
IN THE UTAH COURT OF APPEALS

SOLOMON LEE FORD,

Petitioner/Appellee,

vs.

STATE OF UTAH,

Respondent/Appellant.

Case No. 20060720-CA

APPELLANT'S BRIEF

APPEAL FROM A JUDGMENT GRANTING POST-CONVICTION RELIEF, THE HONORABLE JOHN PAUL KENNEDY, THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, UTAH, PRESIDING

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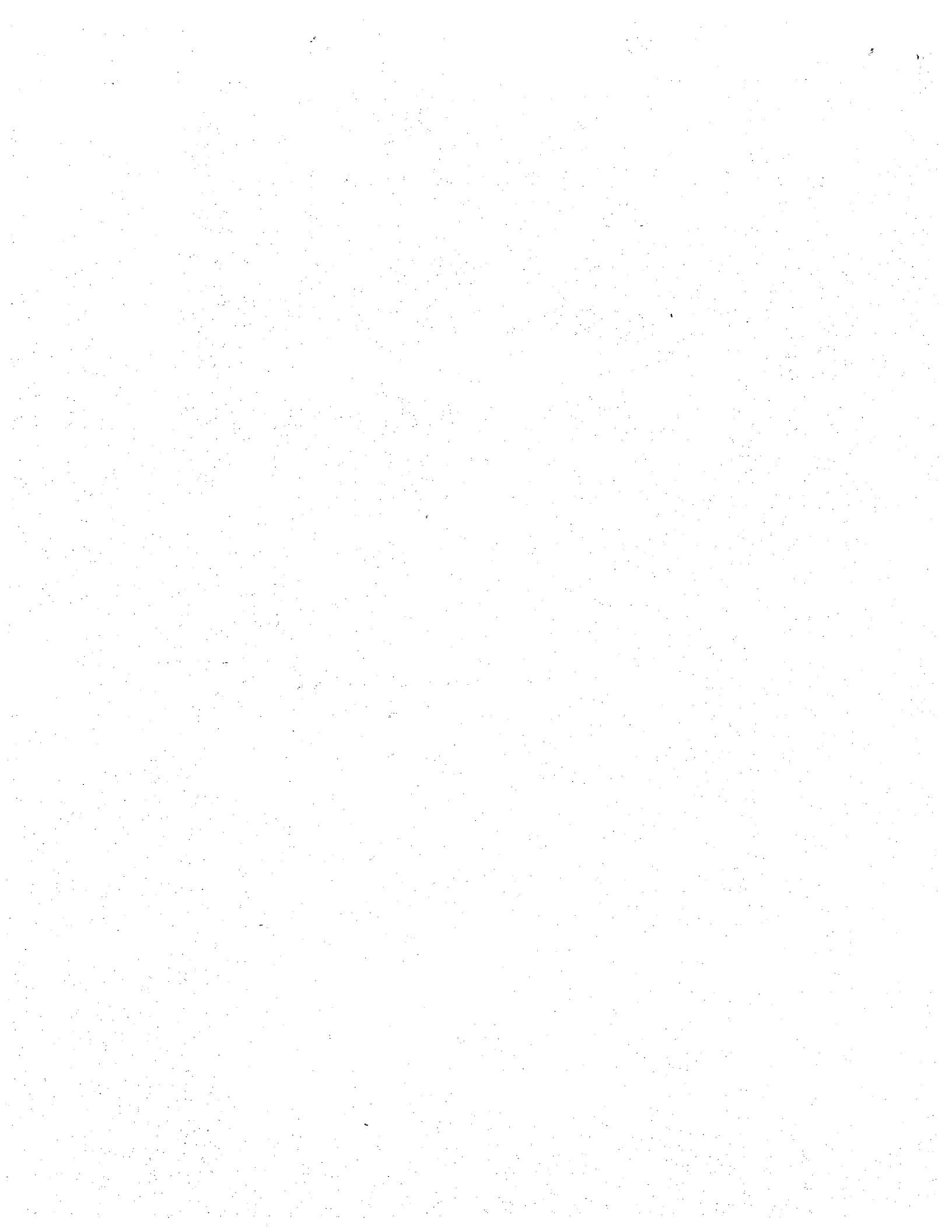


