

No _____

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES L. KELLEY T.D.C.J. #01894193, PETITIONER PRO-SE'

Vs.

LORIE DAVIS, TDCJ DIRECTOR, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

James L. Kelley 01894193 – Pro-Se'

901 East 5th Street

Cleveland, Texas 77327

QUESTIONS(S) PRESENTED

1. Does the attorney of record need to be present at sentencing in open court? Is the attorney of record being insufficient for not being present for sentencing on cause # F09-72634?
2. Should the plea agreement and Right to Appeal documents be voided for Cause # F09-2634 if the attorney of record did not sign? (*See Appendix G- Fraudulent Court Records*)
3. Can trial court (282nd District Court of Dallas) deny Mr. Kelley's Due Process Right of a court reporter during sentencing or any other proceedings?
4. Can Texas Appeals Court, Court of Criminal Appeals, U.S. District Court Northern Dallas Div. and the U.S. Court of Appeals Fifth Circuit denies Mr. Kelley of a court reporters record? (*See Kelley vs. State 2013 Tex. App Lexis 985*3 & Appendix F – Court Reporters statements*)
5. Can fraudulent court records be used for convictions?
6. Can acknowledged fraudulent court records be used by the original trial court to uphold an illegal sentence? (*See Appendix G – Fraudulent Court Records*)
7. Do the defendant, attorney of record and a court reporter have to be present during sentencing?

LIST OF PARTIES

Mr. James L. Kelley	Petitioner - Pro-Se
Lorie Davis	Respondent, TDCJ CID Director
Nathan Tadena	Assistant Attorney General
Chief Judge Fitzwater	U.S. Dist. Court for Northern Dist. Texas (Dallas)
Magistrate Judge Ramirez	U.S. Dist. Court Northern Dist. Tex. (Dallas)

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Petitioner James L. Kelley respectfully prays that a writ of certiorari be granted to review the judgement below.

OPINIONS BELOW

FEDERAL COURTS -

On October 2, 2017, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming the District Court: *Miller-El*, 537 U.S. 322, 336 (2003); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). A copy of that opinion is attached as Appendix A (Unpublished).

The opinion of the United States District Court for the Northern District of Texas, Dallas Division judgement is attached as Appendix B (unpublished).

A timely petition for Rehearing was denied by the United States Court of Appeals Fifth Circuit on November 10, 2017, a copy of the denial order is attached as Appendix H. (The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1))

STATE COURTS

On February 4, 2015, the Court of Criminal Appeals denied both Writs of Habeas Corpus 11.07 at the highest State Court able to review on merits. A copy of that opinion is attached as Appendix C (unpublished)

The judgement on direct appeal was made January 21, 2013 and that opinion is attached as Appendix E (unpublished). The jurisdiction of this court is 28 U.S.C. § 1257(a).

JURIDICTION

On October 2, 2017 the United States Court of Appeals for the Fifth Circuit entered its judgement and opinion affirming the District Courts judgement. *Miller-El*, 537 U.S. 322, 336 (2003) *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). This petition has been timely filed within 90 days of that order. *Supreme Court Rule 13.1* The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

The United States District Court for Northern District / Dallas Division decided my case and a copy of that decision appears at Appendix B.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Issue One – The right to have counsel for defense during entire sentencing process – is based on the Compulsory Process Clause of the Sixth Amendment of the United States Constitution which guarantees assistance of the counsel for Mr. Kelley's defense not even signing the plea agreement (F09-72634) *Supreme Court Rule 24.02(b)(2)*.

Issue Two – Denied Court reporter throughout all hearings to record the verbatim accounts – is based on the *Due Process Clause of the Fifth Amendment of the Constitution* which provides that “no person... shall be deprived of life, liberty or property, without Due Process of Law. *U.S. Constitution Amendment V*

Issue Three – Acknowledged Fraudulent records used to uphold an illegal sentence committed by the original trial court is based on the *Due Process Clause*, as well as *Texas Penal Code 37.09* which creates criminal penalties if a person knowing that

an investigation or official proceeding is pending or in progress....makes, presents or uses any record, document or anything with the knowledge of it being false with the intent of depriving Mr. Kelley of life, liberty or property without the Due Process of Law. *U.S. Constitutional Amendment V*

Issue Four – The original trial court held sentencing against Mr. Kelley, without Mr. Kelley, the attorney of record “Timothy Jeffrey” or a court reporter “Joseph Phillips” present at the hearing. – is also based on the Due Process Clause as well as the text of the relevant statutes. *7 U.S.C. § 13(a) (2); 18 U.S. Code § 371 and 18 U.S. Code § 1343*, which cannot be reproduced verbatim, due to Mr. Kelley was denied a word for word verbatim record by a court reporter. *Supreme Court Rule 24.02(d) (2)*

Issue Five – Mr. Kelley has exhausted all remedies in the lower courts. This is a case of imperative public importance to deviate from the normal appellate practice due to the fact there has been a criminal act made and an obvious conspiracy to the crime by all state and federal courts who gave an adverse ruling to Mr. Kelley’s pleadings. *Supreme Court Rule 10(a) (b); Supreme Court Rule 12*

