No. 21-6574

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Robert Tracy Warterfield — PETITIONER
(Your Name)

vs.

Bobby Lumpkin, Director — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Fifth Ciruit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Robert Tracy Warterfield, #1829999
(Your Name)

Clements Unit, 9601 Spur 591
(Address)

Amarillo, Texas 79107-9606
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

(1) Can a lawfully perfected interlocutory appeal pursuant to 28 U.S.C. §1292(a)(1) that has been fully briefed and pending in the United States Court of Appeals be mooted prior to resolution by issuance of the District Court's Final Judgement, or must such a judgement be witheld until the appeal has been resolved less the Due Process Clause of the Fifth Amendment and, or the right to petition of the First Amendment be thereby infringed?

(2) Has the Supreme Court of the United States over time effectively nullified or else diminished the Contracts Clause to the point that the Constitutional prohibition of Art. I, §10 that "No State shall...pass any...Law impairing the Obligation of Contracts..." is irrelevant to the proper interpretation and enforcement of plea agreement contracts?

(3) Does the Due Process Clause of the Fourteenth Amendment compel State prosecutors to perform, and courts to interpret and enforce, plea agreements pursuant to the laws in existence at formation?

LIST OF PARTIES

[X] 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:

RELATED CASES

None.

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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

[X] For cases from **federal courts:**

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

[X] reported at Docket Number 18-40936 CA5; 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[ ] is unpublished.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

[X] reported at No. 4:17-cv-00330-ALM (E.D.TX.); 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

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was July 23, 2021.

[X] 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 _____.

[ ] 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

Constitution of the United States:

- Article I, Section 10, Clause 1 (Contracts Clause):

  "No State shall...pass any...Law imparing the Obligations of Contracts..."

- Amendment V (Due Process Clause):

  "No person shall...be deprived of life, liberty, or property, without due process of law..."

- Amendment I (Petition Clause):

  "Congress shall make no law...abridging the right...to petition the Government for a redress of grievances."

- Amendment XIV, Section 1 (Due Process Clause):

  "...nor shall any State deprive any person of life, liberty, or proerty, without due process of law..."

Constitution of the State of Texas:

- Article I, Section 16 (Contracts Clause):

  Sec. 16. BILLS OF ATTAINDER: EX POST FACTO OR RETROACTIVE LAWS: IMPAIRING OBLIGATIONS OF CONTRACTS. No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made.

- Article I, Section 29 (Iviolability Clause):

  Sec. 29. PROVISIONS OF BILL OF RIGHTS EXCEPTED FROM POWER OF GOVERNMENT; TO FOREVER REMAIN INVIOLATE. To guard against transgression of the high powers herein delegated, we declare that everything in this "Bill of Rights" is excepted out of the general powers of government, and shall forever remain inviolate, and all laws contrary thereto, or to the following provisions, shall be void.

Federal Statutory Provisions:

Title 28:

• Section 1291. Final decisions of district courts (in relevant part):

The court of appeals...shall have jurisdiction of appeals from all final decisions of the district courts of the United States, ...except where direct review may be had in the Supreme Court.

• Section 1292, Interlocutory decisions (in relevant part):

(a) Except as provided in subsections (c) and (d) of this section, the court of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States,..., or the judges thereof granting, continuing, modifying, refusing, or dissolving injunctions, or refusing to dissolve or modify injunctions, except where direct review may be had in the Supreme Court [.]

• Section 1331. Federal question.

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

• Section 1361. Action to compel an officer of the United States to perform his duty.

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

• Section 1651. Writs (All Writs Acts):

(a) The Supreme Court and all courts established by Act of

Congress may issue all writs necessary and appropriate in aid of their respective jurisdictions and agreeable to the usuages and principles of law.

(b) An alternative writ of rule nisi may be issued by a jus justice or judge of a court which has jurisdiction.

State of Texas Statutory Provisions:

• Texas Code of Criminal Procedure, Article 12.01:

As existed on April 18, 1994 - date of plea agreement formation:

Acts 1987, 70th Leg., Ch. 716, §1, eff. Sept. 1, 1987 (innrelevant part):

Art. 12.01. Felonies. Except as provided in Article 12.03, felony indictments may be presented within these limits, and not afterward:

(2) ten years from the date of the commission of the offense:

(D) sexual assault under Section 22.011(a)(2) of the Penal Code; indecency with a child;

In 1997, this statutory provision was amended by:

Acts 1997, 74th Leg., Ch. 740, §1, eff. Sept.1, 1997, (inrelevant part):

Section 1. Article 12.01, Code of Criminal Procedure is amended as foltowread as follows:

Art. 12.01. Felonies. Except as provided in Article 12.03, felony indictments may be presented within these limits, and not afterward:

(5) ten years from the 18th Birthday of the victim of the offense:

(G) agravated sexual assault under Section 22.021(a)(1)(B), Penal Code.

In 2001, the 1997 promulgations was amended by:

Acts 2001, 77th Leg., Ch. 12, §1, eff. Sept 1, 2001, (intrelevant part):

Section 1. Article 12.01, Code of Criminal Procedure is amended as follows:

Art. 12.01. Felonies. Except as provided by Article 12.03, felony indictment may be presented within these limits, and not afterward:

(1) no limitation:

(B) sexual assault, if during the investigation of the offense biological matter is collected and subjected to forensic DNA testing and the testing results show that the matter does not matchgthe victim or any other person whose identity is readily ascertained;

(5) ten years from the 18th birthday of the victim of the offense:

(B) except as provided in Subdivision (1) sexual assault under Section 22.011(a)(2), Penal Code, or aggravated sexual assault under Section 22.021(a)(1)(B), Penal Code:

In 2007, this statutory provision was amended again by:

Acts 2007, 80th Leg., R.S., Ch. 593 (HB - 8), §1.03, eff. Sept 1, 2007:

(no statute of limitations for 22.021(a)(1)(B)).