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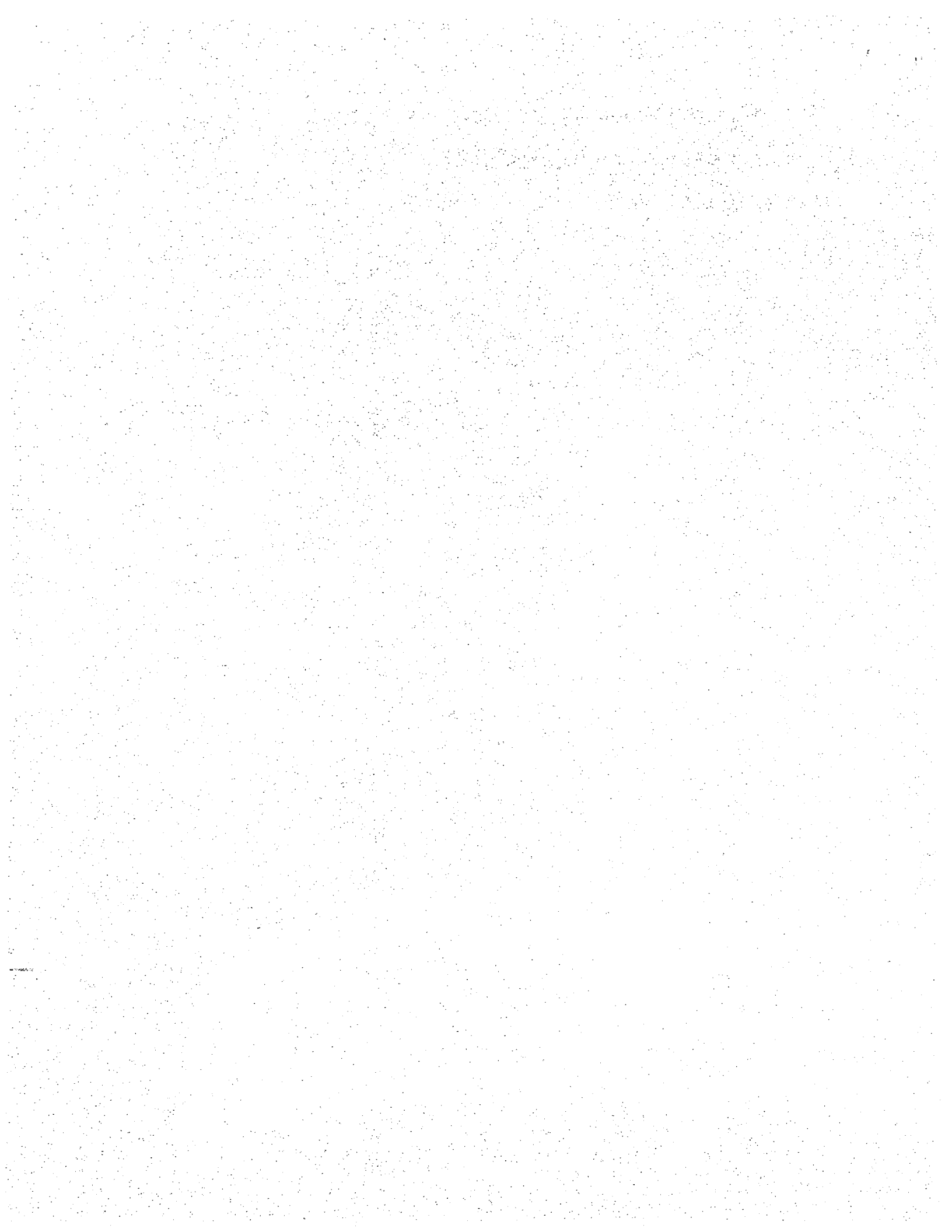


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APPELLANT'S BRIEF

* * *

JURISDICTIONAL STATEMENT

The State appeals from a judgment granting Ford post-conviction relief, and from orders denying the State's motions to dismiss Ford's post-conviction petition. This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(f) (West 2004).

ISSUE STATEMENT

Issue 1. In his third post-conviction petition, Ford claimed that his conviction was illegal because a court commissioner presided at his preliminary hearing and bound him over for trial. In his fourth post-conviction petition, Ford again claimed that the court commissioner lacked authority to preside at his preliminary hearing; because she lacked that authority, his preliminary hearing was defective; and the defect deprived the district court of subject matter jurisdiction to try him. Should the fourth post-conviction court have dismissed the fourth petition as procedurally

barred either because 1) Ford raised and lost the claim in his third petition; or 2) could have raised the claim in his third petition?

Issue 2. Was Ford's beyond-a-reasonable-doubt conviction rendered constitutionally infirm because a lawyer with criminal law experience made the preliminary, probable cause determination that Ford committed the crime for which a jury later convicted him?

Standard of Review. This case arises from a judgment granting post-conviction relief. The parties disputed none of the relevant facts. "Generally, an appeal from a judgment on a petition for post-conviction relief raises questions of law reviewed for correctness, giving no deference to the post-conviction court's conclusion." *Wickham v. Galetka*, 2002 UT 72, ¶ 7, 61 P.3d 978.

Preservation. The State preserved the appellate issues in its motion to dismiss Ford's petition, the supporting memoranda, and the oral argument (R40-41, 106-13, 130-34, 294).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Addendum E contains Utah Code Ann. §§ 77-3-1, 78-3-31, and 78-7-17.5 (1993); Utah Code Ann. §§ 78-35a-104 through 106 (West 2004); and Utah R. Crim. P. 7 (1993).

CASE STATEMENT

Conviction. On August 19, 1993, the State charged Ford with aggravated assault and possession of a dangerous weapon by a restricted person (R52 (R51-57 are attached as addendum C)). Ford's preliminary hearing was held before then Commissioner Frances M. Palacios. Commissioner Palacios bound Ford over for trial on the criminal charges. A jury convicted Ford on the weapons charge. *Id.*

This Court affirmed Ford's conviction in an unpublished opinion. *State v. Ford*, slip op. 940044-CA (Utah App. March 21, 1995), *cert. denied*, 899 P.2d 1231 (Utah 1995). Ford did not claim on direct appeal that his conviction was illegal because a commissioner bound him over. *Id.*

First and Second Petitions. Ford filed two petitions for post conviction relief (case numbers 960903799 and 970905132). Again, Ford did not claim in either petition that his conviction was illegal because a court commissioner had bound him over for trial (R53). The post-conviction court dismissed the first two petitions. *Id.*

Third Petition. Ford filed his third post-conviction petition on March 12, 1999. The post-conviction court, Judge Tyrone Medley presiding, read Ford's *pro se* petition liberally to include a claim that "the commissioner lacked authority to preside at his preliminary hearing." Ford argued that allowing a commissioner to preside at a preliminary hearing was an unconstitutional delegation of judicial

authority, and that it amounted to a jurisdictional defect that nullified his subsequent conviction. (R53-54, 64, 66.)

The third post-conviction court dismissed Ford's petition. That Court agreed that Ford's claims were procedurally barred. In an alternative merits ruling, the third post-conviction court ruled that "[a]llowing a court commissioner to preside at a preliminary hearing is not an unconstitutional delegation of judicial authority. A commissioner, when presiding at a preliminary hearing, exercises none of the powers of a judge and does not function as a court of record." (R54-55, 66-68.)

