

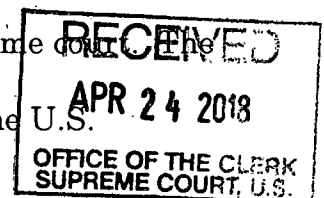
IN THE
SUPREME COURT OF THE UNITED STATES

Case No 17-7254

Certificate on Grounds

Pursuant to Rule 44 of this Court, Mr. James L. Kelley T.D.C.J. # 01894193 Pro-se` petitioner, hereby respectfully submits these intervening and extenuating circumstances of a substantial and controlling effects in this Petition for Rehearing.

This case warrants the exercises of this court's discretionary powers, and adequate relief cannot be obtained in any other form or from any other court. The Petitioner will prove that the Supreme Court should grant review, not only because the 5th Circuit Courts opinion is wrong but also because by doing so the court can clarify ambiguities in both Civil Rights, the Constitution and "National Courtroom Justice Security" in dealing with court records. The interpretation of modern law has clearly been jeopardized, if these lower courts have denied the petitioner the right to a court reporters record, in addition to committing another crime of fraud in the process. If this could happen to one person, who knows how many others have been affected by not having a court reporter record within the state of Texas or nationally across the U.S., If the Supreme court doesn't intervene, it will allow these criminal acts to continue to happen in other cases in the future. This is a model issue, that requires guidance to the lower court by the Supreme court. The ruling of the 5th Circuit Court of Appeal is not in agreement with the U.S.



clerk, appeals court, 5th Circuit Court of appeals? Are judges above the law, that they can falsify court documents?

3. 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)*. 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*

Certification / Declaration

Under penalty of perjury, I, James L. Kelley TDCJ #01894193, solemnly present this litigation which has criminal acts proven as fact committed by the original trial court against the petitioner in good faith and not for delay



TDCJ #01894193

No 17-7254

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

Vs.

LORIE DAVIS, TDCJ DIRECTOR, RESPONDENT

ON PETITION FOR A REHEARING

THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

James L. Kelley 01894193 – Pro-Se'

901 East 5th Street

Cleveland, Texas 77327

**NOTE –This litigation has criminal acts proven as facts committed by
original trial court against petitioner**

Pursuant to Rule 44 of this Court, Mr. James L. Kelley T.D.C.J. # 01894193 Pro-se` petitioner, hereby respectfully petitions for a rehearing of this case before a full nine-Member Court.

STATEMENT OF THE CASE

This case warrants the exercises of this court's discretionary powers, and adequate relief cannot be obtained in any other form or from any other court. The Petitioner will prove that the Supreme Court should grant review, not only because the 5th Circuit Courts opinion is wrong but also because by doing so the court can clarify ambiguities in both Civil Rights, the constitution and also "National Courtroom Justice Security" in dealing with court records. The interpretation of modern law has clearly been jeopardized, if these lower courts have denied the petitioner the right to a court reporters record, in addition to committing another crime of fraud in the process. If this could happen to one person, who knows how many others have been affected by not having a court reporter record within the state of Texas or nationally across the U.S. If the Supreme court doesn't intervene, it will allow these criminal acts to continue to happen in other cases in the future. This is a model issue, that requires guidance to the lower court by the Supreme court. The ruling of the 5th Circuit Court of Appeal is not in agreement with the U.S. Constitution. There are 2 main issues in this case that need to be address that not only harmed the petitioner but may have already harmed millions of others across the U.S.:

1. No court reporter in a court takes away defendant's right to appeal, because if there's no record it's no proof it happened. *Protect Our Water v. County of Merced*, 110 Cal. App. 4th 362, 364 (2003). *Foust v. San Jose Constr. Co.*, 198 Cal. App. 4th 181, 185-86 (2011)
2. Copying of Official Court documents, just adding on a case number or white out one case & replace with different case number. Why hasn't that thrown up any red flags in the eyes of the court from the file clerk, appeals court, 5th Circuit Court of appeals? Are judges above the law, that they can falsify court documents?

This case shouldn't have had to come to the Supreme Court, this should've & could've been resolved within the state of Texas. Obviously, there are some conspiracy going on across the state lines into Louisiana for the 5th Circuit Court of Appeals to overlook it also.

