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ORIGINAL

FILED

Bowen Greenwood  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

Case Number: DA 24-0676

FEB 13 2025

Bowen Greenwood  
Clerk of Supreme Court  
State of Montana

In the  
SUPREME COURT OF THE STATE OF MONTANA

STATE OF MONTANA,  
Plaintiff-Appellee,  
-vs-  
DOUGLAS P. PASQUINZO,  
Defendent-Appellant.

) Cause No: 24-0676  
)  
) APPELLANT'S  
) OPENING BRIEF  
) ON  
) APPEAL

Comes now Douglas P. Pasquinzo, the Appellant, to hereby appeal the decision by the Montana Fifth Judicial District Court, in cause no: DC-22-2015-42, dated October 31, 2024, signed by the Hon. Luke Berger.

The Appellant presented a Motion to Dismiss Judgment and Information due to Void Judgement. That pleading and subsequent pleadings are incorporated here.

This Motion was based on the record and the documented violations to the Due Process of Law, as demanded by the Fourteenth Amendment of the U.S. Constitution, and Art. II, Sect. 17, of the Montana Constitution; inclusive in the Fifth Amendment of the U.S. Constitution.

The Montana Rules of Civil Procedure, and Montana Statute MCA: §46-11-205, Amending information as to substance or form; which states:

- "(1) The court may allow an information to be amended in matters of substance at any time, but not less than 5 days before trial, provided that a motion is filed in a timely manner, states the nature of the proposed amendment, and is accompanied by an affidavit stating facts that show the existence of probable cause to support the charge as amended. A copy of the proposed amended information must be included with the motion to amend the information.
- (2) If the court grants leave to amend the information, the defendant must be arraigned on the amended information without unreasonable delay and must be given a reasonable period of time to prepare for trial on the amended information.

The State of Montana filed an Amended information on June 15, 2016; without having moved for leave to file the Amended Information, nor did the district court grant leave to file the amended information. See attached case registry, at Doc.Seq. 18.000.

The record is clear that the State violated the Rules of Criminal Procedure, at MCA: §46-11-205, and the Due Process of Law. At that point the State district court lost it's subject matter jurisdiction to continue, and based upon the long standing 'Fruit of the Poisonous Tree' doctrine, this conviction and judgement can not stand as legal. The district court defied U.S. Supreme Court caselaw principles.

The Fifth Judicial District Court has abused its discretion by ignoring the legal procedure for a matter to be Amended, and as such also defied the U.S. Supreme Court's holding that a party MUST file a Motion for leave, followed by an Order that grants the State leave to Amend, and THEN the State can file an Amended Information. Not before as the County Prosecutor did here. See Montana v Wyoming, U.S. Lexis 8446, at 361. This was cited to the district court and was ignored and demonstrates the unfairness in the district court to allow the Jefferson County Attorney representing the State to act "Above the Law", and that courts 'Bad Faith' bias, in favor of the County Attorney. Both Actionable to the Commission on Practice, and the Judicial Standards Commission, as well as issues to be placed before the Montana Legislature.

Thus the underlying conviction and judgement are void for lack of subject-matter jurisdiction.

The U.S. Supreme Court has held that, NO ONE is above the law. See Trump v Vance, "In our system of government, as this Court has often stated, no one is above the law." Trump v Vance, 591 US 786, 812, 140 S.Ct 2412(2020).

"It is not enough to recite sayings like 'no man is above the law' and 'the public has a right to every man's evidence.'...These sayings are true and important—but they beg the question, The law applies equally to all persons..." Id at 836.

The Law is the Law, and the court can NOT legally disregard it and still claim to maintain its integrity, where that court has lost all subject-matter jurisdiction once the court itself has violated the Statutory Due Process of Law.

The Law is explicit as written and interpreted by the Montana Supreme Court, and the Higher Courts, concerning the LACK of subject-matter jurisdiction:

#### CONTROLLING CASELAW STANDARDS

"Subject matter jurisdiction is subject to challenge or review at any time on motion, or sua sponte by the court, and can not be established or maintained by consent or waiver of the parties."

