No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2019

SHAWN M. TWITTY, *Petitioner*,

-VS-

STATE OF INDIANA, *Respondent*.

On Petition for Writ of Certiorari to the Indiana Supreme Court

PETITION FOR WRIT OF CERTIORARI

Shawn M. Twitty, *Petitioner, pro se*
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Indiana Department of Correction
6908 S. Old U.S. Hwy 41; P.O. Box 1111
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QUESTION(S) PRESENTED

The "touchstone of Due Process" is "fundamental fairness."[1] It is well-established, therefore, that due process must wear many different robes. The grandest of which is the unctuously objective mantle that clothes a criminal defendant protecting them from the arbitrary exercise of government power. Thusly, this Court is beseeched to consider the controversy presented for review in guise of these two questions:

- Whether a sentence is manifestly erroneous because the Doctrine of Amelioration allows for that sentence to be controlled by a newly amended version of a criminal statute, enacted before the sentence was imposed, rather than the older statutory provisions; and
- Whether such sentence, being manifestly erroneous – as it would violate the new statutory authority that governs it – may be challenged at any time, because it cannot be waived and, hence, is not subject to the limiting Doctrine of *Res Judicata*?

PARTIES

The petitioner is Shawn Twitty, a prisoner at the Wabash Valley Correctional Facility, of the Indiana Department of Correction, in Carlisle, Indiana. The respondent is the State of Indiana.

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[1] *Santobello v. New York,* 404 U.S. 257, 262, 92 S. Ct. 495 (1971)

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 2019

Shawn M. Twitty, *Petitioner,*

v.

State of Indiana, *Respondent.*

Petition for Writ of Certiorari from the Indiana Supreme Court

Marion Superior Court, Criminal Division Six – Case No. 49G02-9503-CF-33600
Indiana Court of Appeals – Case No. 19A-CR-00500
Indiana Supreme Court – Case No. 19A-CR-00500

I, Shawn Twitty, respectfully petition this Court for a writ of certiorari to review the judgment of Criminal Court Six for the Marion Superior Court of Marion County, Indiana – as reviewed by the Indiana Court of Appeals, and ultimately by the Indiana Supreme Court despite the denial of transfer. This petition presents, I believe, substantial questions of law with great public importance concerning the constitutionality of the common law doctrine of amelioration's application to criminal sentences, and the denial of such entitled sentences to that doctrine's application. All of which, I believe, implicates a criminal defendant's right to Due Process, as promulgated by the Fifth and Fourteenth Amendments of the United States Constitution.

DESICIONS BELOW

The opinions of the Indiana Court of Appeals, as expressed in the Petitioner's three State-level appeals, reported at: (1) *Twitty v. State,* No. 19A-CR-00500 (Ind. Ct. App. 2019), *trans. denied* (Ind. Jan 23, 2020); (2) *Twitty v. State,* 834 N.E.2d 1156 (Ind. Ct. App. 2005), *trans. denied at* 841 N.E.2d 188 (Ind. 2005); and (3)

Twitty v. State, 684 N.E.2d 260 (Ind. Ct. App. 1997), *trans. denied* are set for in Appendices A, B, and C, and are decisions without published opinion.

JURISDICTION

The decision of the Indiana Supreme Court, denying transfer for the instant cause, was entered on **January 23rd 2020.** Pursuant to Rule 13(1) of the United States Supreme Court Rules, this Petition must, therefore, be filed on or before **April 22nd 2020.** Jurisdiction of this Court, with said petition having been timely filed, is invoked in accordance with 28 U.S.C. § 1257(a), where the questions of law concerning application of a long-accepted, common law doctrine requires unambiguous direction for application toward criminal sentencing to all who constitutionally qualify.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"THE DOCTRINE OF AMELIORATION" - FORMULATED FROM THE RULE OF LENITY - AND ITS IMPACT ON CRIMINAL SENTENCES WHERE ITS DENIED APPLICATION VIOLATES THE FUNDAMENTAL FAIRNESS CLAUSE OF DUE PROCESS

