STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

THEODORE ANTHONY LEE #365979,

Petitioner,

v

Case No. 10-27756-AH
HON. PHILIP E. RODGERS, JR.

MICHIGAN DEPARTMENT OF CORRECTIONS, DAVID PRATT, ACTING WARDEN, and PUGSLEY CORRECTIONAL FACILITY,

Respondents.
_____/

Theodore Anthony Lee #365979
Petitioner in Pro Per

DECISION AND ORDER DENYING
PETITIONER'S APPLICATION FOR WRIT OF HABEAS CORPUS

On October 11, 2001, the Petitioner received a sentence of 10 years to 22 years, 6 months with the Michigan Department of Corrections after pleading guilty to Criminal Sexual Conduct, Third Degree. He is currently housed at the Pugsley Correctional Facility in Grand Traverse County, Michigan.

On January 19, 2010, the Petitioner filed a complaint for writ of habeas corpus in the 13th Judicial Circuit Court, pursuant to MCR 3.303. The Court dispenses with oral argument, pursuant to MCR 2.119(E)(3), and issues this written decision and order. For the reasons stated herein, the Petitioner's application is denied.

A prisoner's right to file a complaint for habeas corpus is guaranteed by the Michigan Constitution. *Hinton v Parole Bd*, 148 Mich App 235, 244; 383 NW2d 626 (1986), citing Const 1963, art 1, § 12. The primary, if not the only, object of a writ of habeas corpus is to determine the legality of the restraint under which a person is held. 39 Am Jur 2d, Habeas Corpus, §1, p 179, citing *Carlson v Landon*, 342 US 524; 72 S Ct 525; 96 L Ed 547 (1952), reh den 343 US 988; 72 S Ct 1069; 96 L Ed 1375 (1952). A complaint for habeas corpus is designed to test the legality of detaining an individual and denying him his liberty. *In re*

Huber, 334 Mich 100; 53 NW2d 609 (1952); *Trayer v Kent Co Sheriff*, 104 Mich App 32; 304 NW2d 11 (1981). If a legal basis for detention is lacking, a judge must order the release of the detainee from confinement. MCL 600.4352; MSA 27A.4352. But, the writ of habeas corpus deals only with radical defects which render a judgment or proceeding absolutely void. *In re Stone*, 295 Mich 207; 294 NW2d 156 (1940); *Walls v Director of Institutional Services*, 84 Mich App 355; 269 NW2d 599 (1978). "A radical defect in jurisdiction contemplates . . . an act or omission by state authorities that clearly contravenes an express legal requirement in existence at the time of the act or omission." *People v Price*, 23 Mich App 663, 671; 179 NW2d 177 (1970).

Pursuant to MCL § 600.4307 "[a]n action for habeas corpus to inquire into the cause of detention may be brought by or on the behalf of any person restrained of his liberty within this state under any pretense whatsoever, except as specified in section 4310."

MCL § 600.4310 provides, in pertinent part, as follows:

> An action for habeas corpus to inquire into the cause of detention may not be brought by or on behalf of the following persons:
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> * * *
>
> (3) Persons convicted, or in execution, upon legal process, civil or criminal; . . .

Thus, habeas corpus cannot serve as a substitute for an appeal and cannot be used to review the merits of a criminal conviction. *Cross v Dep't of Corrections*, 103 Mich App 409; 303 NW2d 218 (1981).

The Petitioner alleges that he is unlawfully detained by the Michigan Department of Corrections because this State's judicial system, specifically the 60th District Court for the County of Muskegon, was non-compliant with mandatory procedural provisions, delineated in both the United States Constitution and Michigan's State Constitution, prior to transferring his case to the 14th Circuit Court.

The Petitioner cites Article VI of the United States Constitution, which provides that "all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution," and Article XI of the Michigan Constitution, which additionally clarifies:

> All officers, legislative, executive and judicial, before entering upon the duties of their respective offices, shall take and subscribe the following oath or

> affirmation: I do solemnly swear (or affirm) that I will support the Constitution of the United States and the constitution of this state, and that I will faithfully discharge the duties of the office of . . . according to the best of my ability. No other oath, affirmation, or any religious test shall be required as a qualification for any office or public trust. Const 1963, art 11, §1.

