No 23-5797

IN THE
SUPREME COURT
OF THE UNITED STATES

In Re: DERYL DUDE NELSON, Petitioner.

PETITION FOR A WRIT OF HABEAS CORPUS

Derly Dude Nelson
#348736
4533 W. Industrial Park Dr.
Kincheloe, MI 49788

QUESTIONS PRESENTED

The magistrate issued an arrest warrant without probable cause based on a complaint that was not sworn to but instead signed by an unknown person functioned as the complaining witness to make it appear that the arrest warrant was properly issued. This act and omission violated numerous federal laws including the Fourth Amendment that requires an arrest warrant to be issued upon a finding of probable cause supported by Oath of affirmation.

I.

DID THE STATE APPEALS COURT ERR WHEN IT REACHED A DECISION THAT THE COMPLAINT MET THE STATUTORY REQUIREMENT ABSENT OF A JUDICIAL FINDING OF PROBABLE CAUSE?

II.

DID THE STATE APPEALS COURT ERR WHEN IT REACHED A DECISION THAT THE PROBABLE CAUSE WAS ESTABLISHED TO CONVICT PETITIONER AT PRELIMINARY EXAMINATION RATHER THAN DECIDING WHETHER WAS THERE PROBABLE CAUSE AT THE FIRST JUDICIAL HEARING FOR THE ISSUANCE OF THE ARREST WARRANT?

III.

DID THE STATE APPEALS COURT ERR WHEN IT REACHED A DECISION THAT PETITIONER DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL WHERE THE RECORD SHOW COUNSEL FAILED TO ATTACK THE VALIDITY OF THE COMPLAINT AND WARRANT VIA EVIDENTIARY HEARING AND WITHDREW THE MOTION FOR EVIDENTIARY HEARING AFTER THE JUDGE INSISTED THAT THE HEARING WAS NEEDED?

LIST OF PARTIES

PETITIONER: DERYL DUDE NELSON, Pro Se.

RESPONDENT: Acting Warden BARBA STOREY;
Attorney General DANA NESSLE

RELATED CASES

People v Deryl Dude Nelson,
Case No. 14-003572-01-FC Third Judicial Circuit Court

People v Deryl Dude Nelson,
Case No. 323683 Michigan Court of Appeals

TABLE OF CONTENTS

The magistrate issued an arrest warrant without probable cause based on a complaint that was not sworn to but instead signed by an unknown person functioned as the complaining witness to make it appear that the arrest warrant was properly issued. This act and omission, violated numerous federal laws including the Fourth Amendment that requires an arrest warrant to be issued upon a finding of probable cause supported by Oath or affirmation.

I

DID THE STATE APPEALS COURT ERR WHEN IT REACHED A DECISION THAT THE COMPLAINT MET THE STATUTORY REQUIREMENT ABSENT OF A JUDICIAL FINDING OF PROBABLE CAUSE?

II

DID THE STATE APPEALS COURT ERR WHEN IT REACHED A DECISION THAT PROBABLE CAUSE WAS ESTABLISHED TO CONVICT PETITIONER AT THE PRELIMINARY EXAMINATION, RATHER THAN DECIDING WHETHER WAS THERE PROBABLE CAUSE AT THE FIRST JUDICIAL HEARING, FOR THE ISSUANCE OF THE ARREST WARRANT?

III

DID THE STATE APPEALS COURT ERR WHEN IT REACHED A DECISION THAT PETITIONER DID NOT RECEIVE INEFFECTIVE ASSISTANT OF COUNSEL, WHEN THE RECORD SHOW COUNSEL FAILED TO ATTACK THE VALIDITY OF THE COMPLAINT AND WARRANT VIA EVIDENTIARY HEARING AND WITHDREW THE MOTION FOR EVIDENTIARY HEARING AFTER THE JUDGE INSISTED THAT THE HEARING WAS NEEDED?

