NO. 22-6179

IN THE

SUPREME COURT OF THE UNITED STATES

BRANDON OFFICE #396954
PETITIONER,

VERSUS

MARCUS MYERS, WARDEN
RESPONDENT,

ON PETITION FOR WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR FIFTH CIRCUIT

STATE OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI

/S/ Brandon Office
Brandon Office #396954
RLCC, Cajun 1 C-2
1630 Prison Rd.
Cottonport, LA. 71327

QUESTIONS PRESENTED

1. Was the Petitioner entitled to Habeas Corpus Relief, where the Petitioner properly raised a *Motion to Correct an Illegal Sentence*?

2. Was the Petitioner entitled to Habeas Corpus Relief, where the Petitioner's sentence is invalid and illegal, where it rest upon the improper "amendment" of a null and void charging document?

LIST OF PARTIES

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

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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OTHER

CONSTITUTION

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

[✓] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

The opinion of the United States district court appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[✓] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was September 29, 2022.

[✓] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT 5

[Criminal actions-Provisions concerning-Due process of law and just compensation clauses]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 14

Section 1. [Citizens of the United States.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On November 22, 2005, Petitioner was charged with one count each of *Armed Robbery* and *Aggravated Kidnapping.*

On April 11, 2006, the day of trial, the State attempted to amend the ersatz Bill of Information of *Aggravated Kidnapping,* to charge the term-of-years offense of *Second Degree Kidnapping.*

On June 15, 2020, Petitioner filed a *Motion to Correct an Illegal Sentence*, in the Thirtieth Judicial District Court of Louisiana, raising two claims of: (1.) Whether Petitioner properly raised a *Motion to Correct an Illegal Sentence,* and (2.) Whether Petitioner's sentence is valid and legal where it rest upon the improper amendment of a null and void charging document.

On June 16, 2020, the very next day said Motion was Denied by the District Court Judge.

On August 11, 2020, Petitioner filed a *Supervisory Writ of Review,* with the Third Circuit, Court of Appeal, alleging the same claims that was denied by the District Court, Id.

On August 10, 2021, Petitioner's *Supervisory Writ of Review* was denied by the Third Circuit, Court Of Appeal.

On September 19, 2021, Petitioner filed a *Writ of Certiorari* with the Louisiana Supreme Court, also alleging the same claims.

On January 12, 2021, the Louisiana Supreme Court denied Petitioner's *Writ of Certiorari.*

On March 12, 2022, Petitioner petitioned the United States District Court, for the Western District of Louisiana in a *Writ of Habeas Corpus,* raising the same two claims from the denial of his *Motion to Correct an Illegal Sentence* in the State Courts, Id.

On April 20, 2022, United States Magistrate Judge, Kathleen Kay, issued a *Report and Recommendation* dismissing Petitioner's *Writ of Habeas Corpus* without prejudice, to his right to file a motion with the Fifth Circuit to filed a successive 2254 petition.

On May 18, 2022, Petitioner filed a *Motion For for a Certificate of Appealability "(C.O.A)"* with the Fifth Circuit, Court of Appeals.

On June 29, 2022, Petitioner received a letter from the Fifth Circuit Clerk of Court's Office, informing Petitioner that his *Appeal* was docketed and he needed to file a *Separate Brief and Motion for a "C.O.A"*.

On July 10, 2022, Petitioner filed a *Separate Brief and Motion for a* "C.O.A" with the Fifth Circuit, Court of Appeals.

On September 29, 2022, the Fifth Circuit denied Petitioner's request for a *"C.O.A."*

It is from the denial of Petitioner's "C.O.A." in the Fifth Circuit, Court of Appeals, that Petitioner now petitions this Honorable Court for a *Writ of Certiorari,* raising the issue of, is Petitioner entitled to *Habeas Corpus Relief* to his claims brought in the state court, Id.

Petitioner should have been granted a "C.O.A."

