

**IN THE DISTRICT COURT OF TRAVIS COUNTY
331st JUDICIAL DISTRICT**

Ex parte §
Tom Delay § **No. D1-DC-05-900725**
§
§

March 16, 2006

APPLICATION FOR WRIT OF HABEAS CORPUS

This application is presented by, Randall D. Kelton, hereinafter referred to as "Petitioner" (see Texas Code of Criminal Procedure, Article 11.12), on behalf of Thomas Delay, hereinafter referred to as "Applicant" (see Texas Code of Criminal Procedure, Article 11.13).

Applicant is being illegally restrained at his liberty by the Sheriff of Travis County Texas, Greg Hamilton, hereinafter referred to as "Respondent," without jurisdiction or charge being properly filed in any court of jurisdiction.

REASONS RESTRAINT IS ILLEGAL

Applicant's restraint is illegal as no person has made a criminal accusation against Applicant which is necessary to render the State jurisdiction.

ARGUMENT IN SUPPORT OF WRIT

Applicant has been made to answer for an infamous crime, which no one has accused him of committing. Therefore, the State of Texas is restricting him at his liberty without authority or jurisdiction.

Applicant was charged by indictment and a warrant issued from the District Clerk. However, there is no complaint in the court record to support the warrant.

The trial court has recommended that the writ be granted since the information is fundamentally defective, and the State's brief concedes that error of fundamental dimensions has occurred. We agree, noting that **it is fundamental that the name of the complaining witness is a necessary requisite to a valid indictment or information.** *EX PARTE BOB LEWIS (12/22/76) 1976.TX.41549; 544 S.W.2d 430* (emphasis added)

The current cause raises significant questions about how the grand jury came to indict Applicant. If the cause was initiated by the grand jury, what person had personal knowledge that Applicant committed some crime, and by what method does that person avoid the civic duty of filing a proper criminal accusation?

If the grand jury did not come by the knowledge on its own, but by way of the prosecuting attorney, then the prosecutor must be viewed as the accuser. However, such would create an untenable conflict. In *PETER B. PETERSON v. STATE TEXAS (12/20/89), 1989.TX.41854; 781 S.W.2d 933* the court held:

An information is a "primary pleading in a criminal action on the part of the State," Article 27.01, V.A.C.C.P., a written pleading in behalf of the State drawn, filed and presented by a prosecuting attorney charging an accused with an offense that may be prosecuted under the law. Article 21.20, V.A.C.C.P. in order to "**protect its citizens from the inherent dangers arising from the concentration of power in any one individual,**" *Kennedy v. State, 161 Tex. Crim. 303, 276 S.W.2d 291 (1955)*(Opinion on Motion for Rehearing, at 664), **the Legislature precluded a prosecutor from presenting an information "until affidavit has been made by some credible person charging the defendant with an offense,"** and also mandated, "**The affidavit shall**

be filed with the information." Article 21.22, supra. Such an affidavit is, of course, a complaint within the meaning of Article 15.04, V.A.C.C.P. "In other words, a prosecuting attorney is not authorized to institute prosecutions in the county court upon his independent act or of his own volition." Kennedy v. State, supra, at 294. One may not be "both the accuser and the prosecutor in misdemeanor cases." Wells v. State, 516 S.W.2d 663, at 664 (Tex.Cr.App. 1974). Compare Glass v. State, 162 Tex. Crim. 598, 288 S.W.2d 522 (1956); Catchings v. State, 162 Tex. Crim. 342, 285 S.W.2d 233, at 234 (1955)

If the indictment is to be considered the charging instrument, where is the jurat? The indictment is merely a presentment by the grand jury consequent to a verified criminal accusation. So, whose affirmation is verified on that primary accusation?

