No. 23-7180



IN THE

SUPREME COURT OF THE UNITED STATES

Warner Gary Wayne pro se — PETITIONER
(Your Name)

vs.

Texas — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Texas Court of Criminal Appeals, Austin Tx.
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Mr.Warner Gary Wayne *00861634
(Your Name)

Coffield Unit
(Address)

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

(Phone Number)

## QUESTION(S) PRESENTED

WHETHER TEXAS COURT OF CRIMINAL APPEAL'S IS APPLYING SEC.4 [TCCP ART.11.07]-AS ADEQUATE & INDEPENDENT STATE LAW GROUND IN LIGHT OF THIS COURT HOLDING IN-[Cruz v.Arizona,143 SCt.650]-Trevino v.Thaler,133 SCt.1911-Magwood v.Patterson,130 SCt.2788-PRECLUDES SUBSEQUENTAL WRIT APPLICATION-BASED ON NEWLY DISCOVERED EVIDENCE INEFFECTIVE ASSISTANCE OF COUNSEL-BARS RE URGEING COUNSES INEFFECTIVENESS IN OTHER CAUSES DISPOSED OF IN A SINGLE "PLEA PACKAGE" INEFECTED THE INTIRE PROCEEDING ?

WOULD IT RESULT IN A "FUNDANENTAL MISCARRIAGE OF JUSTICE" TO BAR REVIEW WARNER"S COLORABLE CLAIM OF ACTUALLY & OR FACTUALLY INNOC -ENCE OF **FELONY THEFT**_ ALLEGATION HE WAS NEVER CHARGE FOR COMMITT -ING-BUT IMPROPERLY USE TO RAISE THE MISDEMEANOR ESCAPE TO A FEL _ONY ?

## 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:

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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

[ ] 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[ ] is unpublished.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[ ] is unpublished.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 White Card No opinion; 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[✓] is unpublished.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 3-23-2024 (date) on 1-18-2024 (date) in Application No. 23A522.

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: 1-23-2024, and a copy of the order denying rehearing appears at Appendix B.

[ ] 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

THE FIFTH AMENDEMNT: No person shall be held to answer for a Capi
-tal, or otherwise infamous crime, unless on a presentment of in
-dictment 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 limd; nor sha
-ll be compelled in any criminal case to be a witness against him
-self, nor be deprived of life, ;ibery, or property, without due process of law; nor shall private property be taken for pubic use, without just compensation.

THE 6th & 14th amendments of the U.S.C.A

28 U.S.C.§1651 which states:

"(a) The Supreme Court and all courts established by act of CO
NGRESS MAY ISSUE ALL WRITS NECESSARY OR APPROPRIATE IN AID OF
These pespective jurisdictions and agreeable to the uage and principle of law.

(b) An alternative writ or rule nisi may be issued by a just
-ice or judge of a court which has jurisdiction".

## STATEMENT OF THE CASE

Mr. Warner filed a subsequent application for writ of habeas corpus in Dallas County Texas, attacking the 2nd count allegation of (FELONY THEFT) made in the same indictment in the felony escape cause number F98-48916.

Mr.Warner presented Federal constitutional violation, 5th, 6th, 14 -th Amendment(s), his claim of new evidence of ineffective assist -ance of trial counsel, involuntary gulity pleas, actual innocence of FELONY THEFT ALLEGATION, in which he has never been charged for by the State of committing, but such allegation was stated in the indictment to falsely raise the misdemeanor escape to a felony.

Mr.Warner undisputed evidence of ineffective assistance of couns -el claim is based on the unpub opinion from the Court of Criminal Appeals GRANTING Mr.Warner writ of habeas corpus on his illegal life sentence. Clearly Mr.Warner could NOT have know during trial counsel was ineffective, as this appear to be the reason for the States respond.

Mr.Warner filed his respon to the States defense, The Court of Criminal Appeals agreed with the State and dismissed Mr.Warner's writ WITHOUT AN OPINION. Mr.Warner filed his rehearing in the Cou -rt of Criminal Appeal's, and it too was denied.

This Honorable Court granted him a extension of time to file in this Honorable Court. Mr.Warner was given a defective notice and more time to correct it.

This writ is timely filed-and IS filed in "GOOD FAITH".

## REASON TO GRANT THE WRIT

QUESTION NO.1:Whether Texas Court of Criminal Appeal's Is Apply -ing Sect.4 Bar [T.C.C.P.Art.11.07]-As An Adquate & Independent State Law Ground In Light Of This Court Holding In Cruz v.Arizona, 143 S.Ct.650-Trevino v.Thaler,133 S.Ct.1911-Magwood v.Patterson,1 -30 S.Ct.2788-Precludes Subsequental writ application Based on NEW -ly Discovered Post-Conviction evidence Ineffective Assistance of CounselBars Re-Urging Counsel Ineffectivness In Other Causes Dis- posed Of In A Single "Plea Package" Infected the Intire Proceeding?