REASONS FOR GRANTING THE PETITION

Under the Antiterrorism and Effective Death Penalty Act, a *"Certificate of Appealability" "(C.O.A.)"* is necessary to proceed with an appeal. **See, 28 U.S.C. § 2253 (c) (1)** (*"Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals..."*); **See also, Resedndiz v. Quatterman, *454 F.3d 456, 458 (5th Cir. 2006)***. A District Court's dismissal of a motion on the ground that it is an unauthorized successive collateral attack constitutes a final order within the scope of **28 U.S.C. § 2253 (c)**, and therefore a "*certificate of appealability*" is required." (alteration in original)(quoting **Sveum v. Smith, *403 F.3d 447, 448 (7th Cir. 2005)***.... To obtain a "*C.O.A.*", Petitioner must make a substantial showing of the denial of a constitutional right. **See, 28 U.S.C. § 2253 (c) (2); Miller-el v. Cockrell, *537 U.S. 322, 327, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003).*** To meet that standard, Petitioner must demonstrate that reasonable jurist could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issue presented were adequate to deserve encouragement to proceed further, **Slack v, McDaniel, *529 U.S. 473, 483-84, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000)***.*(internal quotation marks and citations omitted) (quote at 484);* **See also, Hernadez v. Thaler, *630 F.3d 420, 428 (5th Cir. 2011).***

Petitioner is no stranger to collateral attack, yet that should not hinder this Honorable Court's full and fair review of Petitioner's instant writ-Petitioner's repeated forays into post conviction and post trial relief are born as much from the certainty that his conviction was improper as from his actual innocence.

Petitioner was charged by Bill of Information dated November 22, 2005, with one count each of *Armed Robbery* and *Aggravated Kidnapping*[1]. As will be discussed further below, it is

[1]See Exhibit. 1

undisputed that the commencement of the latter, a mandatory-life offense, was unavailable by Bill of Information[2]. It is also undisputed that Bill of Information attempting to charge a capital or life-eligible offense is void ab initio. Nevertheless, Petitioner's matter proceeded on both charges for approximately six (6) months until the date of Petitioner's trial when, on April 11, 2006, the State attempted to amend the ersatz Bill to charge the term-of-years offense of *Second Degree Kidnapping*. As it concerns Petitioner's *Aggravated Kidnapping* charge, every event prior to this "*amendment*"—every arraignment, bond setting, motion hearing, pre-trial, trial preparation and court appearance—occurred during the illegal proceeding brought pursuant the null charging instrument.

Irrespective of the above, Petitioner was convicted as charged of *Armed Robbery* and as not-quite charged with the "*amended*" offense of *Second-Degree Kidnapping*... Petitioner was sentenced to 40 years, concurrent, for both offenses. Petitioner's conviction was upheld by the Third Circuit on October 3, 2007[3], and the Louisiana Supreme Court on April 18, 2008[4].

Petitioner now seeks *Habeas Corpus Relief* to correct the illegal sentence imposed on April 11, 2006. The State's error in attempting to charge a life-eligible offense pursuant to a Bill of Information was not cured by the last minute "*amendment*". The Bill was void at its inception as per the charge of *Aggravated Kidnapping*. A void Bill has no legal effect, attempts to amend are as futile and backward-looking as closing the proverbial barn door upon the horse's escape.

Because the Bill did not properly charge Petitioner with *Aggravated Kidnapping*, because the absolute nullity could not be corrected by amendment Petitioner's resulting conviction and thus his associated sentence—are void and illegal.

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[2] State v. Green, *347 So.2d 229 (La. 1977)*
[3] State v. Office, *967 So.2d 1185 (La. App. 3rd Cir. 2007)*
[4] State ex Rel. Office v. State, *978 So.2d 348 (La. 2008)*

Article. 882 of the Louisiana Code of Criminal Procedure permits a criminal defendant to seek review of an allegedly illegal sentence by the court that imposed the sentence. An illegal sentence is one not*" authorized or directed by law"*[5]. It is "*no sentence at all*" and can be corrected at any time[6].

A defendant may attack the legality of his conviction and sentence at anytime irrespective of a defendant's previous appeals. Filings, judgments, write, or remands[7]. Indeed, the comments included in the 1996 codification of the statute are quite emphatic:

The first sentence, taken from **Fed. Rule. 35,** States the almost self-evident authority of the court to correct an illegal sentence at ant time, for an illegal sentence is, in the contemplation of the law, no sentence at all[8].