In *State of Texas v. Carroll Pierce* the court held:

"A valid complaint is a prerequisite to a valid information. Holland v. State, 623 S.W.2d 651, 652 (Tex. Cr. App. 1981). Without a valid complaint, the information is worthless. Williams v. State, 133 Tex. Crim. 39, 107 S.W.2d 996, 977 (Tex. Cr. App. 1937). A jurat is the certificate of the officer before whom the complaint is made stating that it was sworn to and subscribed by the Applicant before the officer. Carpenter v. State, 153 Tex. Crim. 99, 218 S.W.2d 207, 208 (Tex. Cr. App. 1949). A jurat is essential, for without it, the complaint is fatally defective and will not support an information. Shackelford v. State, 516 S.W.2d 180 (Tex. Cr. App. 1970). The jurat must be dated and signed by the official character. See 22 Tex. Jur. 3d, Criminal Law, Section 2266 at 490. Thus, a complaint not sworn to before any official or person in authority is insufficient to constitute a basis for a valid conviction. Nichols v. State, 171 Tex. Crim. 42, 344 S.W.2d 694 (Tex. Cr. App. 1961) (citing Purcell v. State; 317 S.W.2d 208 (Tex. Cr. App. 1958)); see also Eldridge v. State, 572 S.W.2d 716, 717, n.1 (Tex. Cr. App. 1978); Wheeler v. State, 172 Tex. Crim. 21, 353 S.W.2d 463 (Tex. Cr. App. 1961); Morey v. State, 744 S.W.2d 668 (Tex. App. 1988, no pet.). Even where the jurat on the complaint reflects that it was sworn to before a named person but

does not show the authority of such person to act, the complaint is void. *Johnson v. State*, 154 Tex. Crim. 257, 226 S.W.2d 644 (Tex. Cr. App. 1950); *Smola v. State*, 736 S.W.2d 265, 266 (Tex. App. 1987, no pet.). The complaint is also void when the jurat contains no signature but only shows the office such as "County Attorney of Jones County, Texas." *Carter v. State*, 398 S.W.2d 290 (Tex. Cr. App. 1966). When a jurat showed that the complaint had been sworn to before "Lavern I. McCann, Hockley County, Texas," the complaint was insufficient to support the information. *Carpenter*, 218 S.W.2d at 208-09. In the early case of *Neiman v. State*, 29 Tex. Civ. App. 360, 16 S.W. 253 (Tex. Ct. App. 1891), the complaint was sworn to before "Wm. Greer J.P." It was held that the letters "J.P." could not be inferred to mean Justice of the Peace and an official who had the authority to administer the oath."

"When a jurat on a complaint shows that the oath was administered to the Applicant by a party designated as county attorney but who in reality is an assistant county attorney, the complaint is void. *Thomas v. State*, 169 Tex. Crim. 369, 334 S.W.2d 291, 292 (Tex. Cr. App. 1960); see also *Aleman v. State*, 162 Tex. Crim. 265, 284 S.W.2d 719 (Tex. Cr. App. 1956); *Stalculp v. State*, 99 Tex. Crim. 279, 269 S.W. 1044, 1045 (Tex. Cr. App. 1925). When the assistant or deputy is authorized by law to administer the oath himself, he may not administer it in the name of his principal and may not certify that the principal administered the oath by and through him as an assistant. *Goodman v. State*, 85 Tex. Crim. 279, 212 S.W. 171 (Tex. Cr. App. 1919)." *State of Texas v. Carroll Pierce (09/25/91)*, 1991.TX.41404; 816 S.W.2d 824

If the instrument was prepared and presented to the grand jury by the prosecutor, who then is the accuser, and by what authority did the prosecutor initiate a prosecution by present of an indictment to the grand jury?

To avoid situations were the State stands as both accuser and prosecutor, procedures were put in place directing the grand jury in how it would proceed. In the current cause, these procedures have been abridged in such a fashion so as to

deny the accused in his rights, specifically to deny Applicant in his right to know and face his accuser,

