

MAR 13 2023

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No. 22-7091

IN THE  
SUPREME COURT OF THE UNITED STATES

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David Lee Hering — PETITIONER  
(Your Name)

vs.

State of Iowa — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Court of Appeals of Iowa

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

David Lee Hering 6345575

(Your Name)

406 North High Street

(Address)

Anamosa, Iowa 52205

(City, State, Zip Code)

(Phone Number)

**ORIGINAL**

### QUESTION[S] PRESENTED

1. Whether a criminal prosecution and judgement therefrom is void where the trial court lost personal jurisdiction over the defendant prior to the start of their trial through operation of law?
2. When a fraudulently obtained waiver of speedy trial contract, that was filed by attorney's who lacked the legal authority to file it, is utilized to deprive a criminal defendant of their constitutional and statutory right to a speedy trial. Does the Fourteenth Amendments due process clause come into play and require that the criminal prosecution and judgement therefrom be deemed void?

## LIST OF PARTIES

[X] 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:

## RELATED CASES

- \* State v. Hering, No. 04-1222 WL 2756388 Iowa Court of Appeals.  
Judgement entered Oct. 26, 2005
- \* State v. Hering, No. FECR 027417 Iowa District Court For Muscatine County. Judgement entered July 30, 2010
- \* State v. Hering, No. 10-1360, 2011 WL 3129213 Iowa Court of Appeals. Judgement entered July 27, 2011
- \* Hering v. State, No. PCCV 016622 Iowa District Court For Muscatine County. Judgement entered Nov. 25, 2013
- \* Hering v. State, No. 13-1945, 2016 WL 3269454 Iowa Court of Appeals.  
Judgement entered June 15, 2016
- \* Hering v. State, No. PCCV 022294 Iowa District Court For Muscatine County. Judgement entered April 1, 2014

- \* Hering v. State, No. 14-0762, 2016 WL 3285445 Iowa Court of Appeals. Judgement entered June 15,2016
- \* Hering v. Wachtendorf, No. 4:16-cv-000574-JEG United States District Court For the Southern District of Iowa. Judgement entered Sept. 25,2018
- \* Hering v. Wachtendorf, No. 18-3144 United States Court of Appeals For the Eighth Circuit. Judgements entered April 26,2019 and June 13,2019
- \* Hering v. Wachtendorf, No. 22-6018 Supreme Court of the United States. Judgement entered Jan. 9,2023
- \* Hering v. State, No. PCCV 024926 Iowa District Court For Muscatine County. Judgement entered May 11,2021
- \* Hering v. State, No. 21-0688, 2022 Iowa App. LEXIS 369, Iowa Court of Appeals. Judgement entered May 11,2022
- \* Hering v. State, No. PCCV 026087 Iowa District Court For Muscatine County. Judgement entered Nov. 4,2021
- \* Hering v. State, No. 21-1847, 2022 Iowa App. LEXIS 887, Iowa Court of Appeals. Judgement entered Nov. 17,2022

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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 \_\_\_\_\_ 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 \_\_\_\_\_ 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 A 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 Iowa District court 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.

## JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was \_\_\_\_\_.

☐ 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 January 9, 2023  
A copy of that decision appears at Appendix C.

☐ 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

United States Constitution, Amendment 6 [Rights of the Accused]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial

United States Constitution, Amendment 14 Sec. 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 any person within it's jurisdiction the equal protection of the laws.

Iowa Rule Criminal Procedure, Rule 2.33(2)(b) If a defendant indicted for a public offense has not waived the defendants right to a speedy trial the defendant must be brought to trial within 90 days after indictment is found or the court must order the indictment to be dismissed unless good cause to the contrary be shown.

Iowa Code § 822.8 All grounds for relief available to an applicant, must be raised in the applicants original, supplemental, or amended application. Any ground finally adjudicated or not raised, or knowingly, voluntarilly, and intelligently waived in the proceeding that resulted in the conviction or sentence...may not be the basis for a subsequent application, unless the court finds a ground for

relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

Iowa Code § 633.638 [Presumption of Fraud] If a conservator be appointed, all contracts, transfers, and gifts made by the ward after the filing of the petition shall be presumed to be Fraud, against the rights and interest of the ward except as otherwise directed by the court.

