STATE OF MICHIGAN
IN THE COURT OF APPEALS

SCOTT WILLIAM MOSES

Plaintiff-Appellant,

v

DEPARTMENT OF CORRECTIONS,

Defendant-Appellee,

/

Court of Appeals No. 262970

Circuit Court No. 01-0272-FC

DEFENDANT-APPELLEE'S BRIEF IN OPPOSITION TO A COMPLAINT FOR A WRIT OF HABEAS CORPUS

ORAL ARGUMENT REQUESTED

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Counterstatement of Basis of Jurisdiction of the Court of Appeals

This Court has jurisdiction over habeas corpus actions pursuant to MCR 7.203(3) and MCL 600.4304(2). Procedures for litigating habeas corpus matters are set forth in MCR 7.206 and 3.303 However, pursuant to MCL 600.4310 a writ of habeas corpus may not be used to attack a criminal conviction.

Counterstatement of Question Involved

I. **Scott Moses pled no contest to CSC 3rd degree and was sentenced to prison by the Isabella County Circuit Court. Moses did not challenge the jurisdiction of the trial court, did not appeal his conviction, and his motion for relief from judgment failed to raise any jurisdictional claim. Moses subsequently filed a habeas corpus action in the Saginaw County Circuit Court that was denied. He has now filed a complaint for a writ of habeas corpus in this Court, in effect appealing his criminal conviction by claiming that the trial court had no jurisdiction over him because *People v Bennett*, 195 Mich App 455; 491 NW2d 866 (1992) was incorrectly decided and should be overturned.**

Should the writ be denied because habeas corpus cannot be used as a substitute for appeal from a criminal conviction and because the Department of Corrections is not authorized to litigate legal or factual challenges to the criminal conviction or to modify the judgment of sentence?

Appellant's answer: "No"

Appellee's answer: "Yes"

Counterstatement of Facts

The Defendant-Appellee Department of Corrections (Department) accepts the chronology of events set forth in Plaintiff-Appellant Scott Moses's Statement of Facts. Significantly Moses admits at page 6 of his brief that his arrest on CSC 3rd degree charges was submitted to the United States Attorney's Office for prosecution but the matter was referred back to the Isabella County Prosecutor's Office for prosecution. The specific reasons for the referral back by the United States Attorney are unknown. Moses makes no mention of any attempt to challenge the decision of the United States Attorney in the appropriate federal court.

Moses filed a complaint for a writ of habeas corpus with the Saginaw County Circuit Court in File No. 05-55331-AH-3 in which he raised the same claims which he makes before this Court. Warden Jan Trombley of the Saginaw County Correctional Facility was named as the Defendant in the complaint. A response was filed on behalf of Warden Trombley and a hearing was held on March 28, 2005. At the conclusion of the hearing, the Court dismissed the complaint.

At page 5, subparagraph 23 of his habeas corpus complaint filed with the Saginaw County Circuit Court, Moses admitted that his attorney did file a motion for relief from judgment on October 15, 2003, but such motion did not raise any jurisdictional claims. At page 6 of the March 28, 2005, Habeas Corpus Hearing Transcript before the Saginaw County Circuit Court, counsel for Moses admitted that no appeal was taken regarding Moses's criminal conviction and that the motion for relief from judgment did not raise a jurisdictional claim.

Argument

I. Scott Moses pled no contest to CSC 3rd degree and was sentenced to prison by the Isabella County Circuit Court. Moses did not challenge the jurisdiction of the trial court, did not appeal his conviction, and his motion for relief from judgment failed to raise any jurisdictional claim. Moses subsequently filed a habeas corpus action in the Saginaw County Circuit Court that was denied. He has now filed a complaint for a writ of habeas corpus in this Court, in effect appealing his criminal conviction by claiming that the trial court had no jurisdiction over him because *People v Bennett*, 195 Mich App 455; 491 NW2d 866 (1992) was incorrectly decided and should be overturned. The Department of Corrections is not authorized to litigate factual or legal challenges to the criminal conviction or to modify the judgment of sentence

