

Unified United States Common Law Grand Jury:

P.O. BOX 59; VALHALLA, NEW YORK 10595; FAX: 888-891-8977

Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming (States were unified by re-constituting all 3133 United States counties)

WRIT MANDAMUS CORAM NOBIS¹

FILE ON DEMAND UNDER PENALTY OF LAW

Attention Clerk;

You are directed to file the attached document unimpeded as required by law and without charge under Federal Case No: 1776-1789-2015; registered by the UUSCLGJ; and Statutory Case No 155754.

18 USC §2076 Whoever, being a clerk willfully refuses or neglects to make or forward any report, certificate, statement, or document as required by law, shall be fined under this title or imprisoned not more than one year, or both. **18 USC §1512(b)**; Whoever obstructs or impedes any official proceeding shall be fined under this title or imprisoned not more than 20 years, or both.

American Jurisprudence Constitutional Law §326 *“Free Justice and Open Courts; Remedy for All Injuries.- In most of the state Constitutions there are provisions, varying slightly in terms, which stipulate that justice shall be administered to all without delay or denial, without sale or prejudice, and that the courts shall always be open to all alike. These provisions are based largely upon the Magna Charta, chap. 40, which provides; “We will sell to no man. We will not deny to any man either justice or right.” The chief purpose of the Magna Charta provision was to prohibit the King from selling justice by imposing fees on litigants through his courts and to deal a death blow to the attendant venal and disgraceful practices of a corrupt judiciary in demanding oppressive gratuities for giving or withholding decisions in pending causes. It has been appropriately said that in a free government the doors of litigation are already wide open and must constantly remain so. The extent of the constitutional provision has been regarded as broader than the original confines of Magna Charta, and such constitutional provision has been held to prohibit the selling of justice not merely by magistrates but by the State itself.”*

*“Plaintiff should not be charged fees, or costs for the lawful and constitutional right to petition this court in this matter in which he is entitled to relief, as it appears that the filing fee rule was originally implemented for fictions and subjects of the State and should not be applied to the plaintiff who is a natural individual and entitled to relief.” **Hale v. Henkel**(201 U.S. 43)*

CRIME TO INTERCEPT

¹ CORAM NOBIS. Before us ourselves, (the king's bench.) Applied to writs of error directed to another branch of the same court, e. g., from the full bench to the court at nisi prius. 1 Archb. Pr. K. B. 234.

**UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF NEW YORK**

2 Niagara Square Buffalo, NY 14202 (716)551-1705

David J. Mongiolo, David E. Mongiolo ,
Petitioner

Against

CASE NO. 155754

District Attorney Michael J. Violante, Susan D.
Mongiolo, Judge Mark A. Montour, Attorney General
Eric T. Schneiderman, Law Guardian Michele
Bergevin ,

Respondents

**DEFAULT JUDGMENT
CORAM IPSO REGE**

Default Judgment; Entering a Default: *"When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by Affidavit or otherwise [under seal], the clerk must enter the party's default."* FRCP Rule 55(a); FRCP Rule 58(b)(2); 28 U.S.C. §2243.

DEFAULT JUDGMENT

The Respondents, against whom a judgment for affirmative relief is sought, have failed to plead or otherwise defend as provided by these rules; and, that fact is made to appear by Affidavit. **NOW, THEREFORE, THIS COURT OF RECORD** issues this Default Judgment Coram Ipso Rege to dispose of the matter as law and justice require, to wit:

IT IS ORDERED AND ADJUDGED that Petitioners be released from custody immediately; and, that the respondents, namely **STATE OF NEW YORK, COUNTY OF NIAGARA**, District Attorney Michael J. Violante, Susan D. Mongiolo, Judge Mark A. Montour, Attorney General Eric T. Schneiderman, Law Guardian Michele Bergevin shall abate at law all proceedings in and relating to New York State Supreme Court, Case No. **155754**. No damages, costs, or attorneys' fees are awarded.

THE COURT, September 24, 2015



Unified United States Common Law Grand Jury Administrator

Default Judgment

Default Judgment; Entering a Default: "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by Affidavit or otherwise [under seal], the clerk must enter the party's default." FRCP Rule 55(a); FRCP Rule 58(b)(2); 28 U.S.C. §2243.

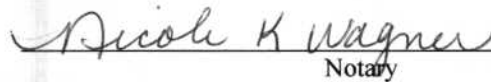


David J. Mongielo

NOTARY

In New York State, Niagara County, on this 26 day of October, 2015, before me, Nicole K Wagner, the undersigned notary public, personally appeared David J. Mongielo, to me known to be the living (wo)man described herein, who executed the forgoing instrument, and has sworn before me that he/she executed the same as his/her free will act and deed.