On March 5, 2018 this court denied the petitioners Writ of Certiorari at the cost of not only Mr. Kelley's U.S. Constitutional Rights and 4th, 5th, 6th & 12 Amendments Rights, but others sentenced after him in the same court who did not have the knowledge to fight for their rights. The question is : Does one person Constitutional Rights as a U.S. Citizen matter in the "Highest" Court of law including the effect it has on his family and loved ones? This case however does have a national significance that might harmonize obvious conflicting decisions in the Federal Circuits and even precedential values that the Supreme Court should address. These are also intervening & extenuating circumstances of a substantial and controlling effect in this petition.

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 petition 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 objective is to humbly come to the court to decide in Mr. Kelley’s favor in this Writ of Certiorari in lieu of *Supreme Court Rule 10; Federal Rule of Civil Procedure 60 (b) (1) (2) (3) (8) and (d)* pursuant to the *U.S. Constitutional Amendments IV, V, VI and XIV* on the cause of action against the Respondent for unlawful detention. There is no such genuine dispute as to any material fact and is entitled to a Judgement in the Petitioners favor as a matter of law. There is no evidence in the record amounting to the ultimate “Factum Probandum” for guilty plea on the cause# F09-72634 or any written record at all for that sentence in the 282nd District Court of Dallas to support the conviction and reason for detainment.

Neither the Respondent nor the Fifth Circuit Court of Appeal has or will address these questions in neither the Writ of Certiorari; nor the core issues specifically.

Fifth Circuit Rule 30.1.4 (a) (e) (f)

The Petitioner pleads with the Supreme Court to restore the standard and very Fundamental Rights of Due Process in the Court of Law for the petitioner. The respondent has shown by default or illegal justification that there is no possible legitimate adverse argument to the Writ of Certiorari,

1. There was no Court Reporter, so there's no record to review of any hearings.
2. The Plea Agreement (F09-72634) is fraudulent
3. The Certificate of Thumbprints (F09-72634) are fraudulent
4. No Defendant present for (F09-72634) at sentencing
5. No attorney of Record for (F09-72634) at sentencing (See Appendix G)

There are Constitutional and Statutory provision involved based on the Compulsory Process of the *VI Amendment of the Constitution* which guarantees effective assistance of counsel. *Supreme Court Rule 24.02 (b) (2)*, there's never a need for legal posturing in this case; there are multiple Constitutional violations.

In addition to that the petitioner was denied his Due Process Rights to a court reporter. This 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”. The fraudulent record only leads to support criminal penalties if a person knowing that an investigation or official proceeding is

pending or in progress...makes, present or uses any record, document or anything with the knowledge of it being false with the result being it deprived Mr. Kelley of 4 years of his life away from his family on a sentence he never received in court. The original Judge Andy Chatham of the 282nd District Court of Dallas has been accused of running one of the most inefficient courtrooms which includes failing to make records of all that transpires in his court, which Mr. Kelley has been victimize to and no telling how many others. (See appendix D)

1. Denied Court Reporter

- a. The Petitioner was denied one of his biggest Due Process Rights to a word for word record of the verbatim accounts of any of the hearings including the plea or sentencing.

*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

The U.S. Court of Appeals has so far departed from the accepted and usual course of judicial procedures by ignoring a straight forward Judgement in the petitioner's favor, *Supreme Court Rule 10*

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!

“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

- b. The U.S. Court of Appeals had an obligation under the *Court Reporter Act of the Fifth Circuit Judicial Council* to oversee the Court Reporters transcripts or lack thereof. The oral pronouncement is crucial to the petitioner's case. The order and judgement entered AFTER the original sentence has been imposed and therefore it is null and void. [*Ex parte Guerrero*, 521 S.W. 2d 613, 614 (Tex. Crim. App. 1975)] Further, a judge who makes an oral pronouncement of cumulating order, it must be stated of record in open court at the time of sentencing to be valid. [*Henson v. State* 638 S.W. 2d 504, 506 (Tex. App.-Houston 1st Dist.))1981 no pet] The oral pronouncement of the sentence is controlling rather than a later written declaration of the oral pronouncement. See *Banks v. State*, 708 S.W. 2d 460, 461-462 (Tex. Crim. App. 1986) Thus, when the oral pronouncement of sentence and the written judgement vary, the oral pronouncement controls. *Coffee v. State* 979 S.W. 2d 326, 328 (Tex. Crim. App. 1998), *Ex Parte Madding* 70 S.W. 3d 131, 135 (Tex. Crim. App. 2002). The oral pronouncement that sentences will run concurrently controls over written judgement stating they are consecutive.
- c. In the instant case, the petitioner only received one sentence in open court. The original trial court imposed a sentence that never existed in open court. Without court reporter's transcripts the court was allowed to simply manipulate the judgement records to enforce whatever it chooses without Due Process of Law when the court has ruled a plea and sentence shall be on record. *Fed. Rule Civ. Proc. 11*. The official Court Reporter for the 282nd Dist. Court of Dallas, Joseph Phillips has submitted an affidavit to all courts to show there was no court reporter present at any of the proceedings. (See Appendix F) The D.A.

