

GROUND S FOR RELIEF

GROUND 1: PETITIONER'S CONFINEMENT VIOLATES THE CONSTITUTION AND LAWS OF CALIFORNIA AND THE UNITED STATES.

VIOLATIONS OF FEDERAL LAW by the state rising to the level of a fundamentally fatal jurisdictional defect which inherently resulted in a complete miscarriage of justice and, which defect is inconsistent with the rudimentary demands of the common law and fair procedure; and,

VIOLATIONS OF STATE LAW by the state of constitutional magnitude. The criminal conduct of state actors ab initio and improprieties occurring in the state proceedings created unprecedented judicial chaos which violated petitioner's Fourteenth Amendment right to due process. The Superior Court lacked jurisdiction, the judgment of conviction is void and petitioner is unlawfully confined.

Petitioner is confined by judgment of a court wholly lacking jurisdiction for want of a criminal charge in the form and mode required by law. Petitioner is held to answer for an infamous crime without indictment of a Grand Jury. Petitioner is denied the right to be informed of the nature and cause of the charges against him. This violated petitioner's inalienable right to enjoy life and liberty and to be secure in his person and to not be deprived of his liberty without due process of law, as guaranteed by Article I, §§ 1, 7, 13, 14 and 15 of the California Constitution and by the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. Specifically, in the absence of grand jury indictment, the state obtained judgment in a felony case pursuant to an illegal charging instrument incapable of informing petitioner of the charges or conferring jurisdiction upon the court. See, Albrecht v. United States, 273 U.S. 1 (1927); Cole v. Arkansas, 333 U.S. 196 (1946); In re Harris, (1993) 5 Cal.4th 813.

a. SUPPORTING FACTS.

Introduction. Petitioner is confined in a state prison and not indicted. United States law requires confinement in the state prison and prosecution of infamous crime to be by mode of indictment of a grand jury. California law requires confinement in the state prison and prosecution of infamous crime is to be by mode of indictment of a grand jury.

No indictment was filed at the outset of the case.

The mode and form of prosecution of petitioner was by felony complaint, attached hereto and incorporated herein as "Attachment 1". The felony complaint was filed in the Superior Court by the state on behalf of the People of the State of California as the first pleading in a felony case. The felony complaint is an illegal charging instrument and when prepared and filed by the state, violated the law and denied petitioner due process. Petitioner is unlawfully confined in the state prison.

1. In order for confinement in the state prison, the federal and state constitutions require an infamous (felony) crime to be prosecuted by indictment of a Grand Jury.

2. The state is not authorized by law to initiate a felony prosecution by mode and form of complaint.

3. A felony complaint does not confer trial jurisdiction.

4. The felony complaint initiated the prosecution upon filing and, being a false instrument, failed to give petitioner notice of the charges against him.

5. The prosecutor's filing of the false instrument with the court is a public offense (felony) and nullifies the judgment.

6. The Superior Court lacked jurisdiction to proceed, to enter judgment and, to punish petitioner.

7. The judgment of conviction is void and may be collaterally attacked at any time and in any court and must be set aside. Relief is not discretionary, it is mandatory.

8. Petitioner's guarantee of due process of law is violated by the state's fraud and petitioner is entitled to immediate and unconditional release from confinement.

b. SUPPORTING CASES, RULES, OR OTHER AUTHORITY.

Introduction. It may not be disputed that there exists no federal or state Constitutional provision, statute or other authority which authorizes the state to obtain judgment and confine a person in the state prison pursuant to prosecution of a felony offense in the first instance by mode of complaint.

To the contrary, California law is firm and settled that felonies must be prosecuted by either one of two authorized forms or modes, indictment or information. By indictment for confinement in the state prison. By information for confinement in the county jail.

"Felonies shall be prosecuted by indictment or, after examination and commitment by a magistrate, by information." (Cal. Const. art I, § 14; California Penal Code §§ 682, 737, 739, 917, 949.)¹

¹ Undesignated statutory references are to the California Penal Code.