(Notary Seal)



Notary

NICOLE K WAGNER
01WA6207732
Notary Public, State of New York
Qualified in NIAGARA County
My commission expires JUNE 15th, 2017

My commission expires: 6-15-17

Unified United States Common Law Grand Jury:¹

P.O. Box 59; Valhalla, New York 10595; Phone: (845) 229-0044; Fax: (888) 891-8977; US@uclgj.org

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

5

David J. Mongiello, David E. Mongiello
Petitioner

Against

District Attorney Michael J. Violante, Susan D.
Mongiello, Judge Mark A. Montour, Attorney
General Eric T. Schneiderman, Law Guardian
Michele Bergevin ,

Respondents

CASE No. 155754, statutory

**DEFAULT JUDGMENT
CORAM IPSO REGE¹
FRCP Rule 55¹; Rule 58 (b) 2¹
28 USC 2243**

COMES NOW THE ABOVE-ENTITLED COURT OF RECORD, to review the record, summarily determine the facts, and dispose of the matter as law and justice require.²

- 10 Habeas Corpus has been called "The Great Writ of Liberty". Historically, that is a side issue. In the early days, Habeas Corpus was not connected with the idea of Liberty. It was a useful device in the struggle for control between common law and equity courts. By the middle of the fifteenth century, the issue of Habeas Corpus, together with privilege, was a well-established way to remove a cause from an inferior court where the defendant could show some special connection with one of the central courts, which entitled him to have his case tried there.³ In the early seventeenth century, The Five Knights' Case⁴ involved the clash between 15 the Stuart claims of prerogative and the common law; and, was, in the words of one of the judges, "*the greatest cause that I ever knew in this court*".⁵ Over the centuries the Writ became a viable bulwark between the powers of government and the rights of the people in both England and the United States.

¹ "The grand jury is an institution separate from the courts over whose functioning the courts do not preside... the grand jury is mentioned in the Bill of Rights, but not in the body of the Constitution. It has not been textually assigned, therefore, to any of the branches described in the first three (3) Articles. It is a constitutional fixture in its own right. In fact, the whole theory of its function is that it belongs to no branch of the institutional government, serving as a kind of buffer or referee between the Government and the people... The grand jury's functional independence from the judicial branch is evident, both in the scope of its power to investigate criminal wrongdoing, and in the manner in which that power is exercised. 'Unlike [a] [c]ourt, whose jurisdiction is predicated upon a specific case or controversy, the grand jury 'can investigate merely on suspicion that the law is being violated, or even because it wants assurance that it is not.'" United States v. John H. Williams; 112 S.Ct. 1735; 504 U.S. 36; 118 L.Ed.2d 352; 1992.

² 28 U.S.C. §2243.

³ De Vine (1456) O. Bridg. 288; Fizerbert, Abridg., sub tit. "Corpus Cum Causa".

⁴ Darnel's Case, 3 St. Tr. 1.

⁵ Ibid., at 31 per Doderidge J.

II. JURISDICTION OF THIS COURT

It is the duty of any court to determine whether it has jurisdiction even though that question is not raised, in order for the exercise of jurisdiction to constitute a binding Decision that the court has jurisdiction.⁹ We fulfill that duty by examining the sovereign power creating the court.

- 60 But, first, what is a court? It is the person and suit of the sovereign; the place where the sovereign sojourns with his regal retinue, wherever that may be. Further, a court is an agency of the sovereign, created by it directly or indirectly under its authority, consisting of one or more officers, established and maintained for the purpose of hearing and determining issues of law and fact regarding legal rights and alleged violations thereof; and, of applying the sanctions of the law; authorized to exercise its powers in the course of law at
- 65 times and places previously determined by lawful authority.¹⁰ The source of the authority is acknowledged by the Preamble of the Constitution for the United States of America.¹¹ The People of the United States, acting in sovereign capacity, “ordain¹² and establish¹³ this Constitution for the United States of America.” The Constitution contains nothing that would diminish the sovereign¹⁴ power of the People, and no State may presume to do so.¹⁵
- 70 Further, the United States of America, and each member State, is a Republic,¹⁶ which means that the People may act either directly or through their representatives.¹⁷ Here the sovereign People are acting directly. Beyond ordaining and establishing the Constitution, what are the powers of the People? The People retain all powers to self-determine and exercise rights.¹⁸ The essence of the People’s sovereignty distills to this: The decree of the sovereign makes law.¹⁹

⁹ State ex rel. Missouri Gravel Co. v. Missouri Workmen’s Compensation Commission, 113 S.W.2d 1034, 234 Mo.App. 232.

¹⁰ Isbill v. Stovall, Tex.Civ.App., 92 S.W.2d 1067, 1070; Black’s 4th, p425.

¹¹ U.S. CONSTITUTION, PREAMBLE: “We the people of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”

¹² ORDAIN: ...to enact a constitution or law. Black’s 6th.

¹³ ESTABLISH: ...to create, ratify, or confirm... Black’s 6th.

¹⁴ ...at the Revolution, the sovereignty devolved on the people; and, they are truly the sovereigns of the country; but, they are sovereigns without subjects...with none to govern but themselves.... Chisholm v. Georgia (U.S.) 2 Dall 419, 454, 1 LEd 440, 455, 2 Dall (1793) pp471-472.

¹⁵ Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them. Miranda v. Arizona, 384 U.S. 436, 491; The State cannot diminish rights of the people. Hertado v. California, 100 U.S. 516; The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people. Constitution for the United States of America, Amendment IX; The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. Constitution for the United States of America, Amendment X.

