERGRIF, RESPONDENT.

ON PETITION FOR A WRIT OF HABEAS CORPUS TO  
THE U.S. EIGHTH CIRCUIT COURT OF APPEALS

PETITION FOR A WRIT OF HABEAS CORPUS

Dale McKenzie #1149497  
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Petitioner, pro se

## QUESTIONS PRESENTED

### GROUND ONE

1. Has prejudice been shown where the trial court overruled the defendant's motion for continuance to show that his prior Georgia conviction was void, and defendant required additional time to show that his conviction was obtained under an unconstitutional law?

2. Has prejudice been shown where the trial court has sentenced the defendant to an extended term of imprisonment based upon a statute that was later declared unconstitutional?

### GROUND TWO

1. Consistent with the holding in Strickland v. Washington, 466 U.S. 668 (1984), which held that to prove prejudice on a claim of ineffective assistance of counsel, a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Has prejudice been shown where defense counsel failed to move for a rehearing, transfer or otherwise correct the court's conclusion that appellant had been convicted of "forcible" sodomy in Georgia because he was also convicted of rape, which was factually incorrect?

## LIST OF PARTIES

All parties appear in the caption of the case on the cover page and are parties to the proceeding in the court whose judgment is the subject of this petition.

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### Constitutional Provisions

U.S. Const. Amends. V, VI, XIV  
Mo. Const. Art. I, §§ 10, 18(a)

### Rules

Mo. Sup. Ct. R. 84.17  
Mo. Sup. Ct. R. 30.26

### Statutes

O.C.G.A. § 16-6-2  
§ 547.070 R.S.Mo.

IN THE  
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF HABEAS CORPUS

Petitioner respectfully prays that a writ of habeas corpus issue to review the judgment below.

OPINIONS BELOW

This case is from Federal Courts:

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is unpublished.

The opinion of the United States District Court appears at Appendix B to the petition and is unpublished.

## JURISDICTION

This case is from federal courts:

1. On August 11, 2010, Petitioner timely-filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, in the U.S. District Court, seeking to challenge his 2006 convictions and sentences. McKenzie v. Steele, No. 4:10-cv-01494-AGF/TCM (E.D. Mo. 2010). On September 30, 2013, the court dismissed the petition on its merits;

2. A timely-filed notice of appeal was filed in the U.S. Circuit Court of Appeals for the Eighth Circuit. McKenzie v. Steele, No. 13-3286. The court dismissed the appeal on March 4, 2014.

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

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that "No State shall ... deprive any person of life, liberty, or property, without due process of law."

The Sixth Amendment to the United States Constitution provides, in relevant part, that no person shall be denied the right to legal counsel in any criminal proceeding, and the effective assistance of legal counsel.



## STATEMENT OF THE CASE

### INTRODUCTION

The Georgia Supreme Court held in Powell v. State, 510 S.E.2d 18, 26 (Ga. 1998), that the Georgia sodomy law "insofar as it criminalizes the performance of private unforced noncommercial acts of sexual intimacy between persons legally able to consent" was unconstitutional. The Eleventh Circuit Court of Appeals held in Mauk v. Lanier, 484 F.3d 1352, 1355 (11th Cir. 2007), that Powell applied retroactively to cases on collateral review.

In this case, the defense sought a brief continuance of sentencing, not trial, to review the record regarding Petitioner, Dale McKenzie's Georgia conviction that formed the basis for the trial court's finding that he was a prior and persistent offender. The defense required time to investigate the circumstances to determine whether Petitioner's conviction was valid; to establish whether Petitioner agreed that his sexual activity was consensual or nonconsensual. If the record at Petitioner's plea hearing did not establish Petitioner's sexual activity was nonconsensual, there was no evidence bringing Petitioner outside the reach of Powell. Here, the record does not establish Petitioner's sexual activity was nonconsensual, and thus, the trial court used a conviction that was void in order to impose an extended sentence, and therefore, the conviction a nullity ab initio.

### GROUND ONE

THE TRIAL COURT ERRED IN OVERRULING PETITIONER'S MOTION FOR CONTINUANCE TO SHOW THAT HIS PRIOR GEORGIA CONVICTION WAS VOID, BECAUSE THIS RULING DEPRIVED HIM OF DUE PROCESS, AND OF FUNDAMENTAL FAIRNESS, IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, § 10 OF THE MISSOURI CONSTITUTION, IN THAT, THE TRIAL COURT SENTENCED PETITIONER TO AN EXTENDED TERM OF IMPRISONMENT BASED UPON A STATUTE THAT WAS LATER DECLARED UNCONSTITUTIONAL, WHICH WOULD RENDER THE CONVICTION VOID, AND PETITIONER REQUIRED ADDITIONAL TIME TO SHOW THAT HIS CONVICTION WAS OBTAINED UNDER AN UNCONSTITUTIONAL LAW.