Ford appealed. In that appeal, the State conceded to this Court that a challenge that the district court lacked subject matter jurisdiction to try Ford would not be procedurally barred, but that Ford had not demonstrated a jurisdictional defect (R294 :8-9).¹

This Court affirmed, holding that Ford's post-conviction claims were procedurally barred. *Ford v. Morgan*, 2000 UT App 245U (per curiam) (Addendum D). The Utah Supreme Court denied review. *Ford v. Morgan*, 20 P.3d 403.

¹ As detailed in the State's memoranda below and in the argument section of this brief, the State withdraws that concession.

Fourth Petition. On June 3, 2005, Ford filed his fourth petition for post-conviction relief. Ford named Judge Medley, the third post-conviction court judge, as a respondent. The fourth petition was assigned to a different judge.

In his fourth petition, Ford again claimed that his criminal conviction was void because a court commissioner presided at his preliminary hearing (R1-19) (addendum A), 294:5-6). Ford argued that Commissioner Palacios lacked authority to serve as a magistrate at the preliminary hearing because she “was not designated by law and [the] Judicial Council to do so” (R4). He continued that this rendered the bindover illegal, and that the district court “acted without due process of law and judicial authority” by relying on an illegal bindover (R4-5).

The State moved to dismiss his petition, arguing that Ford had raised and lost this claim in his third post-conviction petition. (R46-47); *see* Utah Code Ann. § 78-35a-106 (West 2004). The State relied on the third post-conviction court’s ruling that Ford’s challenge to the commissioner’s authority to serve as a magistrate did not establish a defect in the district court’s jurisdiction to try him.

The fourth post-conviction court rejected the State’s procedural bar defense. To get around that defense, the fourth post-conviction court concluded that the jurisdictional issue raised in Ford’s fourth post-conviction petition had not been resolved in the third post-conviction proceeding and that a challenge to the trial court’s subject matter jurisdiction could never be procedurally barred. Based on

that conclusion, and its conclusion that Ford's claim challenged the district court's subject matter jurisdiction, the fourth post-conviction court concluded that the procedural bar did not apply. In the merits ruling that followed, the fourth post-conviction court concluded that, because a commissioner bound Ford over to stand trial on the charged crime, the bindover was defective, and the district court lacked subject matter jurisdiction to try Ford. The court then set aside Ford's beyond-a-reasonable-doubt conviction on the charged crime. (R105, 151, 201-209, 239-40.) (The court's memorandum decision (R144-53), and order (R239-41) are attached as addendum B.).

The State timely appealed (R255).

ARGUMENT SUMMARY

Procedural bar. The fourth post-conviction court erroneously rejected the State's procedural bar defense. Ford presented and lost in his third petition the same claim that he raised in his fourth petition: that his conviction was illegal because a commissioner served as the magistrate at his preliminary hearing and determined that there was probable cause to bind him over on the charge on which a jury later convicted him beyond a reasonable doubt.

The fourth post-conviction court erroneously avoided the procedural bar by reasoning that Ford did not raise the precise jurisdictional argument in his fourth

petition that he litigated and lost in his third. First, Ford did not make that argument and the court should not have made it for him.

Second, Ford raised the same claim, but supported it with a different argument. Neither Ford nor the post-conviction cited any authority for the proposition that a petitioner may avoid the PCRA's plain procedural bar language by raising the same claim supported by different arguments.

Third, even if the fourth petition challenge to the district court's subject matter jurisdiction raised a different claim, the PCRA's plain language clearly barred it because Ford could have, but did not raise it in his third petition. Neither Ford nor the fourth post-conviction court cited any authority demonstrating that a challenge to the trial court's subject matter jurisdiction in a fourth petition will defeat the PCRA's absolute procedural bar.

Finally, any defect in the commissioner's authority to bind Ford over to stand trial on the crime for which the jury ultimately convicted him beyond a reasonable doubt did not strip the district court of jurisdiction to try Ford.

Bindover by a commissioner does not defeat the district court's subject matter jurisdiction. The fourth post-conviction court found that Ford's beyond-a-reasonable-doubt conviction was illegal because a commissioner bound him over for trial and, when a commissioner does so, the bindover is nullified and the district court never acquires jurisdiction.

The fourth post-conviction court erroneously found that the commissioner lacked authority to serve as a magistrate and bind Ford over for trial. Ford argued that allowing a commissioner to serve as a magistrate is an unconstitutional delegation of a core judicial function. However, clearly controlling law demonstrates that a magistrate officiating at a preliminary hearing exercises no judicial functions. Controlling law also permits magistrates to perform non-final, preliminary duties that are subject to judicial review. In the case of a preliminary hearing and bindover to stand trial on a felony, the commissioner's order is fully reviewable by the district court. In addition, the controlling statutes and court rules clearly authorized the commissioner to serve as a magistrate at Ford's preliminary hearing.

In any event, even if there were a defect in the commissioner's authority to serve as a magistrate and bind Ford over for trial, that defect did not strip the district court of jurisdiction to try Ford. Under existing precedent, a preliminary hearing is essential to a district court's jurisdiction to try a defendant, and the court may try the defendant only for the crime on which he was bound over. However, existing precedent also makes clear that the identity of the person officiating at a hearing is not integral to the court's jurisdiction.

Similarly, any defect in the statutory designation of commissioners to serve as magistrates did not invalidate Ford's conviction. The commissioner acted under statutory authority; therefore, she served with *de facto* authority.