¹⁶ “The United States shall guarantee to every State in this Union a Republican Form of Government...” Constitution for the United States, Article IV, Section 4.

¹⁷ GOVERNMENT: Republican government: One in which the powers of sovereignty are vested in the People; and, are exercised by the People, either directly, or through representatives chosen by the People, to whom those powers are specially delegated. In re Duncan, 139 U.S. 449, 11 S.Ct. 573, 35 L.Ed. 219; Minor v. Happersett, 88 U.S. 21, Wall 162, 22 L.Ed. 627. Black’s 6th.

¹⁸ The people of this State, as the successors of its former sovereign, are entitled to all the rights which formerly belonged to the King by his prerogative. Lansing v. Smith, 4 Wend. 9 (N.Y.) (1829), 21 Am.Dec. 89 10C Const. Law Sec. 298; 18 C Em.Dom. Sec. 3, 228; 37 C Nav.Wat. Sec. 219; Nuls Sec. 167; 48 C Wharves Sec. 3, 7.

¹⁹ The very meaning of “sovereignty” is that the decree of the sovereign makes law. American Banana Co. v. United Fruit Co., 29 S.Ct. 511, 513, 213 U.S. 347, 53 L.Ed. 826, 19 Ann.Cas. 1047.

75 Some have argued that the People have relinquished sovereignty through various contractual devices in
which rights were not expressly reserved. However, that cannot hold because rights are unalienable.²⁰ The
People retain all rights of sovereignty at all times.²¹ The exercise of sovereignty by the People is further
clarified when one considers that the Constitutional government agencies have no genuine sovereign power
of their own. All just authority of the Constitutional government agencies is solely that to which the People
80 consent.²² In the Petition, the petitioner identifies himself as “a People²³ of the United States”. As such he
decrees the law for this court; and, ultimately, for this court as a court of record. This, then, is the sovereign
power by which this court is created. The Constitution for the United States of America mandates that: “The
judicial Power²⁴ shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the
United States, and Treaties made, or which shall be made, under their Authority...”²⁵ This is a case in law,
85 i.e., proceeding according to the common law in a court of record. This case arises under the Constitution
and the Laws of the United States. It follows that “the judicial power” of [the People of] the United States
“shall extend” to this case. Therefore, it is the Grand Jury, as arbiter, that shall be enforcer of the law. We
read:

90 *“If any of our civil servants shall have transgressed against any of the people in any respect;
and, they shall ask us to cause that error to be amended without delay; or, shall have broken
some one of the articles of peace or security; and, their transgression shall have been shown
to four (4) Jurors of the aforesaid twenty five (25); and, if those four (4) Jurors are unable to
settle the transgression, they shall come to the twenty-five (25), showing to the Grand Jury
the error which shall be enforced by the law of the land.”* Magna Carta, June 15, A.D. 1215,
95 61.

Justice Powell, in *United States v. Calandra*, 414 U.S. 338, 343 (1974), stated: “*The
institution of the grand jury is deeply rooted in Anglo-American history; [n3] In England, the
grand jury [p343] served for centuries, both as a body of accusers, sworn to discover, and
present for trial, persons suspected of criminal wrongdoing; and, as a protector of citizens
against arbitrary and oppressive governmental action. In this country, the Founders thought
the grand jury so essential to basic liberties, that they provided, in the Fifth Amendment, that
federal prosecution for serious crimes can only be instituted by a ‘presentment or indictment
of a Grand Jury’.* Cf. *Costello v. United States*, 350 U.S. 359, 361-362 (1956). *The grand*

²⁰ UNALIENABLE: Not subject to alienation; the characteristic of those things which cannot be bought, or sold, or transferred from one person to another, such as rivers, and public highways, and certain personal rights; e. g., Liberty. Unalienable: incapable of being alienated; that is, [not capable of being] sold and transferred. Black’s 4th 1891.

²¹ RESERVATION OF SOVEREIGNTY: “[15](b) ...*The Tribe’s role as commercial partner with petitioners should not be confused with its role as sovereign. It is one thing to find that the Tribe has agreed to sell the right to use the land and take valuable minerals from it, and quite another to find that the Tribe has abandoned its sovereign powers simply because it has not expressly reserved them through a contract. To presume that a sovereign forever waives the right to exercise one of its powers unless it expressly reserves the right to exercise that power in a commercial agreement, turns the concept of sovereignty on its head.*” *Merrion et al., dba Merrion & Bayless, et al. v. Jicarilla Apache Tribe et al.* 1982.SCT.394.

²² SOVEREIGN STATE: are cabalistic words, not understood [rejected] by the disciple of Liberty, who has been instructed in our constitutional schools. It is our appropriate phrase when applied to an absolute despotism. The idea of sovereign power [vested] in government of a Republic, is incompatible with the existence, and foundation, of civil Liberty; and, the rights of property. *Gaines v. Buford*, 31 Ky. (1 Dana) 481, 501.