acknowledges there was no court reporter. *Kelley vs. State 2013 Tex. App. Lexis 985, *3*. The court reporter is very much a part of the “Fundamental and Essential” structure in the court procedures that should never be neglected by the court. The U.S. Court of Appeal 5th Circuit failed to rule properly on the petitioner’s appeal. There are serious Constitutional violations against the petitioner that are also transparent to ensure his Due Process Rights of the Sixth Amendment of the Court.

“The Sixth Amendment Violation” pervades the entire proceeding and the harmless error analysis is inapplicable and the violation is enough to overturn the conviction regardless of the severity of the results.

- d. In the Petitioners case a lot has occurred, in the four years on a sentence never received in court, with the loss of love one, time away from kids as well as mental anguish. This has cause great harm to the petitioner, also including divorce and loss of property.

Fifth Circuit Rule 30.1.4 (a) (e) (f) states a copy of relevant pages of the transcript is necessary when the Appeal challenges the admission or exclusion of evidence and the essential pleadings or relevant parts of any written exhibit must be addressed by the Judge if challenged.

In this case Mr. Kelley challenged the only “written record” as fraudulent but the Judge of the Fifth Circuit presiding chose to ignore or conspire to the original criminal act. In addition to, the respondent to the “Writ of Certiorari” is also taking the “Justice” completely out of

the “Justice System” that our forefathers fought hard to put in place by going against the Constitution our country is founded upon. *Fourth, Fifth, Sixth and Fourteenth Constitutional Amendments*

2. Fraudulent Court Records

- a. The records for cause # F09-72634 quite simply are fraudulent. The criminal act should never be the actions of a Court of Law that we depend on for Justice. The U.S. Court of Appeals Fifth Circuit had the opportunity to grant relief since the court knew the record was fraudulent because the same record was the only record used in the judgement. The Petitioner has grounds for relief under Federal Rules of Civil Procedure 60 (b) (3) (4) because there was apparent fraud, misrepresentation or misconduct by the opposing party, therefore they judgement is VOID. The petitioner has made this argument in every court leading up to the Writ of Certiorari. These are not implications; all courts know and are aware of these fraudulent records used to imprison the petitioner. *See appendix G of Writ of Certiorari, There is a redundancy in stating the obvious for the records on cause # F09-72634. 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 Writ of Certiorari's Appendix).*

- b. 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. The prints for cause # F09-72634 are counterfeit by using the same identifying markings by X and Y axis from the Certificate of Thumbprint from 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 a defendant was present for sentencing which obviously Mr. Kelley was not present because then there would be no reason to falsify the document.

3. Ineffective Assistance of Counsel

- a. There is no other definitive definition of insufficient counsel than that of an attorney not attending the plea hearing or sentencing. 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). He did not sign the plea agreement or any other document for cause # F09-72634 required. *Tex. Code of Crim. Proc. 1.052(a); Fed. Rule of Civil Proc. 11(a)*, Logic must be applied when asking why the attorney signed one plea agreement and not the other (F09-72634). The answer is the sentence never existed. That is negligence by counsel.
- b. The entire failure by the court and Mr. Jeffrey for not objecting in order to have a court reporter and to address the core concerns of the procedural rules even if Mr. Kelley received a copy of information and stated that he had ample time to go over it with Mr. Jeffrey. *Cf. US v. Shacklett, 921 F. 2d 580 - Court of Appeals, 5th Circuit 1991* Mr. Jeffrey's bad faith and deficient performance is apparent when he agrees that he failed to sign the fundamental plea agreement on F09-72634 but however attempts to depend on Mr. Kelley's and the prosecutor's signature as a true certificate with the knowledge of falsity, Mr. Jeffrey presented a fraudulent government record. *Texas Penal Code 37.01(2) (A) (B) (C)* with intent that it be taken or given the

same legal effect as a record of the court. *Texas Penal Code 37.10(a) (1) (2) (5); also see Texas Penal Code 37.13(a) (2)*