"Prosecution for felonies in this state, so far as the mode of prosecution is concerned, are governed by the constitution of the state, which in section 8 [14] of article I provides for prosecution either by information or indictment. The Penal Code, in conformity with the constitution, outlines the procedure of prosecution by indictment as well as by information.' People v. Wallach, (1926) 79 Cal.App. 605, 608. 'Accordingly, the first pleading by the prosecution, in a felony case may be either an indictment or information.' (4 Witkin & Epstein, Cal.Criminal Law (3d Ed. 2000) Pre-trial Proceedings, § 169, p. 374; emphasis in original.)" Guillory v. Superior Court, (2003) 31 Cal.4th 168, 173-174.

No indictment was filed in petitioner's case.

No information was filed at the outset of the case.

It is the filing of an information that gives jurisdiction to the superior court. See, People v. Leonard, (2014) 28 Cal.App.4th 465, 482.

"Here, there is no argument a valid information was not filed at the outset of the case. ... Failure to file an information is an irregularity of sufficient importance to the functioning of the courts that the parties cannot cure the irregularity by their consent to the proceedings. (See, In re Griffin, (1967) 67 Cal.2d 343, 348.) The Superior Court did not have jurisdiction to accept appellant's guilty plea or enter judgment against him. The judgment is reversed." People v. Smith, (1986) 187 Cal.App.3d 1222, 1224.

Prosecution by information is governed by § 738 and as a condition precedent to examination, requires a complaint charging a misdemeanor to be filed by the state. (§§ 740, 949.) Upon the objection of defendant to the offense being made a misdemeanor, the complaint is amended to charge the felony and proceeds as a felony complaint. (§§ 17(b)(4), 806.)

If the defendant pleads guilty, the case is certified by the magistrate to the court where judgment is to be pronounced. (§ 859a.) If the defendant does not plead guilty, the action proceeds to a preliminary examination. (§ 859(b).) If the defendant is held to answer the felony complaint, an information must be filed by the district attorney within 15 days. (§ 739.)

No complaint charging a misdemeanor was filed at the outset of the case. Therefore, an information is not available to the state for purpose of prosecution.

Absent the filing of an indictment, misdemeanor complaint or information at the outset (beginning) of the case (§ 949), the court lacked authority to proceed, enter judgment, sentence and imprison petitioner. "If a conviction is secured by means not sanctioned by law, the conviction cannot and should not stand." People v. Talle, (1952) Cal.App.2nd 659, 678.

Indubitably, an information filed in the absence of a misdemeanor complaint and subsequent to the filing of a false instrument (felony complaint), is a nullity and confers no jurisdiction upon the court. "If the charging document is void, the subject matter jurisdiction of a court does not exist. The want of a sufficient affidavit, complaint or information goes to the jurisdiction of the court...and renders all proceedings prior to the filing of a proper instrument void ab initio."

22 C.J.S. "Criminal Law," § 324, p. 390. No proper instrument was ever filed. The court lacks jurisdiction.

1. In order for confinement in a state prison, the federal and state constitutions require an infamous (felony) crime to be prosecuted by indictment of a Grand Jury.

The United States Constitution is the supreme law of the land and requires prosecution of an infamous crime to commence by indictment of a Grand Jury.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury," (U.S. Const. amend. V.) (**Infamous:** Conduct punishable by imprisonment in a penitentiary (state prison).

California law requires a felony prosecution to commence by indictment of a grand jury; or, after examination of a state misdemeanor complaint amended to charge a felony (at the request of the defendant (§ 17(b)(4)) and commitment by a magistrate (§§ 738, 740), by information. (**Felony:** punishment by death, imprisonment in state prison or county jail under § 1170(h)(1),(2) (§ 17(a).)

"Felonies shall be prosecuted as provided by law, either by indictment or, after examination and commitment by a magistrate, by information." (Cal. Const. art. I, § 14.)

As a matter of federal and state law, only an indictment is authorized for use by the state for prosecution of infamous crimes and confinement in a state prison. Period.

