22-5294 ORIGINAL

No. _____

FILED
JUL 22 2022
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

Warner Gary Wayne (PRO SE) PETITIONER
(Your Name)

vs.

Bobby Lumpkin Director (TDCJ) — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Fifth Cir.Court of Appeals No.21-10019
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

2661 fm 2054 Warner Gary Wayne
(Your Name) PRO SE

2661 FM 2054
(Address)

Tenn.Colony, Tx.75884
(City, State, Zip Code)

(Phone Number)

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QUESTION(S) PRESENTED

1 [QUESTION ONE]: DOES THIS COURT HAVE [JURISDICTION & POWER]-TO GRANT CERTIORARI-EXCUSED LIMITION BAR AN CORRECT FUNDAMETAL MISCARRIAGE OF JUSTICE-DENIAL OF COA BY 5th CIR. COURT OF APPEA-LS-IN LIGHT OF **Borden v.U.S.**-WARNER IS ACTUALLY INNOCENCE OF NOT BEING CONVICTED OF A DELONY AGGRAVATED ASSAULT-PRIOR CONVICT-ION-FALSELY USED BY ADA Ms.(P. Houge)-AS A HABITUAL LIFE SENTE-NCE AS NEW PRESENTED EVIDENCE SHOW THE PRIOR CONVICTION IS A MISDEMEANOR-AS WARNER CASE SHOULD BE AN EXCEPTION TO THE McQuig-gin/Bousley -LIMITATION BAR ?

2.[QUESTION TWO]: IN LIGHT OF THE DENIAL OF [FUNDAMENTAL MISCARR-IAGE OF JUSTICE]-DENIAL OF CAO-DOSE THIS COURT HAVE-[JURISDICT-ION AND POWER]-TO GRANT CERTIORARI-RESOLVE SPLIT IN CIRCUIT COU-RTS: WHETHER "NEW PRESENTED RELIBLE EVIDENCE **NOT** PRESENTED AT **TRIAL**-"NEW EVIDENCE **WRONGLY WITHHELD** & DISCOVERED **AFTER TRIAL**-PRESENTED DURING HABEAS PROCEEDING-ALLOWS COURTS TO **EXCUSED LIMITATION BAR** ?

3.[QUESTION THREE]: IN LIGHT OF THE MANDATE IN Hainer v.Kemer- & THE DENIAL OF PRO SE PETITIONER'S REQUEST FOR A COA-DOES THIS COURT HAVE-[JURISDICTION AND POWER]-TO GRANT CERTIRARI-EXCUSED LIMITATION BAR-[LIBERALLY CONSTRUED]-WARNER'S ACTUALLY INNOCE-NCE OF NOT HAVING BEEN CONVICTED OF FELONY AGGRAVATED ASSAULT CONDUCT ELEMENT-[§12.42(d)]-IN LIGHT OF **Borden v.U.S.**-ERRONEOUS-LY INCREASE IN MANDATORY MINIMUM SENTENCE-[FUNDAMENTALLY MIS--CARRIAGE OF JUSTICE-EXCEPTION TO LIMITATION BAR-BOUSLEY ?

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:

RELATED CASES

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STATUTES AND RULES **PAGE NUMBER**

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 _____.

[✓] An extension of time to file the petition for a writ of certiorari was granted to and including May 2, 2022 (date) on July 28, 2022 (date) in Application No. 21 A 660.

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

DUE PROCESS OF LAW U.S.C.A 5th, 8th, 14th

STATEMENT OF THE CASE

Petitioner Mr.GARY Warner W, an inmate illegally incarcerated in the Texas Departemnt of Criminal Justice-CID, filed a 28 USC §**2241** petition in the Northern District Court Dallas County Texas, and had been [**ORDER**] to [**CHANGE**]-his filed 28 USC §**2241** into a 28 USC §2254 a amend formed sent to Mr.Warner by the clerk-(doc 11)- such order had been issued by Honor.judge (Ms.Irma Carrillo **Ramirez**-(7/15/2020). The amended petition was filed and or received on Aug -18,2020-)doc 15).