On July 19, 2001, Petitioner was brought before the Honorable Donald C. Neitzel, a retired Southgate municipal judge and Wayne County District Court judge, for his preliminary examination. At this time, Petitioner presented the court with a proposal whereby he would waive his preliminary examination in exchange for a plea to the reduced charge of Criminal Sexual Conduct, Third Degree. Upon acceptance of Petitioner's proposal, the court transferred the matter to the 14th Circuit Court pursuant to Michigan Court Rule 6.110, which states, "If the court permits the defendant to waive the preliminary examination, it must bind the defendant over for trial on the charge set forth in the complaint or any amended complaint." MCR 6.110(A).

Subsequently, after Petitioner pled guilty in the 14th Judicial Circuit Court, the Honorable James M. Graves sentenced him to a minimum term of 10 years with the Michigan Department of Corrections. The Petitioner argues that any further detention by the Department of Corrections is illegal because the 60th District Court never had jurisdiction to bind over his case to the Circuit Court and therefore, his constitutional rights to due process were violated.

The Petitioner previously brought an action for habeas corpus, again citing the 60th District Court's lack of jurisdiction, in the 14th Judicial Circuit Court, Muskegon County. The Honorable James M. Graves, Jr. denied the motion on January 19, 2007, stating:

> The court notes that the 60th District Court Judge who signed the bindover, Hon. Donald C. Neitzel, was a retired District Judge who was appointed by the Michigan Supreme Court to serve as a visiting district judge in the 60th District Court pursuant to Const 1963, art 6, sect 23. See also MCL 600.226(1). Article 11, Sect 1 requires the oath of office to be taken only by judges who are actually serving a term of office, either because of election, or appointment by the governor. Retired judges who accept limited assignments by the Michigan Supreme Court are not appointed to an "office" within the meaning of art 11, sect 1 and are thus not required to take an oath of office before assuming their duties under the temporary assignment.

On February 5, 2007, the Honorable James M. Graves, Jr. denied the Petitioner's Motion for Reconsideration, noting that the court had "stated in the order its legal reasoning for

denying the writ of habeas corpus, and did not discuss plaintiff's constitutional arguments because they had no merit."

This Court now finds that the doctrine of res judicata bars the Petitioner from bringing a suit in this judicial circuit which, *ipso facto*, prohibits the issuance of a writ of habeas corpus in Petitioner's favor.

The doctrine of res judicata requires that: (1) the first action be decided on the merits, (2) the matter contested in the second case was or could have been resolved in the first, and (3) both actions involve the same parties or their privies. *Schwartz v Flint*, 187 Mich App 191, 194; 466 NW2d 357 (1991), lv and reconsideration den 439 Mich 867 (1991), cert den 503 US 961; 112 S Ct 1562; 118 L Ed 2d 209 (1992). *Board of Co Rd Comm for the County of Eaton v Schultz*, 205 Mich App 371, 375-376; 521 NW2d 847 (1994).

In the case of *Jones v State Farm Mutual Automobile Ins Co*, 202 Mich App 393; 509 NW2d 829 (1994), the Court of Appeals discussed the doctrine of res judicata. The Court said:

> The rule of res judicata is summarized in 1 Restatement Judgments, 2d, §§ 24, 25, pp 196, 209:
>
> > (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar ..., the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.
> >
> > * * *
> >
> > The concerns behind the doctrine of res judicata are economy of judicial resources and finality of litigation. *Gose v Monroe Auto Equipment Co*, 409 Mich 147, 159; 294 NW2d 165 (1980). The doctrine of res judicata applies not only to facts previously litigated, but also to points of law necessarily adjudicated in determining and deciding the subject matter of the litigation. *Hlady v Wolverine Bolt Co*, 393 Mich 368, 376: 224 NW2d 856 (1975), citing *Jacobson v Miller*, 41 Mich 90; 1 NW 1013 (1879). Michigan has adopted the broad application of res judicata, which bars claims arising out of the same transaction that plaintiff could have brought but did not, as well as those questions that were actually litigated. The doctrine of res judicata applies equally to facts and law. *Gose, supra* 409 Mich at 161; 294 NW2d 165. The test for determining whether two claims arise out of the same transaction and are identical for res judicata purposes is whether

