IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No: DA 19-0334

State Of Montana;	§	Flathead County District Court
Plaintiff/Appellee	§	No.18-125 (B)
-vs-	§	
Cecil Lee Russell:	§	
Defendant/Appellant	§	Appellant's Opening Brief
	§	

On Appeal From The Montana Eleventh Judicial District Court;
Flathead County, Montana;
The Honorable Robert Allison, Presiding

APPEARANCES

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Submitted on this the 15th day of November, 2019

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Statement of the Issues.

1-i Whether a District Court may proceed after an accused has challenged the Court's jurisdiction for cause?

1-ii Did the District Court's abuse its discretion, in refusing to prove jurisdiction after Appellant had challenged the Court's personal or subject matter jurisdiction, and render all subsequent Court action Void?

1-iii) Whether the State possess lawful standing to initiate a criminal information where the allegations constituted fabrications by the government?

2-i) Whether a constitutionally infirm prior conviction for a listed sex offense triggers a requirement to register as a sex offender in Montana?

2-ii) Can the state sustain a requirement to register as a sex offender in Montana when the existing alleged prior conviction is constitutionally infirm?

3) Does the District Court abuse its discretion where it fails to bring timely filed pre-trial motions: to wit:

i) Motion to Dismiss – [Trl Rec. #21]
ii) Motion for Franks Hearing - exhibit 1 [1]
iii) Motion in Limine - [Trl Rec. #33]
iv) Petition for Writ of Habeas Corpus - exhibit 2
v) Motion for Additional Discovery - [Trl Rec. #28]

for a hearing on the merits?

4) Does the refusal of the District Court to convene a hearing for pre-trial motions to wit:

i) Motion to Dismiss – [Trl Rec. #21]
ii) Motion for Franks Hearing - exhibit 1
iii) Motion in Limine - [Trl Rec. #33]
iv) Petition for Writ of Habeas Corpus - exhibit 2
v) Motion for Additional Discovery - [Trl Rec. #28]

deprive Appellant of Due Process of Law and a fair trial?

5) Does the fabrication of evidence by the State deprive Appellant of Due Process of Law under the Fifth and Fourteenth Amendments to the US Constitution and Article II Section 17 of the Montana Constitution?

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1) Franks v. Delaware; 438 US 154, 98 S. Ct. 2674, (1978);—The Flathead County Clerk didn't include the Franks Hearing motion in the Court record Appellant paid for. Appellant has included the States response as exhibit 2.

6) Is the Alford Plea [2] entered by the Appellant a valid plea where the State and District Court deprived Appellant of Due Process of Law?

7) Was Appellant deprived on constitutional effective assistance of counsel where counsel made no effort to investigate the law and the facts of the case or to prepare any defense?

8) Did the District Court abuse it's discretion for failure to comply with Mont. Code Ann. § 46-23-509(5)?

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2) North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160 (1970)

Statement of the Case:

Appellant/Defendant appeals the conviction in DC-18-125(B) [Trl. Rec. #37], pursuant to M.C.A. § 46-20-104.

Appellant was charged in the Eleventh Judicial District Court, with Failure To Register As A Sex Offender in violation of Mont. Codes Ann. §§ 46-23-504 and 46-23-505. [Trl. Rec. #1]

The State alleged that Appellant had been convicted in 2008 in Potter County, Texas for the offenses of Indecency with a Child and Sex Offense Against a Child. [3] Neither of these convictions has ever existed.

At the initial appearance, the Magistrate stated that the hearing was just to accept a plea, set a bail amount and determine whether Appellant had counsel or needed the appointment of counsel, ignoring Appellants right to a Franks hearing and refused to prove jurisdiction or that Probable Cause existed to detain Appellant.

Mr. William Managhan, was appointed as counsel. [Trl. Rec. # 8].

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3) There is no statute in Texas "Sex Offense Against A Child." There is no arrest record, allegation, counsel of record, indictment, initial appearance, court of record, arraignment, plea, trial, finding of guilt or judgment of conviction against Appellant in Potter County, Texas (or any other jurisdiction) in 2008.]

At the arraignment hearing, Appellant instructed counsel to enter no plea, challenging the Court's jurisdiction as no Probable Cause existed to detain Appellant.

The District Court ignored Appellants' jurisdictional challenge and entered a plea of not guilty without Appellant's permission and without proving jurisdiction or Probable Cause.

Throughout counsel's representation, counsel refused to investigate the fabricated allegations contained in the States' Affidavit In Support, the lack of jurisdiction or the lack of Probable Cause; counsel refused to investigate the constitutional law governing a void judgment from a sister state; refused to file the motions instructed by Appellant until Appellant was forced to dismiss the counsel and proceed pro se'. [Trl. Rec. #14].

The only conviction on record in Texas for a listed offense, which could arguably require Appellant to register as a sex offender is a 1988 conviction for "Indecency with a Child" which judgment of conviction is a null, void and invalid judgment of conviction. [exhibit 1]
(Appellant's Texas counsel had instructed Appellant to enter a plea of guilty to an offense where the trial court imposed an illegal sentence, a sentence counsel had advised to Appellant was a legal sentence. [exhibit 1] [4])

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4) Strickland v. Washington; 466 US 668, 104 S. Ct. 2052, (1984)
State v. Henderson; 93 P. 3d 1231, 322 Mont. 69; (2004)

Summary of Argument:

- District Court does not acquire personal or subject matter jurisdiction from fabricated allegations.
- The District Court ignored its obligation to prove it possessed jurisdiction over Appellant after jurisdiction was challenged
- Denial of Due Process.
- Arrest Warrant did not identify Appellant as the person to be arrested, violating Appellants Fourth Amendment right to be free from unlawful seizures.
- The fabrication of evidence presented by a prosecutor in an Affidavit In Support Of Motion For Leave To File An Information does not establish constitutional personal or subject matter jurisdiction to proceed or Probable Cause.
- A void and invalid judgment of conviction from a sister state which violates fundamental Constitutional protections does not trigger a requirement to register in a sister state forum.
- Ineffective assistance of counsel.