The Rule of Lenity is defined as "'[t]he judicial doctrine holding that a court, in construing an ambiguous criminal statute that sets out multiple or inconsistent punishments, should resolve the ambiguity in favor of the more lenient punishment.'"[2]

Derived from this prolific lea, the Doctrine of Amelioration has evolved to apply to criminal sentences. As it applies to the context of the case at bar, the "*amelioration doctrine,*" for criminal law is defined as: "the rule that if a new statute reduces the penalty for a certain crime *while* a prosecution for that crime is

[2] Black's Law Dictionary at 1069 (7th ed. 2000).

pending, the defendant should gain the benefit of the reduction even though the crime was committed *before* the statute passed."[3] It is the application of this doctrine, or denial of which, that implicates Twitty's Due Process right.

The Doctrine of Amelioration derives its forcer from common law and its roots bend all the way back to English law.[4] Fundamentally, though, its application in American law has proven particularly problematic at times, because of "the interplay of the Constitution's *ex post facto* clauses."[5] For instance, if legislation amended, repealed, or re-enacted previous legislation without some form of express savings clause – which would invariably limit this doctrine's applicability – conviction under the old statute was *per se* prohibited; while conviction under the new statute, if it ***increased*** punishment, was barred by the *ex post facto clauses*.[6] Over time, the doctrine was determined to provide a criminal defendant the benefit of a more lenient sentencing provisions *if* they were sentenced *after* the date that provision became effective.[7] Notably, the doctrine of amelioration is only applicable if no savings clause was enacted with the new statutory revisions. Such is the case, presently. Inquiring upon this basis, then, if a criminal sentence *were* entitled to amelioration of a new statutory revision in law, would it not then follow that said sentence – if it were to be imposed under the old law – would be "illegal" in the sense that it was imposed contrary to the statutory authority which governed it?

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[3] *Ibid.* at 98 (10th ed. 2014) (emphasis added).

[4] *Today's Law and Yesterday's Crime: Retroactive Application of Ameliorative Criminal Legislation*, 121 U. Pa. L. Rev. 120, 121-24 (1972).

[5] *Id.* at 124.

[6] *Id.* at 124-25.

[7] *Vicory v. State*, 272 Ind. 683, 400 N.E.2d 1380 (Ind. 1980).

Moreover, could it not then be deemed reasonable that a sentence set outside those governing statutory parameters – having been viably labeled as "illegal" or "erroneous" – may be challengeable at any time?

Pointedly, this Court has narrowly defined an "illegal" sentence as one that: (1) is in excess of the statutory maximum punishment; (2) imposes multiple punishments for the same offense; or (3) the terms of which are otherwise legally or constitutionally invalid.[8] As Indiana law similarly defines it, an illegal or erroneous sentence is essentially one that is contrary to, or violative of, the penalty mandated by the applicable statute.[9] Accordingly, Indiana has held that an illegal sentence may be attacked collaterally or directly "at any time."[10] In fact, not only may an illegal sentence be challenged at any time under current Indiana precedent, the law mandates that Courts are "duty bound" to correct any illegal sentences.[11]

Furthermore, as this Court and the State courts of Indiana have determined, illegal sentences (as they run afoul of the law) cannot be waived, nor are they subject to the limiting doctrine of *res judicata*. As it stands the Doctrine of *Res Judicata* is, essentially, a doctrine of "claim preclusion" for later review whereby a final judgment (i.e. adjudication of a claim on its merits) forecloses any successive

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[8] *Hill v. United States*, 368 U.S. 424, 430, 82 S. Ct. 468, 472, 7 L. Ed. 2d 417 (1962); *see e.g., United States v. Wheeler*, 645 F. Supp. 250, 252 (N.D.Ind.1986).

[9] *Niece v. State*, 456 N.E.2d 1081, 1084 (Ind. Ct. App. 1983).

