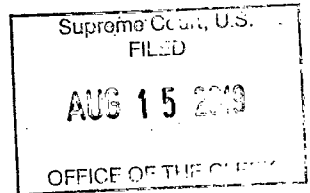


No. 19-5602

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES



Kirk Wayne McBride, Sr. — PETITIONER
(Your Name)

vs.

Lorie Davis Director — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals - Fifth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

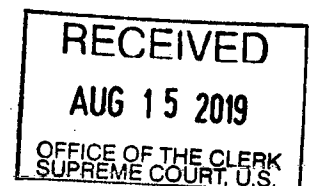
PETITION FOR WRIT OF CERTIORARI

Kirk Wayne McBride, Sr.
(Your Name)

John M. Wynne Plantation
(Address)

810 F.M. 2021
Huntsville, Texas. 77349
(City, State, Zip Code)

(936)-295-9126
(Phone Number)



QUESTION(S) PRESENTED

Question No. 1: Did the court of appeals error by denying a Certificate of Appealability on the issue of whether the district court properly characterized the Petitioner's Federal habeas petition as one under Title 28 U.S.C., Section 2254 rather than under Title 28 U.S.C., Section 2241 when the claims presented did not challenge the decision of a State court judgment, but challenge the decision of an Administrative Agency under which the Petitioner is in custody?

Question No. 2: Did the court of appeals error in its determination that the district court was correct upon its determination that the petition was moot when the Petitioner's term to be completed on parole has not expired and was extended 150 days as a result of the parole revocation proceedings?

Question No. 3: Did the court of appeals error in its determination that the district court was correct upon its determination that the Petitioner fail to exhaust his administrative remedies when the claims were presented in a Supplemental Petition and in a response to the State's Answer in the State habeas proceedings although State law does not provide a judicial process to challenge parole revocation proceedings?

Question No. 4: Did the court of appeals error in its determination that the district court was correct upon its determination that the Petitioner's claims were meritless and that the denial of habeas relief appropriate when such determination is contrary to this Court's decision in *Morrissey v. Brewer*, 92 S.Ct. 2593 (1972) and *Gagnan v. Searpelli*, 93 S.Ct. 1754 (1973), and *Goldberg v. Kelly*, 98 S.Ct. 1011 (1978), and State law requiring: (1) a Preliminary Hearing be held; (2) that the parolee be found to have violated a condition of his release; and (3) that the record reflect the reason why the parolee was denied the right to retain counsel?

i

Question No. 5: Did the court of appeals error with respect to district court's failure to address, ~~and~~ address the Petitioner's claim for Declaratory Relief pursuant to Title 28 U.S.C., Section 2201 to declare his rights under a formal agreement and contract?

LIST OF PARTIES

[] All parties appear in the caption of the case on the cover page.

[✓] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Petitioner; Kirk Wayne Mc Briede, Sr.
No. # ~~733~~ 97
John M. Wynne Plantation
816 E.M. 2821
Huntsville, Texas. 77348

Respondent; Lorie Davis, Director
Texas Department of Criminal Justice
Correctional Institutions Division
P.O. Box 99
Huntsville, Texas. 77342

Attorney for Respondent;
Adham R. Bissar
Assistant Attorney General
State of Texas
P.O. Box 12548
Austin, Texas. 78711

TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION.....	
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	
STATEMENT OF THE CASE	
REASONS FOR GRANTING THE WRIT	
CONCLUSION.....	

INDEX TO APPENDICES

APPENDIX A

APPENDIX B

APPENDIX C

APPENDIX D

APPENDIX E

APPENDIX F

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
Brown v. Allen, 73 S.Ct. 397 (1953)	7
Coleman v. Dretke, 395 F.3d 216 (5th Cir. 2004)	22
Collins v. Turner, 599 F.2d 657 (5th Cir. 1979)	24, 26
Dickerson v. State of Louisiana, 816 F.2d 224 (5th Cir. 1987)	16
Downs v. Sec'y, 738 F.3d 244 (11th Cir. 2013)	15
Ex Parte Bohannon, 354 S.W.3d 116 (Tex. Cr. App. 2011)	25
Ex Parte Carmone, 185 S.W.3d 492 (Tex. Cr. App. 2006)	28
Ex Parte Garolano, 956 S.W.2d 833 (Tex. App. - El Paso 1997)	32
Ex Parte Glenn, 690 S.W.2d 578 (Tex. Cr. App. 1985)	25
Ex Parte Maceyra, 690 S.W.2d 572 (Tex. Cr. App. 1985)	25
Ex Parte Royall, 6 S.Ct. 734 (1886)	21
Ex Parte Usener, 391 S.W.2d 735 (Tex. Cr. App. 1965)	31
Ex Parte Woodward, 619 S.W.2d 179 (Tex. Cr. App. 1981)	21
STATUTES AND RULES	
United States Constitution 14TH Amendment	14, 24, 29
United States Constitution Article IV, Section 1	21
Title 28 U.S.C., Section 1738	21
Title 28 U.S.C., Section 2241	31
Title 28 U.S.C., Section 2241	15, 16, 18, 22
Title 28 U.S.C., Section 2244(d)(1)	14
Title 28 U.S.C., Section 2253(c)(1)	14
Title 28 U.S.C., Section 2253(c)(1)(A)	17
Title 28 U.S.C., Section 2254	14, 15, 16, 17, 18, 22
Title 28 U.S.C., Section 2254(a)	15
Title 28 U.S.C., Section 2254(b)(1)	14
Title 28 U.S.C., Section 2254(d)	22
Title 28 U.S.C., Section 2254(d)(1)	23
Supreme Court Rules - Rule 14	14
Supreme Court Rules - Rule 14(a)	18, 26
Supreme Court Rules - Rule 14(c)	18, 26
Rules Governing 2254 Cases - Rule 2(a)	14
Rules Governing 2254 Cases - Rule 2(d)	14
Texas Code of Criminal Procedure, Article 11.07	21, 23, 24
Texas Code of Criminal Procedure, Article 11.07, Section 1	21
Texas Government Code, Section 508.154	27, 31, 32
Texas Government Code, Section 808.201(a)	25

Farah v. Matrigue and Kormanick, P.C., 927 S.W.2d 663 (Tex. App. 1st Dist. 1996)	32
Gagnon v. Scarpelli, 93 S.Ct. 1756 (1973)	22, 24, 25, 26, 30
Goldberg v. Kelly, 98 S.Ct. 1011 (1974)	22, 30
Jackson v. Johnson, 158 F.3d 520 (5th Cir. 1998)	23
Lehman v. Lycoming County Childrens Service, 142 S.Ct. 3231 (1982)	24
Marbry v. Johnson, 104 S.Ct. 2543 (1984)	19
Marshall v. Rodgers, 133 S.Ct. 1446 (2013)	15, 24
Michaux v. Collins, 944 F.2d 231 (5th Cir. 1991)	23
Miller-El v. Cockrell, 123 S.Ct. 1029 (2003)	14, 24
Moore v. Johnson, 101 F.3d 1069 (5th Cir. 1996)	23
Morrissey v. Brewer, 92 S.Ct. 2593 (1972)	22, 24, 25, 26, 28, 29
O'Sullivan v. Boerckel, 119 S.Ct. 1728 (1979)	21
Picard v. Connor, 92 S.Ct. 509 (1971)	21
Quick v. Plastic Solutions of Texas, Inc., 270 S.W.3d 173 (Tex. App. - El Paso 2008)	32
Septe v. State, 6 S.W.3d 530 (Tex. Cr. App. 1999)	31
Singleton v. Johnson, 179 F.3d 381 (5th Cir. 1999)	23
Spencer v. Kemna, 118 S.Ct. 978 (1998)	19
Stark v. Benckewstein, 156 S.W.3d 112 (Tex. App. 9th Dist 2004)	32
State v. Montgomery County, 338 S.W.3d 49 (Tex. App. Beaumont 2011)	32
Story v. Collins, 920 F.2d 1247 (5th Cir. 1991)	24
Stringer v. Williams, 161 F.3d 259 (5th Cir. 1998)	16
U.S. v. Spraglin, 418 F.3d 479 (5th Cir. 2005)	28
Villages v. Thaler, 480 Fed. Appx. 741 (5th Cir. 2011)	19
Walker v. O'Brien, 216 F.3d 624 (7th Cir. 2000)	18
White v. Indiana Parole Board, 266 F.3d 759 (9th Cir. 2001)	21, 24
Wilton v. Seven Falls Co., 115 S.Ct. 2137 (1995)	32
Texas Government Code, Section 508.2811	25
Texas Administrative Code, Rule 145.20(b)	27
Texas Administrative Code, Rule 145.22	27
Texas Administrative Code, Rule 146.9	27