STATEMENT OF THE CASE

A. Background

On November 16, 2009 on cause # F09-59778, the state indicted Mr. Kelley for possession of a controlled substance (less than 1 gram of cocaine) in a drug free zone. The state on March 26, 2010 errored by indicting Mr. Kelley for fraudulent use / possession of identifying information that belonged to his biological nephew in addition to, they indicted him to a third degree felony of more than five items when there was only two items. His nephew's I.D. and social security card and that makes it a state jail felony. Two items, therefore the indictment is erroneous. Mr. Kelley was never guilty of F09-72634

B. Request for Court Reporter

Mr. Kelley was denied a court reporter by the original trial court (282nd District Court of Dallas). *See Appendix F*

*Kelley vs. State 2013 Tex. App. Lexis 985, *3*

Mr. Kelley made a pre-trial request for a court reporter and his written pleas do not indicate he waived his right to have a court reporter. -Dallas County D.A., 282nd District Court Judge

C. Possession of Controlled Substance / DFZ F09-59178

On December 31, 2010, Judge Andy Chatham chose to go against qualified probation agreement and sentenced Mr. Kelley to five years in the Texas Department of Corrections.

D. Fraudulent Use / Possession of Identifying Information F09-72634.

This is a fraudulent sentence using counterfeit and fraudulent court records. There is not one court document for this cause number that is original. Mr. Kelley wasn't present, Timothy Jeffrey (attorney) was not present at sentencing, and Joseph Phillips (official court reporter for the 282nd District Court of Dallas-for that time period) wasn't present at sentencing. This sentence was enforced outside of the presence of the defense and without a legitimate record.

REASONS FOR GRANTING THE PETITION

1. The court should grant certiorari to correct / restore Due Process Rights

a. Fifth Circuit ruled against the U.S. Constitution

The Constitutional Due Process Right to a court reporter has not been specifically addressed in Mr. Kelley's Certificate of Appeal's judgment, neither has there been a specific and clear ruling plus separately to the Motion for Records filed June 26, 2017 (5th Circuit U.S. Court of Appeals) in the same cause # 16-11744. Mr. Kelley has challenged the only record as fraudulent and has requested that the court reconsider the ruling based on the rules as follows:

5th Circuit Rule 30.1.4 (e) states a copy of the relevant pages of the transcript is necessary when the Appeal challenges the admission or exclusion of evidence.

5th Circuit Rule 30.1.4 (a) (f) states essential pleadings or relevant parts of any written exhibit must be addressed by the Judge if challenged.

Mr. Kelley has absolutely proven all grounds as follow in this petition as required by the Constitution. 28 U.S.C. § 2250 (c) 2; see *Miller-El v. Cockrell* 537 U.S. 322 (2003). There are criminal acts proven in this petition by the 282nd District Court of Dallas. See *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000).

Mr. Kelley's grounds are based ENTIRELY on the fact he was denied a court reporter in all proceedings subjecting him to fraudulent records. See grounds

1. Insufficient and absent counsel, no signature on plea agreement

a. Federal Rule of Civil Procedure 60(b)(4)

2. Trial Court Records Fraudulent – Defendant was denied a court reporter

a. Federal Rule of Civil Procedure Rule 9 (b)

3. Illegal Cumulating of sentence – use of falsified Government Instruments

a. Federal Rule of Civil Procedure Rule 60(b)(3)

Supreme Court Rule 24.02 (d) (2) Disclosure of Plea Agreement states the court shall require the disclosure of the plea agreement on the record in open court, on a showing of good cause on camera at the time plea is offered, or the plea agreement is null and void and should be remanded back to the original trial court.

This is in direct violation of Mr. Kelley's VI Amendment Constitutional Right to Due Process in the court of law to be denied the word for word accounts verbally to be transcribed at any of the court proceeding by a Court Reporter

Mr. Kelley does have a right to relief based on the Constitution, State & Federal laws, *Fifth Circuit Rule 11.1 & 11.3*, in addition to the *Court Reporters Act* that the Fifth Circuit Judicial Council Adopted October 11, 1982, which requires a Judge, the clerk or some other person designated to supervise the court reporter.

The petitioner's VI Amendment Due Process Clause was violated when the petitioner wasn't present to fingerprint at sentencing or any other part for cause# F09-72634. See *U.S. V. Faulks 201 F.3d 208, 2011, 212 (3d Cir. 2000)* also a 3rd degree felony by the Trial Court to falsify government instruments (*Texas Penal Code 37.10*) and violates *Texas Code of Criminal Procedure 38.33* to print at sentence for each case # separately, which obviously did not occur.

B. Denial of Court Reporter

The appellant argues that the court reporters transcripts are absolutely mandatory for an effective appeal. Every appeal, Writ and/or Brief submitted to any court on the appellant's behalf has had this very important litigation factor in his grounds. Including the Motion to Appeal and attached affidavit to the 5th Circuit Court of Appeals December 9, 2016 and also to the U.S. District Court December 7, 2016.

It is a fact there was never any transcripts nor was there any court reporter present. The question is "Why would Judge Ramirez request transcripts that she knows do not exist?" In fact the Judge herself acknowledged there was no court reporters record in the Judges recommendation to deny the petitioner's habeas corpus petition entered September 22, 2016 (Document 45, page 14 B) It's also been known since August 26, 2011 by the affidavit from Mr. Joseph Phillips, the official court reporter in the 282nd District Court of Dallas at the time of proceedings occurred, that the proceedings was not recorded again the 5th Circuit of Appeals &

Judge Ramirez was aware of this on NOA submitted for this appeal along with the fact Mr. Kelley did not waive a court reporter. *Kelley vs. State 2013 Tex. App.*

*Lexis 985, *3*

There's a redundancy in the fact that all parties are fully aware of this very crucial litigation factor.