²³ PEOPLE: ...considered as... any portion of the inhabitants of a city or country. Webster’s 1828 Dictionary. The word “People” may be either plural or singular in its meaning. The plural of “person” is “persons”, not “People”.

²⁴ JUDICIAL POWER: The power to decide and pronounce a judgment; and, carry it into effect between persons and parties who bring a case before court for decision. Power that adjudicates upon, and protects, the rights and interests of persons or property; and, to that end, declares, construes, and applies the law. Black’s 6th.

²⁵ Constitution for the United States of America, Article III, Section 2, Clause 1.

105 jury's historic functions survive to this day. Its responsibilities determination whether there
is probable cause to believe a crime has been committed, and the protection of citizens
against unfounded criminal prosecutions. *Branzburg v. Hayes*, 408 U.S. 665, 686-687
(1972).”

110 III. EXHAUSTION OF ADMINISTRATIVE PROCEDURE

115 Ordinarily, exhaustion of state administrative procedures is a requirement before a court of another
jurisdiction will review the proceedings of another court. This is founded upon the principle of comity.²⁶ The
courts of the United States, and the courts of the various States, are independent of each other.²⁷ Federal
courts have no supervisory powers over State judicial proceedings,²⁸ State court systems,²⁹ or trial judges.³⁰
Thus, federal courts have no general power to correct errors of law that may occur from time to time in the
course of State proceedings.³¹

120 However, a federal court and a State court are not foreign to each other. They form one system of
jurisprudence, which constitutes the law of the land; and, should be considered as courts of the same country,
having jurisdiction partly different, and partly concurrent,³² and, as a matter of comity, one of such courts
will not ordinarily determine a controversy of which another of such courts has previously obtained
jurisdiction. In cases of apparent conflict between State and federal jurisdiction, the federal courts are the
exclusive judges over their jurisdiction in the matter.³³ That being a given, federal intervention is only proper
to correct errors of constitutional dimension,³⁴ which occurs when a State court arbitrarily, or
discriminatorily, applies State law.³⁵ The rule of comity does not go to the extent of relieving federal courts
125 from the duty of proceeding promptly to enforce rights asserted under the federal Constitution;³⁶ and, all

²⁶ JUDICIAL COMITY: Blacks 4th. “The principle, in accordance with which, the courts of one State, or jurisdiction, will give effect to the laws and judicial decisions of another; not as a matter of obligation; but, out of deference and respect.” *Franzen v. Zimmer*, 35 N.Y.S. 612, 90 Hun 103; *Stowp v. Bank*, C.C.Me., 92 F. 96; *Strawn Mercantile Co. v. First Nat. Bank, Tex. Civ.App.*, 279 S.W. 473, 474; *Bobala v. Bobala*, 68 Ohio App. 63, 33 N.E.2d 845, 849.

²⁷ *Claffin v. Houseman, N.Y.*, 3 Otto 130, 93 U.S. 130, 23 L.Ed. 833.

²⁸ *Smith v. Phillips*, 102 S.Ct. 940, 455 U.S. 209, 71 L.Ed.2d 78, on remand 552 F.Supp. 653, affirmed 717 F.2d 44, certiorari denied 104 S.Ct. 1287, 465 U.S. 1027, 79 L.Ed.2d 689; *Ker v. State of California, Cal.*, 83 S.Ct. 1623, 374 U.S. 23, 10 L.Ed.2d 726, 24 O.O.2d 201; *Burrus V. Young, C.A.7 (Wis.)*, 808 F.2d 578; *Lacy v. Gabriel, C.A.Mass.*, 732 F.2d 7, certiorari denied 105 S.Ct. 195, 469 U.S. 861, 83 L.Ed.2d 128; *Smiths v. McMullen, C.A.Fla.*, 673 F.2d 1185, certiorari denied 103 S.Ct. 740, 459 U.S. 1110, 74 L.Ed.2d 961.

²⁹ *U.S. ex rel. Gentry v. Circuit Court of Cook County, Municipal Division, First Municipal Dist., C.A.Ill.*, 586 F.2d 1142.

³⁰ *Harris v. Rivera, N.Y.*, 102S. Ct. 460, 454 U.S. 339, 70 L.Ed.2d 530.

³¹ *Buckley Towers Condominium, Inc. v. Buchwald, C.A.Fla.*, 595 F.2d 253.

³² *Claffin v. Houseman, N.Y.*, 3 Otto 130, 93 U.S. 130, 23 L.Ed. 833.

³³ *Craig v. Logemann*, 412 N.W.2d 857, 226 Neb. 587, appeal dismissed 108 S.Ct. 1002, 484 U.S. 1053, 98 L.Ed.2d 969.

³⁴ *Burrus V. Young, C.A.7 (Wis.)*, 808 F.2d 578; *Lacy v. Gabriel, C.A.Mass.*, 732 F.2d 7, certiorari denied 105 S.Ct. 195, 469 U.S. 861, 83 L.Ed.2d 128; *Smiths v. McMullen, C.A.Fla.*, 673 F.2d 1185, certiorari denied 103 S.Ct. 740, 459 U.S. 1110, 74 L.Ed.2d 961; INCONSISTENT VERDICTS: Court of Appeals erred when it directed State trial judge to provide explanation of apparent inconsistency in his acquittal of codefendant and his conviction of defendant, without first determining whether inexplicably inconsistent verdicts would be unconstitutional. *Harris v. Rivera, N.Y.*, 102 S.Ct. 460, 454 U.S. 339, 70 L.Ed.2d 530.