### ARGUMENT

In this case, the U.S. Eighth Circuit Court of Appeals overlooked material matters of fact and law when it issued its Judgment dismissing appeal on March 04, 2014. Moreover, the court's dismissal is based on an unreasonable determination of the facts in light of the evidence presented in the state-court proceedings. In particular, Petitioner, Dale McKenzie requested a continuance of his sentencing hearing so that he could seek to review the record regarding his Georgia conviction (No. 98-CR-0091; State of Georgia v. Dale McKenzie) that formed the basis for the trial court's finding that he was

a prior and persistent offender (Tr.960). The Georgia Supreme Court held in Powell v. State, 510 S.E.2d 18, 26 (Ga. 1998), that the Georgia sodomy law "insofar as it criminalizes the performance of private unforced noncommercial acts of sexual intimacy between persons legally able to consent" was unconstitutional. The Eleventh Circuit Court of Appeals held in Mauk v. Lanier, 484 F.3d 1352, 1355 (11th Cir. 2007), that Powell applied retroactively to cases on collateral review.

In this case, the defense required time to investigate the circumstances to determine whether McKenzie's conviction was valid, and to seek to overturn it (Tr.960). The State objected on the ground that McKenzie was originally charged with rape, and the court's ruling only protected private, consensual sexual activity (Tr.961). The trial court agreed and denied the continuance (Tr.964). It sentenced McKenzie to extended terms beyond the statutory maximum (Tr.975).

The grant or denial of a continuance rests in the sound discretion of the trial court, and the court's ruling will be reversed only upon a strong showing of abuse of that discretion. State v. Wolfe, 13 S.W.3d 248, 261 (Mo. banc 2000). Here, the trial court was only requested to grant a brief continuance of sentencing, not trial. Thus, the court abused its discretion in refusing to do so.

If a statute under which a defendant is convicted is later declared unconstitutional, the conviction is "presumptively void." U.S. v. Martin, 164 Fed. Appx. 776, 777-78 (10th Cir.

2006). The statute is void and the conviction a nullity ab initio, for the constitutionality of the statute affects the foundation of the whole proceedings. Journigan v. Duffy, 552 F.2d 283, 289 (9th Cir. 1977). The law is void and is as no law. Id.

In this case, the State's argument is not compelling. It is not what McKenzie was initially charged with, but what he actually pled guilty to, that is controlling. Moreover, the Sentence and Judgment from Georgia (Case No. 98-CR-0091) confirms that McKenzie entered a plea of guilty to "SODOMY" and was sentenced to ten years probation. Furthermore, the "RAPE" charge was ordered Nolle Prosequi. Specifically, McKenzie was charged with: RAPE, COUNT I; AGGRAVATED SODOMY, COUNT II; AND POSS./FIREARM BY CONVICTED FELON, COUNT III. COUNTS I AND III WERE ORDERED NOLLE PROSEQUI, AND COUNT II AGGRAVATED SODOMY WAS REDUCED TO A LESSER OFFENSE OF SODOMY.

The defense needed time to establish whether McKenzie agreed that his sexual activity was consensual or non-consensual. If the record at his plea hearing did not establish McKenzie's sexual activity was nonconsensual, there was no evidence bringing McKenzie outside the reach of Powell, supra. Here, the record does not establish McKenzie's sexual activity was nonconsensual.

The Constitution's Due Process [Clause] guarantees every defendant the right to a fair trial. Turner v. Louisiana, 379

U.S. 466, 471-472, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965). Here, the trial court has used a conviction that was void in order to impose an extended sentence, and McKenzie's right to a fundamentally fair trial and sentence required the granting of a continuance to prevent this sentencing error.

The Eighth Circuit's denial of appeal is based on an unreasonable determination of the facts in light of the evidence presented in the state-court proceedings. The court's denial of appeal thus violated McKenzie's rights to due process, and to fundamental fairness, in violation of the Fourteenth Amendment to the United States Constitution and Article I, § 10 of the Missouri Constitution. This Court must grant habeas relief, and reverse McKenzie's conviction and sentence, and remand the case for a new sentencing hearing without the improper prior conviction from Georgia or, at the very least, remand for an evidentiary hearing.