## STATEMENT OF THE CASE

David Lee Hering was arrested on August 6, 2003. From that point he has been held captive by the State of Iowa. Muscatine County Case No. FECR 027417.

Eight days after his arrest he asked the Iowa District Court For Muscatine County to appoint an attorney to assist him with his criminal defense. Christine Dalton was legally appointed by the court and she made her first appearance on August 14, 2003. (App. G, p. 28 )

The States trial information was filed on September 11, 2003. Arraignment took place on September 19, 2003 at that time Hering and Dalton legally demanded a speedy trial. (App. D, p. 22, 24) Speedy trial deadline was December 10, 2003 Hering's trial did not start until May 24, 2004 some five and a half months past the deadline.

Also on the 19th a petition for the appointment of an involuntary conservator for David Hering was filed in the district court by Kathleen Franks. (App. E, p. 25 ) It was granted on October 6, 2003 by Judge Patrick Madden who presided over Hering's criminal prosecution. (App. F, p. 27 )

Then on October 8, 2003 attorney's J.E. Tobey and David Treimer appeared, out of the blue, with a fraudulently obtained contract and proclaimed that they were going to be assisting Hering with his criminal defense. (App. H, p. 29 ) This caused Christine Dalton to withdraw as Hering's attorney.

Hering never legally waived his constitutional and statutory right to a speedy trial and he was not brought to trial by the

State within the 90 day speedy trial statute of limitations of Iowa R.Crim.P. 2.33(2)(b). Consequently his right to a speedy trial was violated.

Hering lodged his first attack upon this speedy trial violation in 2010 in the Iowa District Court For Muscatine County through a motion to correct illegal sentence, void judgement. The basis for the void judgement claim contained within the motion was that do to the speedy trial violation the district court had lost personal jurisdiction over him prior to the start of his criminal trial through operation of law so the judgement that was imposed upon him is void.

The district court's ruling did not address the void judgement claim. The court denied the motion based upon a finding that the court had the power to impose the sentence that was imposed.

The district courts ruling was appealed and the Iowa Court of Appeals affirmed the district court's denial of Hering's void judgement claim based upon a finding that Hering cites no ~~case~~ authorities for the proposition that a speedy trial violation deprives the court of personal jurisdiction over the defendant. Absent such authority, this argument falls on it's own weight. State v. Hering 804 N.W.2d 314 (Iowa 2011).

Years later the Iowa Supreme Court substantiated Hering's void judgement claim when it decided in State v. Tipton 897 N.W.2d 653, 687 (Iowa 2017) that; (compliance with a statute of limitations is required for the court to have personal jurisdiction over the defendant) Tipton confirmed the fact that the trial court did not have personal jurisdiction over Hering at the time of his criminal

trial.

Predicated on Tipton Hering lodged a second attack upon this void judgement through an application for postconviction relief that he filed in the Iowa District Court For Muscatine County.

He claimed in the application that his conviction and sentence is in violation of the constitution of the United States, the constitution of the State of Iowa, and the laws of the State of Iowa. He cited Tipton and argued once the 90 day statute of limitations of Iowa R.Crim.P. 2.33(2)(b) expired and there was no valid speedy trial waiver, good cause for delay, or delay attributable to him that the district court lost personal jurisdiction over him so the judgement that has been imposed upon him is void.

The district court disposed of this claim based upon a finding that; since the Petitioner is raising the same issue of law on the same judgement; the court is bound by res judicata to reject it. Petitioners claim under Iowa Code § 633.638 is thus time barred and may not serve as a basis for his current post-conviction relief application. (Ruling)(App. B, p. 17 )

The district courts ruling was appealed and in the appeal Hering raised two arguments. (1) that his void judgement claim is not res judicata, and (2) that the judgement that has been imposed upon him is void.