Gottlob v DeRosier, 2020 MT 210, P7; Stanley v Lemire, 2006 MT 304, ¶31-32.

"Similarly the United States Supreme Court, recently observed that subject matter jurisdiction, because it involves the court's power to hear the case, can never be forfeited or waived. Moreover, the Courts, including this Court, have an independent obligation to determine whether subject matter exists, even in the absence of challenge."

Stanley at P32; citing Arbaugh v Y & H Corp., 546 US 500, 514, 126 S.Ct 1235, 1244, 163 L.Ed.2d 1097(2006).

"Once jurisdiction has been challenged the court cannot proceed when it clearly appears the court lacks jurisdiction." Joyce v United States, 474 F.2d 215 (3rd Cir. 1973).

"There is no discretion to ignore lack of jurisdiction." Joyce at 215.

"The law provides that once State and Federal jurisdiction has been challenged, it must be proven." Me v Thibutot, 448 US 1, 100 S.Ct 2502(1980).

Neither the Fifth Judicial District Court jurist, nor the Jefferson County Attorney has proven that the District Court could maintain subject-matter jurisdiction, after the County Attorney Amended the Information, without first being granted leave to do so. Thus the criteria in *Me v Thibutot*, is met, and the court clearly lacked the required subject-matter jurisdiction to proceed, after violating the Defendant Douglas Pasquinzo's Right to Due Process. Relief should now be granted for such.

"The Judgment of conviction pronounced by a court without jurisdiction is void..."  
*Johnson v Zerbst*, 304 US 458,468, 58 S.Ct. 1019(1938).

"A court's jurisdiction at the beginning of trial may be lost "in the course of the proceedings" due to failure to complete the court— as the Sixth Amendment requires— by providing [Competent] counsel..." *Zerbst* at 468.

The Appellant-Defendent Pasquinzo was denied competent counsel, who DID NOT, at any time challenge the fact that the court lost subject-matter jurisdiction, by it excusing the County Attorney's Amended Information without leave from the Court.

Based on the record, and legal principle that the Appellant can challenge the district courts subject-matter jurisdiction at any time, per *Gottlob* at P7, the district court was bound by law to vacate this matter for lack of subject-matter jurisdiction, at the instant point that the Appellant's Right to the Due Process of Law was violated, and the matter could NOT proceed. The defense counsel's duty is to know the law, and as such was required to file or orally demand that the court no longer proceed for the lack of subject-matter jurisdiction, as the district court could no longer hear the case, per *Stanley and Arbaugh* precedence, which still stands and is binding in this matter.

Granting Summary Judgment to the Defendent is the proper procedural avenue, here where the County Attorney, representing the State, did not brief or dispute the fact that subject-matter jurisdiction was lacking based on his procedural error, which by law is defined as being waived.

The Montana Rules of Civil Procedure apply at this point under Rule 12(b) and (h), 12(b): Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial hearing.

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required.

But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction.

12(h) Waiving and preserving Certain Defenses. §(1)(B) failing to either:

§(ii) include it in a responsive pleading...as a matter of course.

The State thus waived the fact that the District Court lacked the required subject-matter jurisdiction. The 'Rule of Law' is very clear, that once an issue is waived, that waiver can not be excused.

CONTROLLING WAIVER AUTHORITY:

Wood v Milyard, 566 US 463,466,132 S.Ct. 1826(2012)

"A court is not at liberty, we have cautioned, to bypass, override, or excuse a state's deliberate waiver..."; See Day v McDonough, 547 US 198,202,210, n.11 126 S.Ct 1675.(2006).

Based on controlling Supreme Court law, the district court has abused its discretion for disregarding the fact that the State waived the issue of lack of subject-matter jurisdiction, where the State was excused from disregarding state statute and procedure concerning an amended information.