• Texas Code of Criminal Procedure, Article 18.01(d):

As existed on April 18, 1994 - date of plea agreement formation:

Acts o

Act of May 25, 1977, 65th Leg., R.S., Ch. 237, 1977 Tex. Gen. Laws 640, 641 (in relevant part):

> Subsequent search warrants may not be issued pursuant to Subdivision (10) of Article 18.02 of this Code to search the same person, place, or thing subjected to a prior search under Subdivision (10) of Article 18.02 of this Code.

Article 18.02(10) stated:

> A search warrant may be issued to search for and seize:
>
> (10) Property of items, except personal writings by the accused, constituting evidence tending to show that a particular person committed an offense.

In 1995, this statutory provision was amended by:

Acts 1995, 74th Leg., Ch. 670, §1, eff. Sept 1, 1995 (in relevant part):

> A subsequent search warrant may be issued pusuant to Subdivision (10) of Article 18.02 of this Code to search the same person, place, or thing subject to a prior search under Subdivision (10) of this Code only if the subsequent search warrant is issued by a judge of a district court, court of appeals, the court of criminal appeals, or the supreme court.

STATEMENT OF THE CASE

On May 5, 2017 Petitioner Warterfield filed a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. §2254 in the United States District Court for the Eastern District of Texas. He was challenging the constitutionality of a conviction he received in the 416th District Court of Collin County, Texas in December 2012 for two counts of aggravated sexual assault of a child and two counts of indecency with a child. Prior to this prosecution, Petitioner was tried and convicted in the 7th Criminal District Court of Dallas County, Texas in January 2012 of one count of aggravated sexual assault of a child. The sentences were cumulated so that he effectively must serve two consecutive life sentences. However, both of these prosecutions initiated in 2010 were conditioned and limited by an April 18, 1994 plea agreement between Texas and Warterfield approved by the 292nd District Court, Dallas County, Texas.

With a multiplicity of prosecutions having the 1994 plea agreement as a nexus and believing that both 2010 prosecutions contain common violations of the 1994 plea agreement, Petitioner filed as part of the Eastern District of Texas §2254 proceeding a petition for injunctive relief pursuant to Fed. R. Civ. P. 65 seeking to have Texas officials enjoined to perform their unimpaired contractual obligations in order to cease and prevent irreparable harm; inter alia, incarceration pursuant to unconstitutional Acts that abridge a vested right to immunity from prosecution for both cases.

The District Court construed the petition for injunctive relief instead as a petition for a writ of mandamus. The petition was then dismissed for want of jurisdiction. Petitioner believed that (1) the District Court's construement of that pro se pleading to be a misconstruement and an abuse of discretion, or (2) in alternate, if properly construed as requesting a writ of mandamus, that either 28 U.S.C. §1361 infringed the Seperation of Powers Doctrine by Congress preventing district courts by way of mandamus to enforce the Constitution of the United States or that the District Court nonetheless had jurisdiction under 28 U.S.C. §1331 as part of the 28 U.S.C. §2254 proceeding.

Under such beliefs, Petitioner then filed an interlocutory appeal pursuant to 28 U.S.C. §1292(a)(1). This lawful and perfected interlocutory appeal had been fully briefed by the parties and pending before a panel of the Fifth Circuit. However, prior to resolution of that appeal, the District Court determined that the appeal was improvident because its construement of the petition for injunction as one for a writ of mandamus was correct, and issued a Final Judgement in the underlying §2254 action. The Fifth Circuit thereafter dismissed the interlocutory appeal as moot.

Petitioner believing the District Court's Final Judgement to be premature and the Fifth Circuit's dismissal of the interlocutory appeal as moot to be an error that infringes his First Amendment right to petition the Government for the redress of grievances and/or his Fifth Amendment right to due process, Petitioner Warterfield herein petitions this Court for a Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

Admittedly, Petitioner must rely heavily of logic due to being short on authorities showing that a final judgement by a district court when issued prior to resolution of a pending interlocutory appeal is premature. This lack of authorties illustrates two points: (1) as a pro se prisoner he has limited research capacity, and (2) that such a procedure as has been accorded him is such an extreme departure from accepted procedure that there exists little to no precedent calling for this Court's oversight.

The Fifth Circuit sanctioned and extended the District Court's violations of due process and right to petition when it ~~i~~dismissed as moot the interlocutory appeal pending before it. In reality, the District Court's Judgement made prior to resolution of the interlocutory appeal ipso facto is not "final." Not being a final judgement, the follow-on Motion for COA (20-40620 CA5) is without §1291 jurisdiction. For the Fifth Circuit to condone and particpate in this procedure which infringes Warterfield's rights of due process and to petition calls for an exercise of this Court's oversight.

Additionally, if addressed, settling the scope of the Contracts Clause as applied to plea agreements, and/or whether the Fourteenth Amendment's Due Process Clause requires prosecutors' performance of plea agreement obligations to be made under the status of the laws in existence at formation to the exclusion of future legislation would be of great systemic benefit.

ARGUMENTS AND AUTHORITIES

What Petitioner Warterfield originally conceived of as a direct and efficient means of having vindicated his rights, Constitutional and contractual, has turned into a prolonged procedural thicket which he sought to avoid. Rule 1 of the Federal Rules of Civil Procedure (since 2015) states in part that those Rules should be "... employed by...the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." With two cases being simulatneously litigated having non-performances and impairments of the obligations of contract in common, Petitioner sought by injunction to have "every action and proceeding" determined in a "just, speedy, and inexpensive manner." In other words, the unconditional relief warranted in this case would be, by injunction, made plenary to the other case.