State v. Johnson, ***55 So.2d 782 (1951).*** The phrase *"at any time"* make clear the court's authority to make a correction after the defendant has begun to serve the sentence. Such authority was squarely affirmed in **United States v. Johnson,** ***142 F.Supp. 532 (E.D.TEX. 1956), Aff'd 241 F.2d 60 (5th Cir, 1957),*** **citing Bozza v. United states,** ***330 U.S. 160, 67 S.Ct. 654, 91 L.Ed. 818 (1947).***

A sentence can be rendered illegal if the formalities of conviction are not properly followed. A valid sentence must contain all of three(3) conjunctive elements provided in **Louisiana Code of Criminal Procedure Article. 872**: (10 Statute; (2) indictment; and (3) verdict, judgment, or plea of guilty. In the instant case, there is no dispute that Petitioner's case was instituted by Bill of Information charging Petitioner with one count of *Armed Robbery* And one count of *Aggravated Kidnapping*. The question before the court is two-fold: First, what is the result of an improperly instituted criminal offense? It is void ab initio or merely "*voidable*", an

[5] State v. Maricle, *998 So.2d 909 (La. App. 3d 2008).*
[6] State v. Rome, *696 So.2d 976 (La. 1997).*
[7] State v. Sholar, *801 So.2d 534 (La. App. 2d 2001).*
[8] State v. Williams, *800 So.2d 790 (La. 2001).*

error which the parties may excuse or, waive? Second, if a Bill of Information attempts to charge a life-eligible offense, can it be "*corrected*" through a ministerial act, through the fevered scribbling of the Assistance District Attorney who discovers the error on the day of trial?

As it concerns the first prong of analysis, a faulty Bill of Information seeking to charge a capital or life-eligible offense is void at inception[9]. For example, in **State v. Underdonk,** the First Circuit reversed a conviction of *Aggravated Kidnapping* instituted in the same information as a charge of *Aggravated Rape*[10]. On error patent review, the court noted that the life-eligible offense charged by information was anullity from its outset. Therefore, even though the defendant had been convicted of the responsive verdict of *Second Degree Kidnapping*—which was available for charge under an Information—jeopardy had not attached because the trial and the resulting verdict were the product of an invalid, void, and null charging instrument. Additionally, an invalid Bill of Information charging an indictable offense is void ab initio even if the jury concludes that the defendant is guilty of a lesser-includes offense that would otherwise have been properly brought through a bill of Information"[11]. An invalid Bill of Information can also not support an otherwise valid plea of guilty[12].

These ruling solidify into precedential legal authority what was implicitly clear all along: that which has no legal existence cannot simply be amended into being."*To amend*" is roundly defined as *"to put right"* especially "*to make emendation to something, such as a text*". It is simply beyond dispute that the something to be amended is a condition precedent for the act of amending. In the words of Billy Preston: "*Nothing from nothing is nothing*".

Here, the State attempted to correct its error on the day of trial, after almost six (6) moths in which Petitioner was subject to an illegal and improper charge for a life-eligible offense

[9] State v. Donahue, *355 So.2d 247(La. 1978)*
[10] State v. Underdonk, *92 So.3d 369 (La. App. 1 Cir. 2012)*
[11] State v. Thomas, *461 So.2d 332 (La. App. 1984)*
[12] State v. Ruple, *437 So.2d 873 (La. App. 2d Cir. 1983)*

brought under the auspices of a Bill of Information and null and void from the start. An amendment downward to the responsive verdict of *Second Degree Kidnapping* helped save the State face; it did not salvage the faulty Bill of Information or resurrect the original charge, which was dead on arrival. Consequently, the answer to the court's second prong of analysis—whether amendment cured the defect in charging Petitioner with a life-eligible offense without the prophylactic of a grand-jury can be answered by starting with the court's ruling in Donahue, **Underdonk, Ruple, Thomas**, and **Engel**, as well as others and subjecting them to common sense and sound logic. If the defective Bill of Information charges no offense, them there is no offense to amend. The April 11, 2006 *"amendment"* was invalid and without legal authority.... Petitioner's conviction was therefore rendered illegal. And his resulting sentence- premised upon an invalid charge, "amendment", and conviction-is likewise invalid and illegal. This renders Petitioner's present sentence illegal within the meaning of **Article. 882 of the Louisiana Code of Criminal Procedure.**