INDEX OF APPENDICES

APPENDIXES

INDEX OF AUTHORITY

UNITED STATES STATUTES

STATE STATUTES

PETITION FOR A WRIT OF HABEAS CORPUS

Deryl Dude Nelson, on behalf of himself, Pro Se, respectfully petition for a writ of habeas corpus. Petitioner Nelson is being held illegally incarcerated in Michigan Department of Corrections in violation of federal law and United States Constitution.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals (MCOA) affirming Petitioner's conviction is not reported (but is available at 2016 Mich. App. LEXIS 32). App-A, MCOA opinion. App-B, Trial Court's Order and Judgment. App-C, Michigan Supreme Court's Order denying Leave to Appeal. App-D, Michigan Supreme Court's Order denying Reconsideration.

JURISDICTION

This Court has jurisdiction to review this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241(a). The Michigan Court of Appeals affirmed Petitioner's conviction on January 12, 2016. (App. A).

STATUTORY AND CONSTITUTIONAL PROVISIONS

28 USCCS § 2254

The Supreme Court, a Justice thereof a circuit judge, or a district court 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 only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effect, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT VI

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 been 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.

AMENDMENT XIV SECTION I

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 CASE

On June 24, 2013, Petitioner, Deryl Dude Nelson, was involved in a car accident that resulted in the death of Tyeissha Washpan on Interstate I 96 E. in the City of Detroit, in Wayne County, in the State of Michigan.

On March 5, 2014, a warrant was issued for Petitioner's arrest for Second Degree Murder and Rackless Driving Causing Death. Petitioner's was later arrested and arraigned on charges and no bond was given at that time.

On April 28, 2014, at Petitioner's preliminary examination, he was given bond and that proceeding was postponed. Petitioner was later released on $100.000, ten percent bond. On April 28, 2014, the preliminary examination was conducted. The complaining witness had not appeared. The judge bound Petitioner over for trial, stated:

> So...I, you know but that as it may, I am satisfied that the record here has enough testimony for THE charge of both counts that is charged in this case. And I will bind him over on the allegations contained in the complaint. (P.E.T., p. 81, 4/28/14).

Petitioner bond was raised to $150.000, ten percent plus tethered, he was taken back in custody. Later Petitioner was released on bond.

Jeffery Edison was Petitioner's paid defense counsel for Petitioner's preliminary examination. Edison did not object that the complaint lacked probable cause nor requested that the complaining witness Sgt. Keely Cochran appear in court to be confroned about his sworn complaint. Therefore, Petitioner retained Aronld L. Weiner on as a pretrial attorney to file Petitioner's motions that challenge the Fourth Amendment violations and the Court's jurisdiction.

Shortly after defense counsel Weiner was retained, Weiner failed several times to inform Petitioner when he was to appear in court, causing Petitioner to miss several court dates. See Capias Hearing, May 12, 2014, p. 3. See also Motion Hearing, 6/6/14, p. 6.

Petitioner could not rely on counsel. In order for Petitioner to know when he was to appear in court, Petitioner had to go to the court clerk's office to review the Register Of Actions and to file the motions that counsel had failed to file. Counsel call Petitioner and stated that the Prosecutor would not allow him (Weiner) to file the Motion to Quash. Counsel then told Petitioner that he created a new Motion to Quash to file. Petitioner rejected Weiner's motion. Weiner theatened Petitioner, by stating that he will not get away without being punished for the alleged crimes he was charged with.

Counsel sabotaged and obstructed Petitioner's opportunity to litigate his Fourth Amendment violation claim. Counsel deceived Petitioner to think that the motion hearing was about Petitioner's motion to quash the information that challenged the complaint, warrant and jurisdiction. Counsel switched motions, replaced Petitioner's motion with another motion that had no language that a true motion to quash suppose to have but counsel fraudulently labled that motion as a motion to quash the information. Counsel made it known to the court that is was not his interest and that Petitioner only had the concern that his constitutional rights were being violated. App. E, Motion Hearing Transcripts, 7/11/2014, pp. 3-7.

The following comments were made during that proceeding:

> MR. WEINER: Good morning, Your Honor. Arnold Weiner appearing on behalf of Mr. Nelson, who is present in court with his mother.

YOUR Honor, this has been a little unusual procedures. There are three motions. Very quickly I would like to address the ones that I filed on behalf of Mr. Nelson.