The Texas Constitution

Article 1 - BILL OF RIGHTS

Section 10 - RIGHTS OF ACCUSED IN CRIMINAL PROSECUTIONS

In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury. He shall have the right to demand the nature and cause of the accusation against him, and to have a copy thereof. He shall not be compelled to give evidence against himself, and shall have the right of being heard by himself or counsel, or both, **shall be confronted by the witnesses against him** and shall have compulsory process for obtaining witnesses in his favor, except that when the witness resides out of the State and the offense charged is a violation of any of the anti-trust laws of this State, the defendant and the State shall have the right to produce and have the evidence admitted by deposition, under such rules and laws as the Legislature may hereafter provide; and no person shall be held to answer for a criminal offense, unless on an indictment of a grand jury, except in cases in which the punishment is by fine or imprisonment, otherwise than in the penitentiary, in cases of impeachment, and in cases arising in the army or navy, or in the militia, when in actual service in time of war or public danger. (Amended Nov. 5, 1918.) (emphasis added)

and to deny Applicant opportunity to head off this whole process through the presentation of exculpatory evidence at a proper examining trial. An examining trial is defined by the Texas Code of Criminal Procedure by Article 2.11 as follows:

Texas Code of Criminal Procedure by Article 2.11. [35] [62] [63] EXAMINING COURT.

When the magistrate sits for the purpose of inquiring into a criminal accusation against any person, this is called an examining court.

Applicant has been indicted, bound to the court for trial, and forced to step down his high level political position yet no one has made a criminal accusation against him; no credible person has presented any criminal accusation to any magistrate; and no court clerk ever received any criminal accusation against Applicant from an examining court. Neither has any clerk kept said complaint and other documents had in said hearing safe and delivered them up to the next grand jury.

Applicant's attorney and the district attorney's office were apprised of the concerns addressed here, specifically, "Who is Applicant's accuser?" Both replied that it must be the grand jury. Mr. Degurin seemed somehow to think this notion of the need for a criminal accusation prior to prosecution to have somehow been discredited. The prosecutors to whom I spoke, while surprisingly civil, respectful, and candid, could give no reason not to proceed as all seemed of the opinion the governmental instrument of the grand jury could somehow be the accuser absent a verified affidavit, while another governmental instrument could be the prosecutor.

Article 20.19 Texas Code of Criminal Procedure instructs the grand jury as follows:

Texas Code of Criminal Procedure Article 20.19. [391] [442-443] Grand jury shall vote

After all the testimony which is accessible to the grand jury shall have been given in respect to any **criminal accusation**, the vote shall be taken as to the presentment of an indictment, and if nine members concur in finding the bill, the foreman shall make a

memorandum of the same with such data as will enable the attorney who represents the State to write the indictment. (emphasis added)

By what legal mechanism did the grand jury vote on a non-existent criminal accusation? An examination of the code will reveal no other method of bringing an indictment.

This power of the grand jury to act without a criminal accusation has the effect of circumventing criminal procedures carefully crafted by the Legislature and codified into Chapter 16 Texas Code of Criminal Procedure. Specifically, by granted this implied power to the grand jury, Applicant is denied in his right to an examination into the sufficiency of the allegation before he be subject to answer to an infamous allegation.

Surely this practice of indictment without criminal accusation cannot be based on past practice or some assumption of implied power. In *Thomas v. State* the court held:

"A matter not included within a penal statute should not by judicial construction be read into it because in so doing the judiciary would usurp the functions of the Legislature. The legislative intent should be ascertained from the words of the act itself." . *H. R. Thomas v. The State, 129 Tex. Crim. 628, at 632; 91 S.W.2d 716; 1935 Tex. Crim. App. 557*

If the statutes are read and followed, there is no room for assumption or implication. The statutes create a corpus juris which stipulates a procedure designed to insure a criminal complaint is always present as the primary pleading in a criminal cause, an information is always properly prepared, and both are

presented to the court having jurisdiction and the grand jury. In *MALLORY v. UNITED STATES* the court held:

"The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication." *MALLORY v. UNITED STATES*, 77 S. Ct. 1356, 354 U.S. 449 (U.S. 06/24/1957)

It seems, in the instant cause, the grand jury voted without securing the jurisdiction provided by a criminal accusation. When the foreman of the grand jury requested an indictment be drawn up, the prosecutor had a clear duty to advise the foreman of the need for a proper criminal accusation. Also, he was certainly, by the request to prepare an indictment and evidence presented to him, made known that a public official had violated a law relating to his office. Article 2.03 Texas Code of Criminal Procedure clearly directs the prosecuting attorney in these matters as follows:

Texas Code of Criminal Procedure Article 2.03. [27] [33] [34] Neglect of duty

- (a) It shall be the duty of the attorney representing the State to present by information to the court having jurisdiction, any officer for neglect or failure of any duty enjoined upon such officer, when such neglect or failure can be presented by information, whenever it shall come to the knowledge of said attorney that there has been a neglect or failure of duty upon the part of said officer; and he shall bring to the notice of the grand jury any act of violation of law or neglect or failure of duty upon the part of any officer, when such violation, neglect or failure is not presented by information, and whenever the same may come to his knowledge.