[10] *Thompson v. Thompson,* 811 N.E.2d 888, 906 (Ind. Ct. App. 2004) (citing *Hull v. State*, 799 N.E.2d 1178, 1181 (Ind. Ct. App. 2003) (citing *Beanblossom v. State*, 637 N.E.2d 1345, 1349 (Ind. Ct. App. 1994), *trans. denied*).

[11] *Id.* (citing *Hull,* 799 N.E.2d at 1181 (citing *Golden v. State,* 553 N.E.2d 1219, 1223-24 (Ind. Ct. App. 1990), *trans. denied*).

litigation of that claim.[12] However, this claim preclusion, as will be evidenced by the application of legal principles and the law of this Country, and the State of Indiana, does not apply to such illegal sentences which contradict the very law that attempts to impose them. As such, the imposition of such a sentence surely tarnishes that gilded robe of Due Process that clothes a sentences' recipient.

STATEMENT OF THE CASE

On the night of March 4th 1995, the petitioner, Shawn Twitty ("Twitty"), was at the "Barritz Nightclub" in Indianapolis, Indiana where Twitty and his friends got into a fight with a group of people that included Garcia Scott, Chadwere Underwood, and Craig Mushatte. Both groups were ejected from the club. Though, once outside, the fight between the two continued in the parking lot. At some point during this altercation, it was testified to at trial, Mushatte claimed to see Twitty remove a gun from the trunk of a care and shoot fire at Mushatte, Scott and Underwood. Mushatte would further testify at Twitty's trial that he believed the weapon used was a 9-milimeter gun.

After the shooting occurred, it was testified that Twitty and the others in his party left in the care from which Twitty had purportedly removed the gun. The car in question was later found at Twitty's residence, and crime scene investigation yielded a spent bullet jacket. At trial, a ballistics expert testified that the spent jacket was fired from a 9-milimeter gun. Two days after the nightclub altercation, Mushatte identified Twitty in a photo array as the person who fired the gun.

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[12] *Taylor v. Sturgell,* 553 U.S. 880, 128 S. Ct. 2161, 2171 (2008).

It must be noted that as a result of the shooting, Scott and Underwood were both shot in the head. Scott was permanently blinded, and Underwood suffered irreversible memory loss along with motor skill impairment.[13]

On March 8th 1995, Twitty and his co-defendant were both charged with three counts of attempted murder and one count of carrying a handgun without a license. Twitty's co-defendant was acquitted of the charges at the conclusion of jury trial on June 7th 1995. A mistrial was declared with regard to Twitty when the jury was unable to reach a verdict. A second trial was held for Twitty August 28th and 29th 1995 where Twitty was found guilty on all counts. On September 27th 1995, Twitty was sentenced to three terms of forty-five years for each of the three attempted murder convictions. Two of those counts were ordered to run concurrent to each other but consecutive to the third count. Twitty received a one year sentence for the misdemeanor handgun conviction which was ordered to run concurrent with the first two counts. Therefore, Twitty's total aggregate sentence was ninety years.

On direct appeal, Twitty challenged the propriety of his consecutive sentencing based on the trial court's use aggravating factor and the sufficiency of the court's sentencing statement.[14] The Indiana Court of Appeals affirmed Twitty's sentencing and the Indiana Supreme Court denied transfer.[15]

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[13] *Twitty v. State,* No. 49A05-9601-CR-016, slip op. at 2, 684 N.E.2d 260 (Ind. Ct. App. 1997), *trans. denied.* ("*Twitty I*").

[14] *Id., slip op. at 2.*

[15] *Id., slip op. at 9.*

On November 9th 1998, Twitty filed a state-level petition for post-conviction, which was amended by counsel on December 8th 2003. Twitty's petition was denied after an evidentiary hearing on January 12th 2005. On appeal, Twitty argued that his attorney failed to raise a proper consecutive sentencing argument on direct appeal.[16] Though, the Indiana Court of Appeals was unpersuaded as it reasoned that Twitty had, in fact, raised the claim on direct appeal, and even if it had not, Twitty had not convinced the Court that it would have ruled differently.[17] Subsequently, the denial of Twitty's post-conviction was affirmed,[18] and the Indiana Supreme Court denied transfer.