## GROUND TWO

THE MOTION COURT CLEARLY ERRED WHEN IT DENIED PETITIONER'S POST-CONVICTION MOTION WITHOUT A HEARING BECAUSE PETITIONER ALLEGED FACTS, NOT REFUTED BY THE RECORD, SHOWING HE WAS DENIED HIS RIGHTS TO DUE PROCESS, TO EFFECTIVE ASSISTANCE OF COUNSEL, AND TO FUNDAMENTAL FAIRNESS, AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§ 10 AND 18(a) OF THE MISSOURI CONSTITUTION, IN THAT, APPELLATE COUNSEL FAILED TO MEET THE STANDARD OF A REASONABLY COMPETENT ATTORNEY UNDER SIMILAR CIRCUMSTANCES BY FAILING TO MOVE FOR A REHEARING, TRANSFER OR OTHERWISE CORRECT THE (MISSOURI COURT OF APPEALS) COURT'S CONCLUSION THAT PETITIONER HAD BEEN CONVICTED OF "FORCIBLE" SODOMY IN GEORGIA BECAUSE HE WAS ALSO CONVICTED OF RAPE. PETITIONER PLED AND TENDERED DOCUMENTARY PROOF SHOWING THE RAPE CHARGE WAS DISMISSED, WHICH RAISED A GENUINE ISSUE OF FACTS AS TO THE LEGITIMACY OF THE SODOMY CONVICTION. THE MOTION COURT'S RULING THAT APPELLATE COUNSEL HAD NO OBLIGATION TO FILE SUCH MOTIONS LEAVES A DEFINITE AND FIRM IMPRESSION A MISTAKE HAS BEEN MADE.

## ARGUMENT

In this case, the U.S. Eighth Circuit Court of Appeals overlooked material matters of fact and law when it issued its Judgment dismissing appeal on March 04, 2014. Moreover, the

Court's dismissal is based on an unreasonable determination of the facts in light of the evidence presented in the state-court proceedings. In particular, Petitioner, Dale McKenzie complained that appellate counsel (for his direct appeal) was deficient for failing to correct the Missouri Court of Appeals when it errantly concluded that McKenzie was convicted of rape. That McKenzie was "convicted" of rape was significant to the court on direct appeal, because it concluded that McKenzie's rape conviction demonstrated that his sodomy conviction in Georgia was of the type not invalidated by the Georgia Supreme Court. However, McKenzie was not convicted of rape. The motion court denied a hearing on this claim, concluding simply that appellate counsel was under no obligation to file a motion for rehearing. The Missouri Court of Appeals (Division One) agreed with the motion court, which poses the following questions:

- 1) Was appellate counsel required to file a motion for rehearing? Yes, if the situation warranted it.
- 2) Was the trial court's confidence in the outcome of the proceedings undermined? Yes.

In this case, McKenzie was convicted of "sodomy" following his guilty plea (No. 98-CR-0091; State of Georgia v. Dale McKenzie) in 1998 (PCR-LF 67, 148). The statute under which McKenzie was convicted of sodomy in Georgia had been declared

unconstitutional, under certain circumstances. Powell v. State, 510 S.E.2d 18 (Ga. 1998). Georgia statute defines "sodomy" as:

(a)(1) A person commits the offense of sodomy when he or she performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another.

O.C.G.A. § 16-6-2.

Powell concluded that to criminalize non-forced, consensual activity between adults was unconstitutional. Id. The same Georgia statute also criminalizes "aggravated sodomy" which is sodomy accomplished through the use of force or against one below the age of ten years. O.C.G.A. § 16-6-2(2).

In this case, assuming McKenzie was over eighteen at the time he committed the Georgia offense, and he was, the only way the Georgia prior conviction could have been valid as proper enhancement, would have been if the complaining witness was below the age of (sixteen) consent, and she was not; she was seventeen years of age in November, 1997. If McKenzie's supposed crime had been with an adult, then a "sodomy" conviction would not lie, and a conviction based on an unconstitutional statute would not be valid. If a statute under which a defendant is convicted is later declared unconstitutional, the conviction is "presumptively void."



U.S. v. Martin, 164 Fed. Appx. 776, 777-78 (10th Cir. 2006).

The statute is void and the conviction a nullity ab initio, for the constitutionality of the statute affects the foundation of the whole proceedings. See Journigan v. Duffy, 552 F.2d 283, 289 (9th Cir. 1977). The law is void and is as no law. Id.