Federal Rule of Criminal Procedure 11(g) states the proceedings during which the defendant enters a plea must be recorded by a court reporter and If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice that court made to the defendant.

There is no such legal citation regarding a court reporters transcript order, other than they are absolutely necessary. See *Federal Rule Civil Procedure 11, Federal Rule Criminal Procedure 11 (g); Fifth Circuit Rule 11.1, 11.3; Texas Rule Appellate Procedure 13.1 – 13.6; Texas Rule Appellate Procedure 34.6 (d) (e) (f) (2) (3)*. It also has precedent by the *Court Reporters Act of the 5th Circuit Judicial Council (Oct. 11, 1982)*. The 5th Circuit Court of Appeals should note that by depriving Mr. Kelley of a court reporter record that this has become a seriously prejudicial case against the rights of Mr. Kelley. It has been held:

"Presuming waiver from a silent record is impermissible. The record must show the word for word content, anything less is not a waiver, A Sixth Amendment Right"

Carnley v. Cochran, 369 US 506, 369 U.S. 516

Several federal constitutional rights are involved in a waiver that takes place when

a plea of guilty is entered in a state criminal trial.

1. is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment applicable to the states by the Fourteenth? *Malloy v. Hogan*, 378 US 1 1964
2. the right to jury by trial, *Duncan v. Louisiana*, 391 US 145 – 1968
3. the right to confront one accusers *Pointer v. Texas*, 380 U.S. 400

A waiver cannot be presumed without these three import federal rights from a silent record.

The same standard must be applied to determining whether a guilty plea is voluntarily made. For as the Supreme Court has held, a plea of guilty is more than an admission of conduct, it is a conviction. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover up of unconstitutionality.

“The question of an effective waiver of a federal constitutional right in a proceeding is of course, governed by federal standards” *Douglas v. Alabama*, 330 U.S. 415, 380

U.S. 422

C. Harm caused by Silent Record

In the instant case Mr. Kelley was beyond harmed by a silent record. Mr. Kelley is

victim to a fraudulent sentence claiming 4 years of his life he never received in court. No Defendant, No counsel, No Court Reporter, its plain error on the face of the record.

That brings this appellant to the “Poisonous Tree” doctrine. The same logic that prohibits the evidence produced by illegal means and used against that person in Trial Court should also apply here.

What is at stake for Mr. Kelley behind the fraudulent sentence demanded the utmost solicitude of which the courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequences? When a Judge discharges that function, he leaves a record adequate for any review that may be later sought (*Garner v. Louisiana* 368 U.S. 157, 368. U.S. 173; *Specht v. Patterson*, 386 U.S. 605, 386 U.S. 610), and forestalls the spinoff of collateral proceedings that seek to probe murky memories. So it is concluded that there is a reversible error because the record does not disclose that Mr. Kelley voluntarily and understandingly entered his plea or waivers.

In the federal regime, Rule 11 of the federal Rules of Criminal Procedure, this governs the duty of the trial judge before accepting a guilty plea. “

See McCarthy v. United States, 394 U.S. 459

For Mr. Kelley’s waiver to be valid under the Due Process Clause, it must be an

intentional relinquishment or abandonment of a known right or privilege.

Johnson v. Zerbst, 304 US 458, 304 U.S. 464 – 1938. Consequently, if a defendant guilty plea is not equally voluntary and knowing, it has to be obtained in violation of due process and is therefore void.

In the instant case there was never a court reporter present during any of the court proceedings. (See attached affidavits) In addition to the sentence for cause # F09-72634 is fraudulent because of the lack of a verbatim record, nor was the defendant or counsel present at sentencing. Both of Mr. Kelley's sentences are void by the due process clause.

It's clearly apparent by the record or lack thereof that petitioner was not present for sentencing on cause # F09-72634, in addition petitioner can effectively challenge the sentence on the cause # F09-72634 in a Habeas Corpus because a person serving consecutive sentences is considered "In Custody" under any one of them for Habeas purposes, thus being petitioner can challenge the sentence in question even if he has made parole on that particular sentence *DeFoy, v. McCullough* 393 F3d 439, 442 (3d Cir. 2005). Peyton also extends to petitioners serving a consecutive sentence who challenges a conviction underlying the sentence already served.

Garlotte 515 U.S. at 46-47 Therefore the jurisdiction isn't defeated because petitioner is held on another sentence consecutive to the illegal sentence because it's considered collateral damage. The petitioner request that the courts reverse and

vacate both sentences due to the violations of petitioner's *VI Amendment Rights* to fundamentally be present during sentencing. Mr. Kelley also feels there is a conflict of interest by having Judge Jerry E. Smith presiding over the Appeal filed in the Fifth Circuit. He's a Texas native and denied both the Appeal and the Petition for Rehearing. See Appendix I

Boykin v. Alabama 395 U.S. 238, 243 (1969) states that before a plea is entered it has to be admonished on the record of the consequences and the requirements to have been decided and states the knowing and voluntary waiver of the petitioners Constitutional Rights are not presumed by a silent record, THIS *VI Amendment* VIOLATION PERVAILS ALL PROCEEDINGS!