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix C..

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

XIV Amendment United States Constitution, Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Texas Government Code, Section 548.2811-
Preliminary Hearing: A parole panel or a designee of the board shall provide within a reasonable time to an inmate or person described by Section 548.281(a) a preliminary hearing to determine whether probable cause or reasonable grounds exist to believe that the inmate or person has committed an act that would constitute a violation of a condition of release, unless the inmate or person; (1) waives the preliminary hearing.

Texas Government Code, Section 548.154 - Contract on Release: An inmate to be released on parole shall be furnished a contract stating in clear and intelligible language the conditions and rules of parole. Acceptance, signing, and executing of the contract by the inmate to be paroled is a precondition to release on parole.

Article IV, Section 1 United States Constitution: Full Faith and Credit shall be given to each State to the Public Acts, Records, and judicial Proceedings of every 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.

Texas Administrative Code, Rule 146.9. - Revocation Hearing: The parole panel or designee of the Board shall conduct the revocation hearing. The purpose of the revocation hearing is to consider the evidence offered pursuant to an allegation of a violation of a condition of parole or mandatory supervision. The parole panel or designee of the Board must determine whether it is shown by a preponderance of the credible evidence that the releasee violated a condition of parole or mandatory supervision.

Texas Government Code, Section 548.154 - Contract on Release: An inmate to be released on parole shall be furnished a contract stating in clear and intelligible language the conditions and rules of parole. Acceptance, signing, and executing of the contract by the inmate to be paroled is a precondition to release on parole.

Texas Administrative Code, Rule 145.22(b) - Conditions and Rules of Parole: Every offender approved for release on parole shall be issued a written statement listing the conditions and rules of parole in clear and intelligible language. The conditions and rules of parole must be agreed to and accepted by the offender prior to release.

Texas Administrative Code, Rule 145.24(b) - Parole Certificate: The parole approval is not effective or final until a formal parole agreement is executed by the offender.

Texas Code of Criminal Procedure, Article 11.47, Section 1: This article establishes the procedures for an application for writ of habeas corpus in which the applicant seeks relief from a felony judgment imposing a penalty other than death.

Rules Governing 2254 Cases - Rule 21(d): a petition shall be limited to the assertion of a claim for relief against the judgment or judgments of a single State Court.

Title 28 U.S.C., Section 2241(a): Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

Title 28 U.S.C., Section 2244(a): No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in Section 2255.

Title 28 U.S.C., Section 2253(c)(1)(A): Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from - the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court.

Title 28 U.S.C., Section 2254(a): The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the grounds that he is in custody in violation of the Constitution or laws or treaties of the United States.

Rule 1.(a)(1) - Cases Involving a Petition under 28 U.S.C., Section 2254: These rules govern a petition for a writ of habeas corpus filed in a United States district court under 28 U.S.C., Section 2254 by - a person in custody under a State court judgment who seeks a determination that the custody violates the Constitution, Laws, or treaties of the United States.

STATEMENT OF THE CASE

On November 5, 2014, the Petitioner was released from the Texas Department of Criminal Justice - Correctional Institutions Division to the Texas Department of Criminal Justice - Parole Division on parole by Order of the Texas Board of Pardons and Paroles issued on October 6, 2014.

Prior to the Petitioner's release, and as a precondition to release on parole the Petitioner signed a formal agreement and contract pursuant to Section 548.154 of the Texas Government Code, that provides: "An inmate to be released on parole shall be furnished a contract stating in clear and intelligible language the conditions and rules of parole. The acceptance, signing, and executing of the contract by the inmate to be paroled is a precondition to release on parole." As required by Rule 145.22 of the Texas Administrative Code: "Every offender approved for release on parole shall be issued a written statement listing the conditions and rules of parole in clear and intelligible language. The conditions and rules of parole must be agreed to and accepted by the offender prior to release." The Petitioner signed the formal agreement and contract on November 5, 2014. (Appendix D), (Appendix B; p. 1). Under Rule 145.20(b) of the Texas Administrative Code, the parole approval is not effective or final until a formal parole agreement is executed by the offender.

On February 13, 2017, a Violation Report, (VR Number: 11894348) was written, and a Pre-Revocation Warrant was issued on February 15, 2017, pursuant to the Violation Report. On February 18, 2017, the Petitioner was notified of his rights in the revocation process and was informed that he had been accused of violating one or more of the rules - conditions of his release as set out in the Certificate of Release, or as modified since release, to-wit: Rule 85. (Appendix E), (Appendix B; p. 2).

On March 2, 2017, a parole revocation hearing was held absent a Preliminary Hearing or a valid waiver of the right to a Preliminary Hearing. At the time of the hearing the Petitioner requested that he be allowed to

hire an attorney, however the request was ignored by the Parole-Revocation Hearing Officer. No reasons were given for the denial of the Petitioner's request to hire an attorney.

At the conclusion of the hearing the Petitioner's parole was revoked and it was recommended that the Petitioner be confined in an Intermediate Sanction Facility. On March 7, 2017, the Texas Board of Pardons and Parole entered a decision that the Petitioner successfully participate and complete an Intermediate Sanction Facility Program.

The Petitioner sought State habeas relief challenging the parole revocation's proceedings pursuant to Article 11.07 et seq. of the Texas Code of Criminal Procedure, which is the exclusive remedy in which a person seeks relief from a felony judgment imposing a penalty other than death. (Article 11.07, Section 1 - Texas Code of Criminal Procedure. In the State habeas application, as on the the Petitioner's federal habeas petition, the Petitioner advanced, that: (1) The Board violated his due process rights when it fail to provide him with a preliminary hearing; (2) The Board violated his due process rights and committed breach of contract when it subjected him to a parole revocation hearing for a violation of a condition not set out in the Certificate of Release; (3) There was insufficient evidence to find that he violated the terms and conditions of the Certificate of Release; (4) He was denied his right to counsel and an adequate opportunity to hire an attorney to represent him at his parole hearing; and (5) He was denied due process because the drug testing log used to sustain the charge was hearsay and not properly certified. (Appendix B; p. 4). The State habeas court recommended that the writ be denied, however, the Texas Court of Criminal Appeals did not adopt the State habeas court recommendation, and denied the application without written Order on November 15, 2017. (Appendix F).