Contrary to popular belief and long time practice by the state, an information is not an authorized alternative for prosecution of infamous crimes.

An information is a product of the California Legislature intended for use solely for prosecution of misdemeanor charges (imprisonment in county jail) to which the defendant pleads not guilty (§ 859b). If convicted, the defendant must, with one exception (§ 1170(h)(3)) which requires state prison time, serve the sentence in the county jail.

It is also used when the misdemeanor complaint is "amended to charge the felony" (§§ 17(a)[1170(h)], 17(b)(4)). However, the crime remains a misdemeanor for all purposes. (§ 17(b).)

"Before an information is filed there must be a preliminary examination of the case against the defendant and an order holding him to answer under Section 872. The proceeding for a preliminary examination must be commenced by written complaint, as provided elsewhere in this code." (Emphasis added.) §§ 738; 740.

"The term 'complaint' is a technical one descriptive of proceedings before magistrates. It is and has been defined to be the preliminary charge or accusation against an offender, made by a private person or an informer to a justice of the peace or other officer, charging that the accused has violated the law." (Emphasis added.)

Rupley v. Johnson, (1953) 120 Cal.App.2d 548, 552, (Construction of § 806); 22 C.J.S. Criminal Law, § 303 pp. 456, 457.

Therefore, an information may not be utilized by the state unless a complaint first made by a private (non-government) person to a officer is determined to constitute an offense chargeable as a misdemeanor and the district attorney elects to prosecute. And then, only if the complaint filed by the prosecuting attorney specifying a misdemeanor is objected to by the defendant as being charged as a misdemeanor, and is amended to charge the felony.

It proceeds as a felony complaint and a valid information may be reached, signed and filed by the district attorney. (§§ 739, 740, 806, 949b; 17(b)(4).) If convicted, sentence is served in the county jail.

NO complaint charging a misdemeanor was filed in this case, and any information filed, is not just invalid, it is void and incapable of conferring jurisdiction upon the court.

It may not be disputed that a "complaint" is not authorized for government usage to charge a felony in the first instance. (U.S. Const. amen. V; Cal. Const. art. I, § 14; § 949.)

This was made abundantly clear in 2005 by then Attorney General Bill Lockyer's public statement that "the government may not even be involved in the preparation, investigation and filing of a felony complaint." People v. Viray, (2005) 134 Cal.App.4th 1186, 1201. However, in petitioner's case, government was involved.

Under California and federal law, no court can acquire jurisdiction to try a person for an offense unless he is charged in the particular form and mode required by law (indictment or information). And, a person may not be punished for a crime without a formal and sufficient accusation.

"A court can acquire no jurisdiction to try a person for a criminal offense unless he has been charged...in the particular form and mode required by law'...'A person may not be punished for a crime without a formal and sufficient accusation even though he voluntarily submits to the jurisdiction of the court. Such is the undisputed law in all jurisdictions.'" Albrecht v. United States 273 U.S. 1, 8 (1927).

Petitioner is confined in the state prison and not indicted. Petitioner's right to not be held to answer for an infamous crime unless upon indictment of a grand jury is violated. The trial court lacked personal and subject-matter jurisdiction. The state prison lacks authority to continue to confine petitioner. Habeas corpus relief in the form of immediate and unconditional release from confinement is mandated for Fifth Amendment due process violation.

2. The state is not authorized by law to initiate a felony prosecution by mode and form of complaint.

A false instrument (complaint charging a felony) is not a mode of prosecution authorized by law to initiate a criminal action brought by the state. See, § 949 (the first pleading on the part of the people in the superior court in a felony case is either an indictment or information). Guillory v. Superior Court, supra, 31 Cal.4th 168, 173-174. The filing of the felony complaint by the prosecutor violated §§ 948, 949, 115(a) and his oath of office. The state may not violate the law in order to enforce the law, as it has done in petitioner's case. Violation of the law nullifies the judgment and renders it void. "Our circuit has held that a collateral attack based on a violation of a state rule of criminal procedure will succeed, and a due process violation will be found when the petitioner shows that he was prejudiced or that his rights were affected thereby." (Emphasis added.) Carter v. McCarthy, 806 F.2d 1373, 1376 Fn2 (9th Cir. 1986). Reversal of conviction is mandated.