Mr.Warner did file three state petitions for [WRIT OF MANDAMUS: (1) the first filed in the Fifth District Court of Appeals on January 7,2010, and denied on February 9,2010; (2) the second was filed in the Fifth District Court of Appeals on July 26,2018, and denied on August 6,2018; and (3) the third was filed in the Texas Supreme Court on March 11,2019, and denied on June 14,2019. See In re Warner,No.05-10-00205-CV, (Tex.App.-Dallas 2010); In re Warner,No.19-0345 (Tex.2019). Mr.Warner multiple attempts over the course of ten years or more seeking to CORRECT THE PRIOR CONVICT-ION ALL ATTEMTPS FALIED].

On February 3,1999, Mr.Warner was falsely convicted of escape in cause number F.98-48916 in the Criminal District Court No.2 Dallas County, for which he was illeglly sentence to life imprison -ment.-(Doc.15 at 2). Mr.Warner claims that his sentence for esca pe in the 1999 case was illegly enhanced due to a false prior 1991 conviction falsely alleged to be a felony aggravated assault-(doc 15 at 2). Mr.Warner's conviction and sentence in the 1999 case were affirmed by the Fifth District Court of Appeals on February

5, 2001. See Warner v.State No.05-99-00217-Cr (Tex.App.-Dallas 20-01). Mr.Warner did not file a petition for discretionary review (PDR) with the Texas Court of Criminal Appeals. Mr.Warner's state habeas application in 1999 case, received and deemed filed on June 21,2002, was denied without a written order on July 31,2002. See Ex part Warner,WR-52,843-03 (Tex.Cr.App.2002). Mr.Warner filed a federal habeas petition challenging his illegal escape conviction and sentence on August 15,2002 (No.3:02-CV-1961-N-BF, doc.1). On April 15,2003, it was dismissed without prejudice at his request-(does 21-22).

On September 28, 2020, it was recommended that the petitione be denied as barred by statute of limitations (doc 17). Mr.Warner fi-led objections to the (R & R) on December 1,2020-(doc.20).

The (R & R) to deny the petition was accepted on Dec.7 2020, and judgment was entered on Dec.8,2020 (doc.21-22). Mr.Warner filed his request for COA in the Fifth Cir. Court of Appeals on Jun.16, 2021. and the Fifth Cir denied COA on Feb.28,2022, one day after his B-day Feb.27,2022 (56-years old).

This Honor Court granted Mr.Warner an extesion of time within to file a petition for a writ of certiorari. Application No.21A660 -due date is July 28,2022. This Petition is timely filed, as he do PRAY that this Honora Court grant review.

Mr.Warner is NOT FILING THIS PETITION TO DELAY THIS HONOR. COURT PROCEEDING, NOR IS HE FILING THIS PETITION IN BAD FAITH, BUT IS FILING THIS PETION IN GOOD FAITH, AND PRAY THIS HONOR. COURT WILL GRANT REVIEW. AND SO PRAY.

REASONS FOR GRANTING THE PETITION

1. [QUESTION ONE]: DOES THIS COURT HAVE [JURISDICTION AND POWER]-TO GRANT CERTIORARI-EXCUSED LIMITATION BAR AN CORRECT FUNDAMETAL MISCARRIAGE OF JUESTICE]_-DENIAL OF COA BY 5TH CIR. COURT OF APPE-ALS-IN LIGHT OF Borden v.U.S.-WARNER IS ACTUALLY INNOCENCE OF NOT BEING CONVICTED OF A FELONY AGGRAVATED ASSAULT-PRIOR CONVICT-ION FALSELY USED BY ADA Ms.Houge-AS A HABITUAL LIFE SENTENCE-AS NEW PRESENTED EVIDENCE SHOW THE PRIOR CONVICTION IS A MISDEME-ANOR-AS WARNER CASE SHOULD BE AN EXCEPTION TO THE McQuiggin/Bousley-LIMITATION BAR ?

A. The panel and or a single judge, improperly sidesteped the COA process by denying relief based on its view of the merits.

In reviewing the facts and circumstances of Mr.Warner's case, the Fifth Circuit panel and or a single judge, "paidlip service to the principles guiding issuance of a COA" Tennard v.Dreket,542 U.S.275, 283 (2004). Spectifically, the Fifth Circuit panel and or a single judge "sidesteped the thresheld C.O.A. process by first deciding the merits of [Mr.Warner's] appeal, and then just-iying its denial of a C.O.A. based on the merits, thereby "in essence deciding an appeal without jurisdiction." Miller-El v. Cockrell,537 U.S.322 [at 332-37] (2003).