The Iowa Court of Appeals affirmed the district courts dismissal of Hering's void judgement claim based upon a finding that the court of appeals decision on Hering's first attack was a final adjudication for purposes of section 822.8. The argument



contained in Division 2 was summarily rejected.(Decision)(App. A, p. 10 )

The court of appeals decision is devoid of a finding of fact and conclusion of law that justifies it's decision not to vacate this void judgement and the Iowa Supreme Court declined to correct this miscarriage of justice.As the court denied Hering's Petition For Further Review. (App. C, p. 20)

## REASONS FOR GRANTING THE PETITION

In refusing to vacate this void judgement the Iowa Court of Appeals departed from the limits of admissable discretion as basic void judgement principles and established legal precedents were not complied with leading to a miscarriage of justice that calls for an exercise of this courts supervisory power.

The Court of Appeals disposed of Hering's void judgement claim based solely upon a finding that the decision on his first attack was a final adjudication for purposes of section 822.8.(App. A, p. 10 )

The court of appeals decision on Hering's first attack does not contain a final adjudication for purposes of Iowa Code § 822.8 and even if it did Hering was not precluded from lodging this second attack because it was predicated on a decision of the Iowa Supreme Court that post-dates the court of appeals decision on his first attack.

Under res judicata, a final judgement on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Allen v. McCurry 449 U.S. 90,94 (1980) Res Judicata means "a matter already judged" res judicata is a legal concept that requires that issues cannot be relitigated after a final judgement is made by a court. This notion may also be called "collateral estoppel" or "issue preclusion". A Jailhouse Lawyers Manual, 12 th Ed. p. 1520

A judgement is a "final judgement" if it "finally adjudicates the rights of the parties." Peppmeier v. Murphy 708 N.W.2d 57,64

(Iowa 2005) A final judgement has also been defined as a courts last action that settles the rights of the parties and disposes of all issues in controversy. Id at 64 The phrase "on the merits" means a judgement based on the evidence rather than on technical or procedural grounds. Jackson v. FYE Excavating Inc. 2021 Iowa App. LEXIS 839.

In his first attack the court of appeals disposed of Hering's void judgement claim, "solely" on a finding that he did not cite any authority to support his argument that a speedy trial violation deprived the district court of personal jurisdiction of him. State v. Hering 804 N.W.2d 314 (Iowa 2011)

The first attack was disposed of based on a technicality. The principles of res judicata only bars relitigation of issues that were raised or might have been raised in an action between the parties if the action resulted in a final judgement on the merits. The court of appeals decision on the first attack does not contain a final judgement on the merits. Therefore Hering was not precluded by Iowa Code § 822.8 from lodging a second attack.

The second attack is predicated on State v. Tipton 897 N.W.2d 653,686 (Iowa 2017) A case where the Iowa Supreme Court acknowledged for the first time that (compliance with a statute of limitations is required for the court to have personal jurisdiction over the defendant)

The Tipton decision was handed down after the court of appeals issued it's decision on Hering's first attack and res judicata does not bar claims that are predicated on events that post-date the

filing of the initial complaint. Whole Womans Health v. Hellerstedt 136 S.Ct. 2292,2305 (2016) Where important human value-such as the lawfulness of continuing personal disability or restraint are at stake, even a slight change in circumstances may afford a sufficient basis for concluding that a second action may be brought. Id.

The court cannot be required to disregard significant changes in law or facts if it is satisfied that what it has been doing has turned through changing circumstances into an instrument of wrong. System Federation No. 91 v. Wright 364 U.S. 642,647-48 (1961) A balance must be struck between the policies of res judicata and the right of the courts to apply modified measures to changed circumstances. Id.

The principle of collateral estoppel is designed to prevent repetitious law suites over matters which have been decided and which have remained substantially static, factually and legally. It is not meant to create vested rights in decisions that have become obsolete or erroneous with time. Comm'r v. Sunnen 333 U.S. 591,599 (1948)

The Supreme Court has held that, as a general rule,...res judicata is no defense[to rehearing an issue] where between the time of the first judgement and the second there has been an intervening decision or change in the law creating an altered situation. In re Jourdan 108 B.R. 1020,1022 (Bankr. N.D. Iowa 1989)

While the Iowa Supreme Courts decision in Tipton did not render a change in the law it qualifies as an intervening decision that created an "altered situation" that Hering utilized to lodge

a second attack upon this void judgement. Tipton substantiated the fact that the district court had in fact lost personal jurisdiction over him prior to the start of his criminal trial.