Statement of Facts:

On March 5, 2018, the State of Montana had filed the Motion for Leave to File An Information with Affidavit in Support. [Trl. Rec. #. #1]

On March 6, 2018, Judge Allison signed an Arrest Warrant for a person that is not Appellant. [Trl. Rec. #4].

> The warrant states: "YOU ARE THEREFORE COMMANDED to arrest the above named CECIL RUSSELL {DOB:3/ 1965) (S.S.N.:) LKA: unk) [Trl. Rec. #4 pg. 1]
> [Appellant's Social Security number is not
> Appellant's date of birth is 03/ /1856 not 03/ /1965]

On Dec. 19, 2018, Appellant was extradited from Mobile County Metro Jail, Mobile, Ala.

On Dec. 21, 2018, the State filed a Notice of Arraignment scheduled for Jan. 17, 2019. [Trl. Rec. #5]

On Dec. 24, 2018, attorney, William Managhan, was appointed to represent Appellant. [Trl. Rec. #8] [5]

In the initial meeting with counsel, Appellant attempted to explain to counsel that the warrant described someone other than Appellant; Constitutional law governing jurisdiction; void judgments of convictions from a sister state and why Appellant was instructing counsel not to enter a plea until the district court proved it could obtain jurisdiction from fabricated evidence or a void judgment

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5) Montana State Public Defender's Office; 248 3rd Avenue East, Kalispell, Montana, 59901 (406) 751-6080

from a sister state.

On Jan. 17, 2019, at the arraignment hearing, Appellant instructed counsel to enter "NO PLEA." The District Court ignored Appellant's constitutional challenge to the jurisdiction and entered a plea of not guilty on behalf of Appellant.

Counsel ignored Appellant's instructions throughout his 'representation.' Counsel made no effort to familiarize himself with the applicable Texas statutes even though Appellant had provided-in writing-the relevant statutes.

On March 29, 2019, [because counsel refused to follow instructions and failed to research relevant and pertinent statutes from Texas], Appellant was forced to file a Motion to Dismiss counsel and Proceed Pro Se. [Trl. Rec. #14]

The District Court refused to bring Appellant's Motion to Dismiss Counsel until after the Omnibus hearing which Appellant was not allowed to attend. [Trl. Rec. #17]

On April 16, 2019, and after Appellant was able to make the Court aware that the prosecution had fabricated allegations of non-existent Texas convictions, the state was allowed to file an Amended Information, [Trl. Rec. #18] but the District Court refused to set a subsequent Omnibus hearing or entertain any of Appellant's relevant pre-trial motions, which in turn, deprived Appellant of an

opportunity to obtain discovery of documents concerning the amended information.

On April 16, 2019, Appellant had filed Defense's Motion for Additional Discovery in order to obtain discovery, under Brady v Maryland [6] a certified copy of the void Texas judgment of conviction and certified copy of the law in effect in Texas in 1988 and the Texas law which demonstrated that the 1988 Texas judgment of conviction is void. [Trl. Rec. #20]

The District Court ignored all Appellant's pre-trial motions depriving Appellant of his First Amendment right to petition the Court for redress of a grievance; his Fifth Amendment right to Due Process of law; his Fourteenth Amendment right to equal protection of the law among other rights under the Constitutions of Montana and the United States. [Trl. Rec. #'s 20, 21, 28, 31, 33, & 35].

Recognizing the intent of the Flathead County District Court, to deny and deprive Appellant of a fair trial, Appellant submitted an intent to enter an Alford plea in order to flee the corruption of the Flathead county judicial system.

Appellant was coerced under duress into agreeing to enter an Alford plea [7]

6) Brady v. Maryland; 373 US 83, 83 S. Ct. 1194, (1963)
State v. Craig (1976), 169 Mont. 150, 545 P.2d 649.

7) North Carolina v Alford;
State v. Nauman, 334 P.3d 368; 376 Mont. 326 (2014)

under Mont. Code Ann. § 46-12-211(1)(b).

By denying Appellant constitutional rights and due process, Appellant was forced under duress to accept a plea deal just to get out of jail and not because the state could constitutionally prove its case. Considering that Appellant's Motion To

Dismiss, [Trl. Rec. #21];
Motion for Franks Hearing,
Motion In Limine, [Trl. Rec. #33];
Motion for Additional Discovery, [Trl. Rec. #28] and
Petition for Writ of Habeas Corpus, [exhibit 3] with accompanying exhibits; were all ignored by the District Court and counsel refused to attempt to obtain the Texas documents that proved the State had no constitutionally admissible evidence, Appellant was left with no other option. Combined with the knowledge that if found guilty, Appellant's appeal would be unsuccessful as Appellant would not be able to obtain the very documents from Texas which proved that the 2008 convictions alleged by the State did not exist and the one from 1988 that does exist, is constitutionally inadmissible in a court of law, Appellant initiated the Alford plea colloquy just to get out of jail and flee Montana.

On April 17, 2019, Appellant entered an Alford plea, [Trl. Rec. #37], stating on the record those things that were necessary to convince the court to release Appellant from jail-not because Appellant was guilty-and when released, Appellant immediately fled Flathead County and the State of Montana.

Appellant would ask this Court to take Judicial Notice that even though Montana law requires a "sex offender" to notify the Sheriff's department whenever that offender changes address, Appellant deliberately and intentionally did not comply with said statute, to demonstrate the corruption and incompetence of Flathead County law enforcement and Flathead County Attorney's office. Flathead County has made no effort to initiate another charge against Appellant.

Appellant would also ask this Court to take Judicial Notice that the District Court failed to require Appellant to comply with the established sex offender programs that set the tier level for a sex offender. [8] [Trl. Rec. #37].