In January of 2019, Twitty filed a motion to correct erroneous sentence pursuant to Indiana's Criminal Code[19] arguing for the first time that his consecutive sentences were "erroneous" because they were imposed without express statutory authority. Specifically, Twitty opined that because Indiana's consecutive sentencing statute[20] had been amended before he had been sentenced, and that amendment removed the critical "serious bodily injury" language which the sentencing court had used to impose consecutive sentences (providing in its place a list of "crimes of violence" which did not include attempted murder),[21] Twitty was

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[16] *Twitty v. State,* No 49A02-0503-PC-199, 834 N.E.3d 1156 (Ind. Ct. App. 2005), *trans. denied.* ("*Twitty II*").

[17] *Id., slip op. at 14.*

[18] *Id., slip op. at 20.*

[19] Indiana Code § 35-38-1-15 (1998)

[20] Ind. Code § 35-50-1-2

[21] *See* Ind. Code § 35-50-1-2(a) (1995 Supp.); *accord Reed v. State,* 856 N.E.2d 1189, 1193 (Ind. 2006).

entitled to the new sentencing provisions under the amelioration doctrine.[22] However, the trial court summarily denied Twitty's motion. On appeal, the Indiana Court of Appeals determined that Twitty had raised claims against his consecutive sentencing multiple times and, therefore, concluded that the latest claim was barred by *res judicata.*[23]

Twitty disagrees and asserts for this Court's consideration that the above-stated legal doctrines propound that his sentence *is illegal* and thusly not subject to *res judicata* since an illegal sentence cannot be waived, but may be challenged at any time. It is by this logic that Twitty seeks *Certiorari* in this Court.

BASIS FOR FEDERAL JURISDICTION

It must be noted that Twitty's time for federal habeas corpus review has long-since expired. Subsequently, his only option for further review is before this Court in its discretionary review.[24] As provided in the Rules for the United States Supreme Court, Rule 10, Twitty may seek this Court's discretionary review where the Indiana Supreme Court has decided an important question of federal law that has not been but should be settled by this Court. Rule 10(c).

Specifically, Twitty believes that the Rule of Lenity's subsumed doctrine of amelioration made his consecutive sentencing erroneous, because his sentence was relevant to the new statutory language that was enacted before his sentence was

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[22] *See e.g., Richards v. State,* 681 N.E.2d 208, 213 (Ind. 1997).

[23] *Twitty v. State,* No. 19A-CR-00500, slip op. at 2 and 9 (Ind. Ct. App. 2019), *trans. denied* (Ind. Jan 23, 2020) ("*Twitty III*").

[24] 28 U.S.C. § 1257(a).

imposed. The effect of this Doctrine – as part of the Rule of Lenity – has far reaching importance where, as here, a criminal defendant was deprived of its clearly valid application and, instead, sentenced under a statutory authority that was no longer controlling. This denial, therefore, creates a controversy that requires a review at the highest source as it implicates the very fundamental fabric of Due Process.

REASONS FOR GRANTING WRIT

A. Twitty's instant Indiana Court of Appeals' decision conflicts with prior decisions of similar substance involving Amelioration for a sentence.

Whether a federal court has the authority to apply the Rule of Lenity to a State statute is a question of law to be reviewed *de novo*. In deciding this, Twitty argues that a strict definition of the rule of lenity is required. As noted by the Seventh Circuit, which oversees the State of Indiana's courts, "the rule of lenity, [as] a canon of statutory construction, is for States to use or abjure, as their domestic law requires."[25] As apparent by standing case law, Indiana has adopted to use of the Rule of Lenity in the virtue of its "amelioration doctrine."[26] Truly, it is upon that basis that Twitty proffers the questions presented in this brief. Lenity and Amelioration – when applied to a criminal sentence – makes a sentence imposed without their lawfully appropriate application ***manifestly erroneous***. This contention is rooted in Twitty's belief that any sentence entitled to amelioration for a new statutory provision, though sentenced under a former language – where such

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[25] *Mueller v. Sullivan*, 141 F.3d 1232, 1235 (7th Cir. 1998).