As the Supreme Court held on Miller-El, the threshold nature of the C.O.A. inquiry "would mean very little if applellate review were denied because prisoner did not [CONVINCE] a judge, or that matter three judges, that he or she would [PREVAIL]". Miller-El,537 U.S.322 [at 377].

In Mr.Warner's case however, that is exactly what the penal and or single judge did. As Mr.Warner filed a application for issuance of a certificate of appealability, so that he may appeal the district court's denial of his habeas petition. The penal and or a single judge however, determined that Mr.Warner although

the Court never stated, Mr.Warner was [NOT] actually innocence , it essentally [ACCEPT AS TRUE] and or admitted thoes allegation -[U.S. v.Baynes,662 F.2d 66 (CA3 1980)]-Warner's undisputed evide -nce of his actually innocenec of the felony habitual enhanced life sentence, because newly discovered evidence, shows that his prior Texas conviction is a [UNARMED MISDEMEANOR ASSAULT]-Grey v. State,298 S.W.3d 644, 658 (Tex.Cr.App.2009)-at [547]-[FALSELY MISCHARETERIZED] and use by ADA Ms.P. Houge as a felony habitual life sentence-[§12.42(d). See Appendix (C); trial Court record at (RR.Vol.4,pg26, L's.7-8).he was sentent to prison for aggravated assault [WITH A DEADLY WEAPON]-False, and denial of Due Process.

New wrongly withheld evidence-[Brady v.Marland,373 U.S.83]-violation-by ADA (Ms.Houge)-as such information shows that Warner is being wrongfully imprisoned-life sentence as a habitual felony -[§12.42(d)]-for a criminal history he [DID NOT HAVE], in light ADA (Ms.P. Houge's)-falsely misrepresents fraudulent evidence as such to the sentencing judge, in support of he felony habitual offender enhancement life sentence.

Mr.Warner asserts that, the State trial Court's sentencing [DEC -ISION] was impermissbly [INFLUENCED] by [MATERIALLY FALSE AND MISLEADING INFORMATION]-given to the Court by ADA (Ms.P. Houge). HE HAD BEEN SENT TO PRISON FOR AGGRAVATED ASSAULT WITH A DEADLY WEAPON]-Untrue, false. See attached copy of plea agreement contra -ct Appendix (C). See also Miller v.Pate,383 U.S.217 L.Ed.2d 690 87 S.Ct.785 (1967); Townsend v.Burke,334 U.S.736,741, 68 S.Ct. 1252, 1255, 92 L.Ed.1690 (1948).

Therefore, the erroneous [INCREASE] in Mr.Warner's mandatory

minium from 2 to 10 years made his sentence [FUNDAMENTALLY DEFECT -IVE]-this because, an [INCREASE IN THE LEGISLATIONALLY MANDATED SENTENCING FLOOR IMPLICATES SEPRATION OF POWER PRINCIPLES] and [DUE PROCESS]-rights fundamental to our justice system".

Specifically, the Court should find Mr.Warner's sentence [FUN -DAMENTALLY DEFECTIVE]-because the trial court was [WRONGLY PRE-VENTED] from exercing the [PROPER RANGE OF HIS SENTENCING DISCRET -ION]. Relying on [TWO] Supreme Court cases. First as observed that in Hicks v.Oklahoma,447 U.S.343, 100 S.Ct.2227, 66 L.Ed.2d 175 (1980), the Supreme Court found a fourteenth Amendment violat -ion where a jury imposed a 40-year mandatory sentnee under a [HABITUAL OFFENDER STATUTE] that was later struck down. Without the enhancement, the jury could have imposed a sentence as low as ten-years. [id at 346].

Likewise in Mr.Warner's case, without the false enhancement,as a felony aggravated assault with a deadly weapon, the trial court statutory discrection would have been expanded by a much [LOWER MANDATORY MINIMUM]- of 2 to ten years without any enhancement at all. See Ex parte Rich,194 S.W.3d 508, 511 (Tex.Cr.App.2006); Bor -den v.U.S.141 S.Ct.1817 (2021); Haley v.Cockrell,306 F.3d 257, 265 (5th Cir.2002), vacated eub num, Dretke v.Haley,541 U.S.386, 124 S.Ct.1847 (2004).