It is Appellant's claim that the malicious, egregious and corrupt misconduct of Flathead County law enforcement, Flathead County Attorney's office and the District Court; having been complained of by Appellant to the Montana Attorney Generals' Office, led the State and the District Court to disregard Constitutional law in hopes that Appellant would leave the state and not follow up on his complaint to the Attorney Generals Office. [exhibit #5]

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8) The Montana Legislature adopted the SVORA offender tier level designation in 1997. For those sexual offenders sentenced prior to October 1, 1997, without an assignment of a tier level designation by the sentencing court, the DOC "shall designate the offender as level 1, 2, or 3 when the offender is released from confinement." Mont. Code Ann. § 46-23-509(5). Appellant would ask this Court to take Judicial Notice that the Eleventh Judicial District Court, Honorable Judge Robert B Allison, presiding, refused to comply with Mont. Code Ann. § 46-23-509(5).

Appellant had filed a Petition For Writ Of Supervisory Control concerning these Constitutional issues. [Trl Rec. #38]

History Of The 1988 Texas Conviction:

On January 11, 1988, Appellant had been convicted, by an involuntary plea of guilty to the offense of Indecency with a Child (exhibit 1) at the recommendation and instruction of counsel.

The relevant Texas statute governing that offense is Texas Penal Code §21.11. Indecency With A Child.[9] This is an offense known in law as a divisible statute.

9) Texas Penal Code § 21.11 provides: (a) A person commits an offense if, with a child younger than 17 years of age, whether the child is of the same or opposite sex and regardless of whether the person knows the age of the child at the time of the offense, the person:
(1) engages in sexual contact with the child or causes the child to engage in sexual contact; or
(2) with intent to arouse or gratify the sexual desire of any person:
(A) exposes the person's anus or any part of the person's genitals, knowing the child is present; or
(B) causes the child to expose the child's anus or any part of the child's genitals.
(b) It is an affirmative defense to prosecution under this section that the actor:
(1) was not more than three years older than the victim and of the opposite sex;
(2) did not use duress, force, or a threat against the victim at the time of the offense; and
(3) at the time of the offense:
(A) was not required under Chapter 62, Code of Criminal Procedure, to register for life as a sex offender; or
(B) was not a person who under Chapter 62 had a reportable conviction or adjudication for an offense under this section.
(c) In this section, "sexual contact" means the following acts, if committed with the intent to arouse or gratify the sexual desire of any person:
(1) any touching by a person, including touching through clothing, of the anus, breast, or any part of the genitals of a child; or

Shepard v. United States, 544 US 13, 125 S. Ct. 1254, 2005
Johnson v. United States, 559 US 133, 130 S. Ct. 1265, 2010
(*A divisible statute is a criminal statute that includes various offenses...*)

That 1988 conviction is a void and invalid judgment of conviction by the imposition of an unauthorized penalty.

> "*The limitations inherent in the requirements of due process and equal protection of the law extend to judicial as well as political branches of government, so that a judgment may not be rendered in violation of those constitutional limitations and guarantees.*" Hanson v. Denckla, 357 US 235, 78 S. Ct. 1228, (1958)

The 1988 judgment of conviction [exhibit #1] specifically states the offense is a third degree felony. The Texas record has been altered (by an unknown third party or by Flathead County law enforcement) from the third degree felony [10] with a maximum sentence applicable of ten (10) years to a second degree felony [11] with a

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(2) any touching of any part of the body of a child, including touching through clothing, with the anus, breast, or any part of the genitals of a person.
(d) An offense under Subsection (a)(1) is a felony of the second degree and an offense under Subsection (a)(2) is a felony of the **'third degree'**.

10) Tx. Penal Code § 12.34. Third Degree Felony Punishment.
(a) An individual adjudged guilty of a felony of the third degree shall be punished by imprisonment in the Texas Department of Criminal Justice for any term of not more than 10 years or less than 2 years.

11) Tx. Penal Code § 12.33. Second Degree Felony Punishment.
(a) An individual adjudged guilty of a felony of the second degree shall be punished by imprisonment in the Texas Department of Criminal Justice for any term of not more than 20 years or less than 2 years.

maximum penalty of twenty (20) years in prison by altering the record from Tx. Penal Code § 21.11(A)(2) to 21.11(A)(1).

These are different offenses requiring different elements of proof. [12]

The Texas court imposed a twelve (12) year sentence with the specific stipulation that the alleged offense is a third degree felony, thus the sentence imposed is a null, void and invalid judgment of conviction, inadmissible in a Montana court of law including all references to it.

Standard Of Review:*

Appellant raises the plain error request for review of issues that Appellant did not and could not raise at the District Court.

State v. Daniels, 77 P. 3d 224, 317 Mont. 331, (2003)
¶ 20 "*Where the defendant raises the plain error doctrine to request our review of issues that were not objected to at the district court level, our review is discretionary.*
State v. Earl, 316 Mont. 263, ¶ 25, 71 P.3d 1201, ¶ 25.

12) In Speights v. State; 464 SW 3d 719, 723 TX. Crim. App. 2015 (The highest Court in Texas for criminal cases) that Court explained, "We concluded that the Legislature intended that a defendant should be susceptible to punishment for each...For purposes of our Indecency with a Child statute...TX. Penal Code § 21.11...it is possible to commit indecency with a child by sexual contact without necessarily committing indecency with a child by exposure. It is also possible to commit indecency with a child by exposure without necessarily committing indecency with a child by sexual contact because a person can commit the required exposure and never advance to the point of engaging in contact. By these two distinct prohibitions, the Legislature has proscribed two distinct types of conduct."
see TX. Penal Code § 21.11(d) "An offense under Subsection (a)(1) is a felony of the second degree and an offense under Subsection (a)(2) is a felony of the third degree."