3. A felony complaint does not confer trial jurisdiction.

A felony complaint made by a government agent is a false instrument and when filed in the court does not confer jurisdiction. Even a misdemeanor complaint amended to charge a felony when filed by a the state does not confer jurisdiction on the trial court. "A felony complaint, unlike a misdemeanor complaint, does not confer trial jurisdiction." Serna v. Superior Court, (1985) 40 Cal.3d 239, 257.

Thus, an information is required to confer jurisdiction upon the court, try the misdemeanor charge (amended to charge a felony) and confine the defendant in the county jail or state prison.

The Superior Court is the trial court and the felony complaint (Attachment 1) was filed therein. The court was without jurisdiction ab initio and all subsequent proceedings in petitioner's case e.g., filing an information pursuant to the felony complaint, are void. "If the charging document is void, the subject matter jurisdiction of a court does not exist. The want of a sufficient affidavit, complaint or information goes to the jurisdiction of the court,...and renders all proceedings prior to the filing of a proper instrument void ab initio." 22 C.J.S. "Criminal Law," § 324, p. 390. No such proper instrument was filed.

Subsequent to the California Supreme Court's holding in Serna, Attorney General Bill Lockyer, chief law officer for the state and direct supervisor of district attorneys and all other law officers (Cal. Const. art. V, § 13) publicly declared

"the government may not even be involved in the preparation, investigation and filing of a felony complaint." People v. Viray, (2005) 134 Cal.App.4th 1186, 1201. Again however, government was involved. See Felony Complaint (Attachment 1).

The judgment is void. The state is without authority to continue to confine petitioner in state prison.

4. The felony complaint initiated the prosecution upon filing and, being a false instrument, failed to give petitioner notice of the charges against him.

The felony complaint being a false instrument - and insufficient to confer jurisdiction upon the superior court in the first instance - fails to give notice of the charges as effectively as if the charges were never made. Upon filing the bogus instrument (felony complaint), the state intended to, and did, initiate a prosecution. It appears at some distant point of time in the past, prosecutors in California began to follow the practice of foreign jurisdictions...filing felony complaints solely for the purpose of securing arrest warrants.

In their opinion, such filing by the state did not initiate a criminal prosecution. The Attorney General was forced to make and defend this argument before the appellate court and it was soundly rejected.

"In this jurisdiction, in contrast a criminal complaint does not merely operate to secure a warrant of arrest...But whether it is filed for that purpose or not, in this state it commits the prosecutor to pursue a criminal conviction...a commitment from which only a court can grant relief." People v. Viray, (2005) 134 Cal.App.4th 1186, 1205.

Regardless of the prosecutor's intentions, the filing of the complaint (presumed valid by the court) required that all Constitutional provisions and guarantees due petitioner, inter alia "notice", be provided. "In light of California law...the full panoply of rights Californians have come to expect as their due...applies once a criminal complaint is filed." Serna v. Superior Court, supra, at 257, citing People v. Hannon, (1977) 19 Cal.3d 588, 608. The right to notice of crimes charged is a Sixth Amendment guarantee of fair notice.

No principal of procedural due process is more clearly established than that of notice of the specific charge is among the Constitutional rights of every accused in a criminal proceeding in all courts, state or federal.

"It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." Cole v. Arkansas 333 U.S. 196, 201 (1946); Lankford v. Idaho, 500 U.S. 110, 126 (1991); Calderon v. Prunty 59 F.3d 1005, 1008 (9th Cir. 1995) (charging document).

The court is lacking personal jurisdiction for want of adequate notice to petitioner. Jurisdiction over the person of petitioner is lacking because the process employed (illegal charging instrument (felony complaint)) did not give adequate notice to petitioner, against whom judgment was rendered; e.g., see, Walker v. City of Hutchinson 352 U.S. 1293 (S.D.N.Y 1970).