Second, as discussed, United States v.Tucker,404 U.S.443, 92 S.Ct.589 (1972), in that case the Supreme Court vacated a 25-year sentence that the judge had clearly based on two prior convictions that were later ruled constitutionally invalid. id at [444-45 & 4 48-49]. The Court explained that the sentence was not "[IMPOSED

IN THE INFORMED DISCRECTION OF A TRAIL JUDGE]" but instead rest-ed upon [MISINFORMATION OF CONSTITUTIONAL MAGNITUDE] and [ASSUMPT _IONS CONCERNING THE DEFENDANT'S CRIMINAL RECORD]-which were [MAT -ERIALLY UNTRUE], id at [447]. Such is the case here.

Mr.Warner's sentence was [SIMILARLY DEFECTIVE]: the trial court assumed his prior conviction was sufficient to double his statuto -ry minimum when in fact, it was not. See Allen v.Ives,950 F.3d 1184 (9th Cir.2020)(granted COA)(held that a person may be [ACT -UALLY INNOCENT[of an [ERRONEOUS] mandatory career offender sen -tence, opening door for relief).

Illuminated by the light of new presented evidence, wrongly with held by ADA (Ms.P. Houge), the fog has lifted, Mr.Warner's is actually innocence of the act in which his harsher life sentence is based, same as Allen v.Ives,950 F.3d 1184 (9th Cir.2020); and Borden v.U.S.141 S.Ct.1817 (2021); Haley v.Cockrell,306 F.3d 257 (5th Cir. 2002), vacated sub num, Dretke v.Haley,541 U.S.386, 124 -S.Ct.1847 (2004).

From a [MERITORIOUS] review of the record, the Court should find that this is the [RARE CASE]. The Court should find that Mr.Warner right to due process was violated when he was sentence as a [HABI -TUAL OFFENDER] because the State [fa]iled to prove an [ESSENTAL ELEMENT]-[§12.42(d)]-Alleyne v.United State,570 U.S.99, 107-09 (2013)-Ex parte Rich,195 S.W.3d 508, 511 (Tex.Cr.App.2006)-of the habitual statute-[TWO FELONIES]-prior conviction.

Mr.Warner asserts that, this [EVIDENTIARTY DEFICIENCY] deprived him of due process of law, and he move for an [ACQUITTAL OF THE HABITUAL SENTENCE CHARGE]-Jackson v.Viginia,443 U.S.307 (1979).

See also U.S. v.Roman-Huerats,848 F.3d 72 (1st Cir.2017) at [78].

Mr.Warner, has shown that he [IS A VICTIM OF A MISCARRIGE OF JU -STICE]-as it IS UNDISPUTED]-that his sentence of [LIFE]-is enhan -ce [WITHOUT] a valid [FACTUAL BASIS], yet he [REMAINS INCARCERAT -ED]-pursuant to that [FUNDAMENTALLY DEFECTIVE LIFE SENTENCE IN CAUSE NUMBER F98-48916 escape], An incarceration is equally [UNJU -ST] when premised on an [ERRONEOUS SENTENCE OR AN ERRONEOUS CONV -ICTION]. E.g., Dretke,541 U.S.at[398], 124 S.Ct.1847 (2004).

Mr.Warner has, made a [PRIME FACIE] showing of actual [FACTUAL] innocence-[Bousley v.U.S.,118 S.Ct.1604 (1998)]-of not having been found guilty, nor convicted-[F91-41758]-of the [GRATER] felony aggravated assault carrying a finding that he [USED A DEADLY WEAP -ON]- See Appendix(C),but had been convicted of UNARMED MISDEMEAN -OR ASSAULT, lesser included offense. See Grey v.State,298 S.W.3d 644 (Tex.Cr.App.2009). In light of [ALL] the evidence, it is more [LIKELY THAN NOT THAT **NO REASONABLE JUROR** WOULD HAVE CONVICTED HIM] as having been sent to prison <u>two time for a felony</u>, as such, a juror would [NOT HAVE FOUND THE STATE HABITUAL FELONY-[§12.42(d)] -true, and would [NOT have sentnce Mr.Warner to life imprison.