2. Constitutional Violations

A. **FACTS** - All 3 vital facts in this motion was acknowledged by these District Court in the facts, findings and recommendations submitted September 22, 2016 proving they knew of the Identity Theft. Cause # # 3:14-CV-2984-D-BH Docket 45 –See note below

1. Mr. James Kelley did not waive court reporter at sentencing –

Documented State records confirm above FACT as follows:

- Both plea agreements – F09-72634 / F09-59178
- State Opinion - 2013 Tex. App. Lexis 985*3
- Court Reporter's Affidavit From Joseph Phillips states there was no official recording of the proceedings submitted to the Fifth

Docket 45 -
page 14 at B

District Court of Appeals on August 26, 2011 (see Pages 3-5)

Violates the VI & XIV Constitutional Amendments

Docket 45 –
page 8 at A 2. NO COUNSEL at sentencing & NO COUNSELS SIGNATURE FOR
CASE # F09-72634 on Plea Agreement or Right to Appeal (see copies in
Appendix)

- Violates VI and XIV Constitutional Amendments to have counsel
present

3. CERTIFICATE OF THUMBPRINT FRAUDULENT FOR CASE# F09-
72634 (COPIED FROM CASE # F09-59178) proves sentencing. (See
copies in appendix)

- Identity Theft by courts www.dallascounty.org Docket 45 –
Texas Penal Code 37.10 (a) page 8 at B
- Violates VI Amendment Due Process Clause

Mr. Kelley was DENIED his VI & XIV Constitutional Amendment Right to Due
Process and a fair trial because the attorney was absent during plea & sentencing.
See

- *U.S v. Cronin, 466 U.S. 648 (1984)*
- *Texas Code of Criminal Procedure Article 1.052 (c)* states if a pleading or
motion isn't signed the court shall strike it and it's VOIDED and
BREACHED!
- See also *Federal Rules of Civil Procedure Rule 11(a)*

If the transcripts are lost or destroyed at no fault of the defendant then there is to be a new trial and bond set.

B. Criminal Intent by Trial Court

That brings this appellant to the "Poisonous Tree" doctrine. The same logic that prohibits the evidence produced by illegal means and used against that person in Trial Court should also apply here. This complaint is based on a criminal act itself by the 282nd District Court of Dallas who committed I.D. theft with a tainted Certificate of Thumbprint, cause # F09-72634, and several other falsified court instruments. The U.S. Court of Appeals Fifth Circuit has committed to the conspiracy and neglect by not acting on this crime which is transparent and admitted to by all parties. It's no coincidence that every document used during sentencing process for cause # F09-72634 has been counterfeited, forged or altered to enforce an illegal sentence Mr. Kelley was not present to receive in court. (See Cause # F09-72634 Certificate of Thumbprint, plea agreement, Right to Appeal, and Motion to Appeal in Appendix)

This conduct has violated *Texas Penal Code 37.09* which creates criminal penalties if a person knowing that an investigation or official proceeding is pending or in progress...makes, presents or uses any record, document or anything with the knowledge of it being false with the intent to affect the course, investigation or official outcome. In this instant case, prosecution fabricated the Certificate of

Thumbprint for cause # F09-72634 by counterfeiting the same document for cause # F09-59178, that it be taken or given the same legal effect as a record of court. *Texas Penal Code 37.10(a)(1)(2)(5)*; see also *Texas Penal code 37.13(a)(2)* The prosecution in the trial court as well as the Judges mentioned in this motion KNEW these documents were fraudulent. *Texas Penal Code 32.21(a)(1)* The record in trial court for cause # F09-72634 was manipulated in such a way that the court should take notice and action upon request. *Federal Rules of Evidence 104(b) (c)*; *Federal Rules of Civil Procedure 32(a) (b) (c)*.

C. Fraudulent Records Used By Trial Court

The prints for cause # F09-72634 by using the same identifying markings by X and Y axis from the Certificate of Thumbprint for cause number F09-59178 to defraud Mr. Kelley of 4 years on a sentence never obtained in court in person. The falsified date on cause # F09-72634 – prints, identical markings and placement of those markings and accuracy cannot reasonably be justified as genuine. Each felony sentence should have separate set of prints shown for *Texas Criminal Code Procedure 38.33*. This document also proves the defendant was present for sentencing which obviously Mr. Kelley was not present because then there would be no reason to falsify the document.

The Plea Agreement for cause # F09-72634 is also a fraudulent document. The only explanation for the attorney of record NOT to sign the Plea Agreement is because

Mr. Timothy Jeffrey wasn't there. He sent a notarized affidavit stating he did not sign these documents to the Criminal Court of Appeals. He did however sign the Plea Agreement for cause # F09-59178 because he was present. So why would he not sign for the plea for cause # F09-72634? The answer is clear along with the other documents in question and that is Mr. Kelley is a victim of Identity Theft by the court to imprisonment. No Plea Agreement has ever existed for cause # F09-72634 and neither counsel nor Mr. Kelley was present for sentencing on that cause #.