³⁵ *Jentges v. Milwaukee County Circuit Court, C.A.Wis.*, 733 F.2d 1238

³⁶ *Everglades Drainage Dist. v. Florida Ranch & Dairy Corp., C.C.A.Fla.*, 74 F.2d 914, rehearing denied 75 F.2d 1013.

considerations of comity must give way to the duty of a federal court to accord a People of the United States his right to invoke the court's powers and process in the defense or enforcement of his rights.³⁷

130 As to the principle of exhaustion of state remedies; the petitioner is not founding his Petition on the principle embodied in 28 U.S.C. §2254. The basis of petitioner's Petition is addressed in section V. **PETITION** below. However, we will address it here.

135 In *Friske v. Collins*,³⁸ the Court's view was that exhaustion was not a "rigid and inflexible" rule; but, could be deviated from in "special circumstances". In addition to the class of "special circumstances" developed in the early history of the exhaustion rule, exhaustion was not required where procedural obstacles make theoretically available processes unavailable; where the available state procedure does not offer swift vindication of the petitioner's rights; and, where vindication of the federal right requires immediate action.³⁹

140 Exhaustion today is a rule rooted in the relationship between the national and State judicial systems. The rule is consistent with the Writ's extraordinary character; but, it must be balanced by another characteristic of the Writ, to wit: its object of *providing "a swift and imperative remedy in all cases of illegal restraint upon personal Liberty."*⁴⁰ That is, it "*is not [a rule] defining power but one which relates to the appropriate exercise of power.*"⁴¹

145 The Court noted that where resort to State remedies has failed to afford a full and fair adjudication of the federal contentions raised, either because the State affords no remedy; or, because in the particular case, the remedy afforded by State laws, proves, in practice, unavailable, or seriously inadequate; a federal court should entertain a Petition for Habeas Corpus; otherwise, a petitioner would be remediless. In such a case, the applicant should proceed in the federal district court before resorting to the Supreme Court by Petition for Habeas Corpus.⁴²

150 **28 U.S.C. §2243** provides as follows: Issuance of Writ; Return; Hearing; Decision. A court justice or judge, entertaining an application for a Writ of Habeas Corpus, shall forthwith award the Writ; or, issue an Order directing the respondent to show cause why the Writ should not be granted; unless it appears, from the Application, that the applicant, or person detained, is not entitled thereto. The Writ, or Order to Show Cause, shall be directed to the person having custody of the person detained. It shall be returned within three (3) days; unless, for good cause, additional time, not exceeding twenty (20) days, is [be] allowed.

155 The State has been duly served; and, the State has not made; and, apparently cares not to make a Return. This question of timeliness constitutes a special circumstance justifying deviation from the exhaustion rule. Exhaustion is not required where procedural obstacles make theoretically available processes unavailable; where the available State procedure does not offer swift vindication of the petitioner's rights; and, where

³⁷ *Carpenter Steel Co. v. Metropolitan-Edison Co.*, D.C.Pa., 268 F. 980.

³⁸ 342 U.S. 519 (1952).

³⁹ Amsterdam, "Federal Removal and Habeas Corpus Jurisdiction," 113 U. Pa. L. Rev. 793, 893-94; Developments, "Federal Habeas Corpus," 83 Harv. L. Rev. 1038, 1097-107. Cf. *Markuson v. Boucher*, 175 U.S. 189 (1899) with *Roberts v. LaVallee*, 389 U.S. 40 (1967).

⁴⁰ *Price v. Johnson*, 334 U.S. 266, 283 (1947).

⁴¹ *Bowen v. Johnston*, 306 U.S. 19, 27 (1939). See Brennan, "Some Aspects of Federalism", 39 N.Y.U.L.Rev. 945, 957-58; Brennan, "Federal Habeas Corpus and State Prisoners", 7 Utah L. Rev. 423, 426.

⁴² *Ex parte Hawk*, 321 U.S. 114, 118; See also *Ex parte Abernathy*, 320 U.S. 219 (1943); *White v. Ragen*, 324 U.S. 760 (1945); *Wood v. Niersteimer*, 328 U.S. 211 (1946).

160 vindication of the federal right requires immediate action.⁴³ Until the case is resolved in the district court, the
petitioner will be unable to present his claims to the State Supreme Court.⁴⁴ This delay, and lack of
timeliness, is a further special circumstance. In the interim, the petitioner would be required to lose his
Liberty, because of the lack of swift State vindication of his rights.⁴⁵

IV. COMITY

165 Comity is one court giving full faith and credit to the judicial proceedings of another court, provided that
such proceedings do not violate its own rules. Though comity is not mandated, it is encouraged by The
Constitution for The United States, Article IV, Section 1.⁴⁶ However, comity does not mean that one court
involuntarily gives up its jurisdiction to another court. Comity does not mean that one court must respect the
improprieties of another court. Comity does not mean that one court must submit to the whim of another
170 court. Further, comity cannot enter the equation when the question before the courts concerns which of the
two courts has jurisdiction regarding the vindication of the rights of the petitioner. The protection of the
petitioner's rights from encroachment by the State is the innate responsibility of the federal courts.