In State v. Finley (1996), 276 Mont. 126, 137, 915 P.2d 208, 215, overruled on other grounds by State v. Gallagher, (2001) 304 Mont. 215, 19 P.3d 817, we held: [T]*his Court may discretionarily review claimed errors that implicate a criminal defendant's fundamental constitutional rights, even if no contemporaneous objection is made and notwithstanding the inapplicability of the* Mont. Code Ann. § 46-20-701(2), criteria, *where failing to review the claimed error at issue may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process. The plain error doctrine is to be employed sparingly, on a case-by-case basis, pursuant to the narrow circumstances articulated in* Finley. Finley, 276 Mont. at 138, 915 P.2d at 215. *In order to determine the applicability of the plain error doctrine, we consider the totality of circumstances of each case.*
State v. Brown, (1999) 293 Mont. 268, ¶ 12, 975 P.2d 321, ¶12.

Appellant requests that this Court examines the record of the sister state conviction in Cause 26,269-C (Exhibit 1) and the statutes relevant: to wit: [TX. Penal Code § 21.11], because the record of that conviction was what the Flathead County prosecution has alleged is admissible and proof of a requirement for Appellant to register as a sex offender in Montana.

Appellants' position is that the phrase "convicted of" as used in Mont. Code Ann. § 46-23-502(10); ['*Sexual or violent offender" means a person who has been 'convicted of' or,...found to have committed or been adjudicated for a sexual or violent offense.*']
means a constitutionally "valid" conviction.

In State v. Weaver, 964 P. 2d 713, 290 Mont. 58 (1998) this Court addressed the question of issues not raised in the District Court.

"...To that end we held in Finley that this Court may discretionarily review claimed errors that implicate a criminal defendant's fundamental constitutional rights, even if no contemporaneous objection is made and

notwithstanding the inapplicability of the Mont. Code Ann. § 46-20-701(2), *criteria, where failing to review the claimed error at issue may:*
(1) *result in a manifest miscarriage of justice;*[13]
(2) *leave unsettled the question of the fundamental fairness of the trial or proceedings; or*
(3) *compromise the integrity of the judicial process. Finley, 276 Mont. at 137, 915 P.2d at 215.*
Even so, we stated in Finley that "given the legislature's obvious intention to restrict the use of plain error review by its enactment of Mont. Code Ann. § 46-20-701(2) *we will henceforth use our inherent power of common law plain error review sparingly, on a case-by-case basis...." Finley,* 276 Mont. at 138, 915 P.2d at 215.
¶ 26 Before we can invoke common law plain error review, we must first determine whether the alleged error implicates...[Appellant's]...fundamental constitutional rights. Article II, Section 26 of the Montana Constitution *provides in part: "In all criminal actions, the verdict shall be unanimous." Since the right to a unanimous verdict is explicit in the Declaration of Rights in Montana's Constitution, it is a fundamental right.*
See Gryczan v. State, 283 Mont. 433, 449; 942 P.2d 112, 122 (1997)
¶ 27 Next, we must determine whether the failure to review the claimed error would result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of...[Appellant's]...trial, or compromise the integrity of the judicial process..."

Appellant believes that the issues of this case fits squarely within the requirements of Weaver.

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13) State v. Taylor, 231 P. 3d 79, 356 Mont. 167, (2010)
State v. Gunderson, 237 P. 3d 74, 357 Mont. 142, (2010)

Argument

1-i Whether a District Court may proceed after an accused has challenged the Court's jurisdiction for cause?

1-ii Did the District Court's abuse its discretion, in refusing to prove jurisdiction after Appellant had challenged the Court's personal or subject matter jurisdiction, and render all subsequent Court action Void?

1-iii) Whether the State possess lawful standing to initiate a criminal information where the allegations constituted fabrications by the government?

Standard of Review: Clearly erroneous or de novo standard.

> Stanley v. Lemire; 148 P. 3d 643, 334 Mont. 489, 2006 "*...reviews any factual findings under the clearly erroneous standard, any discretionary rulings for abuse of discretion, and both legal conclusions and mixed questions of law and fact under the de novo standard...*"
> See State v. Seaman, 329 Mont. 429, ¶ 10, 124 P.3d 1137 (2005)

It is clearly established law that, when a defendant challenges the personal or subject matter jurisdiction of the court, no further proceedings can commence until such jurisdiction is proven on the record.

> Melo v. United States; 505 F. 2d 1026 8th Cir. 1974; "*Once jurisdiction is challenged, the court cannot proceed when it clearly appears that the court lacks jurisdiction, the court has no authority to reach merits, but, rather, should dismiss the action.*"
> see also Maine v. Thiboutot; 448 US 1, 100 S. Ct. 2502 (1980) "*The law provides that once State and Federal Jurisdiction has been challenged, it must be proven.*"

In this case, the District Court erred by ignoring Appellant's challenge to the court's jurisdiction, both personal and subject matter. The Court does not acquire jurisdiction from fabricated evidence, [14] does not acquire jurisdiction from a

14) Caldwell v City and County of San Francisco, 889 F.3d 1105, 1074–75 (9th Cir. 2018) "[T]*here is a clearly established constitutional due process right not to be subject to criminal charges on the basis of false evidence that was deliberately fabricated by the government.*"

constitutionally infirm prior conviction, does not acquire personal jurisdiction over Appellant and the State does not possess 'standing' where the alleged prior conviction(s) are constitutionally invalid. State v. Maine, 255 P. 3d 64, (2011)

> "...*we adhere to the principle that, in Montana,"the State may not use a constitutionally infirm conviction to support an enhanced punishment.*" see State v. Okland; 941 P. 2d 431, 283 Mont. 10, (1997)
> *Second, we see no reason to abandon the general approach set forth in Okland. Thus, we will continue to apply this framework for evaluating collateral challenges to prior convictions*:
> (1) *a rebuttable presumption of regularity attaches to the prior conviction, and we presume that the convicting court complied with the law in all respects;*
> (2) *the defendant has the initial burden to demonstrate that the prior conviction is constitutionally infirm; and*
> (3) *once the defendant has done so, the State has the burden to rebut the defendant's evidence...*"

Appellant contends that in order to circumvent this Court's mandated requirements set forth above, the District Court ignored Appellants pre-trial motions, [Trl Rec #'s 20, 21, 28, 33, and exhibit 3] thereby denying Appellant Due Process of Law and a fair and impartial trial.