The Petitioner filed a federal habeas petition on December 4, 2017, pursuant to Title 28 U.S.C., Section 2241. The district court construed the petition as a writ of habeas corpus pursuant to Title 28 U.S.C., Section 2254. The Petitioner objected to the district court's construction of the petition pursuant to Title 28 U.S.C., Section 2254, on the

grounds that the petition did not challenge the judgment of a State court, and challenged the decision of an administrative agency that was not a State court within the meaning of the Rules Governing Section 2254 Cases, and Title 28 U.S.C., Section 2254. The district court did not address the issue and proceeded to treat the petition under Title 28 U.S.C., Section 2254.

On this matter, the Petitioner was required to obtain a Certificate of Appealability from the United States Court of Appeals for the Fifth Circuit. Before the Court of Appeals the Petitioner argued that the district court erred when it construed the federal habeas petition as one pursuant to Title 28 U.S.C., Section 2254, rather than as a petition under Title 28 U.S.C., Section 2241, because the petition did not challenge the judgment of a State court or a process issued by a State court, but the decision of an administrative agency that was not a court within the meaning of Title 28 U.S.C., Section 2254. In support of the argument the Petitioner relied on *Stranger v. Williams*, 168 F.3d 259 (5th Cir. 1998), *Dickerson v. State of Louisiana*, 816 F.2d 228 (5th Cir. 1987), *Story v. Collins*, 924 F.2d 1247 (5th Cir. 1991), Title 28 U.S.C., Section 2254 (a) and (b)(1), and Rule 2(a) of the Rules Governing Section 2254 Cases. The Petitioner argued that his detention did not arise from a process issued by a State court, but was from a process issued by an administrative agency. Without addressing the issue a Circuit Judge for the Court of Appeals held that the district court properly construed the petition as a Section 2254 petition and a certificate of appealability was required. (Appendix A). The Petitioner sought en Banc Rehearing arguing that the undersigned Circuit Judge erred on this matter relying on the same argument and authorities. The Petition for Panel Rehearing was treated as a Motion for Reconsideration, and Petition for Rehearing En Banc, and was denied. (Appendix C).

The district court in denying the petition issued a Memorandum Opinion and Order. (Appendix B). The district court denied the claims on the merits, but also held that the petition and claims presented were moot, and that the first three (3) claims for relief were not

raised in the State habeas application. (Appendix B).

The Petitioner submitted his claims for federal habeas corpus relief on the pre-formatted federal habeas petition form that was acquired from the Prison Law Library that did not propound a question of mootness to be answered. The Respondent in its Answer argued that the petition and claims were moot because the results of the March 2, 2017, parole revocation hearing was to send the Petitioner to an Intermediate Sanction Facility, and since the Petitioner had since been released, the foregoing proceedings were moot. In Traverse to the Respondent's Answer, the Petitioner argued that the petition was not moot under *Villagas v. Thaler*, 488 Fed. Appx. 761 (5th Cir. 2011), because although he was re-released on parole, he was still subject to oversight on parole by the State, and because his maximum discharge date had been extended 150 days as a result of the parole revocation proceedings, and *Williams v. Johnson*, 171 F.3d 300 (5th Cir. 1999). Contrary to the Petitioner's argument, the district court held that the Petitioner did not allege or show a substantial collateral consequence resulting from the hearing or his placement in an Intermediate Sanction Facility, and that neither of these events impacted his maximum discharge date. The district court further that because the "detention" resulting from the challenged proceedings had ceased and there are no collateral consequences arising from the decision in that proceeding, the petition must be dismissed as moot. (Appendix B; p. 5). The Petitioner argued before the court of appeals, that the district court erred by holding that the petition was moot relying on the authorities of *Villagas* and *Williams*, and furthered under *Spencer v. Kemmer*, 523 U.S. 1 (1998) that the petition was not moot because the sentence for which he was serving parole had not expired. The court of appeals construed the Petitioner's argument as that the district court erred in dismissing the claims as moot because his parole discharge date was extended 150 days and the Intermediate Sanction Facility Placement resulted in a modification of the contractual terms of his release. The court of appeals just merely held that the Petitioner did not make the showing required for a certificate of appealability (Appendix A; p. 2).

The Petitioner sought a Panel Rehearing arguing that the undersigned Circuit Judge erred, which was denied. (Appendix C).

The district court held that the Petitioner's first three (3) claims for federal habeas relief were unexhausted and procedurally defaulted because they were not raised in the State habeas action. (Appendix B; p. 6). The Respondent in its Answer asserted the same argument. In traverse to the Respondent's assertion that the claims were unexhausted, the Petitioner relying on *Coleman v. Dretke*, 395 F.3d 216 (5th Cir. 2004), argued that the claims were exhausted because they were presented to the State habeas court in his reply to the State's Answer and General Denial in the State habeas court, and in a Supplemental Application filed in the State habeas court. Further, the Petitioner argued that under State law, Article 11.07, Section 1 and 5 of the Texas Code of Criminal Procedure only a final felony judgment could be challenged under that procedure. In accord with *Ex Parte Woodward*, 619 S.W.2d 179 (Tex. Cr. App. 1981); Article 11.07 does not provide the basis to attack a parole revocation. Instead, 11.07 must be employed to attack the conviction itself. The Petitioner argued that although he presented the claims to the State habeas court in accordance with Article 11.07 of the Texas Code of Criminal Procedure, "he" was not provided with a correct process and judicial review, because Article 11.07 of the Texas Code of Criminal Procedure does not provide for judicial review of parole revocation hearings, thus, the claims were never adjudicated on the merits, as the Board of Pardons and Parole was an administrative agency and not a State court. The district court did not address the Petitioner's argument. The Petitioner tendered the argument to the court of appeals arguing that the district court erred, the court of appeals did not refer to the claim in denying a certificate of appealability. (Appendix A).

In addressing the merits, the district court held that regardless of the fact that all the claims are moot the defaulted claims were without merits. (Appendix-B; p. 7).

The district court held that the Petitioner's due process rights were not violated because he did not receive a

preliminary hearing prior to his parole revocation hearing; his complaints regarding a preliminary hearing were rendered moot by his final hearing, citing *Collins v. Turner*, 599 F.2d 657 (5th Cir. 1979). The Petitioner filed a Motion To Reconsider, arguing that the district court failed to analyze and apply the law correctly; and was contrary to and in conflict with the decision in *Morrissey v. Brewer*, 92 S.Ct. 2593 (1972), and that State law mandated a preliminary hearing to the extent that a parole could not be revoked absent a preliminary hearing or the valid waiver of that right. Under *Ex Parte Maceyra*, 690 S.W.2d 572 (Tex. Cr. App. 1985), *Ex Parte Glenn*, 690 S.W.2d 578 (1985), and *Ex Parte Cordova*, 235 S.W.3d 735 (Tex. Cr. App. 2007), as dictated by *Morrissey*, *Supra*. The Petitioner furthered that the facts and circumstances in *Collins* were clearly distinguishable from the facts and circumstances of his case, in that *Collins* was a probation case where *Collins* had counsel present at the final hearing, and the Petitioner was without counsel at the final hearing of a parole revocation proceeding. The Petitioner pointed out that the court in *Collins* held that the failure to provide a preliminary hearing will not provide basis for habeas relief if the "probationer" is afforded a constitutionally adequate evidentiary hearing with counsel present before the revocation of the probation became final. The Petitioner argued that *Morrissey* controlled the outcome of his claim. The district court denied the motion to reconsider. (Appendix G). The Court of Appeals denied a certificate of appealability and the Petitioner's Petition for Panel Rehearing was denied. (Appendix A and C).

