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STATE OF MONTANA

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IN THE SUPREME COURT OF THE STATE OF MONTANA

SUPREME COURT CAUSE No. _____

GERALD J. STIFFARM,	)	CAUSE No. DC-06-010
Petitioner,	)	DC-04-026
v.	)	
	)	PETITION FOR WRIT
STATE OF MONTANA,	)	
Respondent.	)	OF HABEAS CORPUS

COMES NOW, GERALD J. STIFFARM, Petitioner, in the above named caption respectfully submits the foregoing WRIT OF HABEAS CORPUS to inquire into the legality of the above named Cause No.s DC-06-010 and DC-04-026 where the subject matter contained within the original plea agreement is unlawful and has subjected the Petitioner to a MANIFEST MISCARRIAGE OF JUSTICE.

The Petitioner has been unlawfully imprisoned and restrained of liberty in violation of settled and statutory Montana Laws along with jurisdictional defects and errors.

The State has used an uncounselled prior conviction

namely April 15, 1993, of Partner/Family Member Assault (PMFA) in violation of § 45-5-206 MCA to elevate Cause No. DC-04-026 to a felony. Well settled Montana Law does not permit the State to use uncounselled prior convictions for that purpose. The Petitioner has never been informed nor made aware of this fact of Montana Law prior to August 26, 2004, day set for trial, and it was certainly never revealed to District Court that the April 15, 1993, prior conviction was uncounselled. This illegal elevation of DC-04-026 to a felony is an <u>unlawful act</u> that appears to have taken jurisdiction away from District Court because <u>all</u> court procedures thereafter are based exclusively on and derive from the illegal enhancement of Cause No. DC-04-026 to a felony... And <u>is</u> the controlling issue on which the object of the plea agreement is based.

The Petitioner enters a plea agreement with the State in Cause No. DC-04-026 on August 26, 2004. This agreement, which the State has based exclusively on the unlawfully elevated charge of (PFMA) during the plea process, <u>must be lawful when it is made</u>... See § 28-2-602 MCA and to be enforceable must have a lawful object.

Subsequently, the Petitioner was charged with failure to register as a violent offender Cause No. DC-06-010 in violation of § 46-23-504 MCA. The requirement to register being a provision of the DC-04-026 agreement, added by the Court.

Although, the State threatens the Petitioner with a Persistent Felony Offender (PFO) designation charge to get the Petitioner to admit to the violation of the suspended sentence for DC-04-026, the Petitioner was exempt from any

stipulations of the original plea agreement because it has for it's primary object an illegally elevated charge of (PFMA). An elevation that is contrary to Montana Law that prohibits the use of uncounselled prior convictions for enhancement purposes. In which case Cause No. DC-04-026, according to Montana Law, is essentially a second offense (PFMA) a misdemeanor. A second offense (PFMA) does not require an offender to register under § 46-23-504 MCA. District Court lacked the authority to enforce the requirement to register as a violent offender, Cause No. DC-06-010, because it is in fact a provision of an unlawful DC-04-026 agreement.

Since the plea [a]greement for DC-04-026 derived from the unlawful enhancement of the (PFMA) charge the agreement itself is illegal. Any court proceedings based on the unlawful agreement of DC-04-026 must also be unlawful and the outcome therefrom must be invalid. This would also include the hearing held on August 26, 2004, where the agreement itself had to have been legal before that day... § 28-2-702 MCA exempts the Petitioner from any responsibilities of the unlawful agreement in which the object is in violation of policy of the law. This must also mean the requirement to register as a violent offender Cause No. DC-06-010.

GROUNDS FOR RELIEF

GROUND ONE: The plea agreement for DC-04-026 is unlawful it is based on an illegally elevated charge of (PFMA). No part of an agreement must be unlawful. This is a result of a "DUE PROCESS" violation and ineffective assistance of counsel.

GROUND TWO: An obligation of an unlawful agreement

in DC-04-026 is not enforceable. A party can not be held responsible to abide by an unlawful agreement.

GROUND THREE: The pleas enterred in Cause No. DC-04-026 and Cause No. DC-06-010 can not be considered voluntary, Knowing and intelligent they were enterred under threat and misleading advice and false pretenses.

FACTS

On August 26, 2004, day set for trial, Petitioner appears in the Twelfth Judicial District Court with appointed counsel, Randy Randolph, the State appears through, Gina Bishop, Deputy Hill County Attorney. In the proceeding the Petitioner enterred a plea agreement with the State for a charge by information, where no probable cause hearing was conducted, of Partner/Family Member Assault (PFMA) third or subsequent offense in Cause No. DC-04-026 a felony in violation of § 45-5-206 MCA. The State has relied on two prior convictions of April 15, 1993 and March 14, 1995 to justify the elevation of DC-04-026 to a felony.