The same goes for the Right to Appeal for cause # F09-72634. The attorney of record did not sign this document either for the exact same reasons. Neither he or the defendant were present, the document never existed and is fraudulent. Again he did in fact sign the same document for cause # F09-59178. Neither the "guest of honor" Mr. Kelley nor his counsel was present and the Right to Appeal for cause # F09-72634 is also fraudulent

The "Motion to Appeal" for cause# F09-72634 is also fraudulent. The prosecution was so bold as to just add the cause # F09-72634 to the original Motion to Appeal (F09-59178) which makes it a horrible attempt to pass as an original document.

Texas Criminal Code Procedure 37.10(a)

Any document requiring a signature, print or the counsel and defendants presence should be acted on based on the criminal act involved for cause # F09-72634.

Mr. Kelley never authorized the changes and they were executed at a time and place other than in his presence and purports that they are a copy of an original presented in bad faith. *Texas Penal Code 32.21(a)(1)(A)* Neither court can prove that Mr. Kelley received 5 years in T.D.C. on cause # F09-72634. The “Fruit of the Poisonous Tree” doctrine is an extension of the exclusionary rule, which is subject to exceptions and prevents illegal government records from being admitted in a criminal trial. The use of such records caused Mr. Kelley much harm. Logic must be applied when analyzing the crime at hand pertaining to the “attenuation doctrine” which is the link between whether illegal conduct is at hand.

D. FUNDAMENTAL COURT PROCEEDINGS

The court – ANY COURT in the U.S. should be able to prove the accounts in the court proceedings by the word for word verbatim recording by a certified court reporter. (*Texas Rule App. Procedure 13.1- 13.6*) The trial court intentionally denied Mr. Kelley of that record. (See *Kelley v. State 2013 Texas App. Lexis 985*3*) The absent fundamental structures based on the “Essential Elements” in the 282nd District Court of Dallas are hard to ignore. These two Judges disregarded a straight forward proposition and failed to apply justice for Mr. Kelley.

The Judges mentioned in this motion has in fact gone against its own Federal Rules of the court in conspiracy to the original act committed.

A copy of the official records of the State Court must be duly certified by the

clerk of such court to be a true and correct copy of a finding, Judicial Opinion or other written indicia showing such a factual determination by the state court shall be admissible only.

28 U.S.C. 2254 pt. 6 CH153 Section (g)

A fraudulent record of an illegal sentencing can never be considered a certified record. Both Judges agree that the court documents are altered, but they “assume” that affidavit years “after” the actual sentencing are suffice as a record. The *Texas Rule Appellate Procedure. 34.6 (f)(3)* also states that if the original record of the court proceedings are lost or destroyed at no fault of the defendant, there is to be a new trial and bond set.

The grounds are relevant to this motion because without a court reporters record, it leaves Mr. Kelley vulnerable to the “He says” and the “Court says” and we all understand the “Regularity” in court actions. In the instant case the two courts in either accounts word speaks nothing but criminal intent by action and conspiracy by not acting when government provisions require the Judges to do so. There is no “Regularity” in “copying & forgery” of court records in the trial court. See Recommendation- 3:14-CV-2934-BH-D, Docket 45 Page 8 (B). It takes the Justice completely out of the judicial system and creates corruption and shortcuts which violates Civil and Constitutional Rights and laws in general. The U.S. District Court suggests that a fraudulent record without a court reporter should stand as a

record to uphold a sentence when these two Judges in the U.S. District Court have collectively and “blatantly” conspired to “Identity Theft”. Presently, the Fifth Circuit of Appeals has also give no true legal law justification to deny Mr. Kelley’s appeal and/or rehearing petition

The guilt or innocence has nothing to do with the failure of the trial court, the U.S. District Court or the Fifth Circuit Court of Appeals to apply standard “Judicial Procedures” during and after the proceedings to ensure all Due Process Rights by the VI Amendment of the Constitution has been given.

A judgement is to be entered promptly not 4 yrs. Later and to be absolutely clear the possession of controlled substance cause # F10-52741 has nothing to do with the petitioner’s habeas corpus. The petitioner has no interest in a sentence already served, which should be the case for F09-72634. The U.S. Court of Appeal will not address these issues specifically, the *confrontation clause* and the *Due Process clause* of the *Constitution* states it’s the defendant’s right to be present during criminal proceedings. The Due Process Clause grant the defendant the additional “Right to be present” at any stage of the criminal proceeding that is critical to the outcome, if the defendant presence would contribute to the fairness of the procedure. The cumulative effect of these two clauses guarantees and entitles petitioner to be present at all important states of the proceedings by the VI Amendment of the Constitution.

U.S. v. Faulks 201 F. 3d 208, 211, 212 (3d Cir. 2000) states that the right to be present was violated when the court imposed a new sentence by written judgement in the defendant's absence

3. Ineffective assistance of Counsel

A. Absent of Counsel at Sentencing

There is no other definitive definition of Insufficient Counsel than counsel not being present during a plea or sentencing on cause # F09-72634. By the counsel's own admission by affidavit submitted to the Criminal Court of Appeals, He stated himself that he didn't sign the plea agreement for cause # F09-72634, which is consistent with the petitioner's complaint of counsel not being present. The court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent or prevented from assisting the accused during a critical stage of the proceedings *U.S. v. Cronin 466 U.S. 648, 659 n. 25 (1984)*. The petitioner was harmed by a 5 yr. sentence that he or his counsel wasn't present for. That was a critical stage and the trial court cannot prove sentence occurred thus also harmed by no verbatim record of an official court reporter.