The district court held that the Petitioner's rights to due process were not violated because he was found in violation of a parole condition not set out in the Certificate of Parole, because the record indicated that the Petitioner knew his parole could be revoked for his use of amphetamine; and that the claim that there was insufficient evidence to find he violated the terms of his parole is without merits, as the Petitioner admitted he ingested alcohol and amphetamine while on parole. (Appendix B; p. 6). Upon a Motion To Reconsider, and requested Certificate of appealability to the Court of Appeals, the Petitioner-

11

argued that there was nothing in the record of which could even be inferred, as to ^{he} knew that his parole could be revoked for his use of amphetamine, and even if "he" did admit to such use, such use did not violate a rule or condition of his parole as set out in the "Certificate of Release" as charged. The Petitioner was charged with violating one or more ~~of~~ the rules/conditions as set out in the Certificate of Release, or as modified since release, to-wit: Rule 8 S. (Appendix-E). The Petitioner argued that this was not a rule or condition of his release as set out in the formal agreement and contract that he signed on November 5, 2014. (Appendix-D). Simply put, there was no such rule or condition upon which his release was conditioned. The Petitioner argued that under Morrissey, Supra, and U.S. v. Spraglin, 418 F.3d 479 (5th Cir. 2005), that in order to revoke his parole, it had to be found by the preponderance of the evidence that he violated a rule or condition of his release as set out in the "Certificate of Release." The Petitioner furthered, that given the "contractual nature" of his release, the rules and conditions thereof were the terms of the contract entered into between him and the Parole Board to which they were obligated. See, Septh v. State, 6 S.W.3d 550 (Tex. Cr. App. 1999). The Petitioner argued that the district court erred by denying relief on these grounds. --

The district court held that the State Court's denial of relief on the Petitioner's claim that he was denied an adequate opportunity to hire an attorney to represent him at his parole hearing was not clearly contrary to federal law, because a state prisoner does not have a federal constitutional right to have counsel present at a parole revocation proceeding, relying on Gagnon v. Scarpelli, 93 S.Ct. 1756 (1973), and Davis v. Page, 714 F.2d 512 (5th Cir. 1983). (Appendix-B; pp. 7-8).

The Respondent relying on Gagnon in its Answer argued that the Petitioner had no right to the assistance of counsel in a parole revocation proceeding. --

The Petitioner in his Traverse to the Respondent's Answer, Motion To Reconsider, and as before the court of appeals, that the district court erred under the law and its analysis, argued that within the confines of Morrissey Supra, and Gagnon, it was established that there is no right to the assistance of

Counsel is a probation or parole revocation proceeding at the government's expense, and that under Morrissey and Gagnon, in every case in which a request for counsel at a preliminary or final hearing is refused, the grounds for refusal should be stated succinctly in the record. The Petitioner furthered that under *Goldberg v. Kelly*, 395 U.S. 142 (1969), "He" at least must be allowed to retain an attorney as he desired to...

The district court did not give full consideration to the Petitioner's claim, that he was deprived of his constitutional rights to hire an attorney when requested and that the record did not provide any grounds or reasons for the refusal.

The Petitioner furthered, that the application of Title 28 U.S.C., 2254(d)(1) and (2) were inapplicable because the claims were never adjudicated on the merits by the State Court, and the decision in question was not a judgment from a State court or process thereof.

REASONS FOR GRANTING THE PETITION

Review on a writ of certiorari is not a matter of right but of judicial discretion and will be granted only for compelling reasons. Such a petition is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. See, Rule 10 of the Supreme Court Rules. Thus, the Petitioner has to persuade this Court to exercise its supervisory power in the fair administration of justice. When one undertakes the administration of justice, what is done for one must be done for everyone with equal degree...

The job of a judge is to follow the law. If, judges are to be, as Chief Justice, John Marshall wrote "a government of laws, and not of men," the lower courts must carefully apply the law and precedent of this Court. Unfortunately, the State and Federal courts are not following this foundational constitutional principle in the matter of life, liberty and death, and the restraints of the Due Process and Equal Protection of the Law Clause as set out and guaranteed by the 14TH Amendment to the United States Constitution. If, the system was working as it should, the Petitioner would not be before this Court pleading and begging for what he is entitled to under the law and the binding precedents. For the system to work, this Court should make sure that its rulings and precedents are respected and faithfully applied... The State and Federal courts are bound to apply the United States Constitution as interpreted by this Court. The courts and judges thereof do not have the luxury or the liberty to ignore binding precedent...

As a petition for writ of certiorari, the petition is also being presented pursuant to Title 28 U.S.C., Section 2253(c)(1) (A) for review as to whether the court of appeals should have issued a certificate of appealability (COA) from the district court's determinations of the case. See, *Miller-El v. Cockrell*, 123 S. Ct. 1029 (2003).

Question No. 1: Did the court of appeals error by denying a certificate of appealability on the issue of whether the district court properly characterized the Petitioner's federal habeas petition as one under Title 28

U.S.C., Section 2254 rather than under Title 28 U.S.C., Section 2241 when the claims presented did not challenge the validity of a State court judgment, but challenged the decision of an administrative agency under which the Petitioner is in custody?; thus, a certificate of appealability needed.

The district court did not address this issue, and the court of appeals in a cursory fashion held that the district court properly construed the petition as one under Title 28 U.S.C., Section 2254. (Appendix-A). The court of appeals given the Petitioner's arguments did not provide a reasonable explanation as to why the district court's ruling and determination on this matter was correct. Under the available resources provided to the Petitioner at the prison law library, the Petitioner cannot find any authority from this Court on the matter. However, there is a plethora of circuit precedents on this matter. A circuit court may in accordance with its usual law-of-the-circuit procedure, look to circuit precedent to ascertain whether it has already held that the particular point in issue is clearly established by Supreme Court precedent. See, *Downs v. Sec'y*, 738 F.3d 248 (11th Cir. 2013), and *Marshall v. Roelgers*, 133 S.Ct. 1446 (2013). However, circuit precedent may not be used to refine or sharpen a general principle of United States Court jurisprudence into a specific legal rule that this Court has not announced. Also, a circuit court may not canvas circuit decisions to determine whether a particular rule of law is so widely accepted among the Federal Circuits that it would, if presented to this Court, be accepted as correct.

Under the statutory interpretation that is to be given to Title 28 U.S.C., Section 2254. The primary rule is statutory interpretation is that a court must look to the intent of Congress in enacting Section 2254. It can be said and stated that Section 2254 in itself is a jurisdictional requisite, as this Court held in *Brown v. Allen*, 73 S.Ct. 397 (1953); jurisdiction over a federal habeas corpus petition is controlled by statute. Looking to the context of Section 2254 (a) it is provided that the Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas

Corpus in behalf of a person in custody pursuant to the judgment of a State court only on grounds that he is in custody is violation of the constitution or laws or treaties of the United States. Section 2254(b)(1) also provides that "an application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that - ..." Cf., Rule 2(a) of the Rules Governing Section 2254 Cases, an applicant challenging a State judgment, pursuant to which he is presently in custody must make his application in the form of a petition for writ of habeas corpus. See, also Rule 2(d) of the Rules Governing Section 2254 Cases, a petition shall be limited to the assertion of a claim for relief against the judgment of a single State court. In the comparison with Title 28 U.S.C., Section 2244(c)(1), a 1-year limitation period shall apply to an application for a writ habeas corpus by a person in custody pursuant to the judgment of a State court. Thus, under the text and clear language of the Statute a Section 2254 petition only invest a federal court with jurisdiction if the claims for relief is against the judgment of a State court as it relates to a "criminal judgment" or "conviction." To hold otherwise would clear defy the language of the Statute.

