22-5832

No. _____

FILED
OCT 06 2022
OFFICE OF THE CLERK
SUPREME COURT, U.S.

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT SCHMITT — PETITIONER
(Your Name)

vs.

THE STATE OF TEXAS — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

TEXAS COURT OF CRIMINAL APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ROBERT JOSEPH SCHMITT
(Your Name)

1300 FM 655
(Address)

ROSHARON, TEXAS 77583
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION PRESENTED

Was respondent denied due process of law when the trial court cumulated respondent's two twenty year sentences when the law in effect enacted by the Texas Legislature states that offenses committed before September 1st, 1997 were to run concurrently?

*****Note*** Failure of this Honorable Court to grant certiorari in this case will result in respondent serving an additional 10-flat calendar years in prison on a sentence he was not legally eligible to receive.**

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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TABLE OF AUTHORITIES CITED

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STATUTE **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 _____ 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[ ] is unpublished.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 _____ 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[ ] is unpublished.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 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[✓] is unpublished.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 B 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.

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 _____ (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 9/15/2022. A copy of that decision appears at Appendix A.

[ ] 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

UNITED STATES CONSTITUTION
AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Respondent, Robert Schmitt, was charged by way of a two-count indictment that on or about June 9th, 1997 and on or about November 1st, 1996, Schmitt sexually assaulted a child.

Respondent proceeded to trial to face these allegation in 2000 and was found guilty by a jury. The jury specifically found that in both Counts I and II, find the defendant guilty of sexual assault of a child as charged in the indictment.

Upon finding respondent guilty, the prosecutor requested the trial court to stack the sentences under Section 3.03 of the Texas Penal Code. Respondent's trial counsel did not object and the trial court proceeded to stack respondent's sentences.

However, and the crux of respondent's request for certiorari to be granted in this case is that respondent was not legally illegible for the sentences he received by Legislatively enacted statute as follows:

Respondent puts forth that statutory exception enacted on September 1st, 1997, allowing for imposition on consecutive sentence for crimes arising out of same criminal episode did not apply to allow imposition of consecutive sentences for offenses committed prior to effective date of statute, as in respondent's case.

Respondent contends and will demonstrate with certainty that the trial court

erred by ordering respondent's sentences to run consecutively rather than concurrently. If multiple offenses arising out of a single criminal episode are tried together, the court must order the sentences to run concurrently in accordance to Texas Penal Code, Section 3.03. An exception was enacted by the Legislature, Section 3.03(b), effective September 1st, 1997, the exception provides that the trial court may direct sentences for certain crimes to run consecutively or concurrently. The exception, however, is not applicable to offenses committed in advance of September 1st, 1997.

Respondent was granted parole on the first Count after serving 17 flat calendar years of the 20-year sentence. Respondent has now served 3-years on the second Count and will not become eligible for parole until he has served 10 flat calendar years.

Due to the fact that there is no legal basis for respondent's sentences to be stacked, it follows inexorably that respondent has been denied due process of law and because of the constitutional error by the trial court clearly resulted in the imposition of an unauthorized and illegal sentence, it also follows that respondent is a victim of a miscarriage of justice entitled to immediate and unconditional release.

Failure of this Honorable Court to grant certiorari will result in respondent

serving an additional 10-years in prison on a sentence he was not legally eligible to receive as a matter of law.

REASONS FOR GRANTING THE PETITION

The Texas Court of Criminal Appeals, against their own precedent case law which will be demonstrated herein, has so far departed from their own accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

Failure of this Court to exercise it's supervisory power will result in respondent serving an additional 10-years in prison on a sentence he was not legally eligible to receive as a matter of law.

APPLICABLE TEXAS LAW

The general Rule is that multiple sentences for multiple convictions arising out of the same criminal episode and prosecuted in a single criminal action shall run concurrently. See Texas Penal Code §3.03(a).