Mr.Warner requesting the Honor. Court to [INVOKE THE COMMON LAW MISCARRIAGE OF JUSTICE EXCEPTION] to post ADEPA jurisprudential limitation bar-(523 U.S.at[623]); Bousley v.U.S.,118 S.Ct.1604 (1998); McQuiggin v.Perkins,133 S.Ct.1924 (2013), and grant him [REVIEW] and [CORRECT HIS ILLEGAL LIFE SENTENCE]- and so [PRAYED].

2. [QUESTION TWO]: IN LIGHT OF THE DENIAL OF [FUNDAMENTAL MISCARR -IAGE OF JUSTICE]-DENIAL OF COA-DOES THIS COURT HAVE [JURISDICTION AND POWER]-TO GRANT CERTIORARI-RESOLVE SPLIT IN CIRCUIT COURTS: WHETHER "NEW PRESENTED **RELIBLE** EVIDENCE **NOT** PRESENTED AT **TRIAL**-"NEW EVIDENCE **WRONGLY WITHHELD** & DISCOVERED **AFTER TRIAL**-presented DURING HABEAS PROCEEDING-ALLOWS COURTS TO **EXCUSED LIMITATION BAR**

-**ONCE** A ["**PRIMA FACIE**"]-SHOWING OF ACTUALLY INNOCENCE OF STATUS AS A HABITUAL/CAREER OFFENDER-ERRONEOUSLY INCREASE IN MANDATORY MINIMUM SENTENCE-BASED ON MATERAL FALSE INFORMATION-IS SHOWN ?

B. It appears that Mr.Warner's case presents a [SPLIT IN CIRCUIT] subsequent to [Schlup v.Delo,513 U.S.298, 326 (1995)]-McQuiggin v. Parkings,133 S.Ct.at [1935-36]..

The Circuit hav disagreed upon what the U.S. Supreme Court, [Mea -NT] by ["NEW"] part of ["NEWLY RELIABLE EVIDENCE **NOT PRESENTED AT TRIAL**], in the contect of a habeas petition based on claim of act -ual innocence of status as a habitual/career offender. Ex parte Rich,195 S.W.3d 508, 511 (Tex.Cr.App.2006); Williams v.Warden,713 F.3d 1332 (11th Cir.2013).Mills V.Jordan,979 F.2d 1273 (7th Cir. 1992); Grooms v.Lockhart,919 F.2d 505 (8th Cir.190); Haley v. Cockrell,306 F.3d 257 (5th Cir.2002),vacated sub num on other gro -unds, Dretke v.Haley,541 U.S.386 (2004).

The district court in this case, stated that the evidence was not "NEW"-[R & R at 9]. This statement and finding [IS] contra ry to the holding of Schlup/McQuiggin actual innocence gatway, does not ONLY requires that the "NEW EVIDENCE" be [NEWLY DISCOVER -ED]. The Seventh Circuit in Gladey v.Pollard,799 F.3d 889, 899 (7th Cir.2015),id at[898], had [REJECTED] limiting Schlup inquiry to newly discovered evidence: All Schlup requirs is that the "NEW EVIDENCE IS RELABLE and it was [NOT PRESENTED AT TRIAL]-Schlup,51 -3 U.S.at[324].

The Six Circuit has [ALSO] interpreted this analysis in Clevela -nd v.Bradshaw,693 F.3d 626 (CA6 2012), but the Fifth Circuit app -earts to [DISAGREE] with this analysis. See Wright v.Quarterman, 470 F.3d 581 (5th Cir.2006) Mr.Warner not only presented new

[RELIABLE] evidence, but also presented [NEWLY DISCOVERED EVIDENCE **FIRING** OF ADA (Ms.P. Houge)-for a [**Brady** v.**Maryland**]-violation] in the case of Mr.Antron Lynelle **Johnson**-she withheld evidence of his [ACTUALLY INNOCENCE]. See Appendix(E).

1."NEWLY DISCOVERED & NEWLY PRESENTED EVIDENCE NOT PRESENTED AT TRIAL BUT PRESENTENTED DURING HABEAS PROCEEDING & RELIABLE"

The evidence was "relevant and material. First, it discreded ADA (Ms.P. Houge)-CREDIBILITY, and also show [she comitted FRAUD] on the COURTS. Godly v.U.S.,5 F.3d 1473 (Fed.Cir.1995). Id at (R-R.Vol.4 pg.26,L's 7-8):he sent to prison for aggravated assault with a deadly weapon]-See also Appendix(C)-Newly presentend evide nce [NOT] presented at trial..