In further support that the court of appeals erred by holding that the district court properly construed the petition as a Section 2254 petition, under Circuit precedent the district court's determination and the court of appeals upholding of this determination is erroneous and highly questionable and is at best suspect... In *Stringer v. Williams*, 141 F.3d 259 (5th Cir. 1998); it was held that parole and probation revocation proceedings are not designed to punish a criminal defendant for violation of criminal law, therefore it must be first determined whether a petition is properly characterized as a petition under Title 28 U.S.C., Section 2244 or Section 2254. The court of appeals concluded and held that Section 2254 only applies to post-conviction (trial) situations and affords relief to a petitioner in custody pursuant to a judgment of a State court. Citing, *Dickerson v. State of Louisiana*, 816 F.2d 228 (5th Cir. 1987). In analyzing the issue the court of appeals held that although Stringer was in custody

pursuant to the judgment of a State court, i.e., (the prior felony conviction for which his parole was revoked), he was not attacking a State court judgment, thus, the petition was properly characterized as a petition under Section 2241.

In the instant case the Petitioner's petition should have been characterized and treated as a petition under Section 2241. The record clearly reflects that the Petitioner challenged the decision of an administrative agency and not the judgment of a State court. Thus, the district court's determination that the petition was properly characterized as a petition under Section 2254 is at best suspect, and is questionable as to the court of appeals finding likewise.

Finding, that the petition was treated as a petition under Section 2254 raises a question under the facts as to whether the district court had jurisdiction over the proceedings.

It must be determined whether a COA was required? The Petitioner does not dispute the issue of whether a COA is required for the purpose of appealing the determination of the district court to the court of appeals.

Title 28 U.S.C., Section 2253(c)(1)(A) provides that "Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from; the final order in a habeas corpus proceeding in which the detention complained of arises out of a process issued by a State court. The court of appeals finding that the petition was properly characterized as a petition under Section 2254 also found that a COA was required.

However, under the record and facts this determination is wrong and incorrect, because the detention complained of does not arise out of a process issued by a State court, but out of a process issued by an administrative agency.

The Petitioner upon conviction was committed to the Texas Department of Criminal Justice - Correctional Institutions Division, where by Order of the Texas Board of Pardons and Paroles was granted parole. The Texas Department of Criminal Justice - Correctional Institutions Division then relinquished its jurisdiction and custody of the Petitioner to the Texas Department of Criminal Justice - Parole Division, whereby under this Department the revocation proceedings

were initiated and held. Upon this 'agencies' recommendation to the Board of Pardons and Paroles, the Petitioner's parole was revoked, and was detained under a process issued by this administrative agency... Thus, the Petitioner's detention did not arise out of a process issued by a State Court, thus a COA was and is not required...

In *Walker v. O'Brien*, 216 F.3d 626 (7th Cir. 2004); the Court of Appeals held that a State prisoner does not need a COA when seeking federal review that is collateral of an administrative agency's decision, because the additional time to be served as a result of the decision is not detention that arise out of a process issued by a State Court. Likewise, in the instant case, the detention that is complained of did not arise out of a process issued by a State Court.

How does the Petitioner persuade this Court to review this matter? It is clear that not only the district Court's determination was erroneous and incorrect, but the Court of appeals determination was erroneous and incorrect also... The Petitioner can argue that this Court should grant review on the grounds that the Court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, as to whether Section 2241 governs a petition filed by a State prisoner challenging an administrative decision, and as to whether a COA is required for the purpose of an appeal when the detention complained of does not arise out of a process issued by a State Court. See, Rule 10^(c) of the Supreme Court Rules. It can be argued that the Court of appeals decision is in conflict with the decision of another court of appeals on the same important matter, wherein the Seventh Court of Appeals in *Walker*, *Supra*, held that a COA is not required, because the detention complained of does not arise from a process issued by a State Court. See, Rule 10(a) of the Supreme Court Rules, and the Petitioner can ask that this Court pursuant to Rule 10(a) of the Supreme Court Rules exercise its supervisory power to correct the judicial impropriety of the district court and court of appeals in light of the Petitioner's argument that the district Court did not have jurisdiction over the petition pursuant to Section 2254.

In view of the Question presented "Did the Court of

appeals error by denying a COA," there can be no error if a COA, as under the facts and law, is not required. It would, however, be error for the court of appeals to require a COA.

Question No. 2: Did the court of appeals error in its determination that the district court was correct upon its determination that the petition was moot.

The court of appeals made reference to the Petitioner's argument that the district court erred by dismissing the claims as moot when his parole discharge date was extended 150 days as a result of the parole revocation proceedings. The court of appeals simply wrote the matter and issue off as the Petitioner did not make the required showing for a COA. (Appendix A; p. 2).

As set out above, via Question No. 1, a COA was not required for the purpose of appealing the district court's determination that the petition was moot, because the detention in complaint did not arise from a process issued by a State court, but by an administrative agency who's decision extended the Petitioner's maximum discharge date 150 days.

This Court explicitly held in *Merby v. Johnson*, 104 S.Ct. 2543 (1984); that an "appeal" in a habeas corpus case was not moot despite the fact the petitioner had been paroled, because the petitioner remained in custody of the State. Further, in *Spencer v. Kemna*, 118 S.Ct. 978 (1998) this Court explicitly held that an incarcerated convict's, or a parolee's challenge to his conviction always satisfies the case-or-controversy requirement because the incarceration or the restrictions imposed by the terms of parole constitutes a concrete injury caused by the conviction and redressable by the conviction's invalidation. This Court further held, that once the sentence has expired, however, the petitioner must show some concrete and continuing injury other than the non-existing incarceration, or parole. This Court concluded, that because Spencer had completed the entire term of imprisonment underlying the parole revocation the petition was moot. Like was "Circuit precedent," under *Villgas v. Thaler*, 480 Fed. Appx. 761 (5th Cir. 2011) the court of appeals reversed the judgment of the district court's determination that the petition was moot where the petitioner challenged the revocation of his parole. The district court had in all.

determined that the petitioner's re-release on parole rendered the petition moot, however, the court of appeals disagreed with the district court's determination, and held that because the petitioner was still subject to the State's oversight while on parole the petition challenging the parole revocation proceedings was not moot. The court of appeals further held, that if a prisoner's maximum parole date is extended as a result of the proceedings, then the case is not moot. --

The of the district court's determination that the petition was based on the conclusion that because the detention resulting from the challenged proceedings had ceased and there were no collateral consequences arising from the decision is that proceeding the petition must be dismissed as moot. The district court found the Respondent's Answer appropriate and concluded that the Petitioner's Parole had not been revoked, but instead, was placed in an Intermediate Sanction Facility. However, the Petitioner's Parole was revoked that resulted in the confinement of an Intermediate Sanction Facility, and the extension of his maximum sentence date for an additional 154 days.

This matter was already settled by clear law of the Fifth Circuit and this Court, The determination made by the district court and the court of appeals deviates sharply from the Fifth Circuit's own precedents and this Court's explicit rulings and instructions on the issue of mootness.

The court of appeals determination that the district court determination that the petition was moot is at best suspect and highly questionable.

As delivered above in Question No. 1; this Court exercise it's power of supervision and held that the matter of whether the petition was moot was wrongly decided.

Question No. 3: Did the court of appeals error in it's determination that the district court was correct upon it's determination that the Petitioner fail to exhaust his administrative remedies.

Although, the district court address the claims on the merits, the Petitioner argued that the claims had been exhausted even though under Texas Statutory Law there was no afforded judicial review upon the decision of the Texas -

Board of Pardons and Paroles, and that the claims were presented in a Supplemental Petition and Reply to the State's Answer in the State court.