ARGUMENT

I. FORD'S CLAIM WAS PROCEDURALLY BARRED

“Justice demands that a convicted defendant have an opportunity to appeal in timely fashion, but once the appellate process has concluded, society’s interest in the effectiveness and integrity of the criminal justice system requires a finality of judgment that should severely limit repetitive appeals” *Gerrish v. Barnes*, 844 P.2d 315, 320-21 (Utah 1992) (quoting *Bundy v. DeLand*, 763 P.2d 803, 805 (Utah 1988)). The Post-Conviction Remedies Act (“PCRA”) furthers that purpose by barring without exception post-conviction relief for claims that were or could have been raised in a prior petition. Utah Code Ann. § 78-35a-106(1)(d) (West 2004). Further, when the State asserts a procedural bar defense, as it did here, the burden shifts to the petitioner “to disprove [the bar’s] existence by a preponderance of the evidence.” Utah Code Ann. § 78-35a-105 (West 2004).

The fourth post-conviction court acknowledged that this was “Ford’s fourth bite at the apple” (R145). Nevertheless, the court concluded that Ford’s claim was not procedurally barred because 1) it challenged the district court’s jurisdiction to try him; and 2) Ford attempted to, but did not raise the precise jurisdictional argument in his third petition that the fourth post-conviction court argued that Ford raised in his fourth petition. For the reasons argued below those conclusions were

incorrect and the post-conviction court should have found that Ford did not meet his burden to overcome the procedural bar.

Ford cannot overcome the procedural bar by repeating jurisdictional challenges that he litigated and lost in a prior petition. Utah Code Ann. §78-35a-106(d) and (2) (barring post-conviction relief for claims raised in a prior petition and permitting no exceptions). *Cf. also Carter v. Galetka*, 2001 UT 96 ¶ 6, 44 P.3d 626 (holding under pre-PCRA law that the post-conviction claims that Carter litigated and lost on direct appeal should be dismissed as an abuse of the writ without addressing them on the merits). Ford's third- and fourth-petition challenges to his conviction were the same. In both, Ford claimed that his conviction was illegal because the commissioner allegedly lacked authority to preside at his preliminary hearing and to bind him over for trial, which, in turn, deprived the district court of subject matter jurisdiction to try him (R3-7). The third post-conviction court rejected that jurisdictional argument on its merits (R54-55). Ford appealed that denial of relief, this Court affirmed, and the supreme court denied review. That should have been the end of the inquiry. Ford was not entitled to raise the jurisdictional challenge in successive petitions until he found a post-conviction court that agreed with him.

The fourth post-conviction court agreed that Ford could not proceed on a claim that he litigated and lost in the third post-conviction proceedings. In order to

get around the procedural bar and reach the merits of Ford's claim, the fourth post-conviction court concluded that no court had ruled on the "precise jurisdictional issue" that Ford raised in his fourth petition. The court then characterized the claim to be whether "the legislature is authorized to delegate the authority to preside over preliminary hearings without the approval of the judicial branch." (R151). The fourth post-conviction court incorrectly disregarded the procedural bar on this reasoning.

First, Ford did not oppose the procedural bar defense on the reasoning the fourth post-conviction court applied. Instead, the fourth post-conviction court relied on reasoning of its own making. That course was improper. *See, e.g., State v. Robison*, 2006 UT 65 ¶¶ 10-25 (holding that the court of appeals erroneously reversed a conviction based on "reasoning of its own making").

Second, as demonstrated, the core claim in the fourth petition was the same as that which Ford lost in the third: the commissioner's lack of authority to preside at his preliminary hearing deprived the district court of jurisdiction to try him. Neither Ford nor the fourth post-conviction court cited any authority for the proposition that a petitioner may avoid the PCRA's plain procedural bar language by raising the same claim supported by different arguments.

Third, even if Ford's fourth-petition challenge to the commissioner's authority could be construed as a new jurisdictional claim, it was still procedurally barred.

The PCRA bars relief for claims that could have been, but were not raised in a prior petition. Utah Code Ann. § 78-35a-106(d) (West 2004). Ford could have raised his fourth-petition arguments in his third petition. He did not. Under the PCRA's clear language, those arguments were barred.

On this latter point, the fourth post-conviction court rejected the defense in part by reasoning that a jurisdictional challenge may be raised at any time. In essence, the fourth post-conviction concluded that a post-conviction challenge to his conviction based on a claim that the trial court lacked subject matter jurisdiction to try him can never be barred. The fourth post-conviction court's reasoning failed to disprove the procedural bar. See Utah Code Ann. § 78-35a-105 (West 2004) (once the State raises a procedural bar defense, the petitioner bears the burden of "disprov[ing] its existence").

The court relied solely on *Petersen v. Utah Board of Pardons*, 907 P.2d 1148 (Utah 1995), reasoning that "the jurisdictional question may indeed be raised at any time and should be raised (even *sua sponte* by the court)" (R147 (citing *id.* at 1151) and R151). However, the supreme court in *Petersen* held only that the appellate court could determine *sua sponte* whether it had subject matter jurisdiction over the claims before it. *Peterson*, 907 P.2d at 1151. No one challenged the fourth post-conviction court's subject matter jurisdiction over Ford's post-conviction petition.