I assert, the foreman of the grand jury is given no special power to act outside statutory boundaries. When the foreman made it known to the prosecuting attorney that a crime had been committed, he did not do so in some implied special capacity, but rather, as a singular citizen. The grand jury could not "find the bill," as there was no criminal accusation on which to vote. So, when the foreman made notification to the prosecuting attorney that a crime had been committed, the prosecutor's duty was clear.

As no court was ever been notified that a crime had been committed, the prosecutor had a clear duty to take a criminal complaint from the foreman of the grand jury, some grand jury member, or any other credible person having knowledge or reason to believe a crime had been committed.

He was then commanded by Article 2.04 Texas Code of Criminal Procedure as follows:

Texas Code of Criminal Procedure Article 2.04. [28] [34] [35] SHALL DRAW COMPLAINTS.

Upon complaint being made before a district or county attorney that an offense has been committed in his district or county, he shall reduce the complaint to writing and cause the same to be signed and sworn to by the complainant, and it shall be duly attested by said attorney.

He was then required to act in accordance with Article 2.05 Texas Code of Criminal Procedure:

Texas Code of Criminal Procedure Article 2.05. [29] [35] [36] WHEN COMPLAINT IS MADE.

If the offense be a misdemeanor, the attorney shall forthwith prepare an information based upon such complaint and file the same in the court having jurisdiction; provided, that in counties having no county attorney, misdemeanor cases may be tried upon complaint alone, without an information, provided, however, in counties having one or more criminal district courts an information must be filed in each misdemeanor case. If the offense be a felony, he shall forthwith file the complaint with a magistrate of the county.

With no proper criminal accusation in the court record, there is no accused and the court is without jurisdiction over Applicant. In *William t. Gholson* the court held:

Therefore, it is the complaint alone, and not any other affidavits given in support of arrest or search warrants, which determines the validity of the information. *Holland v. State*, 623 S.W.2d 651 (Tex. Crim. App. 1981). *William t. Gholson v. STATE TEXAS (06/23/83) 1983.TX.41167; 667 S.W.2d 16*

See also, *J. W. Winans v. State*:

OPINION:

Graves, Judge.--The offense charged is for violating the local option liquor laws, the punishment assessed being a fine of \$ 300.00.

The record is before us without a complaint being incorporated therein. We have heretofore held that a complaint is necessary in order to confer jurisdiction upon the county court. See Article 415, C. C. P.; *McQueen v. State*, No. 19521, opinion this day handed down [page 74 of this volume], and *Olivares v. State*, 76 S.W.2d 140.

The judgment is reversed and the prosecution ordered dismissed. [***2]. *J. W. Winans v. The State*, 135 *Tex. Crim.* 102; 117 *S.W.2d* 81; 1938 *Tex. Crim. App.* 584

And *Olivares v. The State*:

HAWKINS, Judge.--Conviction is for operating a commercial motor vehicle which was over the gross weight permitted by law. Punishment was assessed at a fine of twenty-five dollars. The information found in the record recites that it is based upon the affidavit of a named party, which affidavit is "hereto attached and made a part hereof." There is no complaint attached to the information, or if so, it is not shown from the record, and no complaint appears anywhere in the record before this court. In such condition no jurisdiction is shown in the county court. See article 415 C. C. P. (1925); *Wadgymer v. State*, 21 *Tex. Ct. App.* [***2] 459, 2 *S.W.* 768; *Diltz v. State*, 56 *Tex. Crim.* 127, 119 *S.W.* 92; *Day v. State*, 105 *Tex. Crim.* 117, 286 *S.W.* 1107. Other authorities are annotated in note 5 under said article 415, vol. 1, Vernon's Ann. Tex. C. C. P. No complaint appearing as a predicate for the information, it will be necessary for this court to reverse and direct the dismissal of the prosecution. **I. Olivares v. The State.** 127 *Tex. Crim.* 316; 76 *S.W.2d* 140; 1934 *Tex. Crim. App.* LEXIS 42