A. Standard of Review

The question posed by the Department of Corrections is whether a writ of habeas corpus may be used to appeal a criminal conviction and whether the Department is the proper party to respond to the factual and legal claims which are the basis for the appeal. This is a question of law. Questions of law are reviewed *de novo*.[1]

B. Argument

Introduction

Moses is asserting that his criminal conviction should be overturned because controlling precedent, *People v Bennett*, should be overruled.[2] He did not make this claim in the circuit court, on appeal, in post-conviction proceedings, or in a federal habeas corpus challenge. Instead he is attempting to circumvent those remedies by bringing this original complaint for collateral state habeas corpus relief. Permitting him to do so would greatly expand the narrow scope of the State writ and allow him, in effect, to use State habeas corpus as a substitute for appeal of an issue he never properly asserted, in violation of MCL 600.4310.

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[1] *Cardinal Mooney High School v Michigan High School Athletic Association*, 437 Mich 75, 80; 467 NW2d 21 (1991)

[2] *People v Bennett*, 195 Mich App 455; 491 NW2d 866 (1992)

1. A complaint for a writ of habeas corpus may not be used as a substitute for an appeal.

MCL 600.4310 provides:

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

In *Cross v Department of Corrections*[3] and in *People v Price*[4] this Court pointed out that a writ of habeas corpus is not a substitute for an appeal of a criminal conviction. In the present case, the United States Attorney found that Isabella County had the jurisdiction to try Moses and Moses did not directly challenge the United States Attorney's decision. Moses also failed to directly challenge the jurisdiction of the Isabella County Circuit Court before that court, or raise the jurisdictional claim on appeal or in a motion for relief from judgment. Having squandered four opportunities to challenge the jurisdiction of the Isabella County Circuit Court over him, Moses then attempted to raise such jurisdictional claim for the first time before the Saginaw County Circuit Court in a habeas corpus action, and he now makes the claim in this Court. Moses is improperly asking this Court to greatly expand the limited scope of State habeas corpus; to cloak the Department of Corrections with the authority of the Isabella County Prosecutor; and to use this collateral civil proceeding to litigate the factual determinations of whether Moses is a Native American, and what lands the treaty encompasses, and whether

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[3] *Cross v Department of Corrections*, 103 Mich App 409, 414; 303 NW2d 218 (1981)
[4] *People v Price*, 23 Mich App 663, 669; 197 NW2d 177 (1970)

People v Bennett should be overruled.[5] These are factual and legal matters which would have been part of Moses's criminal case had they been timely and properly raised.

Moses failed to make his factual and legal claims in the appropriate forums where the court and prosecuting attorney had authority, expertise, and experience to litigate them; instead, in an end-run around these proper remedies, he seeks to expand the limited scope of State habeas corpus and have his claims litigated by the warden of the prison where he was incarcerated. Even if the prison warden must be a named defendant under MCR 3.303(C)(3), the Isabella County Prosecuting Attorney is a necessary party, MCR 2.205, to litigate the technical factual, treaty, and jurisdictional issues raised by Moses and "permit the court to render complete relief." Because of the nonjoinder, the Isabella County Prosecuting Attorney should be added as a party. MCR 2.207, 7.216(A)(2).

In *Walls v Director of Institutional Services Maxie Boy's Training School*, this Court noted[6]:

> Initially we note that petitioner may not bring an action for habeas corpus under the statute. MCL 600.4310(3); MSA 27A.4310(3). If there is a radical jurisdictional defect in the proceedings, however, the statutory prohibition does not bar a habeas corpus action. *People v Price*, 23 Mich App 663, 670; 179 NW2d 177 (1970). **"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*, *supra*, at 671. The policy behind limiting a habeas corpus proceeding is premised on the concern that such an action may be abused and substituted for normal appellate proceedings. (Emphasis added.)