"THE SIXTH AMENDMENT VIOLATION" pervades the entire proceeding then the harmless error analysis is inapplicable and the violation is enough to overturn the conviction regardless of the severity of the results.

When counsel was absent for petitioner's sentencing the harmless error analysis became inapplicable because it is a critical stage of the proceedings. It is Ineffective

assistance of counsel, he did not object to having a court reporter.

Before a plea is entered it has to be admonished on the record of the consequences and the requirements to have been decided and states that the knowing and voluntary waiver of the petitioners Constitutional rights are not presumed by silent record *Boykin v. Alabama* 395, U.S. 238, 243 (1969). This was challenged in 5th District Court of Criminal Appeals and in Memorandum of Law on State 11.07.

Federal Rules Criminal Procedure 11(g) states that the proceedings during which defendant enters a plea must be recorded by a court reporter and if there's a plea of guilty or nolo contendere, the record must include all the inquiries and advice that the court made to the defendant.

B. Negligence of Counsel

Petitioner was harmed because he was deprived of a court reporter's verbatim recording that would show that he was in fact promised probation in exchange for a guilty plea. Petitioner was in belief that he would receive that probation if he passes the evaluation by C.A.T.S... The petitioner's statement to the judge proves it was indeed "offered" by the trial court probation *2013 Tex. App. LEXIS 985 at*4*. The counsel committed a reversible error because the record is silent since counsel didn't object to not having the court reporter's word for word recording of the plea negotiations. Petitioner's counsel misled the petitioner (James L. Kelley) into believing that probation was in fact promised if he qualified which he did. Petitioner signed required Federal gun control act. Counsel never informed

petitioner of any other consequences and the U.S. Supreme Court made it clear that the

“Negotiation of a Plea Bargain” is a critical stage for ineffective assistance purposes and has rejected the argument made by the stat that a “knowing & voluntary plea supersedes defense counsel errors Padilla V. Kentucky 559 U.S. 356 130 S. Ct. 1473;

176 L. Ed. 2d 284.

The process involving a formal court appearance with the petitioner and all counsel present must be preserved and on record in order to meet the defense counsels responsibilities in the plea bargaining process. To render adequate assistance of counsel that the *VI Amendment* requires, counsel is needed at critical stages of the criminal process. The “Right” to effective assistance of counsel extends to the consideration of the plea *Montejo V. Louisiana 556 U.S. 778, 786, 129 S. Ct. 2079, 173 L. 2d 955 (2009)*. If the oral pronouncement was recorded as they should have been, it would show that the plea wasn’t voluntary because the petitioner wasn’t guilty of charges and could have decided against any plea via- The I.D. in possession belonged to petitioner’s biological nephew & car that drugs were found in wasn’t the defendants.

Federal Rules of Criminal Procedure 11 the hearing should produce a complete record of the factors that’s relevant to determining whether the defendant understands the charges and consequences of the plea in order to eliminate any need

*to resort to any later fact-finding proceedings U.S. v. Marrero-Rivera 124 F. 3d 342,
348 (1st Cir. 1997)*

The petitioner in this Habeas was harmed by counsel not objecting to not having a court reporter and his ill-advised are on record. The U.S. Supreme Court holds that as a General Rule of Defense. Counsel has a general duty as a rule to communicate formal offers from the prosecution to accept Pleas that may be favorable to the accused. The Sixth Amendment, applicable to the States by the Terms of the XIV Amendment provide that Petitioner's counsel didn't protect him by not having a court reporter to preserve the record in ANY of the phases of the court proceedings *Texas Rule Appellate Procedure 13.1 - 13.6*. That also extends to Mr. Timothy Jeffrey being present at those critical stages on record to prevent fraudulent records by the court. Counsel did not sign the Plea Agreement which constitutes a certificate mandatory in these proceedings.

Texas Code of Criminal Procedure Article 1.052(b) The signature of an attorney or a defendant constitutes a certificate by the attorney or defendant that the person has read the pleading, motion, or other paper and that to the best of the person's knowledge, information, and belief formed after reasonable inquiry that the instrument is not groundless and brought in bad faith or groundless and brought for harassment, unnecessary delay, or other improper purpose.

C. Counsel Acknowledges Error

In Petitioner's complaint Mr. Jeffrey by his own admission literally admits to insufficient counsel by not signing the Fundamental Plea Agreement. That is in addition to the fact counsel didn't ensure a court reporter was present. The oral pronouncement of the sentence "Breathes Life" into the judgement *Strokes v. State* 688 SW2d 326, 328 Tex. Crim. App. 1998 without the word for word record of the proceeding the counsel allowed harm to the defendant due to the illegal cumulating outside of the petitioner's presence and not on the record. These rights of the petitioner are congruent and essential to why we hold court! (Counsel, Petitioner and Court Reporter) Counsel didn't attend sentencing on cause # F09-72634 or sign the plea agreement, why would counsel sign one and not the other? The sentence didn't happen for Cause# F09-72634, counsel doesn't forget to sign a plea agreement *Texas Code of Criminal Procedure Article 1.052(c) if a pleading, motion, or other paper is not signed, and the court shall strike it. IT IS VOIDED! Not objecting that no court reporter was present during the "Plea Negotiations" denies the petitioner his VI & XIV Amendment Right to have one and the admonishments on record verbatim and that must be met to render adequate assistance of counsel and at the critical stages of the Criminal Process for both cause #s. Frye V. State 132 S. Ct. 1399 182 L. Ed 2d 379, 2012 U.S.* Counsel has proven he was absent and ineffective as counsel therefore both sentences should be reversed and vacated.