A. Texas Court Of Criminal Appeal's Does Not Strickly Or Regularly Apply It's Sec.4 Bar TCCP.Art.11.07 To Identical Or Similar To Poor People Without Habeas Counsel As People With Counsel

For poor people like (Mr.Warner) without habeas counsel and OTHER (S) ALIKE, the Texas scheme for addressing claims of ineffective assistance of counsel IS BROKEN, and the Supreme Court legal scho -lars know this-[Martinez v.Ran,132 S.Ct.1309, Trevino v.Thaler,1 33 S.Ct.1911 ]. Mr.Warner, with the help of a prison lay-man at law, raised a meritorius claim of ineffective assestance of coun- sel and was granted relief from the illegal life sentence-[Ex par -te WarnerNo.74,531 (Tex.Cr.App.2003)(pre Curiam).

Based upon thie new evidence and new judgment, Mr.Warner filed subsequental application for writ of habeas corpus, raised a meritorius federal claim of ineffective assistance of counsel. Mr Warner asserts that his counsel's ineffective assistance-rendered in his aggravated assault conviction that was handled in the same "plea package" proceeding as his escaple conviction, prejudiced invalided his ples of guilty, ples of true in the escape convict-

-ion. See Ex parte Cox,482 S.W.3d 112 (Tex.Cr.App.2016); Ex parte Carney,2013 Tex.Cr.App.Unpub. Lx 92 (Tex.Cr.App.2013), See also Lafler v.Cooper,132 S.Ct.1376 (2012),id at1389 The Sixth Amend-ment violation here caused the ENTIRE process beteen Warner and the prosecution to be conducted based on an erroneous sentencing calculation, weghted against Warner.

Mr.Warner asserts that each judgments must be vacated and the petitioner returned to the position he was in prior to the plea bargain on each causes. Mr.Warner asserts he entered into a negot-iated plea and that if he would have been made aware that the aggravated assault case was capped at 20-years incarceration, and that in the escape case the indictment only authorized a convict-ion for a misdemeanor one year in the county jail, as there is no jurisdiction underlying element felony theft charge filed by the State-Bermen v.State,798 S.W.2d 8 (Tex.App.-Houston [1st Dist] 1990),pet. dism'd, improvidently granted, Hendricks v.State,817 S.W.2d 86 (Tex.Cr.App.1991)-needed to evelate the misdemeanor esc-ape to a 3rd felony.

Counsel rendered ineffective assistance because counsel failed to correctly advise him of the range of punishment applicable to this offense, and allowed him to plead guilty and true, in exchan-ge for another illegal life sentence in the escape charge, rend-ering his guilty plea involuntary. See Lafler v.Cooper,132 S.Ct. at 1389, Ex parte Carney,2013 Tex.Cr. App.Unpub Lx 92 (Tex.Cr. App.2013); Ex parte Roemer,215 S.W.3d 990 (Tex.Cr.App.2007).

Counsel's performance was deficient, his failure to object to

an error in the Court's guidelines calculation that results in an illegal life sentence, was prejudice , and there was a reasonable probility that, but for his deficient performance the result would have been different Strickland,466 U.S.at 694, a punishment less then one year. Glover v.U.S.531 U.S.198, 200 ;Ex parte Lane,303 S.W.3d 702-720 (Tex.Cr.App.2009).

In Ex parte Cox, the Court of Criminal Appeal's found the plea agreement in multi-count indictment was a "package deal" and applicant's SUCCESSFUL challenge to his conviction for ONE count NEGATED the ENTIRE ple bargain, and the parties MUST be retured to their original positions. See 482 S.W. at 119. See also Lafler v.Cooper, 132 S.Ct. at 1389, See also Magwood v.Patterson, 130 S.Ct.2788 (2010). The 9th Cir. answered the question left open in Magwood, in Wentzell v.Nrvrn,674 F.3d 1124 (9th Cir.2017)

In Wentzell, the Court held that an amended judgment constitut -utes a new, INTERVENING JUDGMENT that renders a subsequent habeas petition not second or successive even if the petitioner challeges only undisturbed portions of the original judgment,674 F.3d at 1126-28.

Exception applies

B. DOES CRUZ V.ARIZONA APPLY IN TEXAS PROC BAR TCCP ART 11.07§4 ?

Like Cruz Mr.Warner filed a successive state post-conviction relief pursuant to Texas Code of Crim Procedure art 11.07(a)(1), based on newly discovered post-conviction evidence of ineffective assistance of counsel in his aggravated assault convicted in which the Court of Criminal GRANTED REFIEF, on his illegal life

sentence, reduced down to 20-years, during new punishment hearing.