> the same facts or evidence are essential to the maintenance of the two actions. *Schwartz v City of Flint*, 187 Mich App 191, 194-195; 466 NW2d 357 (1991).

Regarding the Petitioner's previously submitted motion for a writ of habeas corpus in the 14th Circuit Court, the Honorable James M. Graves, Jr. based his denial of the motion on valid legal grounds. In his Opinion and Order, Judge Graves correctly cites to and interprets the Michigan Constitution and MCL § 600.226(1).[1] There is nothing to suggest that Judge Graves was biased or discriminatory in denying the motion. Further, Judge Graves clarifies in his Opinion and Order denying Petitioner's Motion for Reconsideration that Petitioner's constitutional arguments were not discussed because they had no merit.

In the motion that Petitioner submitted to the 13th Circuit Court, he proffers the same arguments and theories as in his prior motion. There is no new matter being contested. Petitioner's remedy was to appeal that decision and not file this frivolous Complaint.

Finally, Petitioner named the Michigan Department of Corrections, Mary Berghuis and West Shoreline Correctional Facility as co-defendants in his first motion. In Petitioner's second motion, currently before this Court, the Petitioner again names the Michigan Department of Corrections and also David Pratt and Pugsley Correctional Facility as co-defendants. The Michigan Department of Corrections, as principal entity, employs both Mary Berghuis and David Pratt as agents for the Department. Also, both West Shoreline Correctional Facility and Pugsley Correctional Facility are operated by the Department of Corrections. Thus, there is a common relationship amongst all the above listed parties. Therefore, the doctrine of res judicata prohibits the Petitioner from bringing an action for habeas corpus in this Court.

However, this Court wishes to provide the following additional reasoning and rational as to why the Petitioner's motion for a writ of habeas corpus is denied and is frivolous.

In *People v Plumaj*, the Defendant pled to various offenses in two different cases. *People v Plumaj*, 284 Mich App 645; 773 NW2d 763 (2009). Several months after he was

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[1] Justice Graves states, "Article 11, Sect 1 requires the oath of office to be taken only by judges who are actually serving a term of office, either because of election, or appointment by the governor. Retired judges who accept limited assignments by the Michigan Supreme Court are not appointed to an 'office' within the meaning of art 11, sect 1 and are thus not required to take an oath of office before assuming their duties under the temporary assignment."

sentenced, Defendant moved to withdraw his guilty plea citing failures in the plea taking process by the trial court. *Plumaj*, *supra* at 647. The Michigan Court of Appeals found that failure to place the Defendant under oath, by itself, does not automatically require a reversal. *Plumaj*, *supra* at 649, citing *Boyle v Alabama*, 395 US 238; 89 S Ct 1709; 23 L Ed 2d 274 (1969). The court held that automatic reversal is required, after considering the record as a whole, only if "the trial court fails to 'procure an enumeration and a waiver on the record of the three federal constitutional rights set forth in *Boykin v Alabama*: the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers.'" *Plumaj*, *supra,* quoting *Boyle*. The Michigan Court of Appeals noted that violation of a court rule is not structural error requiring automatic reversal. *Plumaj*, *supra* at 650, citing *People v Mosly*, 259 Mich App 90; 672 NW2d 897 (2003). Furthermore, federal case law states:

> [A] trial court's failure to follow procedural rules . . . does not violate the federal constitution nor does it require automatic reversal. Indeed, compliance with the court rules only creates a presumption that a defendant's waiver was voluntary, knowing, and intelligent. If a defendant's waiver was otherwise knowingly, voluntarily, and intelligently made, reversal will not be predicated on a waiver that is invalid under the court rules, because courts will disregard errors that do not affect the substantial rights of a defendant. *Mosly*, *supra* at 96, citing *United States v Rodriquez*, 888 F2d 519 (CA 7 1989).