On December 9, 2005, the Petitioner, again, appears with appointed counsel, Randy Randolph, for entry of judgment, the State appears through Gina Bishop, Deputy Hill County Attorney. The Petitioner was sentenced to (4) four years in the Montana State Prison (MSP) with all but 76 days suspended.

Subsequently, on January 20, 2006, the State petitions the Court for revocation of the (4) four year (MSP) suspended sentence and charges the Petitioner with failure to register as a violent offender in violation of § 46-23-504 MCA,

Cause No. DC-06-010.

On February 24, 2006, the Petitioner appears with counsel, Randy Randolph, for entry of plea and judgment for Cause No. DC-06-010 the State appears through Gina Bishop Deputy Hill County Attorney. The Petitioner is resentenced for Cause No. DC-04-026 to a (4) four year Department of Corrections (DOC) committment. To run consecutive to that sentence was a (5) five year (DOC) committment which was suspended in Cause No. DC-06-010.

Now, as of February 5, 2010, the DC-06-010 suspended sentence has been revoked and has commenced with a disposition of (5) five years with the (DOC) with (3) three years suspended.

MEMORANDUM IN SUPPORT OF HABEAS CORPUS

The Petitioner asserts that settled and statutory Montana Laws control the issues herein... For the integrity of the judicial process the Petitioner respectfully requests that the principles and standards of law setforth in State v. Lenihan and State v. Southwick (2007) be considered and applied when hearing this WRIT OF HABEAS CORPUS submitted here..."We have also noted that, '[c]onventional notions of finality of litigation have no place where life and liberty are at stake and infringement of constitutional rights is alleged.'". Kills On Top v. State, 279 Mont. 384, 402, 928 P.2d 182, 192. (1996)

The Petitioner asserts that a <u>plea agreement</u> is an <u>agreement</u> that requires the parties involved to be held responsible to perform certain duties and at the sametime

these provisions prohibit these parties from doing certain things... See, § 28-2-101 MCA which reads;

§ 28-2-101 MCA, Contract defined: A contract is an agreement to do or not to do a certain thing. (Emphasis)

Further... See also § 28-2-102 MCA which reads;

§ 28-2-102 MCA, Essential elements of a contract. It is essential to the existance of a contract that there be;

(1) identifiable parties capable of contracting;
(2) their consent;
(3) a lawful object; and
(4) sufficient cause or consideration.

The Petitioner asserts that the object contained within the plea agreement/contract for DC-04-026 is unlawful... See, § 28-2-701 MCA.

§ 28-2-701 MCA. What is lawful. That is not lawful which is;

(1) contrary to an express provision of law;
(2) contrary to the policy of express law, though not expressly prohibited; or
(3) otherwise contrary to good morals.

The agreement for DC-04-026 has for an object; that which is contrary to well settled Montana law, an unlawfully enhanced charge of (PFMA) to a felony. Where the State has used the uncounselled prior conviction of (PFMA), namely April 15, 1993, to elevate Cause No. DC-04-026 to a felony ..."The State cannot use uncounselled prior convictions for elevation purposes.", State v. Kvislen, (2003) MT 27; 314 Mont. 176; 64 P.3d 1006; 2003 Mont LEXIS 26. See also, Exhibit "A" ACKNOWLEDGEMENT OF WAIVER OF RIGHTS BY PLEA OF GUILTY, pg. 3, ¶10, Lines 23-25; shows that during the plea process the State infact has relied on the constitutionally

infirm April 15, 1993, conviction to support the elevation of Cause No. DC-04-026 to a felony... See, Exhibit "B" Havre City Court Ticket. The ticket points out the fact that counsel on April 6, 1993 withdrew.

> §46-8-101 MCA, Right to Counsel.
>
> (1) During the initial appearance before the court, every defendant must be informed of the right to counsel and must be asked if the aid of counsel is desired.
>
> (2) If the defendant desires assigned counsel because of financial inability to retain private counsel and the offense charged is a felony or the offense is a misdemeanor and incarceration is a sentencing option if the defendant is convicted, the court shall order the office of state public defender, provided for in 47-1-201, to assign counsel to represent the defendant without unnecessary delay pending a determination of elegibility under the provisions of 47-1-111.,

Counsel abandon his client just prior to a very critical stage in the proceedings when guilt and punishment were to be determined, "A defendant has the right to be accompanied by counsel at every critical stage." Ranta v. State (1998). Montana Law demands that Cause No. DC-04-026 could not have been a felony but a second offense (PFMA) a misdemeanor.