In 1997, the Legislature amended the Texas Penal Code Ann. §3.03, to add some sexual offenses committed against a victim younger than seventeen to the list of offenses subject to consecutive sentencing when there are multiple convictions in a single trial. These amendments went into effect September 1st, 1997, and applied to offenses committed on or after the effective date of the Act. See Acts 1997, 75th Leg., R.S,. Ch 667, sections 2(b), 8, p. 2251, 2253, eff. September 1st, 1997 (currently codified in Texas Penal Code, §3.03(b)(2)(A)).

These 1997 amendments became effective September 1st, 1997, and provided that the change in law "applies only to an offense committed on or after the effective date of this Act," and that an offense committed before the effective date of this Act is covered by the law in effect when the offense was committed and the former law is continued in force for that purpose. See Ex parte Bahena, 195 S.W. 3d 704 (Tex.Crim.App. 2006).

The indictment in cause number 296-81160-00 allege that respondent committed Count I on June 9th, 1997, and Count II on November 1, 1996, both criminal offenses before September 1st, 1997. Respondent declares that the trial court enacted an unlawful and illegal sentence when he stacked the sentences.

However, as shown above, the Texas Legislature created exceptions to the general Rule §3.03(b). One such exception involves the section under which respondent was convicted. This exception was specifically made non-retroactive and is applicable exclusively to offenses committed on or after September 1st, 1997. Yet, the trial court did order respondent's sentences to be run consecutively despite that the offenses were committed prior to September 1st, 1997.

Respondent asserts that statutory exception to sentencing provision allowing for imposition of consecutive sentences for criminal offense arising out of the

same criminal episode did not apply to his case to allow imposition of two twenty year sentences for sexual assault to run consecutively, whe the offenses occurred prior to the statutes effective date. V.T. C. A., Penal Code §3.03 (Vernon Supp. 2002); Yebio v State, 87 S.W. 3d 193 (Tex.App.-Texarkana 2002); See also Flores v State, 2009 Tex. App. Lexis 6808 ("The defendant was convicted by the jury of three counts of indecence with a child by contact. The trial court ordered that the convictions be served consecutively. On appeal to the 13th District Court of Appeals, the State, in the interest of justice, disclosed to the Court "that because the offenses that resulted in stacked sentences occurred prior to September 1st, 1997, we should sustain the issue and modify the trial court's orders to reflect that the sentences are to be served concurrently." The 13th COA's concurred and modified the trial court's orders.

Respondent holds first that the trial judge erred by ordering the sentences to run consecutively rather than concurrently. If multiple offenses arising out of a single criminal episode are tried together, the court must order the sentences to run concurrently, Texas Penal Code §3.03 (Vernon Supp.2003); See also Hendrix v State, 150 S.W. 3d 839 (Tex.App.-Houston [14th Dist.] 2004). On September 1st, 1997, the Texas Legislation carved out several exceptions to this general rule, Texas Penal Code Ann. §3.03(b). However, these exceptions apply only to

offenses committed on or after the effective date of September 1st, 1997:

> **A) The change in law made by this Act applies only to an offense Committed on or after the effective date [September 1st, 1997] Of this Act. For purposes of this section, an offense is committed Before the effective date of this Act if any element of the offense Occurs before the effective date.**
>
> **B) An offense committed before the effective date of the Act is Covered by the law in effect when the offense was committed And the former law is continued in effect for that purpose.**

Acts of June 13th, 1997; 79th., Leg., R.S. 667, §7, 1997, Tex.Gen.Laws 2250, 2250-2253; See also Hendrix, 150 S.W. 3d 852, supra; Malone v State, 163 S.W. 3d 785 (Tex.App.-Texarkana 2005). These exceptions were enacted in 1997 when the Legislature amended Section 3.03 of the Texas Penal Code and were made specifically non-retroactive. Owens II v State, 96 S.W. 3d 671 (Tex.App.-Auston 2003).

Respondent argues that the pre-September 1st, 1997 offense date recited in the indictment and judgments given the jury's specific finding of guilty as charged in the indictment, in this cause, bars cumulation of the two sentences. Both instruments document that the offenses occurred on or about November 1st, 1996 and June 9th, 1997.