[26] *Robertson v. State*, 871 N.E.2d 280, 284 (Ind. 2007); *Vicory, supra*, 272 Ind. at 684, 400 N.E.2d at 1383.

language imposes a harsher punishment, is erroneous (i.e., illegal) as it is without the express statutory authority which should govern it.

Under Indiana's laws, the State Supreme Court has held, in general, that the appropriate statutory authority to be applied when arriving at the proper criminal penalty should be the one in effect at the time a crime was committed.[27] This has been determined to be proper because the time of the crime is selected as an act of free will of the offender.[28] Thusly, the penal consequences are frozen as of the commission of that event.[29] The Doctrine of Amelioration acts as an exception to that generalization by providing that a defendant who is sentenced after the effective date of a statute *which provides for more lenient sentencing is entitled to be sentenced pursuant to that new statute* rather than the sentencing statute in effect at the time of the commission or conviction of the crime.[30]

The facts of the instant case show that Twitty's convicted crimes were committed in March of 1995. During that time, Indiana's Criminal Code provided that *any* offense which resulted in "serious bodily injury" was exempt from a consecutive sentencing cap which limited the term of consecutive sentences so that they could not exceed the advisory or presumptive sentence for the next class of felony higher than the most serious felony committed in the instant offenses.[31] This was so even if those offenses

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[27] *Patterson v. State* 532 N.E.2d 604, 608 (Ind. 1988).

[28] *Id.*

[29] *Parsley v. State* (1980), 273 Ind. 46, 401 N.E.2d 1360, 1362, *cert. denied* 449 U.S. 862, 101 S. Ct. 166, 66 L. Ed. 2d 79.

[30] *Lunsford v. State*, 640 N.E.2d 59, 60-61 (Ind. Ct. App. 1994) (emphasis added).

[31] *See* Ind. Code § 35-50-1-2(a) (1994).

were part of a single episode of criminal conduct. During Twitty's two trials, Indiana's General Assembly revised the portion of Indiana's Criminal Code which governed the imposition of sentences, whether concurrent or consecutive.[32] In revising this Section, the legislature removed the "serious bodily injury" provision and replaced it with an enumerated list of offenses that were considered crimes of violence.[33] What this means is that any committed offense among those listed in Section (a) was exempt from the sentencing cap of the next class of felony higher when it came to imposing consecutive sentences.[34] Again, this exemption overrode the episode of criminal conduct language, which was now codified in Section (b).[35] Though, where a non-listed offenses were committed and were, also, the product of an episode of criminal conduct, a sentencing court was required to limit the term of consecutive sentences to the presumptive sentence for the next class of felony higher than the most serious underlying felony of the defendant's episode.

As it applies here, then, the doctrine of amelioration entitled Twitty to the provisions of the consecutive sentencing statute that were in effect when his sentence was imposed. This is because amelioration bears little pertinence to an offense's commission date. Instead the doctrine focuses on the sentencing date and the effective date of the relevant statute's more lenient revision.[36] As such, the new statutory construction of the Section 35-50-1-2, in 1995, held that Twitty's attempted murder

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[32] *See* Ind. Code § 35-50-1-2 (Supp. 1995).

[33] Ind. Code §§ 35-50-1-2(a)(1) – (11) (Supp. 1995).

[34] Ind. Code § 35-50-1-2(c) (Supp. 1995).

[35] Ind. Code § 35-50-1-2(b) (Supp. 1995).

[36] *Richards v. State*, 681 N.E.2d at 213; *Lunsford*, 640 N.E.2d at 60.

convictions - and any consecutive sentences imposed therefrom - were limited to the next class of felony higher. Under Indiana law, attempted murder is a class A felony,[37] so the next felony higher would be murder which carried a presumptive sentence of fifty years[38] at the time Twitty was sentenced. Therefore, under the new version, Twitty's sentence could not exceed fifty years while, under the old, his ninety year sentence was valid.