"We concluded, that based on Okland's direct evidence that he was convicted without the benefit of counsel and that he did not waive his right to counsel the burden shifted to the State to present direct evidence that Okland's prior conviction was not entered in violation of his right to counsel and that the State failed to meet that burden. Accordingly,

we hold that the District Court did not err when it dismissed the felony D.U.I. charge against David Matthew Okland."... See, State v. Okland... Also see, State of Montana v. Thomas Charles Jenni.., "The record is silent and waiver of counsel from such a silent record is impermissible." (Emphasis Added)

The Petitioner asserts that although he agreed to having two prior convictions of (PFMA), namely April 15, 1993 and March 14, 1995, (See, Exhibit "A", pg. 3, ¶10, Lines 23-25), he was not once told by anyone that Montana laws prohibit the State from using prior convictions that were entered without the benefit of counsel to be used for enhancement purposes. (St. v. Kvislen, St. v. MANN, St. v. Snell). Had the Petitioner been made aware of this fact of law he would have maintained his general denial of the felony charge of (PFMA). Appointed counsel's failure / neglect to advise the Petitioner of this fact of law does not give the State permission to use the prior uncounselled conviction to enhance DC-04-026 to a felony nor does it righten the State's unlawful act. The Petitioner must not be made to agree with nor be held responsible for the unlawful act committed by the State. It must have been appointed counsel's constitutional duty..."to advocate on the behalf the defendant to meet, test, and refute the case of the prosection." State v. Henderson, 2004 MT 173; 322 Mont. 69; 93 P.3d 1231; 2004 Mont. LEXIS 261. The Petitioner and the Court must be informed of any possible defenses. The plea agreement entered in Cause No. DC-04-026 cannot be considered [voluntary] because it is in violation of §28-2-405 MCA.

> §28-2-405 MCA. What constitutes actual fraud. Actual fraud, within the meaning of this part, consists in any of the following acts committed by a party to the contract or with his connivance with intent

to decieve another party thereto or to induce him to enter into the contract:

(1) suggestion as a fact of that which is not true by one who does not believe it to be true;

(2) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

(3) the suppression of that which is true by one having knowledge or belief of the fact;

(4) a promise made without any intention of performing it; or

(5) any other act fitted to decieve. (Emphasis Added)

The Petitioner asserts that even though the element of the crime is denied, (Henderson), in open court when he stated, "I did not hit her.", where in a written statement the State's witness has stated that the Petitioner has hit her not once but twice. The alleged victim has not stated anything other than being hit and must not be assumed that anything else has happened, the agreement/contract has already been in violation of § 28-2-602 MCA which reads:

§ 28-2-602 MCA, Essential characteristics of object. The object of the contract must be lawful when the contract is made and possible and ascertainable, by the time the contract is to be performed. Everything is deemed possible in the nature of things.

Any court proceedings based on the unlawful plea agreement must also be illegal because the agreement itself is based exclusively on the illegal elevation of DC-04-026 to a felony. The remedy of appeal can not have been exhausted because the agreement/contract is VOID before any court proceeding, deriving from the unlawful DC-04-026 agreement, could have taken place

and is in violation of § 28-2-405 MCA. The consent in this case is not free nor real... See, § 28-2-401 MCA which reads:

> § 28-2-401 MCA, When apparent consent not free:
>
> (1) an apparent consent is not real or free when obtained through (a) duress, (b) menace, (c) FRAUD, (d) undue influence; or (e) mistake;
>
> (2) consent is deemed to have been obtained through one of the causes mentioned in subsection (1) only when it would not have been given had such cause not existed.

The Petitioner asserts that the conviction for Cause No. DC-06-010 failure to register as a violent offender in violation of § 46-23-504 MCA is hollow because of three reasons which are:

- (1) Cause No. DC-06-010 is in fact a provision of the unlawful DC-04-026 plea agreement. According to § 28-2-702 MCA the Petitioner has been exempt from any responsibilities thereof even before any court proceedings had taken place... the DC-04-026 agreement, before any court procedures had begun, is in violation of § 28-2-102 MCA(3) and is VOID.

See § 28-2-803 MCA, which reads:

> § 28-2-803 MCA, The consideration of a contract must be lawful within the meaning of § 28-2-701. If any part of a single object is unlawful the entire contract is VOID. (Emphasis Added)

See also § 28-2-603 MCA, reads:

> § 28-2-603 MCA, When a contract wholly void. Where a contract has but a single object and such object is unlawful, whether in whole or in part, or wholly impossible of performance or so vaguely expressed as to be wholly unascertainable, the entire contract void.