In support of respondent's assertion, Nichols v State, 56 S.W. 3d 76 (Tex.App.-Houston [14th Dist.] 2001), states that prior to 1997, the Legislature

required multiple convictions arising out of the "same criminal episode" and presented in a single action" as in respondent's cause, to run concurrently.

Despite the Legislatively enacted statute, and the case law cited to support the statute, the Texas Court of Criminal Appeals refuses to grant respondent relief.

It should be noted that the Honorable Judge Roy Wheless of the 366th Judicial District Court of Collin County, Texas actually granted relief to respondent in 2009 to no avail as follows:

Respondent while researching the law discovered the Texas Penal Code, Section 3.03 which he interpreted that his sentences were to run concurrently as both offenses occurred prior to September 1st, 1997. Respondent wrote to State Counsel for Offenders who researched the issue and concurred that respondent's sentences were in fact unlawful and illegal. Attorney, Nicholas Hughes was assigned to my case and filed a Motion Judgment Nunc Pro Tunc challenging the sentences and on March 9th, 2009, the Honorable Judge Roy Wheless GRANTED the Nunc Pro Tunc acknowledging the sentence to be "illegal and unlawful" under Texas Penal Code §3.03 and remedied the error by deleting the cumulation order. Under the Texas Penal Code §3.03 (1995), the entitlement to concurrent sentences in my case was both automatic and mandatory.

The State appealed to the 5th District COA's on the sole ground that a Nunc Pro Tunc was not the appropriate vehicle to challenge an illegal sentence. In a narrow ruling focused only on the single ground the State presented, the COA's overturned the 366th District Court's ruling and reinstated the original sentence.

Respondent filed for a Petition for Discretionary Review which was GRANTED and on September 12th, 2012, the Court of Criminal Appeals affirmed the lower COA's ruling, writing in their opinion: "...as much as Schmitt's error has merit, we narrowly rule on the issue presented" and affirm the lower COA's opinion.

Both the Texas Court of Criminal Appeals and the Court of Appeals refused to exercise their individual supervisory power and rule on the fact that respondent was serving an illegal and unlawful sentence despite the Court of Criminal Appeals case law in Mizell v State, 119 S.W. 3d 804, 806 (2003), which states: "There has never been anything in Texas law that prevented any court with jurisdiction over a criminal case from noticing and correcting an illegal sentence").

The Texas Court of Criminal Appeals and the 13th District Court of Appeals note that respondent's claim has merit but instead of exercising their supervisory power, hide behind the fact that respondent was filing under an

"improper procedural vehicle" and choose to ignore the miscarriage of justice in favor of a finding of procedural default.

The State argued in response to my PDR that there is a :summer of 1998" offense and this offense justifies the judge to cumulate the sentences. I was not indicted for any offense occurring after September 1st, 1997 and where the jury is the finder of fact, "issues of fact which increase a defendant's punishmnet range must be submitted to a jury." (Respondent understands that cumulation orders are up to the trial court judge). Since respondent was not indicted and convicted for any offense after September 1st, 1997, nor any special finding was made that an offense occurred after September 1st, 1997, the trial court was bound by law to impose concurrent sentences. Therefore, the imposition of concurrent sentences must follow according to the 1995 version of the Texas Penal Code. What the State misleadingly argues to support the unlawful cumulation order is irrelevant.

As to the occurrence of any unindicted post September 1st, 1997 offense not properly resolved by the jury, the trial judge illegally and without authority pronounced an illegal and unlawful sentence and deprived respondent of his right to due process of law by not imposing statutorily mandated concurrent sentences.