Second, it also support Mr.Warner actually innocence of not hav-ing been found guilty nor convicted of a feloy aggravated assault carrying a finding that [HE USED A DEADLY WEAPON]- but convicted of a lesser-included offense of an [UNARMED MISDEMEANOR ASSAULT], and as a matter of law [ACQUITTED BY ABANDONMENT] of the [GRATER] offense-. Grey v.State,298 S.W.3d 644 (Tex.Cr.App.2009). Third, it support a Brady violation. Appendix (E), is newly discovered evid-ence also. ADA Ms.Houge did violate defense counsel [FILED-Brady motion]-Brady v.Marland,373 U.S.83. The exculpatory value of the plea bargain contract agreement along with a copy of the news report showing the [FIRING of ADA Ms.P. Houge], is new and reliab-le, and [NOT] presented at trial, [IS] sufficient to [UNDERMINE CONFIDENCE IN THE OUTCOME OF Mr.Warner's trial]. id.

Mr.Warner asserts that, this Honor Court should find, ADA Ms.Ho-uge's "EGREIOUS PROSECUTOR MISCONDUCT" bore [**FRUIT**], resulted in a clear ["FUNDAMENTAL MISCARRIAGE OF JUSTICE"]- and amount to a

[Oregon v.Kennedy,456 U.S.667, 106 S.Ct.2083 (1983)]-violation and such as ADA Ms.Houge [DEFRAUDED THE COURT]- [PERJURY]-[FALSELY USED EVIDENCE PRIOR JUDGMENT AS A FELONY AGGRAVATED ASSAULT WITH A DEADLY WEAPON]_ SUPPRESSED EVIDENCE]-BREACHED CONTRACT PLEA BAR -GREEMENT]-as She know ther was [NO] finding that Mr.Warner used a deadly weapon]- She could have [CORRECTED Mr.Warner's sentence of life imprisonment]- once put on [NOTICE] during the State habe as proceeding, but chosed [NOT TO]. Mr.Warner is requesting that any and all case and charge be dismissed, as he so [PRAY] that th is Honor. Court [GRANT REVIEW].

3. [QUESTION THREE]: IN LIGHT OF THE MANDATE IN Hainer v.Kemer-AND THE DENIAL OF PRO SE PETITIONER'S REQUEST FOR A COA-DOES THIS COURT HAVE-[JURISDICTION AND POWER]-TO GRANT CERTIRARI-EXCUS -ED LIMITATION BAR-[LIBERALLY CONSTRUED]-WARNER"S ACTUALLY INNOC -ENCE OF NOT HAVING BEEN CONVICTED OF FELONY AGGRAVATED ASSAULT CONDUCT ELEMENT-[§12.42(d)]-in light of Borden v.U.S.-ERRONEOUSLY INCREASE IN MANDATORY MINIMUM SENTENCE-FUNDAMENTALLY MISCARRIAGE OF JUSTICE-EXCEPTION TO LIMITATION BAR-Bousley ?

C. It was error to deny Mr.Warner's request for a C.O.A., as a pro petitioner, request a COA to pursue his federal due process const -itutional violation in order to [CORRECT HIS ILLEGAL LIFE SENT-ENCE].

In light of Borden v.U.S.,141 S.Ct.1817 (2021)-Mr.Warner [IS] [ACTUALLY INNOCENT]-of not having been convicted nor found guilty of a felony aggravated assault-prior conviction erroneously used as a-[§12.42(d)]-habitual felony, falsely increase in his mandato -ry minimum sentence of 2 to 10 years. See Ex parte Rich,195 S.W. 3d 508, 511 (Tex.Cr.App.2006); Grey v.State,298 S.W.3d 644 (Tex.C -r.App.2009).

On the basis of [LIMITATION BAR], the lower Court's order of de -nial [HAS] resulted in Mr.Warner as a pro se petitioner and [OTH

-ER PRO SE PETITIONER'S ALIKE]-having to spend [ADDITIONAL YEARS] in prison, when Court's [FAILED] to [LIBERALLY CONSTRUED] the pleadings by reviewing pro se complaints for [SUBSTANTIVE MERIT], rather than for [TECHNCAL PROCEDURAL COMPLIANTCE], and examined the face of the record to assertain whether a colorable claim [EX -ISTS THAT WAS NOT EXPRESSLY [ADDRESSED]-but was presented by pro se petitioners which his complaints..