Being without jurisdiction, it's subsequent proceeding's and judgement are not simply erroneous, but absolutely void. Roman Catholic Archdiocese of San Juan v. Feliciano 140 S.Ct. 696, (2020) "Every order thereafter made in that court[is]coram non judice", meaning, "not before a judge".Id.

Because Hering's criminal prosecution and judgement therefrom are void the decision of the court of appeals on the first attack as well as all other attacks he has lodged against them are "invalid" as all proceedings founded on the void judgement are themselves regarded as invalid. 46 Am.Jur.2d Judgements §29 The general rule is that a void judgement is no judgement at all. Where judgements are void, as was the judgement originally rendered by the trial court here, any subsequent proceeding's based upon the void judgement are themselves void. Valley Vista Development Corp. Inc. v. City of Broken Arrow, Oklahoma 766 P.2d 344,348 (Okla. 1988)

Pursuant to the facts and the law Hering was-not and is-not precluded from lodging the second attack.

Hering's constitutional and statutory right to a speedy trial was violated and this caused the district court to lose personal jurisdiction over him prior to the start of his criminal trial.

The speedy trial deadline for bringing Hering to trial was December 10,2003. His trial did not start until May 24,2004 some five and a half months past the deadline. The sole remedy for a

violation of a speedy trial right-dismissal of the charges.

Betterman v. Montana 578 U.S. 437,444 (2016)

The right to a speedy trial is guaranteed by the Sixth Amendment of the United States Constitution as well as Article I, Sec. 10 of the Iowa Constitution and is solidified by Iowa R.Crim. P. 2.33(2)(b) State v. Orte 541 N.W.2d 895,898 (Iowa App. 1995) The State is responsible for bringing defendants to trial in a timely manner consistent with due process. *Id.* at 899 Under our rule, if trial does not commence within ninety days from indictment, dismissal is "compelled" unless the State proves, (1) defendants waiver of speedy trial, (2) delay attributable to the defendant, or (3) "good cause" for delay. State v. Nelson 600 N.W.2d 598,600 (Iowa 1999)

Hering was not brought to trial by the State within the 90 day speedy trial requirement and the State can-not produce a "legally binding speedy trial waiver", there is no delay attributable to Hering, and "fraud " is not good cause for delay.

The purpose of a statute of limitations is speedy and fair adjudication of the respective rights of the parties. Pecoraro v. Diocese of Rapid City 435 F.3d 870,875 (8th Cir. 2005) Compliance with a statute of limitations is required for the court to have personal jurisdiction over the defendant. State v. Tipton 897 N.W. 2d 653,686 (Iowa 2017) (Emphasis Added) A judgement entered in the absence of personal jurisdiction is void. Li v. Rizzio 801 N.W.2d 351,356 (Iowa 2011) A judgement, whether in a civil or criminal case, reached without due process of law is without jurisdiction and void. Felhaber v. Felhaber 681 F.2d 1015,1027 (5th Cir. 1982)

A void judgement; means "one which has no legal force or effect" the invalidity of which may be asserted by any person whose rights are affected at any-time and at any-place "directly or collaterally". State v. McCright 569 N.W.2d 605,608 (Iowa 1997) it, is no judgement at all, no rights are acquired by virtue of it's entry of record. Johnson v. Mitchell 489 N.W.2d 605,608 (Iowa 1997) it, is one that from it's inception, is a complete nullity, and without effect. 46 Am.Jur.2d Judgements § 31 at 392 Opat v. Ludeking 666 N.W.2d 597,606 (Iowa 2003) Neither laches nor estoppel can validate it. Schrock v. Erdelt 777 N.W.2d 562 (Iowa Ct.App. 2009)

The proposition that the judgement of a court lacking jurisdiction is "void" traces back to the English Year Books and was made settled law by lord coke in case of the Marshalsea. Traditionally that proposition was embodied in the phrase coram non judice "before a person not a judge" meaning-in effect that the proceeding in question was not a judicial proceeding because lawful judicial authority was not present, and therefore could not yield a judgement. American courts invalidated, or denied recognition to, judgements that violated this common-law principle long before the Fourteenth Amendment was adopted. Burnham v. Superior Court of California County of Marin 495 U.S. 604,609 (1990) The judgement of a court lacking personal jurisdiction violated the due process clause of the Fourteenth Amendment. Id. at 609