In respondent's latest attempt to rectify the illegal sentences, he hired attorney, Daniel Willingham, who had a zoom meeting with the Collin County assistant district attorney on November 3rd, 2021 in hopes of collaborating on the fact that the sentence in respondent's case is unlawful and illegal and sending an agreed Motion to Delete the Unlawful Cumulation Order to the Court of Criminal Appeals. Collin County District Attorney, Mr. Greg Willis, refused and stated that "he has the conviction" and will not concede to correcting respondent's sentences. Mr. Willis added that he would challenge any Motion filed on my behalf. This coming from a District Attorney who declares that his mission is to "fulfill his Oath by looking to his prosecutorial compass—the law" and expresses his primary duty is "not to convict, but to see that justice is done," in respondent's case his conduct appears antagonistic and antipathitic to his expressed mission, oath, and compass.

Respondent, as briefly as possible brings to your attention two cases similar to his that need to be discussed. The first case is Ex parte Carter, 521 S.W. 3d 344 (Tex.Crim.App. 2017) and a case this Court should know well, Dretke v Haley, 124 S.Ct. 1847 (2004).

In Ex parte Carter, Justice Alcala states the following in her dissenting opinion which is directly on point with respondent's argument, with the

exception that Carter would remain unlawfully confined for five years beyond what the law permitted. In respondent's case, respondent will serve a minimum of ten years in prison on top of the 17 flat calendar years he has already served to make parole on the first sentence being unlawfully confined beyond what the law permits. Justice Alcala states the following:

"This Court's judgment unjustly permits the incarceration of a person under circumstances in which the law absolutely disallows it. The consequences of today's plurality opinion is that Roger Dale Carter, applicant, will have to serve five additional years in prison beyond what the law permits under these circumstances. Applicant's habeas complaint is one founded in the theory that he will be unlawfully confined for five years beyond what the law permits due to the trial court's failure to abide by the terms of Section 3.03 of the Penal Code. Section 3.03 mandates that sentences such as the ones at issue here "shall run concurrently." See Texas Penal Code §3.03(a). The trial court had no discretion to cumulate applicant's sentences for these offenses that arose from the same criminal transaction and were resolved in the same proceeding. Applicant, the State, and the habeas court appear to agree that the trial court's cumulation order violated the mandatory terms of Section 3.03 by ordering that applicant's credit card abuse sentences run consecutively to his burglary sentence. Despite

the fact that the interested parties agree that the cumulation order is erroneous, and despite the fact that our Texas Constitution has provided for a habeas remedy for this type of wrongful incarceration, today's plurality opinion denies applicant relief for his unlawful restraint. I disagree with this Court's plurality opinion because it denies applicant's two habeas complaints that provide independent and alternative grounds for relief. Rather than reject applicant's claims, first, I would grant relief to applicant as to his ground that demonstrates that he is unlawfully restrained due to the trial court's wrongful cumulation order. Alternatively, second, I would remand applicant's ground that complaints of ineffective assistance of trial and appellate counsel under the rationale that applicant's attorney's failed to challenge the wrongful cumulation order."

The above stated is exactly what respondent's claims are: First, the trial court clearly erred and erroneously abused his discretion by sentencing respondent to consecutive sentences when the statutory law in effect allowed only concurrent sentences. Secondly, respondent claimed ineffective assistance against both his trial and appellate counsel.

Continuing further in Ex parte Carter, supra, Justice Richardson states in part that: "...There is no disagreement that applicant's sentences were improperly stacked—the statute mandates that his sentences run concurrent.

The trial court judge should have been aware of this. While the initial error was on the trial court judge, everyone else with a law degree missed it too—the prosecutor, applicant's trial counsel, and his appellate counsel. Although this critical mistake was made by the trial court judge, the prosecutor, trial counsel, and appellate counsel, applicant is the one who will be paying for that mistake by serving an extra five years behind bars. It took applicant representing himself to bring this error to the trial court's attention—applicant raised the improper stacking issue through his pro se application for a writ of habeas corpus. Yet, today, this Court says too bad—too little, too late."

"...I am perplexed that we are in support of the State's argument that a procedural bar applies when potentially meritorious ineffective assistance of counsel claims remain unresolved. This exact position was not so well–received by the Supreme Court over a decade ago. In Dretke v Haley, the State of Texas admitted that the sentence was illegal, but maintained that it should be upheld because of a procedural bar–all while ignoring a potential ineffective assistance of counsel claim. The justices responded to the State's argument with puzzlement:

JUSTICE KENNEDY: Can..you tell me...I don't want to derail the argument...you've conceded that this sentence is unlawful?