The two cases are:

(1) Dalas Police Department Agency #691635-X, offense date October 1, 1989. It was tried in January 2012 in the 7th Criminal District Court of Dallas County, Texas. The Federal habeas number is 3:18-cv-03154-N (NDTX). It currently is in the Fifth Circuit on a Motion for COA (21-10782).

(2) Dallas Police Department Agency #867045-X, offense date December 9, 1989. It was tried in December 2012 in the 416th District Court of Collin County, Texas. The Federal habeas number is 4:17-cv-00330-ALM (EDTX). It is the case for which the current Petition is derived.

The prosecution of case #691635-X and #867045-X was conditioned and circumscribed by an April 18, 1994 plea agreement contract that resolved Cause No. F93-43772-RV in the 292nd District Court of Dallas County, Texas. In that negotiated conviction, Petitioner was convicted of sexual assault of a child and sentenced to ten years, probated. Among the fixed conditions for prosecution of the misdemeanor and felony cases listed in the agreement, was that the 1994 negotiated conviction could not be used (1) for purposes of impeachment of Warterfield if he testified, (2) as an extraneous offense of act, or (3) in the punishment phase.

Additionally, the laws in existence at formation of the agreement that conditioned these prosecutions became obligations of contract that are subject to neither non-performance nor impairment. The laws in existence at formation becoming fixed obligations of contract was relied on by the parties; the Prosecutor to induce the guilty plea and Warterfield to have fixed certainty as to the conditions by which #691635-X and #867045-X could be prosecuted.

Petitioner pro se determined that under the Federal Rules and Laws that a petition for injunction would be a proper, effective and efficient remedy. Conversely, a petition for a writ of mandamus would be considered improper, ineffective, and a waste of time. When Petitioner filed the Petition for Injunction on December 4, 2017, the Dallas County case (#691635-X) was still in State courts. See WR-82,182-05 (Tex.Crim.App.). The §2254 Petition for #691635-X was not filed until until November 19, 2018. Arguendo the Petition for Injunction had been correctly construed by the District Court

and considered on the merits instead of being dismissed for want of jurisdiction, relief would properly have been effected in both cases and No. 3:18-cv-3154-N (NDTX) would have never been filed; proper, effective, and efficient.

Pursuant to Fed. R. Civ. P. 81, not only are those Rules applicable to a Federal habeas corpus proceeding (81(a)(4) and Rules Governing §2254 Cases, Rule 12), but also mandamus is abolished and relief under mandamus must be sought elsewhere in the Rules. See 81(b). Thus Rule 65, governing injunction became the focus of seeking relief in a multiplicity context. Whats more, 28 U.S.C. §1361 - The Federal Mandamus Act - omits jurisdiction for district courts in original actions to mandamus State officials. However, as briefed by Petitioner as part of the interlocutory appeal, it is arguable that the district court may in fact do just that under its inherent powers to enforce the Constitution or the §1331 jurisdiction it already had and the All Writs Act, 28 U.S.C. §1651.

Thus, Warterfield viewed an injunction as a proper, effective, and efficient way to terminate an unlawful confinement resulting from two prosecutions void ab initio for being in breach of a vested right to immunity from prosecution. A writ of mandamus, though a remote possibility, is likely improper.

The District Court's illiberal construement of the pro se injunctive pleading was an abuse of discretion. Not followed was United States v. Robinson, 78 F.3d 172, 174 (5th Cir. 1996)("pro se pleading must be treated liberally as seeking the proper remedy."; Haines v. Kerner, 92 S.Ct. 594, 595-596 (1972)("because petitioner is proceeding pro se, it is necessary to construe his claims

liberally and provide himmwith an opportunity to clarify his allegations."); Fed. R. Civ. P. 8(e)("Pleadings must be construed so as to do justice.").

Instead of construing the Petition for Injunction liberally with an eye to doing justice and as one seeking the proper remedy, the District Court did exactly the opposite of what the authorities above direct. Specifically, that Court illiberally construed the document as one seeking an improper remedy that denies justice without considering the merits.

To compound the construement error, the District Court short-circuited the interlocutory appeal perfected under §1292(a)(1) to review its misconstruement of the Petition for Injunction. The District Court issued a putative final judgement prior to resolution of the interlocutory appeal. This final judgement, according to the Fifth Circuit, mooted the interlocutory appeal which was then dismissed. Please consider:

October 29, 2018 - Initial brief of Appellant

April 15, 2019 - Supplemental Brief of Appellant

Febuary 18, 2020 - Fifth Circuit Orders Briefing

May 21, 2020 - Appellant's Brief of the Merits

June 22, 2020 - Brief of Respondent-Appellee

July 17, 2020 - Reply Brief of Appellant

August 10, 2020 - Final Judgement Issued for §2254

All of the parties' and Court of Appeals' time, efforts, and resources on the interlocutory appeal has been putatively wasted. This is the opposite envisioned by Petitioner when he wrote and

filed the Petition for Injunction. The claims he is advancing are meritorious, and an injunction would make unconditional relief plenary to both cases.

To compound the District Court's construement error and its self-determined appeal thereof, the follow-on Motion for COA (20-40620 CA5) was denied without the Fifth Circuit ever having jurisdiction putatively exercised under 28 U.S.C. §1291. This is because when the District Court issued its judgement prior to resolution of the interlocutory appeal, it was premature, incomplete, and ipso facto is not a "final" judgement. Not being a final judgement, the Court of Appeals did not have §1291 jurisdiction, Thus the Court of Appeals erronsously dismissed an interlocutory appeal that was not moot, and denied a Motion for COA for which it lacked jurisdiction.

Despite the Fifth Circuit finally and correctly accepting its §1292(a)(1) jurisdiction and ordering full briefing by the parties, the District Court based its decision to issue its Final Judgement and to also deny the Rule 59(e) Motion to Alter or Amend Judgement by determining that (1) its construement of the Petition for Injunction as instead one for a writ of mandamus was correct, and (2) that the Fifth Circuit did not have §1292(a)(1) jurisdiction.