The 2008 judgments of conviction, alleged by the State as Probable Cause, do not exist and never have existed.

In order for Appellant to be required to register as a sex offender pursuant to Mont. Code Ann. §§'s 46-23-504 and 46-23-505, there MUST be a constitutionally valid judgment of conviction. See State v. Maine, 255 P. 3d 64 (2011).

Additionally; the State does not have Standing to proceed where it has alleged fabricated evidence.

Armstrong v. State; 989 P. 2d 364, 296 Mont. 361; (1999)
Standing, however, is an exception to that rule.
See Matter of Paternity of Vainio (1997), 284 Mont. 229, 235, 943 P.2d 1282, 1286 (*identifying standing as a "threshold requirement of every case*");
Rieman v. Anderson (1997), 282 Mont. 139, 144, 935 P.2d 1122, 1125 (*stating that objections to standing cannot be waived and may be raised by the court sua sponte.*)
"*A probable cause affidavit is exactly what it sounds like, a sworn affidavit delineating probable cause in a criminal case – whether it be to search a place, arrest a person or charge a crime.*
Whatever the particular purpose, the affidavit must delineate the factual basis to support the specific legal action sought to be pursued by the state. And the general principle common to all such affidavits, whether for search, arrest or charging, is that it must "stand on its own" based on "what is within its four corners.
In lay terms, that means there must not only be sufficient information to cover all requisite elements necessary for the action, all such support must be actually in the affidavit – not in some extraneous place or with some extraneous source. A magistrate's determination of probable cause is to be given considerable weight and should be overruled only when the supporting affidavit, read as a whole in a realistic and common sense manner, does not allege specific facts and circumstances from which the magistrate could reasonably conclude that the items sought to be seized are associated with the crime and located in the place indicated.
Civil Liability For False Affidavits; Bryan R. Lemons, Acting Division Chief; page 1, citing United States v. Spry, 1909 F.3d 829, 835 (7th Cir. 1999) (internal quotation marks omitted), cert. denied, 528 U.S. 1130 (2000).
A defendant may challenge the presumption of validity afforded a warrant where the magistrate was misled by information contained in the affidavit that the affiant either
(1) knew was false or
(2) would have known was false had there not been a reckless disregard for the truth.

The only judgment of conviction that could arguably be presented in support of the States Affidavit is the constitutionally infirm 1988 Texas judgment of conviction. [exhibit # 1]

The 1988 Texas judgment of conviction in case 26,269-C clearly stipulates that the offense is a third degree felony. In Texas, in 1988, (and today) a third degree felony had a maximum penalty of ten (10) years.

That judgment of conviction also clearly stipulates that the sentence imposed was twelve (12) years, exceeding the statutory maximum and rendering the judgment invalid. Furthermore, the 1988 judgment of conviction clearly stipulates that it was obtained by a plea agreement and that Appellant had counsel, Ms. Pamela House. It then follows that Appellants counsel was clearly ineffective and that the plea could not have been entered intelligently.

> State v. Lamere; 112 P. 3d 1005 , 327 Mont. 115 (2005)
> ¶7 "*The right to effective assistance of counsel is guaranteed by the Sixth Amendment to the United States Constitution, and by Article II, Section 24 of the Montana Constitution.*
> State v. Kougl, 323 Mont. 6, ¶ 11, 97 P.3d 1095, ¶ 11. (2004).
> As we have previously stated, [t]*he effective assistance of counsel is critical to our adversarial system of justice; a lack of effective counsel may impinge the fundamental fairness of the proceeding being challenged.*"
> State v. Henderson, 322 Mont. 69, ¶ 4, 93 P.3d 1231, ¶ 4 (2004).

Appellant moves this Court to reverse and dismiss the judgment of conviction.

2-i) Whether a constitutionally infirm prior conviction for a listed sex offense triggers a requirement to register as a sex offender in Montana?

2-ii) Can the state sustain a requirement to register as a sex offender in Montana when the existing alleged prior conviction is constitutionally infirm?

No to both questions. Where the sister state has violated the constitutional protections of due process, the judgment of conviction is void and invalid in the convicting state and carry's no legal weight or ramifications in the forum state; (Montana)

Strickland v. Washington, 466 US 668, 104 S. Ct. 2052, (1984)
Compare: State v. Lenihan; 602 P. 2d 997, 184 Mont. 338,1979 holding
"This Court, however, has never specifically ruled on the question presented here. That is, whether an objection at the trial level is a prerequisite to the challenging of a sentencing order on appeal. This issue has been ruled on in other jurisdictions with varying results. A poll of such jurisdictions reveals that:
Arkansas (Haynie v. State (1975), 257 Ark. 542, 518 S.W.2d 492),
Idaho (Pulver v. State (1968), 92 Idaho 627, 448 P.2d 241), and
Kansas (Peterson v. State (1967), 200 Kan. 18, 434 P.2d 542), have held; *an appellate court cannot review a sentence if there was no objection to it at the trial level.*
Illinois (People v. Depratto (1976), 36 Ill. App.3d 338, 343 N.E.2d 628),
Indiana (Kleinrichert v. State (1973), 260 Ind. 537, 297 N.E.2d 822),
Florida (Kohn v. State (1974), Fla.App., 289 So.2d 48),
Pennsylvania (Commonwealth v. Lane (1975), 236 Pa.Super. 462, 345 A.2d 233), and
Oregon (State v. Braughton (1977), 28 Or. App. 891, 561 P.2d 1040), *on the other hand, do not require an objection before the validity of a sentence can be reviewed..."*
State v. Braughton, 561 P. 2d 1040 supra, *The court stated:*
"... The sentencing authority of a court exists solely by virtue of a statutory grant of power and therefore cannot be exercised in any manner not specifically authorized ...Where, as in this case, it is alleged that a sentencing court has exceeded its statutory authority in imposing a specific sentence, an objection below is not a prerequisite to the challenging of the sentencing order alleged to be void." Braughton, 561 P.2d at 1041, note 2. (Citations omitted.)