SOLICITOR GENERAL: Yes, Justice Kennedy.

JUSTICE KENNEDY: Well, then why are you her? Don't..is there some rule that you can't confess error in your State or?

SOLICITOR GENERAL: No, Justice Kennedy, but the State is here, because the State is concerned about the impact on the procedural default rule, in particular the Fifth Circuit's decision.

JUSTICE KENNEDY: Well, so a man does 15 years so you can vindicate your legal point in some other case? I...I just don't understand why you don't dismiss this case and move to a lower sentence."

Justice Richardson further states in footnote #7: "The Dretke case clearly highlights that, when applicant's have potentially meritorious ineffective assistance of counsel claims, there would be "cause to excuse the procedural default." In fact, Justice Stevens commented during the Dretke argument that he always thought there was "a manifest injustice exception to the procedural default rule." In this case, enforcing a prison sentence that is five years longer than legally allowed is a manifest injustice."

Respondent, Robert Schmitt, will serve an additional ten years minimum in prison just to become eligible for parole (already having served 17 years on the first 20 year sentence and three years into the unlawful/illegal second sentence).

Respondent's case represents the truest meaning of a fundamental miscarriage of justice and this "manifest injustice should be an exception to any procedural default rule." How do you hold it against respondent when the trial judge was the cause of the initial error, the prosecutor clearly misstated the law, trial counsel failed to know the law and appellate counsel missed the error on direct appeal. How is this held against respondent when he has no legal training and depended on "professionals to do their individual jobs competently?

It should be noted that after attorney Willingham spoke via a zoom meeting with the ADA, he filed in the Texas Court of Criminal Appeals a Motion titled: SUGGESTION THAT THE COURT, ON ITS OWN MOTION, RECONSIDER IT'S ORDER DISMISSING WITHOUT A WRITTEN ORDER SCHMITT'S HABEAS CLAIM. This was placed on the Court's docket on 2/22/22. Attorney Willingham took a position at the attorney generals office and after seven months of waiting for an answer from the Court of Criminal Appeals, respondent filed a Motion titled: APPLICANT RESPECTFULLY REQUESTS THIS HONORABLE COURT TO HOLD AN EN BANC HEARING ON APPLICANT'S PREVIOUS AND PENDING SUGGESTION TO RECONSIDER ON THIS COURT'S OWN MOTION. This was placed on the docket 9/12/2022. On 9/15/2022, the Court of Criminal Appeals denied

respondent's suggestions without written order.

With the case law of Dretke v Haley, 124 S.Ct. 1847 (2004) in mind. Respondent believes that this Honorable Court, through an "actual innocennt claim" should excuse any procedural default.

ACTUAL INNOCENCE CONSIDERATION APPLIES TO THE SENTENCE IMPOSED

In Dretke v Haley, supra, "This Court refused to apply the "actual innocence" exception to the non-capital sentencing error, but instead remanded with instructions to address the merits of Haley's ineffective assistance of counsel claims relating to sentencing error which would grant the same relief."

It should be noted that in respondent's case, the Court of Criminal Appeals has upheld the State's request that respondent has procedurally defaulted any claims including that of ineffective assistance of counsel. This Court truly is the Court of last resort for respondent.

In Duggar v Adams, 109 S.Ct. 1211, 1217, n.6 (1989)("This Court held that: "If one is actually innocent" of the sentence imposed, a federal court can excuse the procedural default to correct a fundamentally unjust incarceration."
See also United States v Maybeck, 23 F.3d 888 (4th Cir. 1994)("The Court found that: "actual innocence " exception to "cause and prejudice" requirement for

consideration of issue despite procedural default extends to non-capital sentencing enhancement cases; and defendant was prejudiced by career offender sentencing designation for which he was actually innocent and, therefore, was entitled to relief despite procedural default"). In order to be "actually innocent" of a non-capital sentence, within meaning of exception to procedural default rule, habeas petitioner must prove that, but for the sentencing error, he would not have been legally eligible for the sentence he received. See Haley v Cockrell, 306 F.3d 257 (5th Cir.2002).