As a procedural motion, both him and his motion are very concerned that this Court has no jurisdiction, very quickly, regarding the motion to quash the information. As this Court knows in order to get a case started, there has to be a sworn affidavit. And Mr. Nelson puts the law very succinctly, no warrant can issued under the constitution without a showing of probable cause.

MR. HAYWOOD: I object to this, your Honor.

MR. WEINER: Judge--

MR. HAYWOOD: I thought this was a motion to quash the information.

THE COURT: That's all I have was a motion to quash. I don't have notice of any other motion.

MR. WEINER: Judge. I filed this last time. I dropped off copies. These were the motion that Mr.--These were the motions that Mr. Nelson came down to file and the Court would not permit it. I filed on his behalf.

THE COURT: Who came down to file and I would not permit?

MR. HAYWOOD: The Defendant.

MR. WEINER: The Defendant came down.

THE COURT: He's represented by a lawyer.

MR. HAYWOOD: Right.

MR. WEINER: Correct. your Honor.

THE COURT: So he does not file motions if he's represented by a lawyer.

MR. WEINER: I advised him that.

THE COURT: And if the lawyer didn't file them, they're not before this Court today, okay.

MR. WEINER: Well. I filed it on his behalf.

THE COURT: When?

MR. WEINER: Last week. I got the time stamp and I dropped off copies to Mr. Haywood's supervisor.

THE COURT: Do you have a proof of service?

MR. WEINER: We have them when they were stamped, your Honor, and I can indicate to the Court that I did drop them off, yes. I mean, they are procedural matters. I could state this very simply.

THE COURT: I just want the record accuate.

MR. WEINER: That's fine Judge.

THE COURT: Number one you tell your client and his family that if he's represented by a lawyer, he's not allowed to file anything. He can write to the Court, complain about his lawyer or things like that, but he doesn't file, the lawyer does the filing, not the Defendant. Same thing with the prosecution, the alleged victims don't come in here and file things on behalf of themselves, the prosecutor's office does that. So no, I won't accept it. I don't think any judge would.

MR. WEINER: Thank you, your Honor. I think Mr. Nelson has been apprised of that.

THE COURT: What you have just given to me is what I already have. It's a request, a motion to quash and then there's some kind of criminal retainer agreement, which really is between you and your client.

MR. WEINER: No, that may have been given inadvertently, Judge.

THE COURT: Okay. That's all I have. That's what you've just given to me.

MR. WEINER: Well. I dropped off copies the other day just to make sure the Court had copies.

THE COURT: Mr. Weiner, if you don't have time date stamped copies and if you haven't served the prosecutor's office, then those motions are

not before the Court today.

MR. WEINER: All I'm saying is this time stamp shows that I filed it with the Court and the prosecutor time stamped it.

THE COURT: What are you looking at, because what you gave me is not what you are claiming?

On July 18, 2014, Motion Hearing, defense counsel brought to the Court's attention that no probable cause and no sworn complaint existed and that the Court lack jurisdiction. App. F, Motion Hearing Transcripts, 7/18/14, pp. 5-6.

The trial court asked defense counsel several times, did he request for an evidentiary hearing. App. F, pp. 6-7. The Court put defense on notice that an evidentiary hearing was needed to bring the magistrate and the officer before the Court because it was nothing that the Court could do to resolve the issue without an evidentiary hearing. Defense counsel stated and lied that he did not request for an evidentiary hearing. App. F, p. 7. See App. G, Praecipe and Motion For Evidentiary Hearing based Upon Fraud on the Court, was scheduled and was before the Court to be heard that day.

The prosecutor acknowledged that defense counsel filed other motions. App. F, p. 13. The prosecutor also acknowledged that there was a motion based upon Fraud. Then defense counsel "withdrew" the motions after he and the prosecutor argeed that it was proof shown that the "swear to" and jurisdictional requirement were satisfied even though no evidence was shown. App. F, p. 14. At no time did the trial court determined whether it had jurisdiction or determined that probable cause existed via sworn complaint.