The supreme court did not hold in *Petersen* that a person could defeat a procedural bar and challenge his criminal conviction in collateral review no matter how many “bite[s] at the apple he has had” by attacking the original trial court’s subject matter jurisdiction to try him. Compare *United States v. Wolff*, 241 F.3d 1055, 1056-57 (8th Cir. 2001) (collateral challenge that trial court lacked subject matter jurisdiction was time-barred). By *sua sponte* excusing Ford’s failure to raise his fourth-petition argument in his third petition, the fourth post-conviction court violated the PCRA’s plain language and the strong interest in finality, which militates against facilitating petitioners like Ford filing multiple petitions.²

Finally, as demonstrated in point II, any defect in the commissioner’s authority to bind Ford over did not defeat the district court’s subject matter jurisdiction to try him. Therefore, even if a post-conviction challenge to a trial court’s subject matter jurisdiction can never be procedurally barred – no matter how

² The fourth post-conviction court also rejected the procedural bar defense by concluding that applying the bar would “exalt” the PCRA over Ford’s constitutional rights (R151). In effect, the fourth post-conviction court concluded that no procedural bar could foreclose a constitutional claim. Controlling law that the fourth post-conviction court ignored contradicts that conclusion. In *Andrews v. Shulsen*, 773 P.2d 832 (Utah 1988), the Utah Supreme Court found that a constitutional challenge to Andrews’ capital murder conviction was procedurally barred because, like Ford, he first raised it in a successive petition and established no “good cause” for failing to raise it in his first. *Id.* at 833. Thus, the mere fact that the successive petition raises a constitutional challenge to the conviction does not defeat the procedural bar.

many petitions the petitioner has filed - neither Ford nor the court ever demonstrated the requisite defect in the trial court's subject matter jurisdiction.

In short, neither Ford nor the fourth post-conviction court disproved the procedural bar. The post-conviction court should have denied relief on the procedurally barred claim.

II. FORD'S CONVICTION BEYOND A REASONABLE DOUBT WAS NOT CONSTITUTIONALLY INFIRM BECAUSE A COMMISSIONER MADE THE PRELIMINARY DETERMINATION THAT THERE WAS PROBABLE CAUSE TO BELIEVE THAT FORD COMMITTED THE CRIME FOR WHICH HE WAS CONVICTED

The PCRA permits granting relief from a conviction that was imposed "in violation of the United States Constitution or Utah Constitution." Utah Code Ann. §78-35a-104(1)(a) (West 2004). The fourth post-conviction court ruled that the district court lacked jurisdiction to try Ford because a commissioner bound him over to stand trial on the crime for which he was convicted. To reach that result, the fourth post-conviction court concluded that 1) a commissioner cannot serve as a magistrate at a preliminary hearing; and 2) if a commissioner serves as a magistrate at a preliminary hearing, it nullifies the bindover, which, in turn, deprives a district court of jurisdiction to try the defendant. Both conclusions were wrong.

A. The post-conviction court incorrectly concluded that the commissioner lacked authority to serve as a magistrate

The fourth post-conviction court concluded that Commissioner Palacios lacked authority to preside at Ford's preliminary hearing and, consequently, to bind him over to stand trial. Although not clear, it appears that the court may have relied on the argument that authorizing the commissioner to preside at a preliminary hearing is an unconstitutional delegation of a core judicial function. The court also concluded that a commissioner could not preside at a preliminary hearing without the judiciary's oversight. Neither rationale supported post-conviction relief.

1. Officiating at a preliminary hearing is not a judicial function.

Ford argued that Commissioner Palacios lacked authority to preside at his preliminary hearing because doing so was an unconstitutional delegation of judicial authority (R123). It is unclear whether the fourth post-conviction court relied on this as a basis for its conclusion that Commissioner Palacios lacked authority to bind Ford over on the weapons charge. However, the court did rely on *Salt Lake City v. Ohms*, 881 P.2d 844 (Utah 1994), in its overall analysis (R149). *Ohms* turned on

whether the legislature had delegated a core judicial function. *See id.* To the extent that the fourth post-conviction court agreed with Ford's argument, it erred.³

Clearly, the legislature may not delegate core judicial functions of a court of record to non-judicial officers such as commissioners. *Ohms*, 881 P.2d at 851-53. However, in *State v. Humphrey*, 823 P.2d 464 (Utah 1991), the Utah Supreme Court held that judges, "when sitting as magistrates [at a preliminary hearing] hav[e] the jurisdiction and powers conferred by law upon magistrates and not those that pertain to their respective judicial offices." *Id.* at 467 (citation omitted). If a judge serving as a magistrate at a preliminary hearing is not exercising his judicial authority, then designating a court commissioner to serve as a magistrate does not delegate a judicial function, core or otherwise.

Moreover, commissioners may perform non-final, preliminary duties that are subject to ultimate review by a judge. *Ohms*, 881 P.2d at 852 n.17. In *Ohms*, the supreme court held that a statute allowing commissioners to try misdemeanor cases and enter final judgments unconstitutionally delegated a core judicial function because it allowed commissioners to enter judgment and impose sentence. *Salt Lake City v. Ohms*, 881 P.2d at 851-53. Similarly, in *Thomas*, the supreme court found that

³ As detailed in point I, the claim is procedurally barred because Ford raised and lost it in his third petition for post-conviction relief.

a court commissioner unconstitutionally exercised a core judicial function by issuing a search warrant because the warrant was not reviewable by a judge. *State v. Thomas*, 961 P.2d 299, 303-304 (Utah 1998).

Unlike the proceedings at issue in *Ohms* and *Thomas*, “ultimate judicial power remains with the judge” in the case of a preliminary hearing and bindover. A district judge may review a commissioner’s probable cause determination subsequent to a bindover, and the district judge’s review requires no deference to the commissioner’s decision. *State v. Humphrey*, 823 P.2d at 465-66. In addition, a magistrate’s (and, by necessary extension, a commissioner’s) bindover order is not sufficiently final to permit appellate review until the district judge reviews it. *Id.* at 468. Thus, unlike the commissioners in *Ohms* and *Thomas*, Commissioner Palacios entered no final order; she entered an order fully reviewable by the district court.

For the reasons argued, allowing Commissioner Palacios to preside at Ford’s preliminary hearing was not an unconstitutional delegation of a core judicial function.