4. Fraud by Court

A. Identity Theft to imprison Mr. Kelley

The fundamental records of the Plea and sentencing proceedings are in fact fraudulent in part and the trial court denied the petitioner a court reporter to preserve error. The petitioner's Plea has always been involuntary since before the plea, on initial appeal and in both Memorandum of Law 11.07's & 2254's Habeas Corpus because he wasn't guilty of the charges. Ironically the court and the respondent both still have yet to address these crucial and critical fraudulent records specifically. A court not guilty of these accusations would immediately address them & dispose of them promptly. The Honorable Magistrate judge should take this as they both concede to these accusations of forging the Certificate of Thumb prints because it is TRUE! Consequently, the petitioner has suffered from fraud himself and identity theft by the duplication of the Certificate of Thumb prints by Xerox copying the exact prints from Cause# F09-59178 to use for sentencing on cause # F09-72634. *Texas Code of Criminal Procedure Article 38.33* requires a single set of prints for each cause number and the prints for cause # F09-72634 is a counterfeit copy of F09-59178, the only sentence orally pronounced to T.D.C.J. By not having the trial court hearing on the record by an official court reporter the trial court abused its authority and caused harm to the petitioner.

B. Deprivation of Court Reporters Record on Plea

Texas Rule Appellate Procedure 34.6(f) 2 clearly states that an appellant is entitled to a new trial if without the appellant's fault, a significant exhibit or a significant portion of the court reporter's notes and records has been lost or destroyed or – if the

proceedings were electronically recorded – a significant portion of the recording has been lost or destroyed or is inaudible.

In the Petitioner's case the trial court never intended to record any of the hearing and the word for word record is absolutely very necessary to the resolution to the petition *Texas Rule Appellate Procedure 34.6(f) 3*. The state has acknowledged and admitted the petitioner did not ever waive his rights to a court reporter. *2013 Tex. App. LEXIS 985 at*3*

Federal Rules of Criminal Procedure 11; Missouri Supreme Court Rule 24.02 states that at the plea entry hearing the Trial Court and all counsel have the opportunity to establish on record that the defendant understands the process that lead to any offer, the advantages and disadvantages of accepting it and the sentencing consequences or possibilities that will ensue once the conviction is entered.

Furthermore it should be well understood the Trial Court in petitioner's case committed a reversible error because the record is silent and therefore the trial court is not "Entitled" to presume the guilty plea is knowing and voluntary *U.S. v. Correa- Torres 326 F. 3d 18, 24 (1st Cir. 2003)*. The entire process should in fact be on the record and counsel's absence and counsel not signing plea proves exactly why.

Texas Code of Criminal Procedure 1.052(a) states that a pleading, motion, and other paper filed for or on behalf of a defendant represented by an attorney must be signed by at least one attorney of record in the attorney's name and states the attorney's

address. Section (c) If a pleading, motion, or other paper is not signed, the court shall strike it unless it is signed promptly after the omission is called to the attention of the attorney or defendant.

There is only one 5 year sentence orally pronounced in petitioner's sentencing and only one plea agreement signed and that for the cause# F09-59178. Therefore it has been decided that when there's a variation between the oral pronouncement of a sentence and the written memorialization of a sentence the oral pronouncement controls *Coffey v. State, 979 S.W.2d 326, 328 (Tex. Crim. App. 1998)*. The Trial court replaced the verbatim record for the fraudulent records which are not only inadmissible because of altering and reconstructing a government instrument; it's illegal! The court reporter is part of petitioner's Constitutional Right to Due

Process since he didn't waive court reporter via both Plea Agreements *2013 Tex. App. LEXIS 985 at*3*. The Trial Court denied him that right substituting with fraudulent written records. The 282nd District Court of Dallas is test the higher courts judgement forcing it to decide petitioner's habeas presumably by a silent and fraudulent record in part. This has also been a crime ignored by the U.S. Court of Appeals Fifth Circuit, see Appendix A

28 U.S.C. 2254 Section (g) states a copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

C. Remedies Exhausted

As of February 4, 2015 the petitioner has exhausted all of his state remedies at the state level under **2254(b) (1)** and there is obviously an absence of available state corrective process and that includes the existence of circumstances rendering such process ineffective to protect petitioner's *VI and XIV Constitutional Amendment Rights*. The Trial Court abused the title "Supplement" in Supplemental clerks records under *Texas Rule Appellate Procedure 34.6(d)* because it clearly states that a "court reporter" has to prepare, certify and then file those to the higher court including the omitted items. In the petitioner's case the official court reporter – Joseph Phillips-never heard of the petitioner period! (See Appendix F) That's until Mr. Phillips submitted the affidavit to Court of Criminal Appeals. That in itself proves the trial court had no intent to have a verbatim recording and the Official Court reporter verified that no substitute court reporter was available *Texas Rule Appellate Procedure 13*. These procedures are not general but specific in terms of protecting petitioner's Constitutional Right to Due Process and Fair Trial. The verbatim recording would have all the procedural errors of the counsel and the trial court during the early proceedings "negotiations" that shows the plea wasn't voluntary *Brady v. U.S. 397, U.S. 742 1970 via Memorandum of Law Application 2254* – Respondent is misleading asserting that it's not being addressed but in actually it was. The petitioner was literally forced into sentencing involuntarily. The majority of the supplemental clerk's records is inadmissible by way of fraud or