It appears to be the better rule to allow an appellate court to review any sentence imposed in a criminal case, if it is alleged that such sentence is illegal or exceeds statutory mandates, even if no objection is made at the time of sentencing. As a practical matter, this may be a defendant's only hope in cases involving deferred imposition of sentence. If a defendant objects to one of the conditions, the sentencing judge could very well decide to forego the deferred sentence and send him to prison. To guard against this possibility, a defendant often times must remain silent even in the face of invalid conditions. [15] *We, therefore, accept jurisdiction in this matter.*

In the instant case, the State has alleged that a prior conviction cannot be challenged. States "Response To Petition For Writ Of Habeas Corpus" [exhibit #4]

"...The Petitioner is arguing that he is illegally and unconstitutionally confined in the Flathead County Detention Center as a "result of the bond set in DC-18-125(B)". In DC-18-125(B), the Petitioner is charged with Failure to Register as a Sexual Offender, a felony. The basis for the requirement to register stems from a 2008 conviction in Amarillo, Texas. The Petitioner argues that the State has made false allegations in the Affidavit in Support of Motion for Leave to File the Information because the prior conviction is invalid. Other than the Defendant's self-serving statement that he believes his prior conviction should be void, there is no proof before this Court that the conviction has been overturned or determined to be invalid. Furthermore, Section 46-22-101(2), MCA, *provides:*

The writ of habeas corpus is not available to attack the validity of the conviction or sentence of a person who has been adjudged guilty of an offense in a court of record and has exhausted the remedy of appeal. The relief under this chapter is not available to attack the legality of an order revoking a suspended or deferred sentence. The Petition is clearly an attempt to bring untimely legal arguments attacking the validity of his Texas conviction; not to determine the cause of his restraint.

Rudolph v. Day, 273 Mont. 309, 902 P.2d 1007 (1995);
followed in George v. Bd. of Pardons, 2001MT 163, 306 Mont. 115 (2001).
See also State v. Howard, 282 Mont. 522, 938 P.2d 710 (1997).

Appellant argues that the States interpretation of Mont. Code Ann. §

15) Appellant faced a similar situation in entering the Alford plea.

46-22-101(2) is misplaced.

In Steilman v. Michael; 407 P. 3d 313, 389 Mont. 512 (2017) this Court held: "*The exception for filing habeas petitions to challenge a facially invalid sentence is generally limited to invalidity that "stems from a rule created after time limits for directly appealing or petitioning for post conviction relief have expired.*"

Beach v. State, 379 Mont. 74, 348 P.3d 629 (citing Lott v. State, 334 Mont. 270, 150 P.3d 337) and in Lott v State supra, this Court held: "*Given Montana's constitutional right to habeas corpus provided for in* Article II, Section 19, *the issue we address today is whether the procedural bar established in the current habeas corpus statutory scheme is unconstitutional as applied to a facially invalid sentence. We hold that, as applied to Lott, it is.*" Lott at 150 P3d 339,

and in State v. Maine, 360 Mont. 182, 255 P.3d 64) this Court held: ¶ 12 *Whether a prior conviction may be used for sentence enhancement is generally a question of law, for which our review is de novo.* State v. Hansen, 273 Mont. 321, 323, 903 P.2d 194, 195 (1995);

State v. Weaver, 2008 MT 86, ¶ 10, 342 Mont. 196, 179 P.3d 534. *However, in determining whether a prior conviction is invalid, the court may first need to make findings of fact, based on oral and documentary evidence presented by the parties, regarding the circumstances of that conviction.* See e.g. Weaver, ¶ 9; State v. Peterson, 309 Mont. 199, 44 P.3d 499. 2002 *We will not disturb such findings unless they are clearly erroneous*. Weaver, ¶ 9; Peterson, ¶ 7.

This Court's holding in Lott, supra, Lenihan supra, combined with Mont. Code Ann. § 26-3-105 "Impeachment of a Judicial Record", clearly provides that an accused can challenge the legality of a conviction from a sister state especially where that judgment of conviction is intended to be presented as evidence. Since the District Court abused it's discretion in refusing to provide Appellant to demonstrate the constitutional invalidity of the State's only evidence, Habeas

Corpus (also ignored by the District Court) to this Court remains Appellants only remaining avenue to challenge an unconstitutional, null, void and invalid judgment of conviction from a sister state. Mont. Const. Art. II Sec. 19.

Appellant argues that the District Court intentionally failed to bring these motions; to wit: Appellant's timely filed Motions to Dismiss, Motion In Limine, Motion For Franks hearing and Petition For Writ of Habeas Corpus challenging the issue of lack of subject matter jurisdiction in order to circumvent the Constitutional requirement for Due Process to prevent Appellant from demonstrating in Court the egregious misconduct of the Flathead County Attorney's office and Flathead County law enforcement in falsifying and fabricating government records.

Appellant would direct the Court's attention to the State's Response To Petition For Writ Of Habeas Corpus.[exhibit #5] The State continues to allege "The basis for the requirement to register stems from a 2008 conviction in Amarillo, Texas", a conviction that does not exist, never existed and the State could provide no relevant court documents in support of. An information, standing alone, is not evidence.

> Taylor v. Kentucky; 436 US 478, 98 S. Ct. 1930, (1978)
> (*one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.*)

See, e. g., Estelle v. Williams' 425 US 501, 96 S. Ct. 1691, 48 (1976)

Thus the questions: "Whether a constitutionally infirm prior conviction for a listed sex offense triggers a requirement to register as a sex offender in Montana?" and "Can the state sustain a requirement to register as a sex offender in Montana when the existing alleged sex offender prior conviction is constitutionally infirm?" must be answered in the negative. It is axiomatic that the term "conviction" as used in Mont. Code Ann. § 46-23-505 means a "valid conviction" otherwise, all the case decisions concerning invalid and void convictions excluded as evidence in trials are for naught.