After the motion hearing, Petitioner mailed a letter and Phone Call CD to the judge, requesting that he be allowed to argue his motions himself because defense counsel failed to do so, and protect Petitioner's Constitutional rights. Petitioner informed the court that counsel had lie to him by stating that the prosecutor would not allow counsel to file Petitioner's motion to quash. App. H, Letter dated July 18, 2014, and CD.

At the pretrial hearing, Petitioner informed the Court that he did not have a lawyer. App. I, Pretrial Hearing Transcript, 7/28/14, pp. 6-7. The clerk then gave counsel the letter Petitioner sent to the judge. Counsel mention that the letter stated he was working with the prosecutor and trying to railroad Petitioner. Counsel then expressed to the judge that he was unsure that he could EFFECTIVELT represent Petitioner. App. I, Pretrial Hearing Transcript, 7/28/14, pp. 10-11.

The prosecutor expressed his satisfaction with counsel performance by thanking counsel for not filing the motions he was hired to file for Petitioner. App. I, Pretrial Hearing Transcript, 7/28/14, p. 13.

Counsel's defense for Petitioner and opening statement was Petitioner's driving was irresponsible, childish, immature, careless and negligent driving causing the death of the victim and that he will show the jury that Petitioner was guilty not criminally but was guilty via lawsuit. App. J, Jury Trial Transcript, 7/31/14, pp. 16-17.

Defense counsel failed to object or request that the medical examiner to be present to be examined and crossed examined. Instead, counsel allowed the medical examiner's autopsy report to be read and submitted as evidence to the jury for delibration. App. J, Jury Trial Transcipt, 7/31/14, pp. 100-101. Where the autopsy report rule that the Peti-

tioner's driving caused the death of the alleged victim and declared the death a homicide. App. K, Autopsy Report.

At Petitioner's jury trial, Sgt. Keely Cochran appeared as a witness for Petitioner and not as the complaining witness for the prosecution, as the charging document indicate. On Direct Examination, Sgt. Keely Cochram was asked the following questions:

> Q. Okay, And were you--I'm going to show you a copy of the formal complaint in this matter. I want to ask you if you can identify this and is that your signature seeking, asking for the prosecutor's office to authorize the warrant for second-degree murder and reckless driving causing death on Mr. Nelson?
>
> A. No, it's not my signature. It's the court officer's signature, he signed on my behalf.
>
> Q. Okay, But you recognize and that was on your behalf?
>
> A. Correct.
>
> Q. And what was the date that they had requested the authorization of this case?
>
> A. This was warrant authorized on 3/5 of '14.

Defense counsel did not move for dismissal of the case based on Sgt. Cochran's testimony that established that the magistrate issued the arrest warrant outside of his judicial capacity, thus, the ex pate proceeding was illegally initiated and no judicial finding of probable cause existed prior to issuing the warrant. See App. J, Jury Trial Transcript, 7/31/14, p. 107. Defense Counsel completed the proceeding without applying any adversarial challenges to stop the prosecution.

At closing argument, counsel requested that Petitioner be charged and convicted of Moving Violations Causing Death. App. L, Jury Trial

Transcript 8/1/14, pp. 3-6. Petitioner was convicted of Second Degree Murder and Reckless Driving Causing Death. Petitioner was sentence to 25 years to 50 years and 12 years to 24 years in the Michigan Department of Corrections.

Petitioner appealed his convictions to the Michigan Court of Appeals. Petitioner raised the following arguments in his Standard 4 Brief. App. M, Standard 4 Brief.

ARGUMENT I

THE TRIAL COURT LACKED JURISDICTION/AUTHORITY TO TRY AND CONVICT DEFENDANT BECAUSE: (1) THE WARRANT WAS INVALID, (2) PROBABLE CAUSE WAS NOT ESTABLISHED, AND (3) THE RETURN WAS IMPROPER, THEREBY RENDERING ALL PROCEEDINGS NULL AND VOID.

ARGUMENT II

DEFENDANT WAS CONSTRUCTIVELY DEPRIVED OF COUNSEL, AND DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO CONTRACT AND FORCED INTO BEING REPRESENTED BY COUNSEL WITH CONFLICT OF INTEREST.