The requirement that a court have personal jurisdiction flows not from Art.III but from the due process clause. The personal jurisdiction requirement recognizes and protects an individual

liberty interest. It represents a restriction on judicial power not as a matter of sovereignty but as a matter of individual liberty. Ins. Corp. of Ireland v. Compagnie Des Bauxites 102 S.Ct. 2099,2104 (1982) for due process protects individuals right to be subject to lawful power. J.McIntyre Machinery, LTD v. Nicastro 180 L.Ed.2d 765,776 (2011) Personal jurisdiction, too, is an essential element of the jurisdiction of a district court without which the court is powerless to proceed to an adjudication. Ruhrgas AG v. Marothon Oil Co. 526 U.S. 574,584 (1999) Until the court has established personal jurisdiction moreover any assertion of judicial power over the party violates Due Process. Ins. Corp. at 2106 With the adoption of that Amendment, any judgement purporting to bind the person of a defendant over whom the court has not acquired in personam jurisdiction was void within the State as well as without. Hanson v. Denckla 357 U.S. 235,250 (1958) Lack of personal jurisdiction nullifies a judgement. Swaim v. Moltan Company 73 F.3d 711,718 (7th Cir. 1996)

When personal jurisdiction is challenged by a defendant, the Plaintiff bears the burden to show that jurisdiction exists. Fastpath Inc. v. Arbela Corp. 760 F.3d 816,820 (8th Cir. 2014) The party seeking to establish the courts personal jurisdiction carries the burden of proof and that burden does not shift to the party challenging jurisdiction. Id. at 820

The State did-not and can-not establish that the district court had personal jurisdiction over Hering at the time of his criminal trial because after the involuntary conservatorship was forced upon



him, he became a ward of the court.

So at least seven probate provisions are applicable and they establish that any speedy trial waiver and any contract between Hering and trial attorney's Tobey and Treimer that Hering may have signed on or after September 19, 2003 have no legally binding force or effect upon the proceedings.

They are First, the district court may establish an involuntary conservatorship only upon clear and convincing evidence that the proposed wards "decision making capacity is so impaired that the person is unable to make, communicate, or carry-out important decisions concerning the persons financial affairs". Iowa Code § 633.566(2)(a) In re Guardianship & Conservatorship of Feistner 924 N.W.2d 874 (Iowa 2018) Second, If the allegations of the Petition as to the status of the proposed ward and the necessity for the appointment of a conservator are proved, the court may appoint a conservator. Iowa Code § 633.570 In re Guardianship of Teeter 537 N.W.2d 808 (Iowa 1995) Third, A ward for whom a conservator has been appointed shall not have the power to convey, encumber, or dispose of property in any manner, other than by will if the ward possesses the requisite testamentary capacity, unless the court determines that the ward has a limited ability to handle the wards own funds. Iowa Code § 633.637(1) Fourth, The title to the wards property remains with the ward, but subject to the conservators possession and the courts control for certain purposes. Iowa Code § 633.639 Fifth, The conservator has "a right to and shall take possession of all of the real and personal property of the ward".

Iowa Code § 633.640 Sixth, The conservator has a duty "to protect and preserve" the wards property. Iowa Code § 633.641 State v. Finch 946 N.W.2d 538 (Iowa 2020) and Seventh, If a conservator be appointed "all contracts", transfers, and gifts made by the ward after the filing of the petition shall be presumed to be a "fraud" against the "rights" and interests of the ward except as otherwise directed by the court. Iowa Code § 633.638.

Hering, as a ward, has been protected by the legislative body from entering into a contract that waives his constitutional rights. He could not "legally" enter into a contract or waive his constitutional right to a speedy trial through the signing of a contract. Iowa Code § 633.638 protects a wards liberty as well as property interests.