Federal Courts may consider an application for a writ of Habeas Corpus only on the grounds that the petitioner's confinement violates the constitution, law, or treaties of the United States. **See, 28 U.S.C. § 2241 (c) (3); § 2254 (a)**. Relief for violations of federal law by the State will be granted only if the violation raises to the level of a fundamental defect which inherently results in a complete miscarriage of justice or is inconsistent with the rudimentary demands of fair procedure. Violation of State law are not cognizable in a **§ 2254** proceeding unless such violations are of constitutional magnitude. Thus, general improprieties occurring in State proceedings are cognizable only if they created fundamental unfairness that violated the Petitioner's **Fourteenth Amendment** right to due process. If a court has "*grave doubt*",

meaning *"the matter is so evenly balanced"* as to whether the error had substantial and injurious effect, the court must find in favor of the Habeas Petitioner[13].

Under § 2244 (b) (2), a Petitioner can file a second or successive Habeas petition only after obtaining an authorized order from a three (3) Judge panel in the appropriate Federal Court of Appeals. In order to obtain an authorization order, a Petitioner must make a prima facie showing that the claim was not presented in a previous federal Habeas petition. In addition, the Petitioner must show that: (1) the new claim relies on a new rule of constitutional law that was not previously unavailable and that the Supreme Court made the rule retroactive to cases on collateral review; or (2) under **§ 2244 (b) (2) (B)**, the factual basis for the new claim *"could not have been discovered previously through the exercise of due diligence as a whole, show by clear and convincing evidence that but for the constitutional error, no reasonable fact-finder would have the Petitioner guilty of the offense. A Habeas petition filed after a prior petition is dismissed without prejudice is not considered a second or successive petition for the purpose of a § 2244"*[14].

Courts sometimes re-characterize motions filed by pro se Litigant's as petitions under **28 U.S.C. § 2254,** thereby subjecting successive petitions to stringent restrictions[15]. However, according to **Castro v. United States**[16]:

> *"A court cannot so re-characterize a pro se Litigant's motion as the Litigant's first § 2255 motion, unless the court informs the Litigant of its intent to re-characterize, warns the Litigant that the re-characterization will subject subsequent § 2255 motions to the law's 'second or successive' restrictions, and provides the Litigant with an opportunity to withdraw, or to amend the filing."*

[13] O'Neal v. McAninch, *513 U.S. 432, 435 (1995)*; See, e.g., Robertson v. Cain, *324 F.3d 297 (5th Cir. 2003).*
[14] Lang v. U.S., *474 F.3d 348 (6th Cir. 2007).*
[15] Simon v. U.S., *359 F.3d 139 (2d. Cir. 2004).*
[16] Castro v. U.S., *540 U.S. 375 (2003).*

It is based upon the following, that Petitioner now appeals the Magistrate's *Report and Recommendation*, where the Magistrate Judge erroneously interpreted Petitioner's cited issues in his *Motion to Correct an Illegal Sentence* as a second or successive **§ 2244** and/or § **2254**, due to the Magistrate Judge's erroneous interpretation of Petitioner's Litigation, as it pertain to his assignment of errors, manner of being argued in the above entitled matter. Petitioner's *Motion to Correct an Illegal Sentence*, as well as assignment of error in Petitioner's previously filed **§ 2244** and/or **§ 2254** may bare similar, if not the same appellations, the circumstances of there issues were argued contrary to how the violations occurred, therefore making these issues entirely different in substance, thus not a second or successive Habeas petition, as was so erroneously asserted in the Magistrate's *Report and Recommendation.*

CONCLUSION

Based upon the following facts, arguments, and law herein, and whereas Petitioner should have been granted a *Certificate of Appealability (C.O.A.)*. Petitioner respectfully request this Honorable Court to grant his *Writ of Certiorari* in whole, by remanding the matter back to the District Court for an Evidentiary Hearing to his claims, Id.

The petition for a *Writ of Certiorari* should be granted.

/S/ _____

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