- 2. Commissioner Palacios was authorized by statute to determine whether there was probable cause to believe that Ford committed the crime with which the State charged him and for which a jury subsequently convicted him beyond a reasonable doubt.**

The fourth post-conviction court concluded that Commissioner Palacios lacked authority to serve as a magistrate and bind Ford over to stand trial because

the legislature authorized her to do so without the judicial branch's oversight. The court continued that, "to avoid the problem of holding preliminary hearings before an unauthorized (and perhaps incapable) person, the input of the Judicial Council was a prerequisite for the proper designation of a magistrate." (R148).

The only argument that Ford made on this issue was that Commissioner Palacios could not serve as a magistrate because no Judicial Council rule permitted her to do so. That argument failed to demonstrate a defect in her authority to bind him over for trial.

Ford relied solely on Utah Code Ann. § 78-3-31 (1993). *See* (R125). That statute provided that "[c]ourt commissioners are quasi-judicial officers of courts of record and *have judicial authority as provided by this section and rules of the Judicial Council.*" Utah Code Ann. § 78-3-31(1)(a) (1993) (emphasis added). However, as established, commissioners sitting as magistrates are not exercising judicial authority. The statutory reference to a Judicial Council rule does not limit a commissioner's ability to perform non-judicial functions.

Moreover, the legislature and the judicial branch, through Utah Rules of Criminal Procedure, clearly authorized the commissioner to preside at Ford's preliminary hearing and bind him over to stand trial. Utah Code Ann. 77-1-3 (1993) defined "magistrate" to include court commissioners. Utah R. Crim. P. 7(h) and (i) provided that magistrates will preside at a preliminary hearing.

The fourth post-conviction court argued on Ford's behalf that section 77-1-3 could not legitimize a commissioner's status as a magistrate without Judicial Council rules because 77-1-3 referred to 78-3-31. The court continued that 78-3-31 required the Judicial Council to adopt rules "'defining the duty and authority of court commissioners,'" not just rules defining the procedures and qualifications for appointing commissioners (R149).⁴

The court's rationale ignores the statutes' plain language. The plain language demonstrates that section 77-1-3 actually did refer only to section 78-3-31's commissioner qualification and appointment-procedure provisions, and that a Judicial Council rule was a pre-requisite only to a commissioner exercising judicial authority.

Section 77-1-3 designated as magistrates commissioners "*appointed* in accordance with Section 78-3-31." Utah Code Ann. § 77-1-3 (1993) (emphasis added). 78-3-31 included the minimum qualifications for persons "*appointed*" as commissioners and the procedure for "*appoint[ing]*" them. Utah Code Ann. §§ 78-3-31(2) and (3). The subsection requiring the Judicial Council to adopt rules that designated the "*types of cases and matters*" that commissioner's may hear did not

⁴ As demonstrated, the fourth post-conviction court should not have relied on reasoning of its own making. *See, e.g., State v. Robison*, 2006 UT 65 ¶¶ 10-25 (holding that the court of appeals erroneously reversed a conviction based on "reasoning of its own making").

refer to "appoint[ing]" commissioners. Moreover, as stated, section 78-3-31 gave commissioners "judicial authority as provided by this section and rules of the Judicial Council." Magistrates presiding at preliminary hearings are not exercising "judicial authority."

The fairest reading is that 77-1-3 in fact referred only to 78-3-31's qualification and appointment-procedure provisions. Section 77-1-3 did not condition a commissioner's status as a magistrate on the Judicial Council adopting a rule to that effect. To the contrary, a Judicial Council rule was a prerequisite only to a commissioner exercising "judicial authority."

In addition, the fourth post-conviction court presumes without any basis that the commissioners were serving as magistrates without Judicial Branch oversight.⁵ There was no evidence in the record demonstrating that commissioners were presiding at preliminary hearings without the judiciary's knowledge. As demonstrated, the controlling statute defined magistrates to include commissioners,

⁵ Again, the fourth post-conviction court erroneously made this argument on Ford's behalf; it should not have relied on reasoning of its own making.

and the judiciary's criminal procedure rules designated magistrates as the persons who would preside at preliminary hearings.⁶

Similarly, the fourth post-conviction court's alarm that the lack of a judicial council rule could result in a "perhaps incapable" person presiding at a preliminary hearing is unfounded.⁷ The legislature required, among other things, that commissioners be admitted to the practice of law in Utah and have ability and experience in the area of law in which the commissioner would be serving. Utah Code Ann. § 78-3-31(3)(d) and (e) (1993). Thus, only lawyers with criminal law experience could serve as commissioners determining whether there was probable cause to believe that the accused committed the charged crime.

B. Any defect in the court commissioner's authority to make the preliminary probable cause determination did not strip the trial court of jurisdiction to try Ford and did not nullify Ford's beyond-a-reasonable-doubt conviction.

The State acknowledges that, under existing precedent, a preliminary hearing and bindover are "essential to a court's jurisdiction over a felony," and that a district court may "try a defendant [only] on the specific charge that is bound over." *State v.*

⁶ In addition, the controlling statute permitted the Judicial Council to appoint commissioners only with the concurrence of a majority of the district judges in the district where the commissioner would serve. Utah Code Ann. § 78-3-31(2)(a) (1993). It seems unlikely that, after concurring in a commissioner's appointment, the judges would be unaware of the commissioner's activities.

⁷ Again, Ford never made this argument.

Marshall, 2005 UT App 269U at 1 (Addendum D), *cert. denied*, 124 P.3d 634 (2005).⁸

Ford had a preliminary hearing and was bound over only on the charge for which a jury ultimately found him guilty beyond a reasonable doubt. To demonstrate that the trial court lacked subject matter jurisdiction to try him under the existing precedent, Ford had to demonstrate that the preliminary hearing and probable cause determination made by an experienced criminal lawyer equated to no preliminary hearing at all. Ford cited no authority to support such a conclusion, and existing law refutes it.⁹

⁸ The State reserves its right to challenge this precedent in future cases. However, because it did not challenge it below, it does not challenge it here.