B. **The Doctrine of Amelioration and its application have great public importance for criminal sentencing under the fundamental fairness doctrine of the Due Process Clause in the Fifth and Fourteenth Amendments.**

Under Indiana's law a trial court is generally precluded from ordering consecutive sentences in the absence of express statutory authority.[39] As Twitty has already demonstrated, "[a] sentence that is contrary to or violative of a penalty mandated by statute is illegal in the sense that it is without statutory authorization."[40] At the time Twitty committed the attempted murders, the statute limited the trial court's authority to impose consecutive sentences if the convictions were not for crimes resulting in "serious bodily injury" and the convictions "ar[o]se out of an episode of criminal conduct."[41] Twitty acknowledges that either version of the statute does not prohibit consecutive sentences; rather, the limited the length of the aggregate term is limited where the above-mentioned requirements are met.

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[37] Ind. Code § 35-41-5-1.

[38] Ind. Code § 35-50-2-3 (1994).

[39] *See Lee v. State*, 816 N.E.2d 35, 37 (Ind. 2004); *Baromich v. State*, 252 Ind. 412, 249 N.E.2d 30, 33 (1969).

[40] *Rhodes v. State*, 698 N.E.2d 304, 307 (Ind. 1998).

[41] I.C. 35-50-1-2(a) (1994)

Indiana has clearly determined that in 1995, when Twitty was ultimately sentenced, "attempted murder was not included as a statutory crime of violence."[42] Thus this single point of contention, compels the conclusion that Twitty's ninety-year sentence is illegal and requires reversal. While it is true that Twitty raised sentencing claims in both his direct appeal and post-conviction appeal, he never challenged his sentence as "illegal" until the instant action.

The doctrine of *res judicata* bars a later suit when an earlier suit resulted in a final judgment on the merits, was based on proper jurisdiction, and involved the same cause of action and the same parties as the later suit.[43] More to the point, the doctrine of *res judicata* prevents the repetitious litigation of that which is essentially the same dispute.[44] In denying Twitty's appeal under *Twitty III*, the Indiana Court of Appeals determined that his claim was barred by *res judicata*.[45]

Here, Twitty was sentenced to consecutive sentences in excess of the statutorily imposed limit of fifty years. These revisions of Section 35-50-1-2 were enacted as part of Public Law 304-1995, § 1 which did not include an express savings clause that would prohibit any ameliorative properties. As such, the instant sentences that Twitty challenges were entitled to be limited under the new statutory revision and, thus, are illegally ran consecutive in excess of fifty years pursuant to the old statutory authority that is not controlling. Moreover, because

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[42] *Reed, 856 N.E.2d 1199.*

[43] *Sweeney v. State*, 704 N.E.2d 86, 94 (Ind. 1998).

[44] *Id.*

[45] *Twitty,* No. 19A-CR-00500 slip op. at 2 and 9.

these sentences violate the statutory language that controls them, they are illegal as they are without the authorization required to impose them under the 1995 revision. Therefore, the Indiana Court of Appeals' determination that Twitty's instant sentencing claim is barred by *res judicata* is unconvincing, because Twitty's illegal sentence, under Indiana law, can be challenged at *any time*.[46] Accordingly, the doctrine of *res judicata* does not apply, and Twitty's claim must prevail.

CONCLUSION

For the foregoing reasons, certiorari should be granted in this case.

April 20th 2020

Respectfully submitted,

/s/ Shawn M. Twitty

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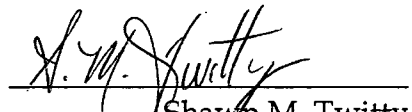
I, the undersigned, in the presence of God, do solemnly swear and affirm[47] that a copy of the foregoing was served upon the Solicitor General of the United States of America, on **April 20th 2020**, in accordance with the Rules of the United States Supreme Court, Rule 29, by ordinary, first-class mail, in the U.S. mail with postage prepaid.



Shawn M. Twitty

[46] *Beanblossom*, 637 N.E.2d at 1349.

[47] 28 U.S.C. § 1746.