The probate court placed no limitations on the involuntary conservatorship and made no finding's or determination's that Hering had limited ability to make any of his own decisions, or to handle any of his own affairs, as required by Iowa Code § 633.637 The probate court also did not make a finding or determination that Hering had the limited ability to enter into any contracts or to waive any of his constitutional rights as required by Iowa Code § 633.638.

Without those determinations Hering did not have the legal authority to enter into any legally binding contracts or to waive any of his constitutional rights through the signing of a contract.

A person under a guardianship is under the protection of the court and cannot make a contract which is obligatory upon him as

such. Union Trust and Savings Bank v. State Bank 188 N.W.2d 300, 303 (Iowa 1971) All of Hering's property, upon appointment of conservator, was in "custodia legis" subject to order of the court. Id. Iowa Code § 633.639.

A contract; is defined as an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law. Wagner v. Chelsea Sav. Bank 2000 Bankr. LEXIS 2070 (N.D. Iowa) It is an agreement between two or more persons to do or not to do a particular thing. The Charles River Bridge v. The Warren Bridge et al 9 L.Ed. 773,834 (1837)

Any agreement between Hering, Tobey and Treimer and any speedy trial waiver Hering may have signed giving up his constitutional right to a speedy trial are all contracts and "all contracts", transfers, and gifts made by the ward after the filing of the petition for a conservatorship are presumed fraudulent. Iowa Code § 633.638 Suplee v. Stonebraker 195 N.W.2d 678,682 (Iowa 1972) No legal right can be found upon an act of fraud. Dunlap & Co. v. Cody 31 Iowa 260,264 (Iowa 1871) General doctrine is that fraud "vitiates" the most solemn contracts, documents, and even judgements. United States v. Throckmorton 98 U.S. 61,64 (1878) Where the jurisdiction of the court is secured through fraud, such fraud vitiates the judgement or decree and may be the basis for a collateral attack thereon. Watt v. Dunn 336 Iowa 67,72, 17 N.W.2d 811,814 (Iowa 1945)

The burden is on the State to establish an exception to the ninety-day speedy trial rule of Iowa R.Crim.P. 2.33(2)(b) Orte 541 N.W.2d at 896 The State did-not and can-not meet this burden

as there is no speedy trial waiver signed by Hering, prior to September 19, 2003 and any waiver he may have signed on or after that date was fraudulently obtained, invalid and has no legally binding force of effect upon the proceeding. (Emphasis Added)

The contract between Hering and trial attorneys Tobey and Treimer was allegedly signed by Hering on October 8, 2003 the day they made their first appearance in the case. (App. H, p. 29 ) So this contract was also fraudulently obtained, is invalid and has no legally binding force or effect upon the proceedings.

An appearance and a plea filed by an attorney without authority from the defendant, or ratification thereof, does not bind the defendant in any-way. Macomber v. Peck 39 Iowa 351, (Iowa 1874) The presumption of an attorney's authority is not conclusive and may be rebutted. If an attorney in fact has no authority to consent to judgement, the judgement must be vacated.

"It is undoubtedly true that an attorney cannot consent to a judgement against his client, or waive any cause of action or defense in the case; neither can he settle or compromise it without special authority".

Dragstra v. Northwestern State Bank of Orange City 192 N.W.2d 786, 790-91 (Iowa 1971)

In regards to Hering's criminal case Muscatine County No. FECR 027417. Neither Tobey nor Treimer had any legal authority to appear in court, to file documents, to waive Hering's right to a speedy trial and any speedy trial waiver[s] they filed regarding Hering's criminal case are not legally binding.

We certainly do not thereby express approval of the filing by counsel of an unauthorized waiver of defendants speedy trial right. State v. Williams 341 N.W.2d 748,751 (Iowa 1983)

The only attorney who had the legal authority to appear in court on Hering's behalf, in regards to his criminal case No. FECR 027417, was Christine Dalton and at Hering's arraignment she and Hering "legally" demanded a speedy trial.(App. D, p.22-24)

Cases that have held that the right to a speedy trial is not a personal right necessarily assume that counsel acting on a defendants behalf possessed the "legal" authority to do so. (Emphasis Added) State v. Leflore 308 N.W.2d 39, (Iowa 1981) In this case Tobey and Treimer were devoid of any actual authority and therefore those cases do not apply.