Comity requires that the State courts should have the first opportunity to review a State prisoner's federal habeas claim and provide any necessary relief. See, *Ex Parte Royall*, 6 S.Ct. 734 (1886), *O'Sullivan v. Boerckel*, 119 S.Ct. 1728 (1999), and *Picard v. Connor*, 92 S.Ct. 589 (1971).

For the purpose of the Full Faith and Credit Clause under Article 4, Section 1 of the United States Constitution, and Title 28 U.S.C., Section 1738 a State agency is not a judicial body, and a federal tribunal therefore may re-examine de novo issues determined by a State agency but not reviewed by that State judiciary. See, *White v. Indiana Parole Board*, 264 F.3d 759 (7th Cir. 2001).

Article 11.07 of the Texas Code of Criminal Procedure as provided by Section 1 of that Article establishes the procedures for an application for writ of habeas corpus in which the applicant seeks relief from a felony judgment imposing a penalty other than death. Thus, this confirms that Article 11.07 can only be used to challenge a judgment of a State court that imposes a penalty other than death. Thus, the Texas Court of Criminal Appeals does not have jurisdiction to review claims upon an application for writ of habeas corpus that does not challenge the validity of a State court judgment that imposes a penalty other than death. Cf., *Ex Parte Woodward*, 619 S.W.2d 179 (Tex. Cr. App. 1981); Article 11.07 does not provide the basis to attack a parole revocation. Instead, 11.07 must be employed to attack the conviction itself.

The Petitioner is a person in custody pursuant to a process issued by a State administrative agency, whom at any given time has the power to release him. The Texas Board of Pardons and Paroles is not a court but is an administrative agency, and although the Petitioner sought review of the Board's decision under Texas law the Petitioner was not afforded judicial review of the Board's decision, as the State does not provide a process that requires the exhaustion of the claims related to the revocation proceedings.

Further in *Coleman v. Drake*, 395 F.3d 216 (5th Cir. 2004); the court held that the habeas petitioner's self-styled "reply" to the State's general denial adequately presented his claims to the State court and thus, those claims were not procedurally defaulted.

Like wise, the Petitioner argued the same in *Traverse* to the Respondent's Answer, and before the court of appeals. In light of the Petitioner's argument, the district court never made a judicial determination upon the record or evidence, whereas the Petitioner directed the district court's attention and the court of appeals to the record that established the claims were presented to the State court.

Given the court of appeals determination it can be said that such determination at most is suspect and highly questionable.

Question No. 4: Did the court of appeals error in its determination that the district court was correct upon its determination that the Petitioner's claims were meritless and that the denial of habeas relief was appropriate when such determination is contrary to this Court's holdings set out in *Morrissey v. Brewer*, 92 S.Ct. 2593 (1972), *Gagnon v. Scarpelli*, 93 S.Ct. 1756 (1973), *Goldberg v. Kelly*, 90 S.Ct. 1411 (1970), and applicable State law, requiring that: (1) a preliminary hearing be held; (2) that the parolee be found to have violated a condition of his release; and (3) that the record reflect the reasons why the parolee was denied the right to retain counsel?

The district court addressed the claims on the merits subjecting the claims to review under the rigorous standard of review under Title 28 U.S.C., Section 2254(d) (1) and (2)... This was premised on the determination that the petition was properly characterized as a petition under Section 2254 rather than Section 2241, and because the claims were adjudicated on the merits by the State court. (Appendix-B). The district court premised such on a finding that because the Texas Court of Criminal Appeals denied relief, this resulted in the claims being adjudicated on the merits... (Appendix-B; pp. 2-3). However, the district court fail to mention the fact that the application was denied without written order... It is questionable as to how an application is denied if there is no "Order" denying the same?

To the contrary the Petitioner is Traverse to the Respondent's Answer and likewise before the court of appeals, that the claims were not adjudicated on the merits, because the recommendation, findings of facts and conclusions of law were not adopted by the Texas Court of Criminal Appeals as dispositive of the application, and that given State Law that the Texas Court of Criminal Appeals does not hear applications under Article II.87 that challenge parole revocation proceedings, it was legally impossible to hold, that the Notice delivered by the Clerk of the Texas Court of Criminal Appeals notifying the Petitioner that the Application was denied without written order was an adjudication on the merits. ~~1992-1993~~ (F).

In Jackson v. Johnson, 158 F.3d 528 (5th Cir. 1998); the court of appeals held that the court must determine whether the claims were adjudicated on the merits in the State Court proceedings and is thus subject to the rigorous standard of review under Title 28 U.S.C. Section 2254(d)(1) and (2)...

On this matter and issue Circuit Precedent has answered this question favorably to the Petitioner. In Moore v. Johnson, 181 F.3d 1868 (5th Cir. 1996); the court of appeals held that there can be no question that the claims presented in that case received a full and fair adjudication on the merits by the State trial court that conducted an evidentiary hearing, heard testimony and received evidence from both parties, and issued a detailed findings of facts and conclusions of law in support of its judgment that were accepted by the Texas Court of Criminal Appeals. Cf. Jackson, Supra, the Texas Court of Criminal Appeals denied relief without written order upon the findings and conclusions of the State trial judge, thus, was an adjudication of the claims on the merits. Also, Michaux v. Collins, 944 F.2d 231 (5th Cir. 1991); the habeas trial court's proposed findings did not survive the Court of Criminal Appeals denial. There cannot even be the semblance of a full and fair hearing unless the State court actually reached and decided the issues of fact tendered by the defendant. In that case it was held that the Court of Criminal Appeals rejected the habeas trial court's findings of facts and conclusions of law... Cf. Singleton v. Johnson, 179 F.3d 381 (5th Cir. 1999); the habeas trial court determined that habeas relief should be granted,

and the Court of Criminal Appeals apparently disagreed and denied the habeas petition without written order.

In the instant case, although the habeas trial court conducted a purported evidentiary hearing that was one-sided. It is clear that the Court of Criminal Appeals rejected the findings of fact and conclusions of law of the habeas trial court and denied the application without written order. This in itself does not constitute that the claims were adjudicated on the merits in view of the fact that Texas statutory law does not allow parole revocation proceedings to be challenged, via Article II.07.

Therefore, on this matter the district court employed the wrong standard of review, because the claims were not adjudicated on the merits.

Further, in *Story v. Collins*, 920 F.2d 1247 (5th Cir. 1991); the court held that Section 2254 specifically confers jurisdiction on the federal courts to consider collateral attacks on state court judgments, accord *Lehman v. Locoming County Childrens Service*, 102 S.Ct. 3231 (1982), and *White*, *Supra*.

(1).

The Petitioner argued that he was deprived of his rights to Due Process under the 14TH Amendment to the United States Constitution because he was not provided a preliminary hearing, and that his parole was revoked absent a valid waiver of a preliminary hearing or a hearing that was prohibited.

The district court held that the Petitioner's claim was without merits and his rights to Due Process were not violated because he did not receive a preliminary hearing prior to his parole revocation hearing, because his complaints regarding a preliminary were rendered moot by his final hearing. Citing, *Collins v. Turner*, 599 F.2d 657 (5th Cir. 1979). In *Collins*, a petition was filed arguing that the State's failure to hold a preliminary hearing "probation" revocation hearing as required under *Morrissey v. Brewer*, 92 S.Ct. 2583 (1972) and *Gagnon v. Scapelli*, 93 S.Ct. 1754 (1973), denied him due process. The court rejected the contention and held that the warrant procedure employed by the State provided sufficient due process safeguards and denied the petition. The court held that although the State fail to conduct a preliminary revocation hearing, the State did

afford him a full evidentiary hearing with counsel present before the revocation of his probation became final. Thus, his present incarceration stems from a decision made after a hearing that was adequate in all respects; the denial of the preliminary hearing right no longer has any relation to his incarceration...