Essentially, in order to prematurely issue its Final Judgeemnt before resolution of the interlocutory appeal and to deny the Rule 59(e) Motion, the District Court had to assume the role of the appellate court and determine its construement of the injunctive pleading was correct. Additionally, the District Court had to again usurp the Fifth Circuit and its determination that it had §1292(a)(1)

jurisdiction with a determination that acquiring jurisdiction was improvident. Thus, the District Court short-circuited a lawful and perfected interlocutory appeal in a manifold abuse of discretion. It is the District Court who has failed to adhere to Fed. R. Civ. P., Rule 1, though obligated to do so.

In sum, the District Court abused its discretion by illiberally construing the pro se pleading, by settling and mooting the appeal of that misconstruement, and by usurping the Fifth Circuit's by determining that its grant of jurisdiction was improvident. As for the Fifth Circuit, it condoned the District Court's errors and usurpations by dismissing the interlocutory appeal as moot when it was not, along with abdicating its role and authority to determine its jurisdiction. Then, the Fifth Circuit denied the follow-on Motion for COA without jurisdiction. Petitioner's role in these mistakes was his seeking to have his Constitutional and contractual rights vindicated by "the just, speedy, and inexpensive determination of every action and proceeding" (Rule 1) "so as to do justice" (Rule 81(e)) through "the" proper remedy." (Robinson, 78 F.3d at 174).

If this Court finds that the District Court's "Final Judgement" was premature and did not moot the pending interlocutory appeal, the most likely course is to remand with instructions to reinstate both the §2254 and interlocutory appeal for further consideration. However, if this Court would be inclined to go further in the interests of justice, two more steps deserve, in Petitioner's opinion, more prompt resolution than remand would afford; to wit, (1) was

the District Court's construement of the pleading improper, or if proper, is a writ of mandamus available, and (2) what is the ~~~ propriety on an injunction as part of a §2254 proceeding.

As just argued, the District Court's construement of the petition for injunctive relief was misconstrued in an abuse of discretion. As argued by Petitioner in his briefing to the Court of Appeals in 18-40936, a district court should have inherent judicial power topcompel State officials by way of writ of mandamus that they fulfill their Federal Constitutional obligations owed to a petitioner, and that Congress infringed the Separation of Powers Doctrine by stripping such inherent power to uphold the Constitution of the United States by enacting 28 U.S.C. §1361. Alternately, the District Court already had 28 U.S.C. §~~1351~~ 1331 jurisdiction in the underlying §2254 action, and could have issued either an injunction or a mandamus under 28 U.S.C. §1651 - The All Writs Act. It is not whether the District Court had jurisdiction over the Dallas County conviction, but rather whether it had jurisdiction over State officials to enforce the Constitutional obligations it owed Petitioner. Under this Court's precedents regarding issuance of a mandamus:

> But is has been well settled, that, where a plain official duty, requiring no exercise of discretion, is to be performed and performance refused, and person who will sustain personal injury by such refusal may have mandamus to compel its performances; and when such a duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have injunction to prevent it. In such cases, the writs of mandamus and injunction are somewhat correlative to each other. In either case, if the officer plead authority of an unconstitutional law for the nonperformance or violation of his duty, it will not prevent the issuing of

> the writ. An unconstitutional law will be treated by courts as null and void[.]

Pennoyer v. McConnaughy, 140 U.S. 11, 13-14 (1891); In re Ayers, 123 U.S. 443, 506 (1887)

Propriety of an Injunction:

The most dispositive of Warterfield's claims is the propriety of an injunction. Fed. R. Civ. P. 81 and The Rules Governing §2254 Cases, Rule 12 seems to allow an injunction pursuant to Fed. R. Civ. P. 65 under the proper circumstances. Warterfield petitioned for both a preliminary and permanent injunction, however inartfully.

A preliminary injunction is an extraordinary remedy that shall only issue if movant shows: (1) substantial likelihood of prevailing on the merits; (2) substantial threat of irreparable injury if injunction is not granted; (3) threatened injury outweighs any harm that will result to non-movant if injunction is not granted; and (4) injunction will not disserve public interest. Canal Authority of State of Florida v. Calloway, 489 F.2d 567, 572 (5th Cir. 1974).

For a permanent injunction, plaintiff must demonstrate that: (1) it has suffered irreparable injury; (2) remedies at law, e.g. monetary damages, are inadequate to compensate for that injury; (3) considering balance of hardships between plaintiff and defendant, remedy in equity is warranted; and (4) public interest will not be disserved by permanent injunction. ITT Educational Services, Inc. v. Arce, 533 F.3d 342, 347 (5th Cir. 2008).

In addition to these criteria for injunction, the primary authority Petitioner relies on for requested injunctive relief is Ex parte Young, 209 U.S. 123 (1908). He seeks through injunctive

relief to restrain Texas officials from:

(1) Further enforcement of two constitutionally repugnant Texas statutes where continued enforcement abridges Warterfield's vested plea agreement rights protected by the Federal and State Contracts Clauses and the Federal Due Process Clause of the Fourteenth Amendment thereby working irreparable injury; and

(2) Enjoining Texas officials' continuing failure to perform their promises and obligations of contract under the 1994 plea agreement where such refusals to perform violate Petitioner's vested rights thereby infringing the Due Process Clause of the Fourteenth Amendment as interpreted by Santobello v. New York, 404 U.S. 257 (1971).

> The various authorities we have referred to furnish ample justification for the assertion that individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal Court of equity from such action.

Ex parte Young, 209 U.S. at 155-156 (1908).

Collection of the judgements and sentences void ab initio, sure to occur absent judicial intervention, is the "positive official act" threatened to occur under authority of unconstitutional acts of the Texas Legislature.