ARGUMENT III

DEFENDANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE COUNSEL: (1) FAILED TO INVESTIGATE, (2) FAILED TO RAISE SUBSTANTIAL DEFENSE, AND (3) FAILED TO PRODUCE EXPERT AND NON-EXPERT WITNESSES.

The Michigan Court of Appeals (MCOA) affirmed Petitioner's convictions without resolving or deciding whether there was probable cause for the magistrate to issue the arrest warrant pursuant to the 4TH and 14TH Amendments. People v Nelson, 2016 Mich App LEXIS 32 (Mich. Ct. App., Jan. 12, 2016) Case No. 323685. The Prosecutor did not respond to the issue above. Petitioner was denied leave to appeal in the Michigan

not present on March 5, 2014, and believed that a court officer went before the magistrate and executed the complaint for the complaining witness. App. O, 2018 Attorney Grievance Commission Report.

28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) imposes the following standard of review for habeas cases:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted with respect to any claim that was adjudicated on the merit in the State Court proceeding, unless the adjudication of the claim:
>
> (1) Resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) Resulted in a decision that was based on an unreasonable determination of the facts in the State court proceedings.

Writ of habeas corpus will not be used to test indictment unless it is constitutionally defective. Glenn v Missouri, 341 F. Supp. 1055; 1972 U.S. Dist. LEXIS 14569 (E.D. Mo 1972).

Sufficiency of state indictment or information is not a matter for federal habeas corpus relief unless it can be shown that indictment or information is so defective that convicting court had no jurisdiction. De Benedicts v Wainwright, 517 F. Supp. 1033; 1981 U.S. Dist. LEXIS 13460 (S.D. Fla. 1981), aff'd, 674 F.2d 841; 1982 U.S. App. LEXIS 19186 (11th Cir. 1982).

Federal habeas relief may "be invoked with respect to the sufficiency of an indictment only when the indictment is so fatally defective that under no circumstances, could a vaild conviction result from the

facts probable under the indictment. Johnson v Estelle, 704 F.2d 232, 236 (5th Cir. 1983).

Evidence of an indictment forged is a ground for habeas corpus relief. Hamilton v McCotter, 772 F.2d 171 (5th 1985).

Here in this MATTER, Sgt. Keely Cochran established that the complaint is indeed a forgery and whether the complaint was signed by a court officer or Trooper Ragsdale that's unclear but whatever the case may be, it is shown and undisputed that the magistrate witnessed the signature being forgered to protray that he administered an oath to the complaining witness. App. N, Complaint.

The Seventh Circuit in a similar situation, held that no one signs anther person's name by accident, that such misconduct invalidated the judicial determination of probable cause because "a fraudulent complaint cannot provide the sole basis for a finding of probable cause." Haywood v City of Chicago, 378 F.3d 714, 719 (7th Cir. 2004).

MCOA represented the unknown and unauthorized signature on the complaint, as the complaining witness. In light of the complaint named Sgt. Keely Cochran as the complaining witness, MCOA concealed this material fact from its opinion. Although the MCOA stated "At trial, the only witness defense counsel call was Sargent Keely Cochran to verify that she did not actually sign the complaint." The MCOA omitted the portion of Cochran's testimony that exposed that the complaint and warrant came into existence via fraud on the court. Appendix A, p. 11, juxtapose with App. J, p. 107.

The root of this evil is not only the mere absence of complaining witness, Keely Cochran's testimony to the magistrate on March 5, 2014. The root of this evil also included the magistrate falsifying his jurat

to make it appear that he had jurisdiction of the subject matter of the complaint. Ex Parte Siebold, 100 U.S. 371; 25 L.Ed. 717 (1880). In short, the convicting court had no probable cause and no jurisdiction of the case. Therefore, this Court granted habeas relief due to the exceptional circumstances.

(2) THE STATE COURT HAS REACHED A DECISION THAT PROBABLE CAUSE WAS ESTABLISHED TO CONVICT PETITIONER, CONTRARY TO WELL ESTABLISHED PRINCIPLE OF FEDERAL LAW.