Finally, the court found that if the violated rule is *not* a protected right requiring reversal, as elaborated in *Boykin*, the trial court must assess whether the plea was understandingly, knowingly, voluntarily, and accurately made, noting that, "While an oath may assist the trial court in making its determination, an oath by itself does not establish the necessary requisites of a valid plea." *Plumaj*, *supra* at 651-652.

The Petitioner argues that Judge Neitzel did not have authority at the preliminary examination to execute a bind over to the 14th Circuit Court because he lacked proper jurisdiction. The right to a preliminary examination is governed by MCR 6.110, which, as stated above, mandates that the court bind defendant over for trial if the defendant waives the preliminary examination. MCR 6.110(A). Further, under MCL § 600.8311, district courts have jurisdiction of "preliminary examinations in all felony cases." MCL § 600.8311(d).

Pursuant to the court's analysis in *Plumaj*, violation of a court rule is not structural error requiring automatic reversal. An application of this holding to Petitioner's case effectively

nullifies his argument. Clearly, the district court had jurisdiction to preside over Petitioner's preliminary examination under MCL § 600.8311(d). Regardless of whether Judge Neitzel had properly filed his oath of office, he was a district court judge and Petitioner understandingly, knowingly, voluntarily, and accurately waived the preliminary examination in exchange for a plea to the reduced charge of Criminal Sexual Conduct, Third Degree.

Even if we assume the district court judge never filed his oath, this fact would not automatically require a reversal. In *Plumaj*, the court noted that "an oath by itself does not establish any of the necessary requisites of a valid plea" and ordered the trial court to consider the situation as a whole in determining whether the Defendant knowingly pled guilty. *Plumaj, supra.* In *Plumaj*, the Defendant was 'under the illusion' that the court was in compliance with plea-taking procedure and that his pleas would be legally valid and binding. Only later did Defendant claim that his pleas were involuntary, arguing his lack of oath was a technicality that automatically negated his earlier pleas. The ultimate issue in the case was not whether the pleas became automatically involuntary because of judicial noncompliance with the oath requirement under the court rules, but whether Defendant's earlier pleas were given voluntarily and if the situation as a whole substantially complied with compulsory legal requirements.

Comparatively, here the Petitioner was "under the illusion" that Judge Neitzel had jurisdiction at the preliminary examination because the clerk, prosecutor, and defense counsel addressed the judge as "Honorable," the judge's appearance and his location behind the bench. While an oath does not establish a valid plea, the lack of one does not negate the court's jurisdiction or Petitioner's waiver and subsequent bind over. Petitioner voluntarily waived the preliminary examination in exchange for a plea to the reduced charge. Petitioner has never argued that he was inadequately informed regarding the process of waiver and bind over. Because he was adequately informed by the court and believed that his waiver was legally valid and binding, the situation as a whole substantially complied with compulsory legal requirements and any judicial noncompliance does not automatically reverse Petitioner's waiver.

Additionally, the Honorable Donald C. Neitzel possessed proper jurisdiction and authority on July 19, 2001 to bind over the Petitioner to circuit court. The Michigan Court of Appeals in *Olepa v Mapletoff* referred to Judge Neitzel as follows:

> The plaintiff, Walter Olepa, alleges that he was taken into custody and held in Wayne County General Hospital from August 14 to August 22, 1962 upon an order issued by the defendant *municipal judge Donald C. Neitzel.* [Emphasis added] *Olepa v Mapletoff*, 2 Mich App 734, 736; 141 NW2d 350 (1966).

Further, the case of *People v Royal* denotes that it is addressing an appeal from the Recorder's Court of Detroit where Judge Donald C. Neitzel served as trial judge. *People v Royal*, 52 Mich App 10; 216 NW2d 427 (1974).