⁹ Ford relied on *Holm v. Smilowitz*, 840 P.2d 157 (Utah App. 1992); *Thompson v. Jackson*, 743 P.2d 1230 (Utah App. 1987); *State v. Trujillo*, 214 P.2d 626 (Utah 1950); *Christiansen v. Harris*, 163 P.2d 314 (Utah 1945); and *State v. Freeman*, 71 P.2d 196 (Utah 1937). None stands for the proposition that a preliminary hearing before a person who lacked authority to preside equates to no preliminary hearing at all. *Holm* and *Thompson* stand for the proposition that a court must determine whether it has jurisdiction before proceeding. *Holm*, 840 P.2d at 160-62; *Thompson*, 743 P.2d at 1232. *Trujillo* and *Freeman* stand for the proposition that not every procedural defect in the preliminary hearing process will deprive the district court of jurisdiction over the criminal case. *Trujillo*, 214 P.2d at 630-31; *Freeman*, 71 P.2d at 203. Similarly, *Christiansen* stands for the proposition that not every procedural misstep amounts to a due process violation that will deprive a court of jurisdiction. *Christiansen*, 163 P.2d at 316-17. In addition, *Christiansen* discusses what due process requires before the State deprives a person of his liberty. *Id.* at 317. The preliminary hearing and bindover did not deprive Ford of his liberty; the subsequent trial, conviction, and sentence did.

Ohms makes clear that the identity of the person presiding at a hearing does not affect a court's subject matter jurisdiction. In *Ohms*, the Utah Supreme Court considered the constitutionality of Utah Code Ann. § 78-3-31's provisions allowing commissioners to perform judicial functions. Specifically, the supreme court considered whether a magistrate could sit as a circuit court judge and enter final judgments in misdemeanor cases. The supreme court concluded that that provision violated the Utah Constitution because it attempted to "vest authority to enter final judgments and impose sentence in criminal misdemeanor cases, which are core judicial functions." *Ohms*, 881 P.2d at 851, 853.

However, the supreme court distinguished between a court commissioner's authority to act and a court's subject matter jurisdiction. *See id.* at 852-53. Although it declared that the commissioners had no authority to enter final judgments in misdemeanor cases or sentence misdemeanor defendants, it also held that "the circuit court clearly had jurisdiction to decide [misdemeanor] matter[s]." *Id.* at 853. Thus, the supreme court made clear that a court does not lose subject matter jurisdiction merely because the person presiding at a hearing lacks constitutional authority to do so. It follows that, even if Commissioner Palacios lacked authority to determine whether there was probable cause to believe that Ford committed the crime with which the State charged him, that lack of authority did not deprive the district court of subject matter jurisdiction to try him for that crime and did not

nullify the ultimate beyond-a-reasonable-doubt determination that he committed that crime.¹⁰

Further, the supreme court held in *Ohms* that the commissioners' unconstitutional exercise of judicial authority did not warrant reversal in cases adjudicated by commissioners prior to its *Ohms* decision because the commissioners possessed *de facto* authority. That is, the commissioners "'exercise[d] the office of a judge under color of lawful authority and by a title valid on its face, though [they lacked the] full right to the office, as where [they were] appointed under an unconstitutional statute . . .'" *Id.* at 853 (quoting *Black's Law Dictionary* 841 (6th ed. 1990)) (additional citations omitted)(emphasis in original). The supreme court continued that "when an officer lacks authority to perform the duties he or she has performed but acts as an officer *de facto*, the action taken by that officer is valid." *Id.*

¹⁰ The supreme court also recognized that because *Ohms* had not preserved his argument below, it could only reach his claim if the trial court committed plain error or if other "exceptional circumstances" existed that justified reaching *Ohms*' claim. *Ohms*, 881 P.2d at 847. The court ultimately concluded that *Ohms*' situation satisfied the "exceptional circumstances" exception. *Id.* The court's requirement that his situation satisfy the "exceptional circumstances" exception before reviewing his claim also demonstrates that the commissioner's lack of authority did not strip the circuit court of subject matter jurisdiction. If the court had believed that the unconstitutional delegation of authority created a defect in the court's jurisdiction, it would not have needed to fit *Ohms*' case into an exception because claims challenging subject matter jurisdiction may be raised on appeal even if they were not preserved. See, e.g., *State v. Perank*, 858 P.2d 927, 930 (Utah 1992). The negative inference is that no jurisdictional defect existed.

at 854 (citing *Vance v. Fordham*, 671 P.2d 124, 130–31 (Utah 1983)); see also *Hussey v. Smith*, 99 U.S. 20, 24 (1878) (actions of unauthorized officers are validated when performed by one who, under color of law “assumes to exercise official authority, is reputed to have it, and the community acquiesces accordingly”).

Commissioner Palacios clearly acted with *de facto* authority when she determined that there was probable cause to believe that Ford committed the crime with which the State charged him and for which a jury ultimately convicted him. Utah Code Ann. § 77-1-3(4) (1993) defined magistrate to include “a justice or judge of a court of record or not of record or a commissioner of such a court appointed in accordance with Section 78-3-31.”¹¹ In addition, Utah Code Ann. § 78-7-17.5 (1993) specifically referred to Section 77-1-3’s definition of magistrate and included in a magistrate’s duties “conducting a preliminary examination to determine probable cause.” Utah Code Ann. § 78-7-17.5(f) (1993). No case had declared these sections unconstitutional. Under *Ohms* , even if the legislature improperly allowed

¹¹ Ford did not argue or proffer any evidence that Commissioner Palacios was not appointed in accordance with the qualification and appointment procedures in 78-3-31.