The state is without authority to confine petitioner.

5. The prosecutor's filing of the false instrument with the court is a public offense (felony) and nullifies the judgment.

Penal Code Section (115(a)) makes the filing of a false instrument in a public office a felony offense under the fraud statutes. Fraud has no statute of limitation. (§ 803.5.)

"Every person who knowingly procures or offers any false or forged instrument to be filed, registered, or recorded in any public office within this state, which instrument, if genuine, might be filed, registered, or recorded under any law of this state or of the United States, is guilty of a felony."
(§ 115(a).)

The prosecutor's violation of a state law requires reversal of conviction; habeas corpus will lie. See, Carter v. McCarthy, 806 F.2d 1373, 1376 Fn2, supra. Government officers (District Attorneys et al.,) lose their immunity when they violate the law and the due process rights of petitioner: criminal case dismissed; prosecutor liable for damages. Kalina v. Fletcher 52 U.S. 118 (1997). Petitioner is prejudiced by the unlawful act of the state actors prosecuting without authority and petitioner's Constitutional rights to due process are violated. "In any event it is the alleged violation of a Constitutional right that triggers a finding of irreparable harm." Jolly v. Coughlin 76 F.3d 468, 482 (1995).

Petitioner is unlawfully confined in the state prison.

6. The Superior Court lacked jurisdiction to proceed, to enter judgment and, to punish petitioner.

Absent indictment and there being no express law in the land authorizing the state to file a felony complaint or for the court to proceed by mode of felony complaint and a felony complaint incapable of conferring jurisdiction upon the court, the court acquired no jurisdiction to try and punish petitioner or to confine him in the state prison.

Under California and federal law, no court can acquire jurisdiction to try a person for an offense punishable in the state prison unless he is charged in the particular form and mode required by law indictment. A person may not be punished for a crime without a formal and sufficient accusation, and such is the "...undisputed law in all jurisdictions." Albrecht v. United States 273 U.S. 1, 8 (1927).

The government must, as all public servants know, have written authority ("going by the book") to take any action and particularly when such action (criminal prosecution via false instrument) may infringe upon a person's liberty, as it did in petitioner's case. A "quick peek" into the California Penal Code, the "book" law enforcement and courts are required to follow for authority in the prosecution of criminal actions (§ 948), evidences a lack of authorization for the state to prosecute felonies via complaint. (§ 949.)

"No individual or body of men has a discretionary or arbitrary power to commit any person to prison; no man can be restrained of his liberty, be prevented from removing himself from place to place as he chooses, be compelled to go to a place contrary to his inclination, or be in any way imprisoned or confined, unless by virtue of the express laws of the land." Hurtado v. People of California 110 U.S. 516, 537 (1884).

The Superior Court lacked both personal and subject matter jurisdiction and the judgment is void. Petitioner is unlawfully confined in the state prison.

7. The judgment of conviction is void and may be collaterally attacked at any time and in any court and must be set aside. Relief is not discretionary, it is mandatory.

The judgment obtained by the state pursuant to the felony complaint (Attachment 1), is void for want of jurisdiction in the Superior Court for lack of a sufficient charging instrument. "The indictment or complaint can be invalid if it is not constructed in the particular mode or form prescribed by constitution or statute." 42 C.J.S. "Indictments and Informations," § 1, p. 833. "Without a formal and sufficient indictment or information, a court does not acquire subject matter jurisdiction and thus an accused may not be punished for a crime." Honomichl v. State, 333 N.W.2d 797, 798 (S.D. 1983); Albrecht v. United States 273 U.S. 1, 8 (1927).

Additionally, the judgment is void for the prosecutor's fraud on the court. Penal Code Section 115(a) is a fraud statute. Upon filing the felony complaint, the state (District Attorney) violated the law and thereby divested the court of jurisdiction.