The exception for radical jurisdictional defects does not exist in this case because *People v Bennett* had already decided the jurisdictional question raised by Moses.[7] *Bennett* was

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[5] *People v Bennett*, 195 Mich App 455; 491 NW2d 866 (1992)
[6] *Walls v. Director of Institutional Services Maxie Boy's Training School*, 84 Mich App 355, 357; 269 NW2d 599 (1978)
[7] *People v Bennett*, 195 Mich App 455; 491 NW2d 866 (1992)

precedentially binding on the trial court at the time of Moses's no contest plea conviction, MCR 7.215(C)(2), and must be followed by this Court, MCR 7.215(J)(1). Therefore there was no radical jurisdictional defect in the "express legal requirement[s] in existence at the time" of the no contest plea and habeas corpus is not available. No less important is the fact that the "act or omission by state authorities that clearly contravenes an express legal requirement" cannot be attributable to the Department or Warden Trombley since neither had anything to do with the criminal prosecution in Isabella County.

2. The scope of State habeas corpus is limited.

The Department of Corrections or its employees may be named as defendants in a very narrow class of habeas corpus actions which involve the claim of *improper confinement due to actions directly attributable to or under the control of the Department or its employees*. These habeas corpus actions may involve a parole revocation.[8] Another common habeas corpus action properly involving the Department deals with the claim that the Department is improperly calculating one or more sentences that the prisoner is serving. In *Cross v Dep't of Corrections*, the Department was named as the defendant since it was claimed that the Department was not following the clear sentencing instructions of the trial court and was holding Cross beyond the sentence imposed by the court.[9] **Moses's arrest, conviction, sentence, and failure to pursue post conviction remedies are not the product of any action by the Department nor were they subject to the Department's control.** The Department is not improperly extending the sentence handed down by the Isabella County Circuit Court. Moses is clearly attacking his criminal conviction using a habeas corpus action.

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[8] *Triplett v Warden*, 142 Mich App 774, 779; 371 NW2d 862 (1985)
[9] *Cross v Dep't of Corrections*, *supra* at page 415

The habeas corpus system established by the Michigan Legislature does not give prisoners a second appellate round in which to challenge their criminal convictions and sentences. This Court has repeatedly made it clear that the Department of Corrections cannot be named as a party in a habeas corpus action challenging a criminal conviction. See attached as Attachment A five recent unpublished Court of Appeals Orders dismissing such actions in *Jones v Department of Corrections*; *Floyd v Department of Corrections*; *Kinchloe v Department of Corrections*; *Nobles v Department of Corrections*; and *Spencer v Department of Corrections*.[10]

3. The Department does not have the authority to become involved in any post conviction appeals or challenges to a prisoner's conviction or sentence.

The Department of Corrections, the Director of the Department, and the Department's employees are not the proper parties to become involved in collateral challenges to a prisoner's conviction and sentence. They do not have the authority or expertise to litigate this claim. The claim could have – and should have – been raised in the criminal proceeding or in post-conviction proceedings under MCR 6.501 *et seq*, since the Isabella County Prosecuting Attorney and the Isabella County Circuit Court have the authority, expertise and experience to litigate the claim. This Court in the case of *Howell v Department of Corrections* made it clear that the Department of Corrections has no authority to correct jail credit erroneously granted on a

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[10] *Jones v Department of Corrections*, Docket No. 259772, Unpublished COA Order, March 4, 2005
Floyd v Department of Corrections, Docket No. 259344, Unpublished COA Order, January 7, 2005
Kinchloe v Department of Corrections, Docket No. 261206, Unpublished COA Order, April 22, 2005
Nobles v Department of Corrections, Docket No. 263388, Unpublished COA Order, August 10, 2005
Spencer v Department of Corrections, Docket No. 263325, Unpublished COA Order, August 10, 2005

consecutive sentence for prison escape by the Recorder's Court.[11] See copy of Order attached as Attachment B. At page 2 of its Order the *Howell* Court stated:

> That the award of credit for time served on a consecutive sentence may be erroneous, and that the sentence for prison escape fails to reflect a maximum sentence which accords with statutory requirements, does not render the sentences imposed void, but merely voidable. However, only the prosecutor, by pursuing appellate remedies, has standing to challenge those errors. *People v Collins*, 380 Mich 131, 135 (1986). As an administrative agency, the Department of Corrections has no authority to modify judgments of sentence which were within the jurisdiction of the Recorder's Court to make, whether or not that jurisdiction was erroneously exercised. *Coffman v State Board of Examiners in Optometry*, 331 Mich 582 (1952). Accordingly, the Department of Corrections shall correct its records to show the sentences and credits imposed and granted by the Recorder's Court for the City of Detroit, unless and until those sentences and credits are revised by the order of a court of competent jurisdiction.