In the United States, Habeas Corpus exists in two forms: Common Law and Statutory. The petitioner has
chosen Habeas Corpus at common law in a court of record. The Constitution for the United States of
America acknowledges the Peoples' right to the common law of England as it was in 1789. What is that
175 common law? It does not consist of absolute, fixed and inflexible rules; but, broad and comprehensive
principles based on justice, reason, and common sense...⁴⁷

The common law is also the Magna Carta,⁴⁸ as authorized by the Confirmatio Cartarum, if the accused so
demands.⁴⁹ The Confirmatio Cartarum succinctly says, "...our justices, sheriffs, mayors, and other ministers,
which, under us have the laws of our land to guide, shall allow the said charters pleaded before them, in
180 judgment in all their points; that is, to wit, the Great Charter as the common law and the Charter of the
forest, for the wealth of our realm."⁵⁰ In other words, the King's men must allow the Magna Carta to be
pleaded as the common law if the accused so wishes it.

Magna Carta says, "Henceforth the Writ which is called Praeceptum shall not be served on anyone for any
holding so as to cause a free man to lose his court."⁵¹ In this case, the free man's court is the court of record of
185 the petitioner, as above entitled. The Constitution for the United States of America, Article III, Section 2-1,

⁴³ Amsterdam, "Federal Removal and Habeas Corpus Jurisdiction", 113 U. Pa. L. Rev. 793, 893-94; Developments, "Federal Habeas Corpus", 83 Harv. L. Rev. 1038, 1097-107. Cf.; Markuson v. Boucher, 175 U.S. 189 (1899) with Roberts v. LaVallee, 389 U.S. 40 (1967).

⁴⁴ Magistrate's Report (#5), filed March 7, 2003, 6:46am, p3, L3-6.

⁴⁵ Amsterdam, "Federal Removal and Habeas Corpus Jurisdiction", 113 U. Pa. L. Rev. 793, 893-94; Developments, "Federal Habeas Corpus", 83 Harv. L. Rev. 1038, 1097-107. Cf.; Markuson v. Boucher, 175 U.S. 189 (1899) with Roberts v. LaVallee, 389 U.S. 40 (1967).

⁴⁶ Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial proceedings of every other State. And, the Congress may, by general Laws, prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof. Constitution for the United States of America, Article IV, Section 1.

⁴⁷ Miller v. Mosen, 37 N.W.2d 543, 547, 228 Minn. 400.

⁴⁸ June 15, 1215, King John I.

⁴⁹ November 5, 1297, King Edward I.

⁵⁰ Confirmatio Cartarum, Article I, Clause 3.

⁵¹ Magna Carta, Article 34.

says, "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States..." The judicial power is thusly extended to this Habeas Corpus case at law in the above-entitled court of record.

190 The above-entitled court of record, invoking the extension of the judicial power of the United States upon a case in law, is proceeding according to the common law as sanctioned by the Constitution; and, considering the matter that has arisen under the Constitution and laws of the United States. As stated above, the rule of comity does not go to the extent of relieving federal courts from the duty of proceeding promptly to enforce rights asserted under the federal Constitution;⁵² and, all considerations of comity must give way to the duty of a federal court to accord a citizen of the United States his right to invoke the court's powers and process in
195 the defense or enforcement of his rights.⁵³

This court accepts the duty obligation to proceed promptly to enforce rights asserted under the federal Constitution. Thus, this court has the subject matter jurisdiction to examine, and act, upon the Petition for Habeas Corpus. Further, the parties were duly served personally with a copy of the Petition and the Writ of Habeas Corpus thus this court has "in personam jurisdiction".

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V. PETITION

Title 28 of the United States Code⁵⁴ acknowledges that it is not the responsibility of the petitioner to know by what claim or authority the State acts; but, that the petitioner may inquire as to the cause of the restraint. Petitioner has requested an inquiry into the cause of restraint; but, none of the respondents has returned any
205 statement of cause of the restraint. Therefore, this court may presume that there is neither legal nor lawful cause of restraint.

Petitioner has isolated five (5) points upon which he bases his petition:

- A. The lack of cause of the restraint
- B. The lack of jurisdictional basis of the restraint
- 210 C. Prosecutorial vindictiveness
- D. Reasonable apprehension of restraint of Liberty
- E. Strict compliance with statutory requirements
- F. Diminishment of rights

215 Because the respondents have made no Return, this court must rule solely upon the evidence before it, as provided by the petitioner. Seneca wrote, "*He who decides a case with the other side unheard, though he decide justly, is himself unjust.*"⁵⁵ Mindful of the wisdom of Seneca, we proceed.