Respondent's claim is "supported by the miscarriage of justice" exception to what otherwise would be a procedurally defaulted claim by the case law listed above. The prejudice in this case is manifest. Respondent was sentenced by the jury to serve 20-years on Count I and 20-years on Count II. The law in effect does not allow the trial judge to stack the sentences. There is no factual basis for respondent's sentences to be stacked, it follows inexorably that respondent has been denied due process of law. See Thompson v Louisville, 80 S.Ct. 624 (1960); Jackson v Virginia, 99 S.Ct. 2781 (1979). And because the trial judge's constitutional error clearly resulted in the imposition of an unauthorized/illegal sentence, it also follows that respondent is a "victim of a fundamental miscarriage of justice." See Wainwright v Sykes, 97 S.Ct. 2497 (1977).

In the opinion that first adopted the cause and prejudice standard, the Supreme Court explained its purpose providing "an adequate guarantee" that a procedural default would "not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice." This Honorable Court has since held that in cases in which the cause ans prejudice standard is inadequate to protect against fundamental miscarriages of justice, the cause and prejudice requirement, "must yield to the imperative of correcting a fundamentally unjust incarceration." See Engle v Isaac, 102 S.Ct. 1558 (1982).

CONCLUSION

In a society devoted to the rule of law, the difference between violating or not violating a criminal statute cannot be shrugged off as a minor detail. The miscarriage of justice in this case is manifest because the record clearly shows that respondent did not violate the criminal statute in effect that would allow any court of law to cumulate his sentences. Yet, today the prejudice that respondent has faced starting with just enduring the rigors of the penal system, respondent had to serve 10-flat calendar years to become eligible for parole on the first 20-year sentence. Respondent's first parole review resulted in his receiving a 3-year

set off which expired in July of 2014. At respondent's next parole review he received another 3-year set off. (It must be noted that respondent is an S-3 State Approved Trusty and has never done anything to reduce his chances for parole).

At the present time, respondent has been granted parole on the first 20-year sentence after serving more than 17-years. Respondent is now serving the third year of the second illegal sentence and will have to serve 10-flat calendar years just to become eligible for parole. If granted his first parole on the second sentence, respondent will have served 27-flat calendar years straight that respondent will have been incarcerated when he was legally ineligible for the cumulative sentences as a matter of law.

It is said that the law must serve the cause of justice, that statement has been ignored in the instant case. As stated previously, both the Fifth District Court of Appeals, the Court of Criminal Appeals; and the federal court's (respondent filed in federal court under the cause and prejudice standard to no avail), have had the opportunity to correct the unauthorized/illegal cumulation order. These court's were unwilling to consider respondent's claim and instead, confined their analysis to the narrow scope of whether a Nunc Pro Tunc was correct/incorrect as applied. See e.g. Mizell v State, 119 S.W.3d 804, 806 (Tex.Crim.App. 2003)("There has never been anything in Texas law that prevented any court

with jurisdiction over a criminal case from noticing and correcting an unauthorized/illegal sentence").

This should be the criminal justice's worst nightmare, the continued incarceration of one who is actually innocent of the sentence imposed. Fundamental fairness should overrule any procedural default and dictate the outcome of this simple case.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, respondent prays that this Honorable Court will find that the trial court erred when cumulating the two twenty year sentences which are illegal and unauthorized by law, and subsequently delete the trial court's cumulation order, that the two twenty year sentences will run concurrent and order the immediate release from confinement.

Respondent respectfully requests this Honorable Court to appoint counsel if additional briefing is necessary for this Court to resolve this issue.

Respectfully submitted on this the 6th day of October, 2022.

Robert Schmitt

Robert Joseph Schmitt