- c. Mr. Jeffrey KNEW that Mr. Kelley PRINTS and signature was forged. *Texas Penal Code 32.21(a) (1) (A)* and that Mr. Kelley didn't authorize it. Those PRINTS and signature was executed at a time and place or in a numbered sequence other than was in face the case and purports that it is a copy of an original when no original existed for the Certificate of Thumbprint, Plea Agreement, and Motion to Appeal or Right to Appeal on cause # F09-72634. See *Id 32.2(a) (1) (A)*; also see *Texas Penal Code 37.09*. Trial counsel failed to ascertain that Mr. Kelley's Plea was voluntary and knowingly made. *cf Rhodes v. Estelle, 582 F. 2d 972 - Court of Appeals, 5th Circuit 1978*.
- d. The fact is the defendant never agreed to plead guilty to fraud use/Poss. of I.D... Mr. Jeffrey's deficient performance has a Sixth Amendment significance, *Strickland v. Washington 466 U.S. 668 (104 S.Ct. 2052, 80 L.Ed.2d 674)*. The standard for determining prejudice in an ineffectiveness case during the Plea Bargain Process was established in *Missouri v. Frye, 132 S. Ct. 1399 - Supreme Court 2012* and *Lafler v. Cooper, 132 S. Ct. 1376 - Supreme Court 2012*. Additional jail times also has a 6th Amendment significance *Boykin v. Alabama 395, U.S. 238, 243 (1969)* Mr. Kelley would have went to trial had his attorney performed within his duty and afforded him to participate in the guilty plea personally thus Mr. Jeffrey should be held in contempt.

CONCLUSION

Mr. Kelley is entitled to relief by his right to Due Process, Effective Assistance of counsel, the right to notice of allegations against him and the right to face his accusers in Open Court because the undisputed facts in this case and the Writ of

Certiorari evidence conclusively established and disprove each essential element of a guilty plea/plea agreement. Mr. Kelley is entitled to no evidence by “No Court Reporter” or “Transcripts to adhere to the word for word account of any hearings for cause# F09-72634. It is the duty of the court to provide that Due Process Right to a record and not abuse it’s authority with falsified records since the state has on record stated Mr. Kelley did not waive his rights to a court reporter 2013-Texas App. Lexis 985*3. These facts should be taken LITERALLY and not solely allegations. In this Writ of Certiorari facts and circumstances dictate but one rational decision under unequivocal, well settled (i.e., from extant statutory, constitutional and case laws sources and clearly controlling legal principles). The petitioner, Mr. Kelley, has proven the harm and the despair caused by the Fifth Circuit Judges in this Writ.

PRAYER

The petitioner prays that this Writ of Certiorari be taken into consideration and is also granted. This Pro-Se litigation is presented with all due respect in hopes it is taken in good faith. *Luke 18:6-8 (NIV) And the Lord said, “Listen to what the unjust judge says. ⁷ And will not God bring about justice for his chosen ones, who cry out to him day and night? Will he keep putting them off? ⁸ I tell you, he will see that they get justice, and quickly. However, when the Son of Man comes, will he find faith on the earth?”*

RELIEF SOUGHT

The Petitioner prays the Supreme Court intervenes by reversing and vacate both sentences by Summary Judgement under its own jurisdiction by law.

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. Keaner*, 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 “petitioner” could prevail, it should prevail despite the petitioner’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

INMATE DECLARATION

I, Mr. James L. Kelley T.D.C.J. # 01894193, petitioner-pro-se` declare under penalty of perjury that according to my strongest belief, the facts stated in this brief are true and correct.

A handwritten signature in cursive script, reading "James L. Kelley". The signature is written in dark ink and is positioned above the printed name.

Mr. James L. Kelley, Petitioner-Pro-Se

The petitioner certifies that this document contains 3,875 words which include all 16 pages according to the Microsoft Office word count. The font is Century Schoolbook 12 point.