In this case, at sentencing, the defense requested a continuance of 14 or 15 days to explore the validity of one of McKenzie's two priors, because the statute under which McKenzie was convicted in Georgia had been declared unconstitutional (Tr.961). The trial court denied the request (Tr.963). It sentenced McKenzie as a prior and persistent offender; to 30 years imprisonment for burglary 1st deg.; life imprisonment for assault 1st deg.; and one year for assault 3rd deg.; and ordered all sentences to be served consecutively (Tr.975).

On direct appeal, McKenzie raised that he was wrongly found to be a persistent offender because of the Georgia conviction, which was premised on a sodomy statute later found to be unconstitutional for criminalizing consensual sexual activity. Appellate counsel briefed the trial court erred by not granting the continuance. The Missouri Court of Appeals reasoned that trial counsel waited too long to raise the issue and that McKenzie had not demonstrated that further investigation would show his conviction was void under Georgia law. State of Missouri v. Dale McKenzie, ED89179, Order and

Memorandum of direct appeal at p. 17. The statute was unconstitutional insomuch as it criminalized "unforced, consensual, noncommercial acts of adult sexual activity between persons legally able to consent" Id. The court assumed McKenzie's conviction for sodomy was for a forcible, nonconsensual form of the offense because "Defendant was still charged with and convicted of rape, which is defined as having carnal knowledge with a female forcibly and against her will." Id. (citations omitted).

McKenzie pled the Missouri Court of Appeals (on direct appeal) had made a material mistake of fact; nothing in the record showed that McKenzie was convicted of rape, rather the Judgment and Sentence showed the rape count was dismissed (PCR-LF 108-109). McKenzie pled that appellate counsel agreed the Missouri Court of Appeals got it wrong, but only after the time for filing a motion for rehearing had passed (PCR-LF 109).

McKenzie submitted a copy of the Judgment and Sentence from Georgia with his pro se and amended motions for post-conviction relief (PCR-LF 67, 148). The motion court held that appellate counsel was not required to file a motion for rehearing (on direct appeal), but clearly a motion for rehearing was the proper vehicle for correcting a material mistake of fact. Rule 84.17 (made applicable to criminal appeals by Rule 30.26). Rule 84.17 comprehends filing a motion for rehearing in just such a situation "to call attention to

material matters of law or fact overlooked or misinterpreted by the court." Rule 84.17. Had counsel done so here, the outcome of the appeal would have been different and the matter remanded for a hearing on the validity of McKenzie's prior Georgia conviction.

The Missouri Court of Appeals (Division One) agreed with the motion court's reasoning that because McKenzie had no constitutional right to counsel to seek discretionary review, counsel could not be ineffective for foregoing a motion for rehearing. Dale McKenzie v. State of Missouri, Memorandum at p. 13 citing Kennedy v. State, 771 S.W.2d 852, 859 (Mo.App.S.D. 1989); State v. Barnes, 517 S.W.2d 167-170 (Mo. App. 1974); and Wainwright v. Torna, 455 U.S. 586, 586-88 (1982). However, Division Four's reliance on these cases is misplaced.

Both Kennedy and Wainwright are inapplicable to McKenzie's case because both cases had to do with the right to counsel on transfer applications or petitions for certiorari. Transfer on certiorari is a means to take one's case to a different court. Such review (beyond what one obtains in an intermediate appellate court) is for broad questions of statutory or constitutional interpretation. As the United States Supreme Court noted in Ross v. Moffitt, 417 U.S. 600, 616-17 (1974), a Supreme Court's review depends on many factors other than the perceived correctness of the decision under review. So, the appellants in Kennedy and Wainwright were seeking something

more than that afforded them in their first appeal; review by a different tribunal. Here, in contrast, McKenzie merely sought review of an error made by the court having jurisdiction over his appeal from conviction. McKenzie sought reasonably competent representation by his appointed counsel on appeal to the Missouri Court of Appeals, to correct an error made by the court (on direct appeal) in affirming the judgment of conviction.

The Kennedy case is also distinguishable because McKenzie had not demonstrated a reason that his case should be transferred. Id. at 859. The claim Mr. Kennedy contemplated, an instructional error, the Missouri Court of Appeals deemed "meritless." Here, McKenzie on the other hand, had a bona fide complaint about the factual basis the court used to decide his direct appeal.