used to mask the fundamental procedures as if they were ever in place. The illegal government instruments proves that they petitioner deserves a reversal and to have both sentences vacated as the petitioner humbly request the fundamental structure of the trial court proceedings in terms of the fact that "All Parties" are to be present during the plea and sentencing and petitioner was deprived of the right. This includes the petitioner himself, the petitioner's counsel and an official court reporter to record and witness proceedings.

Texas Code of Criminal Procedure 42.03 Sect 1(a) clearly states except as provided in Article 42.14, sentence shall be pronounced in the defendant's presence.

D. Summary

It's not just a coincidence that the vial records used in sentencing that revolve actually around cause # F09-72634 are fraudulent, missing counsel signatures or more important missing verbatim recording of official court reporter. The truth of the matter is petitioner never received 5 years T.D.C. for cause # F09-72634 on New Year's Eve 2010. "The truth can stand completely alone without any help". In the trial courts case they continuously had to alter or manufacture records because to tell one lie through documents you have to tell yet another. It has long since decided under *Texas Code of Criminal Procedure 38.33* that to prove defendant's presence at a sentencing defendant is to be fingerprinted for each conviction, not one print for all convictions as the trial court did with the petitioner's certificate of thumb print abusing the law and its authority by counterfeiting those prints from

exactly the certificate of thumb prints on the cause # F09-59178. Why would the trial court have to ever commit fraud and identity theft if petitioner was present during sentencing for cause # F09-72634? By the way it just so happens that the Right to Appeal and Plea Agreement has no signature on them for cause # F09-72634 ironically. It's clear that the answer is the sentence wasn't orally pronounced in petitioner's presence.

Ex Parte Madding 70 S.W.3d 131, 136 (Tex. Crim. App. 2002) It violates a defendant's constitutional VI Amendment right to due process to orally pronounce a sentence to him and then later without notice to the defendant and without giving him an opportunity to be heard, enter a written judgement imposing a significantly harsher sentence.

In the Petitioner's petition he argues the fact that he was now present during the sentencing and the written judgement is absolutely VOID without proof that he was present. There's even 2 different Certificate of judgements for cause # F09-72634 used to satisfy each fabrication of sentencing

1. One submitted to the 5th District Court of Appeals 6-25-12
2. One submitted by Shara D. Saget (Assistant D.A.) on 7/25/14 in the State

11.07 response

CONCLUSION

This Writ of Certiorari is completely at the Supremes' Court mercy at this point. Clearly there has been no remedy or relief by Habeas on the state or Appeal in the Fifth Circuit. In fact the two have collaborated in a criminal act that has harmed Mr. Kelley and his family greatly. The judgement records on cause # F09-72634 are post-sentencing and after the act, particularly the record without the verbatim court reporters record could reflect anything the court chooses. In this instant case the written record is fraudulent; therefore it should hold no precedent value to uphold this illegal sentence. All Judges involved and the prosecutor are acting with "Impunity" with "Vindictive Prosecution" while willfully obstructing Justice in a transparent "Miscarriage of Justice." It was a continuity of Judge Jerry E. Smith to "Malicious" prosecution to circumvent Mr. Kelley's VI Amendment Due Process rights to uphold this illegal sentence resulting in a wrongful incarceration of four years on a sentence Mr. Kelley never received in court. The U.S. District Court mention in this Writ of Certiorari should be held liable for their own judgement in this matter. There is no excuse for the court to work against the laws of the land and our Justice System. The court should always have a word for word account of the record to protect the rights of a defendant in all courts. *Fifth Circuit Rule 11.2, 11.3*, therefore both sentences should have been vacated.

The petition for a writ of certiorari should be granted.

LEGAL STANDARD

It has been announced by the Supreme Court of the United States, Pro-Se` pleadings are to be held at less stringent standards than those pleading drafted by a trained attorney. The court must read pro-se` litigants submissions liberally and interpret them to raise the strongest arguments that they claim. *Haines v. Kerner*, 404 US 519 – (1972) 30 L. Ed. 2d. 652 92 S. Ct 594, 596 citing *Conley v. Gibson*, 355 U.S. 41, 45 46 (1957) 78. S Ct. 99,102, 21, 2d80, 84. The court found that if the court can reasonably read the pleadings to state a valid claim on which the “complainant” could prevail, it should prevail despite the complainant’s failure to cite proper legal authority, his confusion of various legal theories, his poor syntax, sentence construction and his unfamiliarity with pleading requirements generally. *Smith v. U.S* 561 F.3d 1090 (10th Cir. 2009), *Erickson v. Pardus* 551 U.S. 89 (2007) 94, 127 S Ct. 2197, 167 L. Ed. 2d. 1081