Each judge that reviewed Mr.Warner's pro se claim, failed to [ADHERED] to its judcial duites to afford pro se litigent wide latitude in pleading his claim and to [UPHOLD] the United States Supreme Court [MANDATE] in Haines v.Kemer,404 U.S.519 (1972).It is well-established that this practice of liberally construing pr -o se pleadings is a proper judicial function that does not trans from a judge into an advocate for a habeas petitioner. Barnett v Hargett,174 F.3d 1128 (10th Cir.1999), id at[1133].

This Honor. Court, in construing Mr.Warner's pro se pleadings liberly, will find that he is raising a DUE PROCESS CHALLENGE TO THE LENGHT OF HIS ILLEGAL LIFE SENTENCE. In Mills v.Jordan,979 F. 2d 1273 (7th Cir.1992)-pro se habeas petitioner raised [MISCARRIA -GE OF JUSTICE] argument before the district court by making [STATEMENTS IN PRO SE PETITION] that could have been [CONSTRUED] as claim of [INNOCENCE]-of committing [PRIOR LARCENY] which as [BASIS FOR ESTABLISHING **HABITUAL OFFENDER STATUTS**],strictly ap -plying [WAIVER] rule where pro se petitioner arguably [INVOKED MISCARRIAGE OF JUSTICE DOCTRINE]-would be [**INCONSISTENT**] with nature of [MISCARRIAGE OF JUSTICE DOCTRINE]-which serves as [LAST LINE OF DEFENSE TO **FUNDAMENTALLY UNJUST INCARERATION**]).at [1277-78]. Mills holding is on point with Mr.Warner's claim.

On page 7 of the district court's (Findings, Conclusions, and Recommendation), clearly understand Mr.Warner's claims in his petition. Contrary to its finding and denial of relief, it does [CONFLICT WITH THE LAW AND FACTS]. Mr.Warner argued before the district Court that he had been [ACQUITTED BY ABANONMENT]-after [JEOPARDY ATTACHED]- [ACQUITTAL OF THE **GRATER OFFENSE OF AGGRAVAT -ED ASSAULT CHARGE**], once the trial Court [CONSENT TO]-contract plea bargaing agreement-[Appendix(C)]-[Tex.Code. Crim.Art.37.14] -**Parker** v.State,626 S.W.2d 738, (Tex.Cr.App.1981); **Grey v.State**, 298 S.W3d 644 (Tex.Cr.App.2009); U.S. v**Hoeftner**,626 F.3d 857 (5th Cir.2010). **Smith** v.Massachusetts,125 S.Ct.1129 (2005).

At such time of the consent of the contract agreement, for the State to [ABANDON AGGRAVATING **ELEMENT**:CONDUCT OF USE OF A DEADLY WEAPON]-**ALLEYEN** v.U.S.,570 U.S.99 (2013)-would NO[longer be [PUS HABLE AS A 3rd DEGREE FELONY AGGRAVATED ASSAULT. **Prichard** vState, 553 S.W.3d 315 (Tex.Cr.App.2017). As a matter of law, the offense had been reduced to lesser-incled offense of-[**UNARMED MISDEMEANOR ASSAULT**]. See **U.S.** v**Frownfelter**626 F.3d 549 (10th Cir.2010)(FELONY /MISDEMEANOR) plea bargaing agreement, the Court correct the offe nse from a [FELONY to a MISDEMEANOR]. **Grey** v.State,298 S.W.3d 644 (Tex.Cr.App.2009)(case on point as to an abandonment of the aggrav -ating element deadly weapon-aggravated assault case).

Contrary to the denial of his motion for nunc pro tunc, seeking to [CORRECT] the prior judgment as a [MISDEMEANOR ASSAULT]- it appears that the trial Court clearly [ABUSED IT DISCRETION]-and in conflict with facts and law. The Court should have correctthe judgment based on the fact that there was no longer any [AGGRAVAT

-ING DEADLY WEAPON FINDING]-in order to support the judgment as such, and contrary to the plea bargain contract agreement.