A defendant can waive his right to a speedy trial if he raises the issue after the verdict has been returned "unless" he is unrepresented by counsel, and not admitted to bail during the course of proceedings. State v. Paulsen 265 N.W.2d 581,585 (Iowa 1978)

Hering was unrepresented by counsel, not admitted to bail, and had been adjudicated to be incompetant by the trial court judge. Therefore the fact that a motion was not filed by him before the verdict was returned does not constitute waiver of his constitutional and statutory right to a speedy trial.

The burden of proving an exception to the rules deadline rests squarely with the State. State v. Miller 637 N.W.2d 201,204 (Iowa 2001) Without a "valid" speedy trial waiver, delay attributable to

Hering and "fraud" not being good cause for delay the State did-not and can-not provide an exception to the rule.

Iowa R.Crim.P. 2.33(2) or 2.33(2)(b) do not place a requirement onto an incompetant defendant who is not "legally" represented by counsel to file a pre-trial motion to have the charges filed against them dismissed after the 90 day statute of limitations has expired.

Instead, Rule 2.33(2)(b) places the requirement onto the district court to sua-sponte dismiss the charges if the defendant is not brought to trial by the State within 90 days of indictment or the trial information being filed unless good cause to the contrary is shown.

Courts have a duty to refuse on their own motion to decide controversies that are not properly before them. City of Des Moines v. Des Moines Police Bargaining Unit Association 360 N.W.2d 729, 730 (Iowa 1985) The obligation to dismiss the charges sue-sponte falls on the court only in those instances where defendant is neither admitted to bail nor represented by counsel. State v. Myers 215 N.W.2d 262,264 (Iowa 1974)

In this case, Hering was incompetant, not admitted to bail nor "validly" represented by counsel. So the requirement to dismiss the indictment sua-sponte was imposed upon the court by the legislature.

The word "must" like the word "shall" is of mandatory effect. Nowhere in the wording of Iowa R.Crim.P. 2.33(2) or 2.33(2)(b) did the legislature put a requirement onto the defendant, particularly an incompetant defendant who was not admitted to bail and not

"validly" represented by counsel, to file a motion to have the charges dismissed. The requirement is placed upon the court who is overseeing the proceedings, to dismiss the charges if the defendant is not brought to trial within 90 days of indictment absent good cause and fraud is not good cause.

The Fourteenth Amendments due process clause does not allow for a fraudulently obtained waiver of speedy trial contract filed by attorney's who lacked the legal authority to file it to be utilized to deprive a criminal defendant of their constitutional and statutory right to a speedy trial.

The establishment of the involuntary conservatorship for David Hering, ward, known to the trial court judge Patrick Madden, and the prosecuting attorney Al Ostergren, who are presumed to know the law and have taken an oath to uphold it, served to invalidate any waiver of speedy trial contract and all other contracts that Hering may have signed on or after September 19, 2003 making them at all times here concerned of no legal force or effect.

Therefore Hering's constitutional and statutory right to a speedy trial was violated causing the district court to lose personal jurisdiction over him, through operation of law. The judgement of a court lacking personal jurisdiction is void as it violates the due process clause of the Fourteenth Amendment.

The afore listed facts and legal authorities show;

- \* That the reviewing state court's did not comply with basic void judgement principles and established legal precedents.
- \* That several constitutional amendments and statutes were violated.
- \* That contracts that are obtained under the presumption of fraud can-not be utilized to deprive a criminal defendant of their constitutional and statutory right to a speedy trail.
- \* That the trial court had lost personal jurisdiction over David Lee Hering prior to the start of his criminal trial through operation of law.
- \* That the criminal prosecution of David Lee Hering and judgement therefrom are void and through this courts supervisory power must be vacated and the charges dismissed with prejudice.

#### Conclusion

In the interest of justice for all. The petition for writ of certiorari should be granted.

Respectfully Submitted

David Hering

Date: March 10, 2023

Subscribed and sworn before me

this 10 day of Mar, 2023

Amy Christianson  
Notary Public