> In making an officer of the State a party defendant in a suit to enjoin enforcement of an act alleged to be unconstitutional it is plain that such officer must have some connection with enforcement of the act...[i]t has not, however, been held that it was necessary that such duty be declared in the same act which is to be enforced...[t]he fact that the State Officer by virtue of his office has some connection with the enforcement

> of the act is the important and material fact, and whether it arises out of the general law, or is specially created by the act itself, is not material so long as it exists.

Ex parte Young, 209 U.S. at 157 (1908).

Plea Agreement Infringements Common in Both Cases:

Where an infringement of Petitioner's vested plea agreement rights occurred in one prosecution and are the exact same in the other prosecution, a swift injunction to Texas officials is warranted to cease a continuation of irreparable harm; that is, confinement pursuant to judgements and sentences that are void ab initio and maintained and enforced pursuant to those unconstitutional Acts.

Contract Clause:

The ultimate infringement is that both case #691635-X and #867045-X were indicted on October 21, 2010; that is about eleven years after immunity from prosecution became a perfected contractual right in 1999.

As mentioned, a fundamental inducement for pleading guilty in 1994 was limiting and conditioning the circumstances under which prosecution, if any, of a list of cases, both misdemeanor and felony, could occur for which Petitioner was suspected by the Prosecutor of committing. Among the conditions for prosecuting at formation of the contract on April 18, 1994, both case #691635-X and #867045-X had a ten year statute of limitations from offense date. See Acts 1987, 70th Leg., Ch. 716, §1, eff. Sept. 1, 1987. At formation, case # 691635-X was set to expire on about October 1, 1999, and case # 867045-X was set to expire on or about December 9, 1999. However,

this limitations was extended after contract formation in 1997; two years prior to expiration by Acts 1997, 74th Leg., Ch. 740, §1, eff. Sept. 1, 1997. The relevant statute of limitations was extended again in 2001 and then eliminated in 2007.

The question thus becomes: Are these three extensions applicable to the two cases since they became effective prior to expiration of the statute of limitations as explained in Stogner v. California, 538 U.S. 607 (2003), or, as Warterfield contends, does the ten year statute of limitations in existence at formation of the 1994 contract become a fixed obligation of contract subject to neither nonperformance nor impairment unless the Federal Due Process Clause and, or the State and Federal Contracts Clauses be thereby infringed?

Analysis:

Because the 1994 plea agreement between Texas and Warterfield is considered a contract, courts use contract principles and jurisprudence to determine its content and proper enforcement in a criminal case. Jones v. State, 488 U.S. 801, 805 (Tex.Crim.App. 2016); Moore v. State, 240 S.W.3d 248, 251 (Tex.Crim.App. 2007). This Court held in Ricketts that:

> the construction of a plea agreement and the concomitant obligations flowing therefrom are, within broad bounds of reasonableness, matter of state law[.]

Ricketts v. Adamson, 483 U.S. 1, 6 n.3 (1987).

An unreasonable application or failure to apply Texas contract jurisprudence to determine the content and proper enforcement of the 1994 plea agreement is contrary to or an unreasonable application of clearly established Federal law; vis-a-vis, Ricketts. 28 U.S.C. §2254(d).

The 1994 plea agreement is a contract protected by the Federal Contracts Clause, and even more forcefully, as shown below, by the State's Contracts Clause. "[W]ord 'contracts' in §10 of Article 1 of the Constitution is used in its usual or popular sense as signifying an agreement of two or more minds, upon significant consideration, to do or not to do certain acts. 'Mutual assent,' express or implied, 'to its terms is of its very essense.'" Carne v. Hahlo, 258 U.S. 142, 146 (1922). "The constitution of the United States embraces all contracts, executed or executory, whether between individuals, or between States and individuals[.]" Green v. Biddle, 21 U.S. 1, 92 (1821, 1823). "There is no evidence that the clause was directed solely at debtor-creditor legislation. It is phrased in general terms and appears calculated to safeguard all contractual rights from legislative interference." James W. Ely, Jr., "The Contracts Clause: A Constitutional History," p. 18 and p. 277 n.56, University Press of Kansas (2016). "The great object of the framers of the Constitution undoubtedly was, to secure the inviolability of contracts. This principle was to be protected in whatever form it might be assailed." Hon. Joseph Story, "A Familiar Exposition of the Constitution of the United States," §245.

Pursuant to Ricketts, supra, the obligations of contract are determined, for the most part, by State law. In Texas, the "laws existing at the time of contract is made becomes a part of the contract and governs that transaction." Wessely Energy Corp. v. Jennings, 736 S.W.2d 624, 626 (Tex. 1987). "Laws which subsist at time and place of making contract enter into and form part of it

as if they were expressly referred to or incorporated in its terms. This rule embraces alike those which effect its validity, construction, discharge, and enforcement." Edwards v. Kearzey, 96 U.S. 595, 601 (1877). The ten year statute of limitations in existence at formation is a fixed obligation of contract as aplied to case # 691635-X and #867045-X.

Not only are statutory laws in existence at formation expressly incorporated into the 1994 contract as fixed obligations, but so too are the provisions of the Texas Constitution.

> To this we may add, that since the Constitution is also a law - the supreme law - Sec. I, Art. 16, prohibiting enactment of laws impairing the obligations of contract also becomes part of each contract, protecting it to the extent of the meaning of that clause from impairment even by constitutional amendment.

Langever v. Miller, 124 Tex. 80, 83, 76 S.W.2d 1028 (1934).

The Texas Supreme Court explained the scope and meaning of the Texas Contracts Clause in the case immediately preceeding Langever. The Court unanimously held:

> We are interpreting a provision of the Constitution of Texas which had its meaning fixed at the time of its adoption as part of the organic law, and nothing said by any court subsequent to its adoption can change the meaning of our contracts clause, nor make it subject to the police power, in fact of the Bill of Rights which declares it is not subject to that power.