The State court avoided deciding whether probable cause existed for the magistrate to issue the arrest warrant against Petitioner. The State court used an alternative solution to determine that probable cause existed to convict Petitioner by reasoning that probable cause existed at Petitioner's preliminary examination and thus, he was bound over to the trial court. See Appendix A, pp. 6-7.

There is no constitutional requirement after an arrest warrant is issued for an advers hearing, such as a preliminary examination for a judicial determination of probable cause. See Gerstain v Pugh, 420 U.S. 103 (1975). In Baker v McCollan, 443 U.S. 137, 143; 99 S. Ct. 2689; 61 L.Ed.2d 433 (1979), this Court established that "A person arrested pursuant to a warrant issued by a magistrate on a showing of probable cause is not constitutionally entitled to a separate judicial determination that there is probable cause to him pending trial."

When Petitioner here was arrested by virture of the magistrate's warrant which was illegally issued without probable cause and brought into court to have an adverse hearing for a second probable cause determination, such hearing could not be deemed or qualify as legal, thus Petitioner was bound over for trial through an illegal process. Through

Petitioner's understanding of this Court's decision in Manuel v City of Joliet, in headnote 6, that it is only one judicial process FOR finding probable cause that can be had per arrest warrant. 137 S. Ct. 911, 919 note 6 (2017)(that there is legal process and then again there is legal process--the next [and in our view unanswerable] question would be why.)

Without the MCOA deciding the actual issue of whether or not the magistrate had probable cause to issue the arrest warrant against Petitioner, deprived Petitioner from fairly litigating this 4th Amendment claim, and violated his due process pursuant to the 14th Amendment. See Stone v Powell, 428 U.S. 465, 494 (1967).

Pursuant to this Court's decision in Whiteley v Warden, 401 U.S. 560 (1971), this Court held "that the complaint on which the warrant issued clearly could not support a finding of probable cause by issuing magistrate... Therefore, the prisoner's arrest violated his constitutional right under the Fourth and Fourteenth Amendments." Here in this MATTER the convicting court did not have probable cause to convict Petitioner, therefore, Petitioner is illegally incarcerated and this Court should grant habeas relief.

(3) THE STATE APPEAL COURT ERRED WHEN IT REACHED A DECISION THAT PETITIONER DID NOT RECEIVE INEFFECTIVE ASSISTANT OF COUNSEL CONTRARY TO FEDERAL LAW.

Petitioner only reason why he was in court was based on a fraudulent complaint and warrant. Petitioner was prevented from bringing a valid defense challenging the charging documents via motion to QUASH, DISMISS and EVIDENTIARY HEARING BASED ON FRAUD ON THE COURT. All three motions were blocked by defense counsel, where under Franks v Delaware, 438 U.S. 154 (1978) mandated an eveidentiary hearing on evidence that

the complaint was false and no warrant could be valid under the complaint.

Petitioner tried to file the motion himself to have his case set aside, however, the court would not accept motions from Petitioner. App. E, Motion Hearing Transcript, pp. 3-7. Defense counsel drafted a motion to Quash that asked the court to modify the charges against the Petioner, contrary to Petitioner's motion to Quash that asked the court to set aside the case against him because no sworn complaint was made and filed against him. See App. P, Petitioner's Motion to Quash juxtapose with App. Q, Counsel's Motion to Quash. The court noticed the problem Petitioner was having with counsel not filing Petitioner's motions. The court stated that Petitioner could write to the court to complain about counsel's behavior and counsel another opportunity to file Petitioner's motions to be heard on July 18, 2014. App. F, p. 5.

On July 18, 2014, counsel portrayed to challenge the 4th Amendment, complaint and warrant. However, the judge would not allow the challenge without the magistrate and police officer present in court before her at an evidentiary hearing. The judge asked counsel TWICE did he request for an evidentiary hearing. App. F, pp.6-7. Counsel answered "NO". However, the court file does show a time-stamped copy of a motion for Evidentiary Hearing Based on Fraud Upon the Court and Praecipe that proves that counsel did request for the evidentiary hearing and that the motion was scheduled to be heard that day. App. G.