- (2) The State has abused the Persistent Felony Offender (PFO) designation charge using it as a threat to ensure a plea of guilty. (Henderson). See Exhibit "C"
- (3) Had DC-04-026 not been illegally elevated to a felony (Kristen) the charge of (PFMA) would have been, according to Montana law, a second offense (PFMA) a misdemeanor. A second offense (PFMA) does not require the offender to register as a violent offender..."A district court only has the authority to impose a sentence based on the authority granted by applicable statute. Any sentence that exceeds such authority is illegal and facially invalid." State v. Southwick, 2007 MT., ¶ 26, 339; Mont. 281, 169 P.3d 648.

The plea in DC-06-010 can not be used to strengthen the plea agreement entered, in DC-04-026, on August 26, 2004, because the requirement to register is a responsibility of the unlawful DC-04-026 agreement. The Petitioner is exempt from any obligations of the unlawful DC-04-026 agreement., See § 28-2-702 MCA which reads:

> § 28-2-702 MCA, Contract which violate policy of the law-exemption from responsibility: All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, for willful injury to the person or property of another, or for violation of law, whether willful or negligent, are against the policy of law.

CONCLUSION

In order to make the point brought here for lack of legal assistance, which District Court denied, and legal "Know how"

the Petitioner has retraced actual court proceedings and events pertaining to Cause No. DC-04-026 because it is the controlling issue in this matter and is the unlawful basis for the proceedings leading to DC-06-010. Infact all court proceedings derive from and are based upon the illegally enhanced charge of (PFMA) contained within the DC-04-026 plea agreement.

For wanting of conviction the State promises a leanient sentence, but along with appointed counsel the State either deliberately withholds the fact that the [constitutionally infirm] prior conviction of April 15, 1993, had been used to support the elevation of DC-04-026 to a felony... IS in violation of § 28-2-405 MCA. What constitutes actual fraud; OR is a fundamental mistake in the absents of a preliminary / probable cause hearing... See, Montana Constitution (1972) Article II Section 20, "Initiation of Proceedings"... Also see, State v. Strobel, (1994) 268 Mont. 129; 885 P.2d 508; 51 Mont. St. Rep. 1214. A preliminary / probable cause hearing is an essential part of the "Due Process" clause and an essential element for Fundamental Fairness... Such a proceeding would have brought the uncounselled prior conviction of April 15, 1993 to the attention of the District Court preventing the MISCARRIAGE OF JUSTICE the Petitioner has been subjected to.

In addition. Had Petitioner's appointed counsel not failed or neglected to adequately investigate the matter, before insisting the Petitioner plead guilty to the illegally enhanced felony charge of (PFMA), indeed prejudiced the Petitioner... "If the court, the prosecutor, defense counsel or some other party induced the guilty plea, however slightly, by threats or promises or misrepresentation then that evidence indicates involuntariness.", State v. Lone Elk, 2005 MT. 56, 21, 326 Mont. 214, 108 P.3d 500.; State v. Henderson, 2004 MT 173; 322 Mont.

69; 93 P.3d 1231; 2004 Mont. LEXIS 261..., "The overarching duty of a criminal defense counsel is to advocate on behalf of the defendant to meet, test and refute the case of the prosecution.". Here in Cause No. DC-04-026 Petitioner's defense counsel after coaching the Petitioner into entering a plea agreement after stating that there was no chance of winning at a trial, that my arrest record alone was enough to convict and that a loss at trial, which the Petitioner did infact say he wanted, would invoke a substantially harsher sentence. Petitioner's counsel never once mentions that fact that well established Montana Law prohibits the State from using the April 15, 1993 uncounselled conviction and has shown the Court no proof that the matter was researched. "Indeed, he did nothing more than request a plea agreement and facilitated the conviction of his client without a trial." State v. Henderson, (supra). Defense counsel should have exercised his constitutional obligation and... "done more than merely accompany the accused to court." (Henderson)

In State v. Bowley, 282 Mont. at ___; 938 P.2d at 599, "[A] plea agreement presupposes fundamental fairness in the process of securing such an agreement between the defendant and the prosecutor." This has not been the case in Cause No. DC-04-026., See, State v. Schaff, (1998), ¶ 30, 288 Mont. 421; 958 P.2d 685; 55 St. Rep. 396, "absent some legitimate infirmity in the plea process itself, a criminal defendant cannot simply change his mind and back out of an otherwise voluntary plea agreement." Here the Petitioner's plea was influenced, (State v. Lone Elk), and the fundamental fairness has been impinged. Petitioner's counsel for DC-04-026 did not dispute anything the State has done, such as, use the constitutionally infirm prior conviction of April 15, 1993 for enhancement. Appointed counsel in both Cause No. DC-04-026 and DC-06-010 has

acted merely as a messenger of the State relaying only what the State intended to do, when it was convenient for him to do so.