This court has taken judicial notice of the Federal Rules of Civil Procedure, Title 28, United States Code, insofar as it is not repugnant to the common law. F.R.C.P. Rule 55 regarding default⁵⁶ is applied here.⁵⁷ The

⁵² Everglades Drainage Dist. v. Florida Ranch & Dairy Corp., C.C.A.Fla., 74 F.2d 914, rehearing denied 75 F.2d 1013.

⁵³ Carpenter Steel Co. v. Metropolitan-Edison Co., D.C.Pa., 268 F. 980.

⁵⁴ 28 U.S.C. §2242 states in part: Application for a Writ of Habeas Corpus... shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him, and by virtue of what claim or authority, if known.

⁵⁵ Seneca's *Medea*.

220 record shows that the *Petition* was filed; a *Writ of Habeas Corpus to Show Cause* issued; the *Petition* and
Writ were duly served upon the respondents; no Return was filed; a *Notice of Default* was filed. So, no claim
may be made that the State court was unaware of this court's proceedings; nor, may the respondents claim
they were unaware of the consequences for failure to make a Return on the *Writ of Habeas Corpus*. Simply
225 stated; the parties against whom a Judgment for Affirmative Relief is sought, have failed to plead or
otherwise defend, as provided by these rules; and, that fact has been brought before the court by Affidavit in
accordance with F.R.C.P. Rule 55(a).

VI. FINDINGS OF FACT

THEREFORE, BASED UPON THE RECORD BEFORE THIS COURT:

THE COURT FINDS THAT:

- 230 (1) David J. Mongiello and son David E. Mongiello are People as contemplated in the Preamble of the
Constitution for the United States of America.
- (2) This above-entitled court is a court of record.
- (3) All respondents were duly served; and, court personnel were apprised of the petitioner's claims and
235 the Writ; all respondents had full Notice and fair opportunity to argue their cause; and, respondents
did not argue their cause.
- (4) The respondents have not presented any legal or lawful cause of the restraint of David J. Mongiello
and son David E. Mongiello.
- (5) The respondents have not presented any jurisdictional basis for the restraint of David J. Mongiello
240 and son David E. Mongiello. The court of the respondents did not fulfill the duty to determine
whether it has jurisdiction in order for the exercise of jurisdiction to constitute a binding Decision.

⁵⁶ Federal Rules of Civil Procedure, Rule 55. Default: (a) Entry. When a party against whom a Judgment for Affirmative Relief is sought, has failed to plead, or otherwise defend, as provided by these rules; and, that fact is made to appear [has been brought before the court] by Affidavit or otherwise, the clerk shall enter the party's Default. (b) Judgment: Judgment by Default may be entered as follows: (1) By the Clerk: When the plaintiff's claim against a defendant is for a sum certain, or for a sum which can, by computation, be made certain, the clerk, upon request of the plaintiff, and upon Affidavit of the amount due, shall enter Judgment for that amount and costs, against the defendant, if the defendant has been defaulted for failure to appear, and is not an infant or incompetent person. (2) By the Court: In all other cases, the party entitled to a Judgment by Default, shall apply to the court therefor; but, no Judgment by Default shall be entered against an infant, or incompetent person, unless represented in the action by a general guardian, committee, conservator, or other such representative, who has appeared therein. If the party against whom Judgment by Default is sought, has appeared in the action, the party, or, if appearing by representative, the party's representative, shall be served with written Notice of the Application for Judgment at least three (3) days prior to the Hearing on such Application. If, in order to enable the court to enter Judgment; or, to carry it into effect; it is necessary to take an account, or to determine the amount of damages, or to establish the truth of any averment by evidence, or to make an investigation of any other matter; the court may conduct such Hearings; or, Order such references, as it deems necessary and proper; and, shall accord a right of trial by jury to the parties, when, and as required, by any statute of the United States. (c) Setting Aside Default: For good cause shown, the court may set aside an Entry of Default; and, if a Judgment by Default has been entered, may likewise set it aside, in accordance with Rule 60(b).

⁵⁷ Courts of record have an inherent power, independently of statutes, to make rules for the transaction of business. 1 Pet. 604, 3 Serg. & R. Penn. 253; 8 id. 336, 2 Mo. 98.

- (6) The respondents have not presented any evidence to prove the absence of prosecutorial vindictiveness by the respondents against David J. Mongiello and son David E. Mongiello.
- (7) David J. Mongiello and son David E. Mongiello has a reasonable apprehension of future restraint of Liberty arising from the same facts.
- 245 (8) Strict compliance with statutory requirements was not met by the respondents.
- (9) David J. Mongiello and son David E. Mongiello has suffered an unlawful and illegal diminishment of rights.