Commissioner Palacios to preside at Ford's preliminary hearing, her probable cause determination and bindover were valid because she acted with *de facto* authority.¹²

The fourth post-conviction court purported to distinguish *Ohms*' recognition of "*de facto*" authority because *Ohms* dealt with misdemeanor convictions, while Ford was charged with a felony. It ruled, without supporting authority, that "the constitutional rights of criminal defendants charged with felonies cannot and should not be swept away by an assertion of *de facto* authority." (R150).¹³

However, nothing in *Ohms* suggests that *de facto* authority only applies to the unconstitutional exercise of judicial authority to enter final judgment and sentences in misdemeanor cases. To the contrary, the Utah Supreme Court recognized that *de facto* authority applies to exercising authority under the color of lawful authority even though the law is unconstitutional. The supreme court did not limit its application to the kind of case at issue. As demonstrated, Commissioner Palacios

¹² The supreme court's *Ohms* analysis also undercuts the fourth post-conviction court's conclusion that the identity of the person presiding at a hearing is integral to a court's subject matter jurisdiction. If that had been the case, the supreme court could not have validated the prior commissioner-imposed misdemeanor convictions and sentences by relying on *de facto* authority. See *Barton v. Barton*, 2001 UT App 199, ¶ 12, 29 P.3d 13 ("[W]hen subject matter [jurisdiction] does not exist, neither the parties nor the court can do anything to fill that void.") (citations omitted).

¹³ Again, Ford made no such argument. The fourth post-conviction court made it for him.

acted under color of lawful authority when she determined that there was probable cause to believe the Ford committed the crime for which a jury ultimately convicted him beyond a reasonable doubt.

The fourth post-conviction court also concluded that, “[w]ithout a properly authorized magistrate, there was no valid preliminary hearing,” rendering Ford’s preliminary hearing “a nullity.” For sole support, the court cited *State v. Freeman*, 93 Utah 125, 71 P.2d 196 (1937), for the proposition that “a prosecution should not proceed absent the necessary findings by a magistrate *who was vested by the Judiciary with authority to conduct a preliminary hearing . . .*” (R151) (emphasis added).

However, *Freeman* does not support the fourth post-conviction court’s conclusion that the identity of the person presiding at a preliminary hearing and binding a defendant over for trial is integral to the district court’s subject matter jurisdiction to try that defendant. First, as shown, the combined statute and court rules demonstrate that the judiciary did vest commissioners with authority to conduct preliminary hearings.

Second, *Freeman* does not stand for the proposition that the lack of judicial sanction of experienced criminal lawyers making probable cause determinations would have nullified Ford’s bindover and deprived the district court of jurisdiction to try him. The court provided no specific citation in *Freeman*, and the State found none, demonstrating that the identity of the person sitting as a magistrate at the

preliminary hearing was critical to vesting jurisdiction in the district court. A district court loses jurisdiction only when there is no preliminary hearing at all or the defendant is tried on a charge other than that on which the magistrate bound him over. *State v. Marshall*, 2005 UT App 269U at 1 (Addendum D), *cert. denied*, 124 P.3d 634 (2005). Neither Ford nor the fourth post-conviction court cited any authority to support the proposition that a preliminary hearing before and bindover by a commissioner – who, by law, had to be a lawyer with criminal law experience – equates to no preliminary hearing at all.

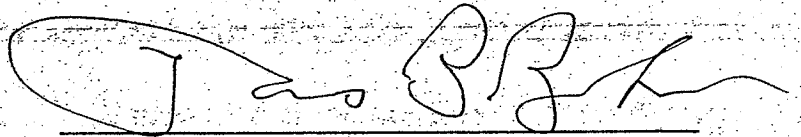
Finally, the fourth post-conviction court's unsupported conclusion that a probable cause determination made by a commissioner is insufficient to vest the district court with subject matter jurisdiction to try the defendant is antithetical to a preliminary hearing's purpose. A preliminary hearing protects a person from the rigors of a criminal trial where there is no probable cause to believe that the person committed the crime charged. *State v. Brickey*, 714 P.2d 644, 646 (Utah 1986). Here, a lawyer with criminal law experience determined that there was probable cause to believe that Ford committed the crime charged. Even if there were some technical defect in that person's authority to do so, it did not justify finding a jurisdictional defect that nullified the subsequent beyond-a-reasonable-doubt determination that Ford committed the charged crime.

CONCLUSION

For the foregoing reasons, the fourth post-conviction court erroneously granted post-conviction relief. The Court should reverse that decision and remand the case with instructions to reinstate Ford's conviction.

Respectfully submitted November 30, 2006.

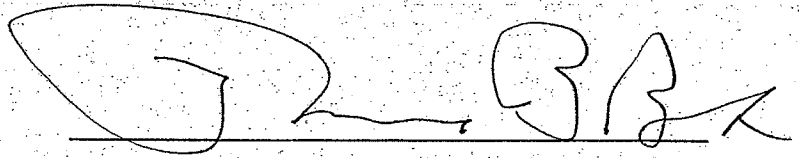
MARK L. SHURTLEFF
UTAH ATTORNEY GENERAL

A handwritten signature in black ink, appearing to read 'T. B. Brunker', written over a horizontal line.

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DELIVERY CERTIFICATE

I certify that, on November 30, 2006, two copies of the foregoing Appellant's Brief were mailed by first-class mail, postage pre-paid, to Ford's counsel, Michael A. Peterson, Salt Lake Legal Defender Association, at 424 East 500 South, Ste. 300, Salt Lake City, UT 84111

A handwritten signature in black ink, appearing to read "J. M. Baker", is written over a horizontal line. The signature is stylized and cursive.