In any event the Petitioner has entered the original agreement of DC-04-026 influenced by constitutionally unsound advice and false pretenses. This DC-04-026 plea agreement is in violation of §§ 28-2-405 and 28-2-401. In the agreement for DC-04-026 the State has in the plea process used the uncounselled conviction of April 15, 1993 for the unlawful elevation of DC-04-026 to felony (kvisten). The plea entered in the agreement <u>cannot</u> be constituted as voluntary, knowing and intelligent because neither the consequences nor the Montana law prohibitting the State from using uncounselled convictions for enhancement purposes were ever explained or used as a possible defense. Infact counsel for both parties construct an agreement during the plea process have withheld from the Petitioner and District Court the unlawful basis of the plea agreement.

According to Montana laws the Petitioner is exempt from any and all responsibilities of the <u>unlawful agreement</u> for DC-04-026... See; § 28-2-702 MCA. Also an agreement based on an illegal act must not be valid or legal. One of the main responsibilities of this DC-04-026 agreement, which is not lawful, was to register as a violent offender Cause No. DC-06-010. Although § 28-2-702 MCA exempts the Petitioner from that responsibility the DC-04-026 plea agreement itself is in violation of policy of the law and has been <u>void</u> before any court actions... See also §§ 28-2-603 and 28-2-803 MCA.

Therefore, Cause No DC-06-010 failure to register as a violent offender must also be <u>void</u>, because it is completely reliant for its very existence and is a stipulation of the

unlawful DC-04-026 plea agreement.

In State v. Garrymore, 2006 MT 245; 334 Mont. 1; 145 P.3d 946; 2006 Mont. LEXIS 468, Garrymore argued that District Court imposed a sentence enhancement which was impermissible... and in Vance v. Acton, 2001 MT 243; 307 Mont. 71; 36 P.3d 881, District Court lacked the authority to revoke a suspended sentence illegally imposed... Here in DC-04-026 the State offered an invalid plea agreement where the District Court lacks the authority and jurisdiction to enter into an unlawful agreement. The District Court must also lack the authority to enforce the provisions of such an unlawful plea agreement... However the DC-04-026 plea agreement is already VOID because it is in violation of § 28-2-602 MCA... See also, §§ 28-2-603 and 28-2-803 MCA. It appears that District Court lacks the authority to invoke action on an unlawful act committed by the State.

To continue to hold the Petitioner responsible for obligations of an unlawful plea agreement must be both unacceptable and unenforceable by law and would allow the State to violate the very laws it is destined to uphold.

The Petitioner is imprisoned for pleas entered under false pretenses and threat. Plea[s] that cannot be constituted as voluntary, Knowing and intelligent for Cause No. DC-04-026 and DC-06-010. The Petitioner must be delivered from the illegal imprisonment and unlawful restraint of liberty. Although the Petitioner has already been subjected to constitutional injury and irrepairable harm, the time the Petitioner has been unlawfully imprisoned and restrained of liberty must not be ignored and the overall situation returned to STATUS QUO.

The PLEAS entered in both Cause No. DC-04-026 and DC-06-010 must be allowed to be withdrawn.

A new trial for a second offense (PFMA) in Cause

No. DC-04-026 must be GRANTED and Cause No. DC-06-010 failure to register as a violent offender, which is a requirement of the unlawful DC-04-026 plea agreement, must be VOID and VACATED!

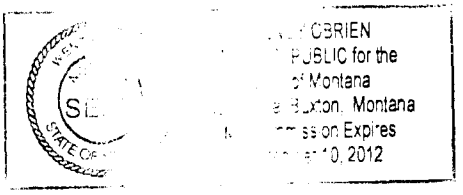
The Petitioner prays this Court has a speedy remedy to this MISCARRIAGE OF JUSTICE.

OATH OF PETITIONER

I, the above named Petitioner, being duly sworn have read the foregoing WRIT OF HABEAS CORPUS and know the contents thereof and know them to be true and accurate to the best of my knowledge and belief.

Dated this 18 day of June, 2010.

Petitioner

Wendy O'Brien
Notary Public

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