Just as the Department has no authority to become involved in correcting a prison sentence, it does not have the authority to function as a county prosecutor and litigate in collateral proceedings factual and legal claims that could have – and should have – been raised in the criminal case and post-conviction proceedings.

4. The Department does not have the authority or experience to litigate the two factual claims that Moses raises for the first time in his habeas corpus complaint.

For almost 150 years the Federal Isabella Indian Reservation has existed in Isabella County and the courts and prosecutors of Isabella County have been required to make determinations of whether an individual is subject to state prosecution based upon his or her tribal membership and whether the crime took place on reservation property pursuant to the terms of the treaty. In *People v Bennett*[12] this Court analyzed and rejected a claim similar to the

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[11] *Howell v Department of Corrections*, Docket No. 152287, Unpublished COA Order, January 23, 1993

[12] *People v Bennett*, 195 Mich App 455; 491 NW2d 866 (1992)

one Plaintiff Moses is making here, and held that a member of an Indian Tribe was subject to criminal prosecution in state court. Moses is clearly claiming that *People v Bennett* should be overturned and he bases this upon two factual claims which he never brought to the attention of the Isabella County Circuit Court or raised in any post-conviction proceedings.[13] This present case, like *Bennett*, arose in Isabella County and Isabella County is the appropriate forum and the Isabella County Prosecuting Attorney is the appropriate party to litigate the basic factual issues that must be resolved in this case, namely whether Scott Moses is a Native American and where exactly did the CSC 3rd degree offense take place in relation to the lands allegedly controlled by the treaty. These factual issues must be resolved before any attempt at addressing the issue of whether *People v Bennett* should be overturned because of alleged changes in federal law or legal errors made by the *People v Bennett* court. The Department of Corrections has no authority to stipulate to or to litigate these two factual issues or to respond on behalf of the People of the State of Michigan as to whether *People v Bennett* should be upheld or overturned.

The case of *Keweenaw Bay Indian Community v State of Michigan* is illustrative of the complex factual determinations that must be made in interpreting a Native American treaty[14]:

> The record in this proceeding was fully developed during eight days of trial. The Court heard testimony from three expert historians presented by the parties, as well as from officials representing both the Tribe and the State. Over 300 exhibits were introduced, many of which were historical documents dating to the period leading up to and immediately following the negotiation of the 1854 Treaty.

Moses is asking this Court to make factual determinations based upon documents which he has submitted as exhibits which have not been subject to the rigors of the adversarial process in the

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[13] *People v Bennett*, 195 Mich App 455; 491 NW2d 866 (1992)
[14] *Keweenaw Bay Indian Community v State of Michigan*, 784 F Supp 418, 420 (WD Mich) (1991)

Isabella County Circuit Court with the Isabella County Prosecuting Attorney properly representing the People of the State of Michigan.

Conclusion and Relief Sought

Having failed to use four different opportunities to challenge the jurisdiction of the Isabella County Circuit Court over him regarding his criminal conviction and sentence, Moses is improperly attempting to use a complaint for writ of habeas corpus to appeal his criminal conviction and argue that *People v Bennett* should be overturned.[15] The limited scope of State habeas corpus should not be expanded in this manner and the Department of Corrections has no authority to become involved in any challenge to Moses's conviction and sentence. The complaint for a writ of habeas corpus naming the Department as the Defendant should be dismissed.

Respectfully submitted,

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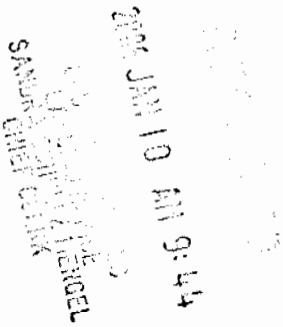

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[15] *People v Bennett*, 195 Mich App 455; 491 NW2d 866 (1992)