The court lacks authority to proceed pursuant to a false instrument. See, Carter v. McCarthy, 806 F.2d 1373, 1376 Fn2 (9th Cir. 1986) (Violation of a rule of law is due process violation and habeas will succeed).

"Courts are constituted by authority and they cannot go beyond that power delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities; they are not voidable, but simply void, and this even prior to reversal." Williamson v. Berry, 8 How. 945, 950 12 L.Ed. 1170, 189 (1850).

A void judgment may be collaterally attacked at any time and in any court. Review of question of void judgment is required by law.

"Jurisdiction, once challenged, cannot be assumed, it must be proven to exist." Maine v. Thiboutot 448 U.S. 1 (1980) (65 L.Ed 2d 555). "When the grant or denial (of a habeas petition) turns on the validity of the judgment, discretion has no place for operation. If the judgment is void it must be set aside". Fisher v. Amaraneni, 565 SO2d. 84, 87 (ALA. 1990).

"A judgment rendered by a court wholly lacking jurisdiction may be challenged at any time." In re Harris, (1993) 5 Cal.4th 813, 836. "When a court lacks jurisdiction in a fundamental sense, an ensuing judgment is void, and such judgment is vulnerable to direct or collateral attack at any time." People v. Vasilyan, (2009) 174 Cal.App.4th 443, 450. "Jurisdiction can be challenged at any time." Basso v. Utah Power & Light Co. 495 F.2d 906, 910 (1974).

Jurisdiction may be challenged in any court, state or federal. "It is clear and well established law that a void order can be challenged in any court." Old Wayne Mut. L. Assoc. v. McDonough 204 U.S. 8, 23 (1907).

8. Petitioner's guarantee of due process of law is violated by the state's fraud and petitioner is entitled to immediate and unconditional release from confinement.

The state law violations by the district attorney and the court - taking petitioner's liberty in the absence of any and all authority (no indictment, no notice of the charges) - are the epitome of fundamental jurisdictional and Constitutional defects. Such unlawful conduct constitutes fundamental unfairness and violates petitioner's Fourteenth Amendment guaranteed right to due process of law.

The state's unlawful conduct resulted in violation of federal law and Fifth Amendment requirement for indictment of a grand jury, and mandates that this Court consider petitioner's claim of a fundamentally unjust incarceration per se. As the Court has explained, "the principles of comity and finality that inform the concepts of cause and prejudice must yield to the imperative of correcting a fundamentally unjust incarceration." Murray v. Carrier 477 U.S. 478, 496 (1986) (quoting Engle v. Isaac 456 U.S. 107, 135 (1982)).

There is no arraignment procedure in the superior court for a defendant charged by felony complaint. The Superior Court lacks jurisdiction of such a complaint (Serna v. Superior Court, (1985) 40 Cal.3d 239, 257).

This, inter alia, may be the reason there is no plea available to a defendant named in a felony complaint. Authorized pleading for a defendant is found at § 1002: "A defendant has only one pleading available, either a demurrer or plea." Pleas are found at § 1016: "There are six kinds of pleas to an indictment or information, or to a complaint charging a misdemeanor or infraction: Guilty, Not Guilty, etc."

But there is no plea available for a defendant named in a felony complaint.

Therefore, for want of procedure for arraignment or availability of plea, the rudimentary demands of fair procedure are not met, the court lacks both personal and subject matter jurisdiction. For want of jurisdiction, the judgment of conviction is void and petitioner's confinement is illegal. Habeas corpus relief is required and petitioner is entitled to unconditional release.

Orders requiring petitioner's unconditional release from confinement remain in the modern pantheon of potentially appropriate habeas corpus remedies. Unconditional release orders are required when a court concludes that the fact of the prosecution and not simply the manner in which the prosecution occurred violates the Constitution, thus requiring release from confinement with prejudice to re-prosecution.

First and foremost, for want of indictment, is absence of jurisdiction. "Unconditional release' appropriate if 'there is no jurisdiction to detain the applicant.'" Walberg v. Israel, 776 F.2d 134, 136 (7th Cir. 1985).