Counsel corruptly turned against Petitioner and withdrew the motion for evidentiary hearing, depriving him of a substantial defense guaranteed to him by the 6th and 14th Amendments. The outcome would

have been different but for counsel fraud, Petitioner was prevented from having an adversary proceeding to litigate his 4th Amendment claim. Counsel was constitutionally ineffective under the two-part-cause-and prejudice standard that's set forth in Strickland v Washington, 466 U.S. 668 (1984). This Court has set forth a different standard where Petitioner would be entitled to have his case set aside in United States v Throckmorton, 98 U.S. 61, 65-66 (1878), where an attorney fraudulently or without authority assumes to represent a party and connives at his defect; or where the attorney regularly employed corruptly sells out his client's interest to the other side...that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing.

B. COUNSEL'S UNAUTHORIZED AND FRAUDULENT REPRESENTATION

Counsel appeared at Petitioner's trial knowing that he was no longer retained. Counsel lied to the court that he was still retained and that Petitioner owed him for trial fees. See Transcript, July 30, 2014, pp. 3-6. See also App. R, The Retainer Agreement says Paid in Full pretrial in the top left corner, not balance owed for trial. Based on counsel's fraud practiced on the court, he was allowed to conduct Petitioner's jury trial, even though he was not retained in order to further defraud Petitioner so he could escape from being illegally and moliciously prosecuted. Counsel had a duty to disclose to the court that he was retained as a pretrial lawyer and no longer Petitioner lawyer. Without counsel the court was without jurisdiction to proceed in violation of the Sixth Amendment to the United States Constitution.

C. COUNSEL'S LESSER-EVILS DEFENSE

During Opening statements, counsel made incriminating statements against Petitioner, by saying that he was irresponsible, childish, immature, driving careless, negligent driving, that he killed the deceased and that he is not criminally but is civilly responsible. App. J, pp. 16-17. Given such comments, Petitioner would have been batter off without counsel than to enfure attacks from his own attorney that equalled or exceeded the prosecutor's. See Rickam v Bell, 131 F.3d 1150, 1159 (6th Cir. 1999). This unreasonable performance ruined Petitioner's chances of acquittal, denied him an adversarial trial and thus constituted ineffective assistance under Strickland.

Counsel lesser evil defense was not a defense at all. Counsel was not seeking a not guilty verdict but instead wanting the jury to find Petitioner guilty of something. See United States v Throckmorton, 98 U.S. 65-66 (where an attorney...represent a party and connives at his defeat; where the attorney...corruptly sells out his client's interest to the other side.).

Counsel failed to capitalize off the prosecutor's error of not securing its complaining witness, Sgt. Keely Cochran for its prosecution against Petitioner. When Sgt. Cochran appeared for the defense, counsel could had requested the court to take judicial notice, by pointing out this error and that no prosecution can be had without a complaining witness. See App. J, p. 2.

Sgt. Cochran testified that a "court officer" signed the complaint as the complaining witness. This act was the same act that Kalina done while she was the deputy prosecutor, signed a "certification for Determination of Probable Cause, this Court held that such act did not

satisfy the Fourth Amendment. Kalina v Fletcher, 522 U.S. 118 (1997). Even without the evidentiary hearing in this MATTER, Sgt. Cochran's testimony established that the complaint, which is equivolent to a Certification for Determination of Probable Cause, the complaint did not satisfy the Fourth Amendment due to the court officer functioned as the complaining witness.

D. EXCEPTION CIRCUMSTANCES

Petitioner filed his first federal petition for a writ of habeas corpus in the United States District Court for the State of Michigan, 2016. The court did not decide Petitioner's 4th Amendment issue raised, whether or not the warrant was issued properly with probable cause. Instead, the court recharacterized Petitioner's 4th Amendment issue raised into an exclusionary rule violation. PETITIONER WAS DENIED October 31, 2016, for habeas corpus relief. Nelson v Jackson, 2016 U.S. Dist. LEXIS 150836 (E.D. MI Oct. 31, 2016). Reconsideration denied, transferred, 2016 U.S. Dist. LEXIS 179508, Docket No. 2:16-cv-12260; Certificate of Appealability denied, Nelson v Jackson, 2017 U.S. App. LEXIS 27977 (6th Cir. July 17, 2017) Docket No. 16-2623; United States Supreme Court certiorari denied, Nelson v Jackson, 138 S. Ct. 478; 199 L.Ed.2d 365; 2017 U.S. LEXIS 6926 (U.S. Nov 27, 2017) Docket No. 17-6056.