This practice of allowing a grand jury to act without a criminal complaint, then allowing prosecutors to ignore the clear requirement of Articles 2.03, 204, and 205 Texas Code of Criminal Procedure, however long it may have been the practice, is simply not in compliance with statutory stipulations.

13 Am Jru Proof of Facts 3d, 21

“Without having been directly authorized, tacitly encouraged, or even inadequately trained, police officers, *like other public employees, may fall into patterns of unconstitutional conduct.* This can result from a variety of factors not sufficiently traceable in origin to any fault of “municipal policy” in the Monell sense (*Monell v*

Dept. of Social Services (1978) 436 US 658, and Soell v McDaniel (1987 CA4 NC) 824 F2d 1380). **If these unconstitutional practices become sufficiently widespread, however, they may assume the quality of “custom or usage” which has the force of law...**” (emphasis added)

I find nothing in law to support the notion the Legislature intended to dispense with the primary pleading in felony cases. I find much about the criminal accusation, properly presented by some credible person, as being the single document upon which jurisdiction lies. In *J. M. Thornberry v. The State* the court held:

"Winkler, J. From all we can gather from the transcript of the record, the information upon which the appellant was tried and convicted was filed without any written affidavit that any offense against the law had been committed by the defendant; and without this the information was worthless and totally insufficient to support a conviction."

"The Bill of Rights declares, among other things, that "no warrant to search any place, or seize any person or thing, shall issue without describing them as near as may be, **nor without probable cause, supported by oath or affirmation.**" Const., Texas Code of Criminal Procedure by Article 1, sec. 9."

"This declaration, being among *high powers* excepted out of the general powers of government, is placed beyond the control of courts and legislatures." *J. M. Thornberry v. The State. 3 Tex. Ct. App. 36; 1877 Tex. Crim. App. 202* (emphasis added)

The indictment cannot be the sole source of jurisdiction as the grand jury is instructed to vote on a criminal accusation. The prosecutor will argue that the grand jury is specifically given the power and the duty to investigate into matters.

Texas Code of Criminal Procedure Article 20.09. [381] [432] [420] Duties of grand jury

The grand jury shall inquire into all offenses liable to indictment of which any member may have knowledge, or of which they shall be informed by the attorney representing the State, or any other credible person.

While the grand jury is given the authority to act as criminal investigators, nothing extends that permission to acting against a person absent a proper criminal accusation. While a prosecuting attorney is specifically forbidden to swear out a criminal complaint, nothing so restricts a grand jury member. Like any other criminal investigator, if a grand jury member comes to knowledge that some person has committed a criminal act, that member has the same civic duty any other citizen has to report the crime by verified affidavit such that the accused may be brought before some magistrate and the allegation examined in accordance with the practices, procedures, and protections contained in Chapter 16 Code of Criminal Procedure.

This is made even more certain by Article 20.22 Texas Code of Criminal Procedure:

Texas Code of Criminal Procedure Article 20.22. [394] [446] [434] PRESENTMENT ENTERED OF RECORD.

The fact of a presentment of indictment by a grand jury shall be entered upon the minutes of the court, if the defendant is in custody or under bond, noting briefly the style of the criminal action and the file number of the indictment and the defendant's name. **If the defendant is not in custody or under bond at the time of the**

presentment of indictment, the entry in the minutes of the court relating to said indictment shall be delayed until such time as the capias is served and the defendant is placed in custody or under bond. (emphasis added)

Since the capias is a form of warrant, it cannot issue absent a proper criminal accusation in the court record. The Legislature never intended any person be indicted until such time as he had opportunity to defend him/herself at an examining trail. By this restriction, indictments by ambush as this one certainly is, would be avoided. Such power to act absent the due course of the laws, not specifically given, may not be assumed or implied.