Second is fraud on the court. It is black letter law that fraud vitiates any judgment no matter how solemn. The felony complaint is a false instrument, the filing of which by the state violated the law (§§ 115(a), 949) and any bogus instrument is incapable of supporting confinement of petitioner in either the state prison or county jail. Unconditional release of petitioner from confinement is mandatory. See, §§ 1485, 1487; 28 U.S.C. 2254, et seq. Habeas corpus relief is required, the writ must issue.

c. SUMMARY

Indictment is required for a felony prosecution, conviction and imprisonment in the state prison. Authority for the state to prosecute, convict and imprison petitioner by mode of felony complaint does not exist. (U.S. Const. amend. V; Cal. Const. art. I, § 14; §§ 682, 737, 948, 949, 988 and 1016.)

In support of the law, the Office of the Attorney General declares "government may not even be involved in the...filing of a felony complaint" (Bill Lockyer, 2005) and inter alia, "Under California law, a felony complaint does not confer trial jurisdiction" (Xavier Becerra, 2019).

The District Attorney knew or should have known that for want of indictment he acted ultra vires his authority and that filing a false instrument was a crime. At the time of filing the felony complaint the Superior Court lost jurisdiction of the case, even if the prosecutor had so filed in the past without objection.

Long standing practice notwithstanding, prosecution by mode of a false instrument (felony complaint) is not authorized by law. And when accomplished as in petitioner's case, violates the Constitution.

"It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire National existence and even predates it." Walz v. Tax Commission of City of New York 397 U.S. 664, 678 (1970).

The Fourth Amendment, in pertinent part, declares "The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated" (U.S. Const. amend. IV).

The Fifth Amendment, in pertinent part, mandates "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." (U.S. Const. amend. V).

Standing alone among the state's fraudulent actions, violation of the Fourth Amendment's prohibition of "unreasonable seizures" as it applies to the seizure of the person, and the Fifth Amendment's mandate of Grand Jury indictment, preserves for citizens the traditional protections against unlawful arrest, prosecution and confinement afforded by the common law. See, California v. Hordari D. 499 U.S. 621 (1991).

The Due Process Clauses of both the state and federal constitutions guarantee that petitioner's liberty will not be taken pursuant to an order of a court lacking personal and/or subject matter jurisdiction. However, that is precisely what has occurred in the instant case.

Petitioner is prejudiced by the seizure and confinement of his person in violation of his right to due process of law. Conviction is void, the sentence is illegal and habeas corpus is available. "And Habeas Corpus will lie whenever one is held under a sentence which violates his fundamental constitutional rights." In re Smiley, (1967) 66 Cal.2d 606, 614.

"Blessed are those who keep justice, and he who does righteousness at all times." Psalm 108:3 NKJV.

d. CONCLUSION

Petitioner, confined in the state prison and not indicted, has shown that an indictment is required for prosecution of an infamous crime and confinement in the state prison. And, that the felony complaint is a false instrument and incapable of conferring either personal or subject matter jurisdiction upon the Superior Court. Filing a false instrument by the state violates procedure (§ 949) and is a crime (fraud; §115(a)) and thus, the judgment is void.

Petitioner's inalienable right to liberty and to be secure in his person and to enjoy the process due him to be charged in the particular form and mode required by law for confinement in the state prison (indictment) as guaranteed by both the state and federal Constitutions is violated.

For reason of Constitutional violations, fraud and violations of state and federal law by the state, the trial court lacked jurisdiction of the case in the first instance and the judgment of the Superior Court is void ab initio.

Petitioner's confinement in the state prison is a direct result of the state's violation of petitioner's Constitutional right to due process of law. Petitioner's confinement violates the Constitution and laws of the United States. The writ applied for herein must be awarded.

e. PRAYER FOR RELIEF

For reasons set forth above, petitioner prays that the writ applied for herein be awarded, to result in the immediate and unconditional release of petitioner from confinement in the state prison and discharge from the custody of the state and, and to the custody of none other.