In year 2019, Petitioner filed his application to file a second or successive habeas corpus. The Sith Circuit denied that application May 6, 2020. In re: Nelson, 2020 U.S. App. LEXIS 14510. Docket No. 19-2481. Also in year 2019, Petitioner filed his first 60(b) motion for relief from judgment in the U.S. District Court, arguing in year 2016 the court on habeas review, ignored his claim that Fraud was perpetrated

upon the court. And that the complaint was forged and that no probable cause exist for the warrant and conviction. The motion was denied February 14, 2020, Nelson v Jackson, Docket No. 2:16-cv-12260; The U.S. Sixth Circuit Court of Appeals stated that Petitioner was raising a claim that a fraud was committed in the State district court and denied C.O.A. June 16, 2020. Nelson v Brown, Docket No. 20-1190; United States Supreme Court certiorari denied, Nelson v Brown, 2020 U.S. LEXIS 5084 (U.S. October 12, 2020).

In year 2020, Petitioner filed his MCR 6.500 motion for relief from judgment in state trial court. Petitioner raised a claim of fraud on the court arguing that the complaint was a falsified and forged document and that the court lacked subject-matter jurisdiction and probable cause to issue the warrant and convict Petitioner. The court ignored this issue and denied the motion, March 30, 2021. People v Nelson, Case No. 14-003572-01-FC; Michigan Court of Appeals, People v Nelson, 2021 Mich. App. LEXIS 5355 (Sept. 8, 2021), Appeal Denied, Reconsideration denied at 977 N.W.2d (July 28, 2022) Case No. 163809; U.S. Supreme Court certiorari denied, Nelson v Michigan, 2022 U.S. LEXIS 5077 (U.S. Nov. 21, 2022) docket No. 22-5653.

To justify the granting of a writ of habeas corpus, the Petitioner must show that exceptional circumstance warrant the exercise of this Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court. Ex parte Hawk, 321 U.S. 114, 117 (1944).

Here in this MATTER, Petitioner emphasize that counsel performance in preventing him to fully and fairly litigate his Fourth Amendment issues and thereafter, present a sham defense which left no option for the jury

other than to find Petitioner civilly guilty, had no standing in a criminal case, denied him effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution, demonstrate as exceptional circumstance that warrants this Court's power to grant this writ. Moreover, exceptional circumstances amounting to judicial usurpation of power will justify the invocation of this extraordinary remedy. Ker v United States Dist. Court for Northern Dist., 426 U.S. 394, 402 (1975). Here in this MATTER the magistrate issued an arrest warrant illegally, demonstrate judicial usurpation of power by falsifying his jurat on a criminal complaint. This act also demonstrate an exceptional circumstance of peculiar urgency.

Petitioner has exhausted his state and federal remedies. Petitioner has demonstrated that he cannot get relief in any form. Even in the form of fraud upon the court, Petitioner presented his case both state and federal court has turned a blind eye. Instead of those courts protecting the constitution and Petitioner's rights under the constitution, the state and federal courts chose to protect and aid the corruption in the courthouse done by the magistracte. Petitioner again emphasize that the record demonstrates that the magistrate illegally issued an arrest warrant against him when no one went before the magistrate on oath to alleged any sworn facts to cause the magistrate to believe that Petitioner had committed or was guilty of the offenses stated in his warrant only denotes that Petitioner is actually innocent in which is an exceptional circumstance that warrant this Court's power to intervene with the State court's judgment. If this Court fails to intervene Petitioner will be remediless.

E. CONCLUSION

For the forgoing reasons, Petitioner respectfully request that the petition for a writ of habeas porpus be granted.

Respectfully submitted,

/S/ [signature]

Deryl Dude Nelson 348736
In Pro Per
4533 W. Industrial Park Dr.
Kincheloe, MI 49788

Dated: October 2, 2023.