> Greenholtz v. Inmates of Neb. Penal and Correctional Complex; 442 US 1, 99 S. Ct. 2100, (1979) *The natural desire of an individual to be released is indistinguishable from the initial resistance to being confined. But the conviction, with all its procedural safeguards, has extinguished that liberty right:"[G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty.*"
> see also Meachum v. Fano, 427 U. S. 215, 224, (1976).
> State v. Olson; 400 P. 3d 214, 387 Mont. 318, (2017) "*Whether a prior conviction may be used to enhance a criminal sentence is a question of law that we review for correctness.*"
> State v. Krebs, 385 Mont. 328, 384 P.3d 98 (citing State v. Burns, 361 Mont. 191, 256 P.3d 944;
> State v. Maine, (2011) 360 Mont. 182, 255 P.3d 64.
> Long v. Shorebank Development Corp., 182 F.3d 548 (C.A. 7 1999).
> (*A void judgment which includes judgment entered by a court which lacks...inherent power to enter the particular judgment...can be attacked at any time, in any court, either directly or collaterally, provided that the party is properly before the court,*")
> Klugh v. U.S., 620 F.Supp. 892 (D.S.C. 1985). "*Judgment is a void judgment if court that rendered judgment lacked jurisdiction of the subject*

matter, or of the parties, or acted in a manner inconsistent with due process"
Const. Amend. 5
City of Los Angeles v. Morgan, 234 P.2d 319 (Cal.App. 2 Dist. 1951). (*A judgment shown by evidence to be invalid for want of jurisdiction is a void judgment or at all events has all attributes of a void judgment,*)
Davidson Chevrolet, Inc. v. City and County of Denver, 330 P.2d 1116, certiorari denied 79 S.Ct. 609, 359 U.S. 926, 3 L.Ed. 2d 629 (Colo. 1958). (*A void judgment is a simulated judgment devoid of any potency because of jurisdictional defects only, in the court rendering it and defect of jurisdiction may relate to a party or parties, the subject matter, the cause of action, the question to be determined, or relief to be granted,*)
People v. Wade, 506 N.W.2d 954 (Ill. 1987).(*Void judgment is one entered by court without jurisdiction of parties or subject matter or that lacks inherent power to make or enter particular order involved and such a judgment may be attacked at any time, either directly or collaterally,*)
Allcock v. Allcock, 437 N.E. 2d 392 (Ill. App. 3 Dist. 1982). (*Res judicata consequences will not be applied to a void judgment which is one which, from its inception, is a complete nullity and without legal effect,*)
City of Lufkin v. McVicker, 510 S.W. 2d 141 (Tex. Civ. App. - Beaumont 1973) (*Void judgment is one which has no legal force or effect whatever, it is an absolute nullity, its invalidity may be asserted by any person whose rights are affected at any time and at any place and it need not be attacked directly but may be attacked collaterally whenever and wherever it is interposed,*)

It is clear from these line of cases, many decided by this Court, that a prior conviction is admissible in a court of law for evidence is reviewable. In the context of the offense "Failure To Register As A Sex Offender", the entire allegation can only proceed if there is a valid conviction for a listed sex offense. A person could not be legally prosecuted for Failure To Register As A Sex Offender if the accused had no felony convictions at all.

Likewise, a person convicted for a 4th DUI could not be subsequently convicted for failure to register as a sex offender. The District Court would not acquire personal or subject matter jurisdiction to proceed and to refuse to prove jurisdiction on the record would be an actionable violations of the Constitution.

It is Appellants position that, pursuant to existing court rulings, an invalid judgment of conviction is of no legal effect and invalid. An invalid judgment of conviction confers no lawful jurisdiction to another court.

> 30A Am Jur Judgments " 44, 45 (*A void judgment is not entitled to the respect accorded a valid adjudication, but may be entirely disregarded, or declared inoperative by any tribunal in which effect is sought to be given to it. It is attended by none of the consequences of a valid adjudication. It has no legal or binding force or efficacy for any purpose or at any place. ... It is not entitled to enforcement ... All proceedings founded on the void judgment are themselves regarded as invalid*)

Appellant moves this Court to reverse and dismiss the judgment of conviction in the instant appeal because the District Court does not acquire personal or subject matter jurisdiction from a falsified affidavit from the state.

3-a) Does the District Court abuse its discretion where it fails to bring timely filed pre-trial motions: to wit:

i) Motion to Dismiss,
ii) Motion for Franks Hearing,
iii) Motion in Limine and
iv) Petition for Writ of Habeas Corpus
v) Motion for Additional Discovery
for a hearing on the merits?

4) Does the refusal of the District Court to convene a hearing for pre-trial motions to wit:

i) Motion to Dismiss,
ii) Motion for Franks Hearing,
iii) Motion in Limine and
iv) Petition for Writ of Habeas Corpus
v) Motion for Additional Discovery

deprive Appellant of Due Process of Law and a fair trial?
Standard of Review for 3-4:

Appellant contends that the totality of the acts of misconduct by the prosecution and the district court, taken together, demonstrate an egregious and malicious disregard for the Constitutions of Montana and the United States which deprives Appellant of any possibility of a fair trial.

In State v. Derbyshire; 201 P. 3d 811, 349 Mont. 114, (2009) this Court held: "*A court abuses its discretion if it acts arbitrarily without the employment of conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice.*" citing State v. McOmber, 2007 MT 340, ¶ 10, 340 Mont. 262, 173 P.3d 690.

The trial court impermissibly restricted Appellant from presenting documentary evidence in the form of the actual 1988 Texas judgment of conviction and Texas state law governing the lawful range of punishment.