The Barnes case does deal with the right to counsel on a motion for rehearing, but it too is distinguishable. Barnes' appellate counsel had been permitted to withdraw and Barnes sought replacement counsel in order to file a motion for rehearing. Barnes, supra at 167-68. The court in Barnes was not called to determine whether existing counsel lapsed by failing to file, but whether counsel ought to have been appointed solely for that purpose.

Moreover, the court denied Barnes' request, using a pragmatic but somewhat suspect legal rationale. The court

concluded that while a motion for rehearing allowed for the court to modify, rehear, affirm or reverse its original decision, in actual practice the court rarely did so. Id. at 169. Thus, the court decided "[i]t is therefore, clear at least to us, that on a criminal appeal a motion for rehearing is merely an exhaustion device used to seek discretionary review in the highest court of this State." Id. So, while the Missouri Court of Appeals may have been dismissive of the ends of a motion for rehearing, the Missouri Supreme Court Rules state the purpose of such motion is to call attention to material matters of law or fact overlooked or misinterpreted by the Court of Appeals. Rule 84.17.

Defendants in Missouri have an appeal of right after final judgment on an indictment or information. Section 547.070 RSMo (2000). The Due process Clause guarantees effective assistance of counsel on a first appeal as of right; a right similar to the Strickland requirement of effective assistance of counsel for trial attorneys. Evitts v. Lucey, 469 U.S. 387 (1985). To allege and prove ineffective assistance of appellate counsel, appellant must show that his counsel made an error in representation, and the error overlooked was "so obvious from the record that a competent and effective lawyer would have recognized and asserted it." Moss v. State, 10 S.W.3d 508, 514-15 (Mo. banc 2000).

The Eighth Circuit's denial of appeal is based on an unreasonable determination of the facts in light of the evidence presented in the state-court proceedings. The court's denial of appeal thus violated McKenzie's rights to due process, to effective assistance of counsel, and to fundamental fairness, in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution. Therefore, this Court must grant habeas relief, and reverse McKenzie's conviction and sentence, and remand this case for a new sentencing hearing without the improper conviction from Georgia or, at the very least, remand for an evidentiary hearing.

## REASONS FOR GRANTING THE PETITION

The writ should issue because the record does not establish Petitioner's sexual activity was nonconsensual, and thus, the trial court used a conviction that was void in order to impose an extended sentence, and therefore, the conviction a nullity ab initio.

Specifically, the Georgia Supreme Court held in Powell v. State, supra, that the Georgia sodomy law "insofar as it criminalizes the performance of private unforced noncommercial acts of sexual intimacy between persons legally able to consent" was unconstitutional. The Eleventh Circuit Court of Appeals held in Mauk, supra, that Powell applied retroactively to cases on collateral review.

Moreover, if the record at McKenzie's plea hearing did not establish his sexual activity was nonconsensual, there was no evidence bringing McKenzie outside the reach of Powell, supra. Here, the record does not establish McKenzie's sexual activity was nonconsensual. Thus, if a statute under which a defendant is convicted is later declared unconstitutional, the conviction is "presumptively void."

In compliance with Rules 20.1 and 20.4 Petitioner states as follows:

1. The writ will be in aid of the Court's appellate jurisdiction, by establishing its precedence that will furnish

a basis for determining an identical or similar case that may subsequently arise, or present a similar question of law.

2. Exceptional circumstances warrant the exercise of the Court's discretionary powers, in that, a constitutional violation has resulted. Thus, a manifest injustice or miscarriage of justice would result in the absence of habeas relief.

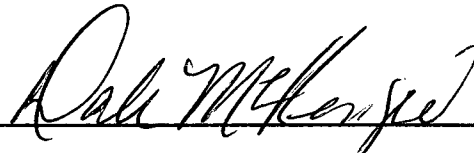
3. Adequate relief cannot be obtained in any other form or from any court, as Petitioner has presented this issue before the United States District Court; and the United States Eighth Circuit Court of Appeals.



CONCLUSION

The Eighth Circuit Court of Appeals' denial of appeal thus violated Petitioner's rights to due process of law, and to fundamental fairness, and to equal protection of the law. The proper remedy is to grant habeas relief, and reverse Petitioner's conviction and sentence, and remand this case for a new sentencing hearing without the improper conviction from Georgia, and for any other relief this Court deems proper.

Respectfully submitted,

A handwritten signature in cursive script, reading "Dale McKenzie", is written over a horizontal line.

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PETITIONER, PRO SE

DATE: October 2, 2020