The Petitioner filed a Motion To Reconsider on this matter arguing that the facts and circumstances were distinguishable.

The Petitioner argued that he was not subjected to a probation revocation proceeding, but a parole revocation proceeding whereas unlike Collins, he was without counsel during the final parole revocation proceeding. The Petitioner furthered, that under State Law as held in Morrissey, that his parole could not proceed to a revocation proceeding nor could his parole be revoked absent a preliminary hearing. See, *Ex Parte Glenn*, 698 S.W.2d 578 (Tex. Cr. App. 1985) and *Ex Parte Maceyra*, 698 S.W.2d 572 (Tex. Cr. App. 1985); enunciated minimal due process requirements for parole revocation, before a parole may be revoked a preliminary or onsite hearing before an independent hearing officer must be held to determine whether probable cause exists to believe that the parolee has violated the conditions of parole. *Ex Parte Bohannon*, 358 S.W.3d 116 (Tex. Cr. App. 2011); a releasee is entitled to a prompt preliminary hearing once the revocation process has been initiated by the execution of a revocation... See, also Section 508.2811 of the Texas Government Code; A parole panel or a designee of the Board "shall" within a reasonable time to an inmate or person described by Section 508.281(a) a preliminary hearing to determine whether probable cause or reasonable grounds exist to believe that the inmate or person has committed an act that would constitute a violation of a condition of release, unless the inmate or person waives the preliminary hearing...

In this Court's holdings in both *Morrissey* and *Gagnon*, in expressing the unanimous view of the Court held that the petitioner was entitled to both a preliminary hearing to determine whether there was probable cause to believe that he had violated his parole or probation and a final hearing prior to the ultimate decision whether his parole or probation could be revoked. It was agreed that a "parole" may not be revoked consistently with Due Process unless the parolee is

afforded, first a preliminary hearing...

Under this Court's instructions and dictation a bifurcated hearing is required...

The decision of the court of appeals is *Collins* deviates sharply from this Court's explicit instructions set-out in *Morrissey* and *Gagnon*, and as applied to the Petitioner, the district court as well as the court of appeals has rejected the consensus of this Court. The court of appeals as well as the district court relies on a Circuit Precedent that has been used to refuse a general principle and binding precedents of this Court jurisprudence into a specific rule of law that clearly was not enounced by this Court. See, *Marshall*, *Supra*. Further, the Petitioner's liberty protected interest under State Law was totally ignored by the district court and court of appeals.

The determination made by the district court is highly questionable and at best is incorrect and wrong.

This Court pursuant to Rule 14(c) of the Supreme Court Rules should grant a writ of certiorari because the district court's and court of appeals determination has resulted in a conflict with a decision by a State court involving an important federal question as to call for an exercise of this Court's supervisory power. Further, the determination of the district court and court of appeals is in conflict with the relevant decision of the Court on the same matter. See, Rule 16(c) of the Supreme Court Rules. If, an appeal was taken to the Court of appeals, relying on Circuit Precedent as the district court did, the appeal would be affirmed under Circuit precedent established in *Collins* that is clearly distinguishable from the facts and circumstances of the Petitioner's case in that the Petitioner did not have counsel present. Thus, for the purpose of a COA, if required, is accordance with this Court's holdings in *Morrissey* and *Gagnon*, just as of reason could disagree with the district court's resolution of the case, and would find the district court's assessment of the Petitioner's constitutional claim debatable or wrong, thus the court of appeals should have issued a COA from the district court's determination. See, *Miller-El v. Cockrell*, 123 S.Ct. 1029 (2003)

(2).

The Petitioner argued before the district court, that his rights to Due Process under the 14TH Amendment were violated because he was subjected to a parole revocation hearing for a violation of a condition not set out in the Certificate of Release and, that the evidence was insufficient to find that he had violated the terms and conditions of his parole as set-out in the Certificate of Release.

In addressing the claim, the district court alluded to the Parole Certificate rather than the Certificate of Release that was signed by the Petitioner on November 5, 2013, which was the formal agreement and contract as released. (Appendix-D). The district court held that the Petitioner's right to due process was not violated because he was found in violation of a parole condition "not set out in the Certificate of Parole," because the record indicated that the Petitioner knew his parole could be revoked for his use of amphetamine. However, the district court did not point to any place in the record where this could be found. The district court furthered that the Petitioner's claim that there was insufficient evidence to find he violated the terms of his parole was without merit, because the Petitioner admitted he ingested alcohol and amphetamine while on parole. (Appendix B; p. 7).

Under State law, Section 54B.154 (Contract and Release); An inmate to be released on parole "shall" be furnished a contract stating in clear and intelligible language the conditions and rules of parole; Acceptance, signing, and execution of the contract by the inmate to be paroled is a pre-condition to release on parole. Cf., Rule 145.22 of the Texas Administrative Code (Conditions and Rules of Parole); Every offender approved for release on parole shall be issued a written statement listing the conditions and rules of parole in clear and intelligible language. The conditions and rules of parole must be agreed to and accepted by the offender prior to release. The parole approval is not effective or final until a formal parole agreement is executed by the offender. See, Rule 145.20(c) of the Texas Administrative Code. The parole panel or designee of the Board must determine whether it is shown by a preponderance of the credible evidence that the releasee violated a "condition" of parole. See, Rule 146.9 of

the Texas Administrative Code.

In *Ex Parte Carmichael*, 185 S.W.3d 492 (Tex. Cr. App. 2006), accord with *Morrissey*, *Supra*, the parolee relies on at least an implicit promise that parole will be revoked only if he fails to live upon the parole conditions. Cf., *U.S. v. Sprague*, 418 F.3d 479 (5th Cir. 2005); in order to revoke term of supervised release, court must find by a preponderance of the evidence that defendant violated a condition of his release. ---

The Petitioner was provided with explicit Notice, that he was being accused of violating one or more of the rules/conditions of his release as set out in the Certificate of Release, or as modified since release, to-wit: Rule 8 S. Not unlawfully use drugs, narcotics, or controlled substances. (Appendix-12). The Certificate of Release, that is the formal agreement and contract, provides that "In consideration of the Parole granted me by the Board, I do hereby accept Such Parole. I recognize that my release is conditional based upon my performance of the following terms and conditions": & I shall abide by all Special Conditions imposed upon me by the Board." The Certificate of Release did not specify what those conditions were, and did not allege a Rule 8 S as a term or condition. There is nothing contained in the Certificate of Release that was agreed upon by the Petitioner, that he not unlawfully use drugs, narcotics, or controlled substance. --- Thus, the Petitioner was subjected to a parole revocation proceeding that resulted in his maximum sentence being extended 150 days for a violation not agreed to by the Petitioner at the time of release or set out in the Certificate of Release as placed.

The issue and question, and as requested for declaratory relief, was whether the Petitioner violated rule/condition as set-out in the Certificate of Release. The district alleged this issue by holding that record indicated that the Petitioner knew that his parole could be revoked for use of amphetamine. In view of the Notice, the Petitioner did not admit to the purported violation. (Appendix-12).

Further, the reference of the district court that the Petitioner admitted to alcohol and amphetamine on January 3, 2017, did not have any relevancy to the

to the parole revocation proceeding upon a purported violation that occurred of February 6, 2017, upon which the Petitioner was charged.

The Petitioner argued that under the district court's determination, the Petitioner could have been charged with failing to go fishing, or that it was a violation of his parole to go fishing and although not agreed to by the Petitioner and not set out in the Certificate of Release, his parole could be revoked. Such absurdity, as that was the purpose of the contract and informal agreement.