This evidence would show a bias, a prejudice or a motive to fabricate by the prosecution.
People v. Brown (1970) 13 Cal. App. 3D 876, 883; disapproved on other grounds in People v. Chi Ko Wong (1976) 18 Cal. 3d 698, 716 557 P.2d 976 Jefferson, Cal. Evidence Benchbook, § 28.8.) (1b)

There can be no justifiable reason to refuse to hear pre-trial motions as this

is a fundamental purpose of the court system in the United States.

It is Appellants position that where the District Court has intentionally refused to comply with the provisions of state criminal procedures, Appellant is deprived of fundamental Constitutional rights. This kind of misconduct by a sitting judge should not go uncorrected. Appellant petitions this Court for an Order directing the disciplinary action of Flathead County District Judge Robert Allison.

Appellant moves this Court to reverse and dismiss the case, the judgment and sentence.

5) Does the fabrication of evidence by the State deprive Appellant of Due Process of Law under the Fifth and Fourteenth Amendments to the US Constitution and Article II Section 17 of the Montana Constitution?

Yes, Appellant is deprived of significant Constitutional rights including the Fifth Amendment right to Due Process, the Sixth Amendment right to effective assistance of counsel, the Fourth Amendment right not to be falsely accused or imprisoned without Probable Cause.

6) Is the Alford Plea entered by the Appellant a valid plea where the State and District Court deprived Appellant of Due Process of Law?

Appellant says no, it is not a valid plea but was obtained by and through coercion and duress. U. S. Const. Amend 5;

7) Was Appellant deprived on constitutional effective assistance of counsel where counsel made no effort to investigate the law and the facts of the case or to prepare any defense?

Yes. U. S. Const Amend 5;
Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, (1984)
State v. Henderson; 93 P. 3d 1231, 322 Mont. 69; (2004) "*Counsel ineffective...for failing to adequately consult with client, investigate, or conduct any research prior to advising defendant to plead guilty. Counsel 'did nothing more than request a plea agreement and facilitate the conviction of his client without a trial.' Prejudice found because there was at least a colorable argument and the defendant maintained his innocence in Alford plea. Had counsel performed adequately, the defendant would not have entered a guilty plea.*"

Appellant was prejudiced by conduct of counsel because had counsel investigated the law and the facts, the trial court would have had to dismiss the charge and case.

The allegations of prior convictions that did not exist did not vest the District Court with personal or subject matter jurisdiction.

The warrant of arrest described someone other than Appellant.

Counsel refused to file Appellants requested Motion To Dismiss for Lack of Personal and/or Subject Matter Jurisdiction.

Had counsel investigated the law and the court records from Texas, a simple Motion In Limine would have demonstrated that the State could not proceed in prosecution because no part of the 1988 Texas conviction was admissible at trial.

Appellant had provided counsel with an exact duplicate case against Appellant in the convicting county (Potter County, Texas-the county of the original conviction in Cause 26,269-C [exhibit 1]) where Appellant had been

charged in 2014 for Failure to Register as a Sex Offender and the case ordered dismissed, March 9, 2015, by that court because of constitutional deficiencies in the 1988 conviction.

8) Did the District Court abuse it's discretion for failure to comply with Mont. Code Ann. § 46-23-509(5);

Yes, this is a statute established by the Legislature and the sitting Judge is bound by existing and established statute. A case citation is unnecessary where the answer is so obvious.

CONCLUSION

With respect to the above violation by the State, the appropriate remedy, as has been offered before, is reversal and dismissal. No other remedy will address the injury suffered by the Appellant in this case.

With respect to the misconduct by the Court, it is not within the Trial Court's discretion to ignore Montana statutory law and/or case law.

Even if there were an exception, the fabrication of evidence, the refusal to answer the challenge to the Court's jurisdiction, the refusal to bring before the Court, timely filed pre-trial motions, the duplicity perpetrated "in the name of the people of the State of Montana under color of state law, deceitfully, taken together constitutes a criminal offense against the public as enumerated in

Mont. Codes Ann. § 45-7-103.Criminal use of office or position:
Mont. Codes Ann. § 45-7-201 Perjury
Mont. Codes Ann. § 45-7-202 False swearing
Mont. Codes Ann. § 45-7-207 Tampering with or fabricating physical evidence.
Mont. Codes Ann. § 45-7-208 Tampering with public records or information

This Court has found that before a constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt, and this Court has made reversals on that basis.

See State v. Milton (1996), 280 Mont. 142, 147, 930 P.2d 28.

Disregarding Appellant's rights to Due Process, to be able to present evidence in his behalf, to not be unlawfully seized and detained without Probable Cause, to be able to challenge jurisdiction where no Probable Cause exists and to have effective assistance of counsel are all fundamental U.S. and Montana Constitutional rights allegedly guaranteed can by no means constitute "harmless error."

State v. Samples; 198 P. 3d 803, 347 Mont. 292 (2008)
In the context of a criminal sentence in Montana, it is not the duration or severity of a sentence that might render it constitutionally invalid; it is the imposition of a sentence based on a foundation which may be extensively and materially false, and which the prisoner had no opportunity to correct that can deny the defendant due process of law.
State v. McLeod, 313 Mont. 358, ¶ 19, 61 P.3d 126, ¶ 19
State v. Herman, 343 Mont. 494, ¶ 21, 188 P.3d 978, ¶ 21

These constitutional violations are real and injurious, having caused Appellant to unconstitutionally convicted where the District Court did not acquire

personal or subject matter jurisdiction; where the District Court erred in depriving Appellant of Constitutional rights to Due Process;

deprived Appellant of a fair and impartial hearing;

deprived Appellant the right to discovery of mitigating and exculpatory evidence in support of the defense and

caused Appellant to be held illegally and without Probable Cause for over 445 days. Reversal and dismissal is the appropriate remedy.

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This 15th day of Nov, 2019

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Certificate of Service

I hereby certify that true and correct copies of the foregoing Appellants Opening Brief and attachments to this Brief were served upon the opposing party's on this the 15th day of December, 2019 by U.S. Mail addressed as indicated below:

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On This the 15th day of November 2019

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