When the grand jury attempted to indict Applicant with no criminal accusation on which to vote, it was the duty of prosecutor to so advise them that they were without jurisdiction absent a criminal accusation. That Travis County District Attorney, Ron Earl, either in person or through one of his functionaries, refused to advise the grand jury of something so basic to jurisdiction as a proper criminal accusation may not be considered mere oversight. Having knowledge such a procedure would have the effect of denying Applicant in his statutory and Constitutional rights, which would most certainly have the effect of irrevocably harming him.

It was also the duty of the prosecuting attorney, upon being made known in any manner that a public official had violated a law relating to his office, to prepare a complaint, have it sworn to by the foreman of the grand jury, a grand jury member, or any credible person having knowledge or reason to believe a crime had been committed by the accused. He then had a duty to reduce the complaint to an information and submit both to the clerk of the court having jurisdiction, that the

accused may have opportunity to be brought before said court in and a proper examining trial held.

As the prosecutor went ahead and prepared an indictment without securing a complaint, it must be presumed he acted willfully for the purpose of denying Applicant in his rights carefully crafted by the Legislature and laid down in Chapter 16 Texas Code of Criminal Procedure.

The previous paragraph assumes the foreman of the grand jury petitioned the prosecutor in accordance with Article 20.19. This assumption certainly begs a question: Did the foreman of the grand jury petition the prosecutor after a vote had been taken; or did the prosecutor prepare an indictment and present it to the grand jury as a primary pleading in the cause?

This question bears directly on the concern of the court expressed in *Kennedy v State*. The seminal case which strictly forbade the prosecutor from being both accuser and prosecutor also addressed another concern:

"There is still another reason why we should not approve of the prosecutor acting in this dual capacity. To do so would be rendering a great disservice to the prosecuting fraternity. We know from experience that a great many people would like to see their neighbor fall into the clutches of the law but are reluctant to sign a complaint. To hold that the prosecutor might be both accuser and prosecutor would subject him to the accusation of misfeasance if he did not accede to the wishes of these reluctant accusers." *Wilma Hazel Kennedy v. State*. 161 *Tex. Crim.* 303; 276 *S.W.2d* 291; 1955 *Tex. Crim. App.* 1397

The real concern is not so much that prosecutor may have connived to circumvent the due course of the laws and maliciously bushwack Affiant with a surprise indictment, the real concern is, given current practices, the prosecutor could. If he could, the presumption will naturally follow that he did.

If the prosecutor notified the grand jury of the allegations against Applicant by way of the presentment of an indictment to the grand jury, what do we call that? I personally would call it a juxtaposition of due course procedure bread of culpable intent.

Even assuming the grand jury somehow came to this knowledge by some avenue other than the prosecuting attorney, by some sort of notification or investigation, they, as criminal investigators, are not necessarily any more skilled or knowledgeable about the particulars of criminal procedure than the average individual. Therefore to imply that simply because they were given the power to investigate into allegations this somehow bestowed other powers not specified, hinted at, or alluded to in any manner is simply reckless.

We don't trust professional investigators to pursue prosecution on their own. They are required to make proper charge before some magistrate. Grand jury members are not even, necessarily, trained investigators. To imagine they are knowledgeable enough to act totally outside the Code of Criminal Procedure and bring an indictment absent any civil rights protections afforded the accused is an outrageous breach of the public trust.

Had the prosecutor acted in accordance with Articles 2.03, 2.04 and 2.05 Texas Code of Criminal Procedure, the prosecution would have been in no way

jeopardized and Applicant would have had opportunity to exercise his rights. He would have been able to have an examining trail before the case was presented to the grand jury.

He may have been able, at an examining trail, to present evidence the grand jury might not have found in its investigation, that would demonstrate a total lack of probable cause and Applicant would not have had to resign his high level position in disgrace. We can't know this as the presumed practices used had the effect of denying Applicant in this right and opportunity.