CONTROLLING INEFFECTIVE ASSISTANCE OF COUNSEL AUTHORITY:

Strickland v Washington, 466 US 668, 104 S.Ct 2052(1984).

Wong v Belmontes, 558 US 15,16-17, 130 S.Ct 383(2009).

"To prevail on this claim, Belmontes [Like Pasquinzo here] must meet both the deficient performance and prejudice prong of Strickland, 466 US at 687, 104 S.Ct 2052, 80 L.Ed.2d 674. To show deficient performance...must establish that "counsel's representation fell well below an objective standard of reasonableness. Id at 688.

"To establish prejudice, [Pasquinzo] must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Strickland at 694, Wong at 19.

In relation to the lack of subject-matter jurisdiction, a competent attorney as defense counsel for defendant Pasquinzo, would have known the laws concerning amending information, and objected to the State's failure to obtain leave to amend the information, per State Statute. Counsel did thus prejudice the defendant, to not object to this violation of the 'Rule of Law'.

Based upon this 5th and 6th Amendment violation of the U.S. Constitution, the defendant should have never been convicted, without the required subject-matter jurisdiction, after the district court and the County prosecutor violated the Appellants Right to the Due Process of Law,

Pursuant to Article VI, Paragraph 2 of the United States Constitution, also known as the Supremacy Clause, which states:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

When a judge or panel of judges violate the Supremacy Clause, it is an usurpation of power and authority which that court and jurist do NOT have, for disregarding the Constitution and the the Supremacy Clause. Such Judicial Misconduct undermines the rule of law, with judicial consequences based on this overreach which undermines the stability of the legal system, and destroys the integrity of the court, and the public confidence in the Courts, which the public's taxes pay to be honest and fair.

CONTROLLING STRUCTURAL ERROR AND BIAS AUTHORITY:

Weaver v Massachusetts, 582 US 286, 137 S.Ct. 1899(2017)

"this Court" adopted the general rule that a constitutional error does not automatically require reversal on a conviction." Arizona v Fulminate, 499 US 279, 306, 111 S.Ct 1246, 113 L.Ed.2d 302(1991).

"The Court recognized, however that some errors should not be deemed harmless beyond a reasonable doubt." Weaver at 294.

"These errors came to be known as structural errors." Fulminate at 309-310, Weaver at 294.

"The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of a criminal trial. Thus, the defining feature of a structural error is that it "affects the framework within which the trial proceeds" Fulminate at 310, Weaver at 295.

The Montana District Court lost its subject-matter jurisdiction when it violated the Due Process of Law, for Amending Information without leave granted to the State.

Without subject-matter jurisdiction the structural error is self evident, which "affects the framework within the trial proceeds."

The case of State v Pasquinzo here then lost all controversy, which the United States Constitution requires per Article III, Section 2:

"The judicial power shall extend to all cases, in law and equity, arising under the Constitution, the laws of the United States, and treaties made, or shall be made, under that authority;...to controversies to which the United States shall be party..."

With the district court's abuse of discretion as shown, by continuing this matter without the required subject-matter jurisdiction, in favor of the State, bias is clearly shown, and is unconstitutional by law:

~~CON~~ "Due Process guarantee an absence of actual bias on the part of the judge." In re Murchison, 349 US 133,136, 75 S.Ct 633, 99 L.Ed.942(1955).

The District Court violated the Due Process Clause of the Fourteenth Amendment by allowing this matter to proceed without subject-matter jurisdiction, which clearly demonstrates his bias in favor of the State, which is grounds for his self recusal.

RELIEF

Based on the record, and the pleadings attached herein, which conclusively show cause for relief due to the violations of Statutory and Constitutional Law, the Appellant asks that the Court order that this matter be remanded back to the district court to vacate the single charge, with prejudice, at the courts earliest convenience.

Dated this 5th day of February, 2025. *Douglas P. Pasquinzo*  
Douglas P. Pasquinzo.