Travelers' Ins. Co. v. Marshall, 124 Tex. 45, 78-80, 76 S.W.2d 1007 (1934).

The provision of the Texas Bill or Rights (all of Article 1) that the Travelers' Court relied on to declare that the Texas Contracts Clause is not subject to an exercise of police power is Art I, Section 29, which states:

> Sec. 29. PROVISIONS OF BILL OR RIGHTS EXCEPTED FROM POWERS OF GOVERNMENT; TO FOREVER REMAIN INVIOLATE. To guard against transgressions of the high powers herein delegated, we declare that everything in this "Bill of Rights" is excepted out of the general powers of government, and shall forever remain inviolate, and all laws contrary thereto, or the following provisions, shall be void.

Texas is one of four States with a provision of this sort adopted as The Will of the People; "we declare." In "The Constitution of the State of Texas: An annotated and Comparative Analysis," by George D. Braden et al. (1977), it claims ipse dixit that this Inviolability Clause is ambiguous and "[p]resumably Section 29 was designed as a closing flourish to emphasize the importance of the Bill of Rights." Id., at p. 85. There was nothing further to support this conclusory "presumption." Petitioner views Section 29 not as a superfluous "closing floursih," but as a deliberate, substantive, and meaningful provision intended to unambiguously declare the level of protection and solicitude those rights engender against encroachment by the State; specifically, absolute protection. Whats more, contrary to Mr. Braden et al., the language is pellucid, simple, and unambiguous. The Travelers' Court apparently viewed Section 29 this way, and so does the authoratative Vernon's:

> This section, in excepting everything in the bill of rights out of the general powers of government and stating such rights included therein are to remain inviolate, places these rights beyond the power of the State government to usurp; it reserves these rights to the people.

Vernon's Constitution of the State of Texas (Annotated), Art. I, §29, "Interpretative Commentary," p. 302 (Thomson/West 2007).

"This section is so plain that construction thereof is unnecessary." Faulk v. Buena Vista Burial Park Ass'n, 152 S.W.2d 891, ___

(Civ.App. 194?); Gold v. Campbell, 54 Tex.Civ.App. 269,) , 117 S.W. 463 (Civ.App. 1909). "[B]ecause the Texas Constitution circumscribes the limits of legitimate legislative action, it provides Texas citizens greater protection than that found in the federal constitution." Sastterfield v. Crown Cork & Seal Co., Inc., 268 S.W.3d 190, 205 (Tex.App. - Austin 2008).

Petitioner argues that legislation impairing the obligations of the 1994 plea agreement contract is repugnant to both Federal and State Contracts Clauses. However, the protection afforded the sanctity of the contract is greater under the State's Contract's Clause, and being in nature a plea agreement, doubly so. The Federal Clause waxed during the Marshall and Taney Courts, and then waned during the Progressive and New Deal Eras of the early Twentieth Century. It became modestly less atrophic with a confusing revitalization starting with U.S. Trust Co. of New York v. New Jersey, 431, U.S. 1 (1977). That case solidified a Circuit splitting 3-part balancing test. C.f. Michael Cataldo (2015) "Revival or Revolution: U.S. Trust's Role in the Contracts Clause Circuit Split," St. John's Law Review: Vol: 87: No. 4, Article 9 found at http://scholarship.law.st.johns.edu/lawreview/vol97/iss4/9. Little has changed since. The amorphous and pliable criteria of the 3-part test has been used in more recent cases; e.g. United Healthcare Ins. Co. v. Davis, 602 F.3d 618 (5th Cir. 2010).

In contrast, the Texas Contracts Clause, though derived from and informed by the Federal Contracts Clause circa 1876 when the Texas Constitution was adopted as The Will of the People, has a comparatively and significantly more expansive scope of protection

when read in context with the Art. I, §29 Inviolability Clause. Whats more, it is fixed and unmalleable - there is no 34part balanc-] ing test nor a binary "reasonable and necessary" police powers exception. Even if the police power exception did apply, no where has the State or the Courts responded to the Contracts Clause claim! There has been no counter-argument or reasoned opinion as to if and how the exception would apply to a plea agreement that was itself an exercise of police power.

As shown previously, the State's Contracts Clause is an obligation of the 1994 plea agreement; thus protected by the Federal Constitution. The content of the contract, defined in part by the status of the laws at formation, does not change an iota from the day it was formed. At formation, the State had until on or about October 1, 1999 to indict #691635-X and until on or about December 9, 1999 to indict #867045-X. The 1997 extension of the Statute of limitations, Texas Code of Criminal Procedure, Art. 12.01 cannot extend that nor the 2001 and 2007 amendments revive.from repose.

At formation, the expiration of the statute of limitations applicable to a particular crime results in amnesty or immunity from prosecution. "Statute of limitations are acts of grace in that soveriegn surrenders its right to prosecute, or right to prosecute at its discretion, and they are thus considered to be acts of amnesty." Ex part Matthews, 933 S.W.2d 134, 136 (Tex.Crim.App. 1996). "Limitations is an absolute bar to prosecution in a criminal case." Ex parte Smith, 178 S.W.3d 797, 802 (Tex.Crim.App. 2005).

The pivotal question is: Can the State retroactively impair

the obligations of contract and perform those obligations pursuant to subsequent legislation, or is the obligations fixed with the ten year limitations annexed to case #691635-X and #867045-X?

If the only applicable statute of limitations for these cases was fixed at formation of the contract, then both expired in 1999, the indictment shows on its face that it was outside the applicable statute of limitations thereby depriving the trial court of jurisdiction, the cases cannot be revived without running afoul of the Ex Post Facto Clause, and immunity from prosecution is a vested right of Warterfield's under the contract. The Prosecutors lacked authority and standing to prosecute, and the trial court lacked the power to impose punishment. Being that the two judicial judgements and sentences are void ab initio and the current confinement illegal (irreparable injury), an injunction that reaches as far as the ca cause of the illegal confinement is still viewed by Petitioner as lawful and necessary.