VII. CONCLUSIONS OF LAW

250 FURTHER, THE COURT CONCLUDES THAT:

- (1) This above entitled court, has the sovereign authority to proceed as a court of record with jurisdiction to act in the instant case and subject matter.
- (2) Because all respondents were duly served; and, court personnel were apprised of the petitioner's *Petition* and *Writ*; and, because all respondents had full Notice and fair opportunity to argue their cause; and, did not so do; and, because none of the aforementioned persons made a Return, Objection, or Motion, the above-entitled court has acquired "in personam jurisdiction" of each of the respondents.
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- (3) Because the respondents have not presented any legal or lawful cause of, or any jurisdictional basis for the restraint of David J. Mongiello and son David E. Mongiello, the respondents do not have any legal or lawful cause against or jurisdiction over David J. Mongiello and son David E. Mongiello.
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- (4) Because the respondents have not presented any evidence to prove the absence of prosecutorial vindictiveness by the respondents against David J. Mongiello and son David E. Mongiello, and because the burden of proof is upon the respondents when evidence of prosecutorial vindictiveness has been presented, as a matter of law the respondents have committed prosecutorial vindictiveness against David J. Mongiello and son David E. Mongiello.
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- (5) Strict compliance with statutory requirements were not met by the respondents, David J. Mongiello and son David E. Mongiello was denied due process, there is a reasonable probability that he will be denied due process, and there is a reasonable probability that David J. Mongiello and son David E. Mongiello will be subjected to future restraint of Liberty arising from the same facts.
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- (6) Because David J. Mongiello and son David E. Mongiello has suffered an unlawful and illegal diminishment of rights David J. Mongiello and son David E. Mongiello will very likely continue to be subjected to further unlawful and illegal diminishment of rights if not immediately released.
- (7) It has become clear to this Grand Jury Investigative Body that the Court has taken advantage through undue influence⁵⁸ of its victims by manipulating peoples' free will for money and is thereby guilty of

⁵⁸ **UNDUE INFLUENCE:** Any improper or wrongful constraint, machination, or urgency of persuasion whereby the will of a person is overpowered and he is induced to do or forbear an act which he would not do or would do if left to act freely. *Powell v. Betchel*, 340 Ill. 330, 172 N.E. 765, 768. Influence which deprives person influenced of free agency or destroys freedom of his will and

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common barratry⁵⁹, maintenance⁶⁰ and champerty⁶¹. Since this problem has been found in many courts in America we have concluded the courts guilty of racketeering.

VIII. CONCLUSION SUMMARY

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The respondents, namely STATE OF NEW YORK, COUNTY OF NIAGARA, District Attorney Michael J. Violante, Susan D. Mongiolo, Judge Mark A. Montour, Attorney General Eric T. Schneiderman, Law Guardian Michele Bergevin , by their Default (their failure to Return the Writ of Habeas Corpus), have failed to prove their jurisdiction; therefore they each and all of them shall *abate at law* all proceedings in and relating to SUPREME COURT OF NEW YORK , COUNTY OF NIAGARA, de facto Case No. 155754 .

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None of the Respondents is an infant or incompetent. None of the Respondents has appeared in the proceedings.

Default Judgment to be entered by this court in accordance with Federal Rules of Civil Procedure, Rule 55(b)(2). Petitioner, if not already released, is to be released straightway. No damages are awarded; no costs are awarded; no attorneys' fees are awarded.

THE COURT, September 25, 2015

290



Unified United States Common Law Grand Jury Administrator

renders it more the will of another than his own. Conner v. Brown, Del., 3 A.2d 64, 71, 9 W.W.Harr. 529; In re Velladao's Estate, 31 Cal.App.2d 355, 88 P.2d 187, 190.

⁵⁹ **BARRATRY:** In criminal law. Also spelled "Barretty." The offense of frequently exciting and stirring up quarrels and suits, either at law or otherwise. 4 Bla.Com. 134; State v. Batson, 220 N.C. 411, 17 S.E.2d 511, 512, 513.; "Common barratry is the practice of exciting groundless judicial proceedings." Pen.Code Cal. § 158; Lucas v. Pico, 55 Cal. 128; Corn. v. McCulloch, 15 Mass. 229; Ex parte McCloskey, 82 Tex.Cr.R. 531, 199 S.W. 1101, 1102.

⁶⁰ **MAINTENANCE:** consists in maintaining, supporting, or promoting the litigation of another.; "Act of maintaining, keeping up, supporting; livelihood; means of sustenance." Federal Land Bank of St. Louis v. Miller, 184 Ark. 415, 42 S.W.2d 564, 566.

⁶¹ **CHAMPERTY:** is a bargain to divide the proceeds of litigation between the owner of the liquidated claim and a party supporting or enforcing the litigation. Draper v. Lebec, 219 Ind. 362, 37 N.E.2d 952, 956.; A bargain by a stranger with a party to a suit, by which such third person undertakes to carry on the litigation at his own cost and risk, in consideration of receiving, if successful, a part of the proceeds or subject sought to be recovered. Small v. Mott, 22 Wend., N.Y., 405; Gilman v. Jones, 87 Ala. 691, 5 So. 785, 7 So. 48, 4 L.R.A. 113; Jamison Coal & Coke Co. v. Goltra, C.C.A.Mo., 143 F.2d 889, 895, 154 A.L.R. 1191.; The purchase of an interest in a thing in dispute, with the object of maintaining and taking part in the litigation. 7 Bing. 378.