This particular cause goes to the particulars of a special statute. Article 2.03 Texas Code of Criminal Procedure stipulates a practice outside the normal criminal procedure. It specifically directs the prosecuting attorney in specific circumstances regarding public officials. The duty required here is essentially the same as for crimes by citizens, but the Legislature saw fit to take care to special emphasis on matters concerning public officials. Therefore, it should be read to mean precisely what it states that the prosecuting attorney shall prepare an information. Even if the court would read "shall" to mean "may," it would still be obligatory, as "may" in this context, is permissive in that it specifically gives the prosecutor permission to do what he has been directed to do.

An examination of the court record will reveal no information prepared by the prosecuting attorney and presented to the court having jurisdiction. Neither will you find a criminal accusation that must be in evidence in order to support the information prosecutor was directed to prepare and provide the court with jurisdiction.

Neglecting to advise the grand jury about Article 20.19 TCCP and the need for a criminal accusation serves a political purpose for prosecutor. Had prosecutor advised the grand jury they could not vote on a non-existent accusation and requested one from the foreman, a member of the grand jury, or any credible person, he would have had a duty to file same with the court having jurisdiction.

The filing of a complaint with some magistrate would start the due course of law with the holding of an examining trial, either to secure a warrant for Applicant's arrest or with the appearance of Applicant by summons. In either case, Applicant would have had opportunity to appear at an examining trail and make a case for dismissal before indictment.

At this hearing a proper examination could have been had wherein Applicant's rights could have been protected. In the event of a finding of probable cause, the magistrate would have been required by Article 16.17 Texas Code of Criminal Procedure to prepare an order.

Texas Code of Criminal Procedure Article 16.17. [261] [308] [296] Decision of judge

After the examining trial has been had, the judge shall make an order committing the defendant to the jail of the proper county, discharging him or admitting him to bail, as the law and facts of the case may require. Failure of the judge to make or enter an order within 48 hours after the examining trial has been completed operates as a finding of no probable cause and the accused shall be discharged.

This order would confer jurisdiction to the court.

After the hearing, the magistrate would have been required to seal all the documents had in the hearing and forward them to the district clerk.

Texas Code of Criminal Procedure Article 17.30. [296] [347] [335] Shall certify proceedings

The magistrate, before whom an examination has taken place upon a criminal accusation, shall certify to all the proceedings had before him, as well as where he discharges, holds to bail or commits, and transmit them, sealed up, to the court before which the defendant may be tried, writing his name across the seals of the envelope. The voluntary statement of the defendant, the testimony, bail bonds, and every other proceeding in the case, shall be thus delivered to the clerk of the proper court, without delay.

Upon receiving these documents, a record of the accusation and the order, bestowing jurisdiction on the court, would be in the court record. The district clerk would then have been directed to keep those papers safe and deliver them up to the next grand jury.

Texas Code of Criminal Procedure Article 17.31. [297] [348] [336] Duty of clerks who receive such proceedings

If the proceedings be delivered to a district clerk, he shall keep them safely and deliver the same to the next grand jury. If the proceedings are delivered to a county clerk, he shall without delay deliver them to the district or county attorney of his county.

By these procedures, assuming the magistrate, at the examining trial found probable cause, the grand jury would have been presented a proper criminal

accusation on which they could vote to true or no bill Applicant, then ask the prosecutor to prepare a proper indictment.

None of this happened and, therefore, the indictment handed down by the grand jury is void and worthless for any purpose.

PRAYER

1. An order directing Respondent to being Applicant before the court and show, by the court record, due cause as to why Applicant is being restricted at his liberty;
2. an order setting aside the indictment against Applicant and setting Applicant to his liberty unencumbered by any restriction;
3. an order directing prosecutor to abide by Articles 2.03, 2.04, and 2.05 Texas Code of Criminal Procedure.

VERIFICATION

I, **Randall D. Kelton**, do swear and affirm that all statements made herein are true and accurate, in all respects.

Randall D. Kelton
PO Box 1
Boyd, TX 76023
940-399-9922
940-433-5070

SWORN TO AND SUBSCRIBED BEFORE ME, _____, by **Randall D. Kelton**, on the _____ day of _____, 2006, which witnesses my hand and seal of office.

NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

Stamp Here