Due Process Clause:

Additionally and alternately, under the Due Process Clause of the Fourteenth Amendment, are the Prosecutors required to make, and the Courts to interpret and enforce, the plea agreement's obligations governed only by the laws in existence at formation, or may they use legislation enacted subsequent to formation to govern performances?

Petitioner's reasonable understanding of the agreement when pleading guilty was that the ten years statute of limitations as applicable to any cases listed in the agreement would become fixed.

He did in fact discuss those limitations with his attorney before pleading guilty as the trial transcripts show. Being a plea agreement, it was not viewed as an aleatory contract. Thus, it was a reasonable understanding that the limitations would expire in 1999 for both of the cases with 1989 offense dates, and that any extension IF passed prior to expirations could not be retroactively ap applied to the fixed provisions of a plea agreement contract.

Moreover, under Mabry v. Johnson, 467 U.S. 504 (1984), a plea agreement must be voluntary. Under Boykin v. Alabama, 395 U.S. 328 (1969), a plea agreement must be knowingly and voluntarily entered into. "Waivers of constitutional rights not only must be voluntary, but must be knowing, intelligent acts done with sufficient awareness of the relevant consequences." Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 1468 (1970). Being able to unilaterally alter the obligations of contract seemed to be EVERY unlikely consequence. Inarguably, future legislation was not known to Warterfield when he plead guilty on April 18, 1994. It was reasonable for him to rely on the laws at formation to become fixed obligations that govern per performances to the exclusion of futur Legislative Acts./

To bolster this as a reasonable understanding of the plea agreement's obligations of contract, the State's conduct had been consistent therewith until 2010. Their permitting the investigation, testing of evidence, and prosecution of these cases to slumber for 16 years after the agreement is but general conduct. Specific conduct is that the State was destroying relevant evidence on October 1, 1999 - the exact expiration for the ten year statute of limitations

for case #691635-X. Such destruction required disregarding the 1997 extension that, if applicable, indicated evidence preservation. Petitioner's pro se subpoenas duces tecums in both state postconviction proceedings seeking other such conduct consistent with his reasonable understanding was either ignored or belatedly denied.

It has been said that the "legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place..." INS V. St. Cyr, 533 U.S. 287,(3171(2001). In that case, it was reasonable for St. Cyr to rely on existing immigration law that provided for discretionary, as opposed to mandatory, deportation when he plead guilty. It is just as reasonable for Warterfield to have relied on the existing statute of limitations to the exclusion of subsequent extensions for amnesty from prosecution when he plead guilty. Though St. Cyr and the current case are distinguishable on points like legislative intent to make legislation retroactive, the foundational due process concerns are not negated by any differences in the cases. As state in St. Cyr;

> A statute has retroactive effect when it takes away or impairs vested rights acquired under existing laws, or creates new obligations, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past...the judgement whether a particular statute acts retroactively should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations.

St. Cyr, 533 U.S. at 321 (2001)(internal quotation marks and citations omitted).

In St. Cyr, Congress was silent about retroactivity. In this case, Texas clearly intended the statute of limitations to apply retroactively for cases which had yet to expire when the amendment

went into effect. However, whatever its intentions, the Texas Legislature does not have the power to impair the obligations of contract, especially so for a plea agreement, nor infringe rights vested under such a contract.

As part of the plea agreement negotiations, unconditional immunity from prosecution to date in exchange for a guilty plea was rejected by Prosecutor who reserved the right to prosecute the listed cases. Petitioner and Prosecutor thus agreed to and reasonably relied on conditional immunity from prosecution as the then existing statute of limitations provided. No statute at formation was excepted, excluded, or varied from as part as part of the agreement; thus were they found agreeable to the parties. The Prosecutor had almost 5 more years to prosecute, but did not exercise this discretion he reserved. It is an unconstitutional bait and switch for the Prosecutor to use and rely on the laws in existence at formation to induce a guilty plea to then make performances under laws subsequently enacted. Specifically, that bait and switch infringes the Due Pro Process Clause of the Fourteenth Amendment.

The preceeding arguments under the Contracts Clause and Due Process Clause also apply, for the most part, to an additional law in existence at formation of the April 18, 1994 contract. Specifically, the prohibition against subsequent search warrants in existence at formation. See Acts of May 25, 1977, 65th Leg., R.S., Ch. 237, 1977 Tex. Gen. Laws 640, 641. It too is a fixed obligation of contract that cannot be impaired by the 1995 elimination of that prohibition. See Acts 1995, 74th Leg., Ch. 670, §1, eff. Sept. 1, 1995. Moreover, the obligation is not subject to nonperformance.

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If this obligation of contract not been impaired and performed as it existed at formation, Texas would have been prohibited from obtaining a subsequent search warrant for Petitioner's DNA, as was done in 2010 as part of the prosecution of case #691635-X and #867045-X. Instead, the State would have and should have been confined to the 1992 DNA warrant and collection in order to prosecute those cases.