In addition to the above case references, evidence that Judge Neitzel served in an official judicial capacity may be found in the City Clerk's office for Southgate, Michigan. The Oath of Office signed by Donald C. Neitzel on December 31, 1984, is located there.[2] The Michigan Election Law Act states as follows:

> Every person elected to the office of judge of the district court, before entering upon the duties of his office, shall take and subscribe to the oath as provided in section 1 of article 11 of the state constitution, and file the same with the secretary of state and a copy with each county clerk in his district. MCL § 168.467j.

The above referenced section commands that district court judges must file their oaths of office with the Secretary of State. Judge Neitzel's Oath of Office document indicates he was a judge serving the 28th District Court. Yet, the "Office of the Great Seal has no Oath of Office filed for The Honorable Donald C. Neitzel"[3] However, this Court finds that MCL § 168.426n is relevant to this matter. MCL § 168.426n states:

> Every person elected to the office of judge of the municipal court of record, before entering upon the duties of such office, shall take and subscribe to the oath as provided in section 1 of article 11 of the state constitution and file same with the city clerk and a copy with the court administrator,

The *Olepa* case, *supra*, clearly indicates that "judge Donald C. Neitzel" was a municipal judge serving in the State of Michigan prior to 1966.

The State Bar of Michigan, the organization that tracks and records all the attorneys currently licensed and previously licensed to practice law in Michigan, only has one Donald C. Neitzel in its records. This 'Donald C. Neitzel' is registered as bar number P18218 with the

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[2] A copy of the Oath of Office is attached to this Decision and Order as Exhibit 1.
[3] State of Michigan, Department of State, Document Number 2354-1-7357-OGS, November 27, 2006.

State Bar. The Honorable Donald C. Neitzel who presided at the Petitioner's preliminary exam also had bar number P18218.[4] This Court finds that Donald C. Neitzel, P18218, is the same Donald C. Neitzel who served as a municipal court judge in Southgate, as a judge in the 28th District Court, and later as a visiting district judge in the 60th District Court.

Since Judge Neitzel first served as a municipal judge, it follows that the Oath of Office he signed was properly filed in Southgate, pursuant to MCL § 168.426n. The absence of a second Oath of Office filed with the Secretary of State is legally insufficient to prove lack of jurisdiction.

It is evident that the Honorable Donald C. Neitzel did, in fact, execute an Oath of Office document and file it in an appropriate location prior to presiding over the Petitioner's preliminary examination.[5] Judge Neitzel was properly and lawfully performing his judicial duties when the Petitioner was bound over. Thus, this Court finds the Petitioner's argument to be without merit.

For the reasons stated herein, the Petitioner's is being legally restrained and his application for a writ of habeas corpus is denied. This Complaint never should have been filed. Petitioner's remedy was to appeal the denial of his first habeas petition, not to re-file in a different county. The Petitioner is fined $150, pursuant to MCR 2.114(F) for filing frivolous litigation. Sanctions shall be paid within 28 days or the Court will attach the Petitioner's prison account to satisfy his debt.

IT IS SO ORDERED.

This decision and order resolves the last pending claim and closes the case.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 2/10/10

[4] Please see the Bind Over/Transfer After Preliminary Examination – Felony document for District Court Case Number 01-016961-FY signed by Judge Donald C. Neitzel P-18218.

[5] MCL § 168.467j lists the "county clerk in his district" as one location in which to file the Judge's Oath of Office.

OATH OF OFFICE

STATE OF MICHIGAN }
County of WAYNE } SS.

I do solemnly swear that I will support the Constitution of the United States and the Constitution of this State, and that I will faithfully discharge the duties of the office of JUDGE OF DISTRICT COURT

TWENTY-EIGHTH (28th) DISTRICT

according to the best of my ability.

DONALD C. NEITZEL

Sworn to and subscribed before me this 31st

day of December *19*84

ROBERT M. ALEXANDER

CITY CLERK-CITY OF SOUTHGATE, MI.

Form 32—8-66

EXHIBIT 1