The Petitioner can admit to anything he likes, and if it is not set out in the contract and informal agreement, the Petitioner has not violated a condition of his parole.

The record is unequivocal that the Petitioner did not have a Rule 8 S as a condition of parole, and the violation of his parole upon such a condition violated his rights to Due Process, as it was the Board who breached the terms and conditions of the contract and informal agreement.

The veracity of the district court's determination is highly questionable as jurist of reason could disagree with the district court's resolution of the case, provided that the ~~district~~ of appeals should have issued a COA from the district court's determination.

Further, review should be granted pursuant to Rule 10(a) and (e) of the Supreme Court Rules, as this matter calls for the exercise of this Court's Supervisory power, and because the determination is in conflict with *Morrisey, Supra*. Due Process requires that the Petitioner be found to have violated a condition of his parole, and as in this case, as was set out in the Certificate of Release...

(3)

The Petitioner argued before the district court that his rights to Due Process under the 14th Amendment to the United States Constitution were violated, because he was denied his rights to counsel and an adequate opportunity to hire an attorney to represent him during the parole revocation hearing. The Petitioner argued that he was denied the right to hire an attorney after he requested.

The district court skirted the issue, and held that the Petitioner had no Federal Constitutional right to have

Counsel present at a parole revocation proceeding, citing, *Gagnon, Supra.* (Appendix-B; p. 7)

The Petitioner, via Motion To Reconsider and as before the court of appeals, argued that this determination was incorrect. Under *Gagnon*, because *Gagnon* explicitly holds that in every case in which a request for counsel at a preliminary or final hearing involving the revocation of probation or parole is refused, the grounds for refusal should be stated succinctly in the record. The Petitioner argued that the record was devoid of any grounds or reasons for not allowing him to hire an attorney after he requested to hire an attorney. The Petitioner furthered, that under this Court's holding in *Goldberg v. Kelly* 98 S.Ct. 1811 (1974), he should have at least been allowed to hire an attorney, as he desired to do. The Petitioner presented this same argument in his Traverse to the Respondent's Answer. The district court did not address the Petitioner's argument directly. The record merely reflects the reasons given for not appointing the Petitioner an attorney at the government's expense... The district court was aware of the Petitioner's claim that he was denied the right and opportunity to hire an attorney, however, the district court did not look to the record to see if there were any grounds for the refusal...

This Court should grant review to settle the question of whether a parolee has a constitutional right to hire an attorney upon request. In interpreting the holding in *Gagnon* and *Goldberg* it can be said that the Petitioner has a constitutional right to hire an attorney. Given the Notice "Rights of the Offender in the Revocation Process," it was discretionary as to whether the Petitioner wanted to hire an attorney or not. (Appendix-E).

Provided, that a COA was required, jurist of reason could disagree with the district court's resolution of the case, as this Court's holding in *Gagnon* clearly dictates that the record should provide the grounds for refusal succinctly... Thus, the court of appeals should here issue a COA from the district court's determination that the Petitioner did not have a constitutional right to be represented by counsel, as the issue was focused on the Petitioner's rights to hire an attorney. This Court should

grant review and settle this question as to whether the Petitioner had a constitutional right as a matter of due process to hire an attorney under Gagnon.

(4)

The Petitioner argued before the district court that the Texas Board of Pardons and Parole violated his rights to due process and committed a breach of contract when it subjected him to a parole revocation hearing for a violation of a condition not set out in the Certificate of Release. (Appendix-B; p. 4). The district court held that this claim was unexhausted and had not been presented to the State court. The Petitioner sought a declaratory judgment to declare his rights under a contract pursuant to the Federal Declaratory Act. (Appendix-B; p. 4).

The district court did not address the issue, and the Petitioner argued before the court of appeals that the district erred by failing to address the claim, and that claim was not unexhausted given the civil nature of the claim under Title 28 U.S.C., Section 2201.

Under State law as interpreted by the Texas Court of Criminal Appeals, that court does not write declaratory judgments. See, *Ex Parte Ussery*, 391 S.W.2d 735 (Tex. Cr. App. 1965), thus, the State does not provide a process that would require the Petitioner to exhaust a "claim" seeking relief in the form of a declaratory judgment for breach of contract. Further, the district court did not hold that a request for declaratory relief could not be brought simultaneously and contains a petition for writ of habeas corpus. The Petitioner is unaware of any authority where it has been held, that a request for declaratory relief under Section 2201 cannot be sought in a petition for writ of habeas corpus.

Under Texas law, the contractual nature of community supervision is true also of parole. An award of community supervision as is parole is not a right, but a contractual privilege, and conditions thereof are terms of the contract entered into between the trial court and defendant in a probation proceeding, and parole officials in context of parole release. See, *Sepp v. State*, 6 S.W.3d 530 (Tex. Cr. App. 1999). In the instant case, the formal agreement and contract is mandated under Section 508.154 of the Texas Government Code.

This Court has explicitly held that the Federal Declaratory Act provides that a court may declare the rights and other legal relations of any interested party seeking such declaration. See, *Wilton v. Seven Falls Co.*, 115 S.Ct. 2137 (1995). In view of State law, it is the appropriate vehicle for clarifying a party's rights under a statute. See, *State v. Montgomery County*, 338 S.W.3d 49 (Tex. App. - Beaumont 2011). It is also appropriate for determining the existence or validity of a contract, and a party to a written contract may seek a judicial determination of its contractual rights. It operates to provide an individual whose rights and legal relations are at issue in a contractual dispute a vehicle by which he can solicit the court to resolve questions of construction or validity under the contract. See, *Quick v. Plastic Solutions of Texas, Inc.*, 270 S.W.3d 173 (Tex. App. - El Paso 2008).

The basic policy of contract law is protection of parties' justified expectations. See, *Farah v. Mafritz and Kormanik, P.C.*, 927 S.W.2d 663 (Tex. App. 1st Dist. 1996).

In a contractual relationship, any party may breach the contract and any party may sue for the breach, and thus any party to the contract may seek, under the Declaratory Judgment Act, a judicial determination of contractual rights. See, *Stark v. Bowckenstein*, 156 S.W.3d 112 (Tex. App. 9th Dist. 2004).

It is clear the Texas legislature enacted Section 548.154 as a *Suigeneris* statute to protect the parolee, that all terms, rules and conditions be stated in clear and intelligible language. Cf., *Ex Parte Garduno*, 956 S.W.2d 833 (Tex. App. - El Paso 1997); conditions of probation must be clear, explicit, and unambiguous so that the probationer understands what is expected of him.

Under the formal agreement and contract there is no remedies clause, nor does Section 548.154 contain a remedies clause, thus, there is no exhaustion requirement required. There is no adjudicatory process or judicial review under State law that would require the exhaustion of administrative review before seeking federal review.

The formal agreement and contract in this case merely recites that: "I shall abide by all conditions imposed on me

by the Board." (Appendix-D).

Given the determination of the district court, the failure to consider the issue and to hold that the claim was not exhausted is at best suspect. If, a COA was required the court of appeals should have granted and issued a COA.

To the extent of the Petitioner's rights under the Declaratory Judgment Act, the Petitioner is entitled to have his rights declared under the contract, thus, the case should be remanded.

This Court should take the opportunity to determine whether a request for declaratory relief can be sought together with a petition for writ of habeas corpus.

CONCLUSION

The petition for a writ of certiorari should be granted; alternatively that a COA be granted and issued by this Court or a Justice thereof.

Respectfully submitted,



Kirk Wayne M. Brice, Sr.

Date: 08- August - 2018