However, in addition to being confined to the 1992 warrant as an obligation of contract, two more obstacles to prosecution using the 1992 DNA warrant and collection exist. First, that warrant's "Affidavit for Probable Cause" is not signed by the Affiant, and there is no other Oath or Affirmation as required by the Fourth Amendment in orderto issue that warrant. Second, the State is estopped by contract from using the 1992 DNA warrant and collection in either case #691635-X or #867045-X. The contract states in relevant part:

> 2. Prosecutor agrees this conviction will not be used as an extraneous offense or act against the Defendant in any subsequent case of which the prosecution has knowledge. (Exhibit "A")

The conviction that was agreed to not be used is the 1994 negotiated conviction, and Exhibit "A" is the list of cases, noth misdemeanor and felony, for which the prosecution had knowledge. The 1992 DNA warrant was obtained during the investigation of the case which led to the 1994 conviction (#681460-A). That warrant is an elemental constituent of that conviction without which not conviction, negotiated or otherwise, would have been obtained. To use a part of the 1994 conviction is a fortiori to use the conviction, and the State is estopped by contract from such use in 691635-X

District Court issuing its "Final Judgement" dismissing with prejudice that §2254 action as time-barred under 28 U.S.C. §2244(d)(1)(A). First, that judgement ipso facto is not "final" due to being issued during the pendency of a valid and lawful interlocutory appeal under 28 U.S.C. §1292(a)(1). Second, arguendo it is a valid final judgement, it is plain error for that District Court to determine the §2254 action was time-barred (4:17-cv-330-ALM). As demonstrated by Petitioner to that Court and to this Court above, the prosecution of #867045-X is void ab initio because the indictment was obtained almost eleven years after immunity had become a vested contractual right of Warterfield's; the applicable statute of limitations had intervened. Being so, the State had relinquished their right to prosecute, and that grant of amnesty may not be recalled under any circumstances. Petitioner did not waive his right to immunity from prosecution. Moreso, the trial court did not have jurisdiction to impose its judgements and sentence. The prosecution thus being null and void, no conviction exists that can be called "final." With no final conviction, 28 U.S.C. §2244(d)(1)(A) is inapposite as it cannot be calculated without a final conviction. Thus, the District Courts assertion that the §2254 Petition is time barred is plain error and a misapplication of the AEDPA statute of limitation's clear and unambiguous language.

Immunity from prosecution was also perfected in 1999 under the 1994 plea agreement for case #691635-X. It too is void ab initio. The USDC for the Northern District of Texas, Dallas Division denied the §2254 Petition in that case (3:18-cv-3154-N). The case is

currently before the Fifth Circuit under Cause No. 21-10782 wherein Petitioner is requesting issuance of a COA.

Thus, the claim that the obligations of contract have been unconstitutionally impaired and, or not performed has been presented time and again to State and Federal Courts, including this one. (18-7042). No Court in the land has provided a reasoned opinion that addresses whether the 1994 contract's obligations have been unconstitutionally impaired or whether Prosecutors have to make performances, and courts to interpret and enforce, the contract governed by the status of the laws in existence ta formation.

If Petitioner's claims are ever correctly reviewed, there is a substantial likelihood of success on the merits. Being incarcerated for the rest of his life despite being fully vested with immunity from prosecution is plainly irreparable harm that will continue with out intervention; the sooner, the less irreparable harm. A whole remedy, rather than piecemeal, is equitably warranted. There are no other adequate remedies at law or by habeas corpus. Only swift equitable relief reaching both cases simultaneously will abate the irreparable harm of an unjust incarceration. Having Prosecutors uphold their agreements and Courts the rule of law is a service to the public's interest; something the Courts below have left to this Court. Such is why an injunction should issue after granting the Petition for a Writ of Certiorari.

CONCLUSION

What originally was a litigation strategy to speed things up by the justifiable issuance of an injunction that results in the

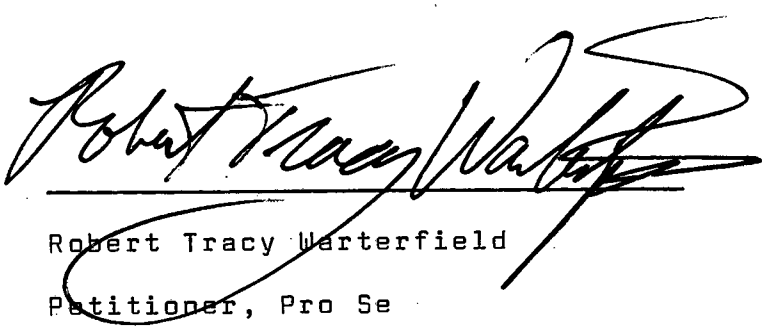
termination of incarceration achieved by enforcement of two unconstitutional statutes and collection of punishment pursuant to Judgements and Sentences that are null and void has been disrupted by the District Court's misconstruement of Petitioner's injunctive pleading. Seeking to have that wrong righted by a lawfully perfected interlocutory appeal was short-circuited by the premature issuance of a final judgement by the District Court. In order to issue that final judgement, the District Court usurped the role of the Court of Appeals and determined that it had correctly construed the pro se pleading, in effect sitting in appeal of its own ruling. Whats more, contrary to the Fifth Circuit's perogative to determine for itself its own jurisdiction, the District Court determined that the Court of Appeals' grant of §1292(a)(1) jurisdiction was improvident and then prematurely issued the putative final judgement in §2254 action and additionally denying the Rule 59(e) Motion.

The Fifth Circuit permitted this usurpation of its perogatives by dismissing the interlocutory appeal as moot. In a continuation of this error, the Fifth Circuit then assumed §1291 jurisdiction on a motion for COA despite the judgement of the District Court being ipso facto not "final."

As envisioned, if the District Court had properly construed, considered on the merits, and granted the injunction as part of the habeas corpus proceeding, it would have realized along the way that §2244(d)(1)(A) is inapposite in this case because the prosecution is void ab initio, that the vested immunity from prosecution is inviolable, that relief should be equitably applied to both

cases, and the unconditional grant of habeas relief thereby properly effected to the extent to which the infringements reach. Instead, October 2021 marked eleven years of incarceration in contravention of Petitioner's vested rights under the plea agreement. Petitioner respectfully and sincerely prays that this Honorable Court will grant this Petition for Writ of Certiorari for the issues deemed worthy of its time.

Respectfully SUBMITTED this 18th day of October, 2021.



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