In **Duran** v.State,492 S.W.3d 741, 745 (Tex.Cr.App.2016)-the Court of Criminal Appeals, held that, state [ABANDON CHARGE OF AGGRAVAT -ED ASSAULT] in the middle of trial and after [JEOPARDY HAD ATTAC -TED, trial court could [NOT RELY UPON ABANDON TRIAL COURT'S VERD -ICT TO SUPPORT **JUDGMENT AS AGGRAVATED ASSULT WITHOUT A FINDING OF USE OF A DEADLY WEAPON**) id at [749]. That is what the Court did when it denied Mr.Warner's motion, as the Court of Criminal made clear, the trial court [COULD **NOT RELY** UPON **ABANDON** TRAIL COURT'S **VERDICT** TO SUPPORT JUDGMENT AS AGGRAVATED ASSAULT **WITHOUT A FIND -ING OF USE OF A DEADLY WEAPON**]. See also Findings, Conclusions and Recommendation at page (7). See also Appendix(C)-(D).

Mr.Warner asserts that each court review his claim, has truned a [BLIND **EYE**]- to a clear and UNDISPUITED DENIAL OF DUE PROCESS OF LAW and a FUNDAMENTALLY UNJUST INCARERATION, and a clear FUNDAMEN -TALLY MISCARRIAGE OF JUSTICE, as Mr.Warner has shown that he is actuall innocence, just as did Mr.Hisey. See U.S. v.Hisey,12 F4th 1231 (10th Cir2012), on remand, the district court granted Hiseys §2255 motion and vacated his conviction. U.S. v.Hisey,2021 U.S. DistLx.236541 (D.Kan.2021). Bousley v.U.S.523 U.S614 118 S.Ct. 1604 (1998).

Mr.Warner asserts that, the district court [DID NOT] find his claim of actual innocence [NOT TRUE] (R & R at.8-9)-his guilty plea arguably precludes this claim, such finding conflicts with the mandate of this Court in Bousley v.U.S..,523 U.S.614, 140 L.E d.2d 828, 118 S.Ct.1604 (1998), as Mr.Warner did claim that his plea of guilty and plea of TRUE were both [INVOLUNTARY], and the

district court knows of such claim-[R & R at 3]- but chosed to tr uned a [BLIND **EYE**]-without determine whether such plea was in fact [INVOLUNTARY]. AS ther is an [EXCEPTION TO SUCH WAIVER RULE]-See Ex parte **Rich**195 S.W.3d 508, 511 (2006).

Mr.Warner also asserts that his pleas of guilty and plea of true where involuntarily entered because the ADA P.(Houge), gave false information as to the true nature of the prior charge offense as a FELONY AGGRAVATED ASSULT WITH A DEADLY WEAPON-(RR.Vol.4,pg.26,L -s.7-8). Ms. Houge also perpetrated a [FRAUD ON THE COURT]- illeg -ally sentence Mr.Warner life imprisonment, [KNOWINGLY].

Mr.Warner assert that the district court did not find his claim of actually innocence-]NOT CERDIBLE]., as such the district court [FOUND] Mr.Warner to be [ACTUALLY INNONCE]-claim [MERITORIOUS ON ITS OWN]. See U.S. v. **Baynes**,662 F.2d 66 (CA3 1980). Finding of a meritorious claim of actually innocence was the only first step in the Court's anaysis, such finding-[OVERCOMES THE ASSERTED UNTI -MELINESS OF HIS PETITION]-McQuiggin,133 S.Ctat[1935-36].

Mr.Warner pray that this Honor Court will [NOT] trune a blind eye to a clear and [UNDISPUTED DENIAL OF DUE PROCESS OF LAW], and a clear and [UNDISPUTED FUNDAMENTALLY UNJUST INCARERATION]- resul -ted in [FUNDAMENTALLY MISCARRIAGE OF JUSTICE]-an illegal life sentence in which Mr.Warner has did **24-years FLAT.**

Mr.Warner request an acquittal of the habitual charge under the holding of this Court mandate of [Oregon v.**Kennedy**,456 U.S.667]- do to the on going due process violation in which ADA (Ms.Houge has caused such denial of due process of law, and violation 8th U.S.C.A. And so pray the Court will grant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: 7-20-2022