Mr.Warner has clearly met the statutory requirement, like Cruz, did, to be granted review or relief as mandated by Texas Law-[(a)-(1), TCCP Art.11.07]-based upon his NEW facts AFTER TRIAL and AF-TER denial of first post-conviction writ.See Ex parte Warner Gary Wayne,No.74,531 (Tex.Cr.App.2003)(pre Curiam). The Panel however, barred review and disregards what the Supreme Court said in "Unit-ed States v.Cronic,466 U.S.648 (1984), the Supeme Court implicit-ly rejected the notion that NEW EVIDENCE OF INEFFECTIVE ASSISTAN-CE cannot constitute "NEWLY DISCOVERED EVIDENCE". id.

Mr.Warner asserts that, Texas Court Of Criminal Appeal judges, has attempted to avoid review or relief by cloaking federal con-stitutional error, in purportedly "independent and adequate" state law grounds. "Random or inconsistent application of state rules of procedural bar or default, will NOT be regarded as adequate and independent state law grounds, so as to bar decision in federal habeas review". Martinez v.Rany,132 S.Ct.1309, Trevino v.Thaler, 133 S.Ct.1911. See also Justice Alcala dissenting opinion in Ex parte Sandovall,508 S.W.3d 284, 287, 290-91 (Tex,Cr.App.2016), id. at [287-291]-on a substantive ineffective assistance of counsel claim, who are otherwise entitled to relief sought.

The Dretke case clearly highlights that when applicant have potentially MERITORIOUS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS, there would be "CAUSE to EXCUSE the PROCEDURAL DEFAULT"Dretke v. Haley,541 U.S.386,124 S.Ct.1847, 158 L.Ed.2d 659 (2004), id. at [394]. In fact, Justice Stevens commented during the Dretke or-

al argument that he had always thought there was "a manifest injustice exception to the procedual default rule". [Dretke oral arguments, supra note 6, at 5].

In this case, enforcing a prison sentence that is 99-years longer than legally allowed-[one year sentence for a Class A misdemeanor Tex.Penal Code Ann.12.21]-is a manifest injustice. Mr.Warner is filing this writ in "GOOD FAITH" and request and pray that this Honorable Court grant review and remand his case back to the State Court for review. Mr.Warner have made a minimal threshold showing of a colorable ineffective assistance claim.

QUESTION NO.2: WOULD IT RESULT IN A "FUNDAMENTAL MISCARRIAGE OF JUSTICE TO BAR REVIEW-WARNER'S COLORABLE CLAIM OF ACTUALLY & OR FACTUALLY INNOCENCE OF-FELONY THEFT-ALLEGATION HE WAS NEVER CHARGE FOR COMMITTING-BUT IMPROPERLY USED TO RAISE THE MISDEMEANOR ESCAPE TO A FELONY ?

B. Denial of Constitutional right -Mr.Warner is currently incarcerated for a crime that he is actually and or factually innocence of-(FELONY THEFT) allegation. Mr.Warner was indicted on two count indictment, escape and felony theft ALLEGATION made under the same cause number which states:

> Defendant, unlawfully then and there intentionally and knowingly escape from the custody of Dennis Craig a peace officer, when he, the said defendant had been arrested for, the offense of FELONY THEFT,

As a matter of Texas law, felony theft was NOT CHARGE in the indictment. See Ex parte Sewell,606 S.W.2d 924, 925 (Tex.Cr.App. 1980), id at-[924-25];Manuel v.State,1994 Tex.App.Lx.1056. Manuel was convicted and sentence for felony escape, and possession of a

controlled substance, [Tex.Health & Safety§Code Ann.§ 481.115].

Unlike Manuel, he was clearly CHARGED with committing two crimes made in the indictment, and was sentence by the court on both counts. Because of the 2nd felony count, it raised the misdemeanor escape to a felony. Mr.Warner on the other hand, was never charge nor found guilty or sentence by the trial court for such an offen se. The felony theft allegation doe not exist and it never result -ed in a FINAL CONVICTION, because Mr.Warner was never charge for committing such. See McQuiggin v.Perkins,569 U.S.383,133 S.Ct.1924 (2013), See also In re Lester,602 S.W.3d 469 (Tex.SCt.2020).

Mr.Warner asserts that , when an indictment charges a complete offense, the state is held to the offense charge in the indictment -regardless of whether the State intended to charge tha offense. See Thompson v.State,892 S.W.2d 8, 11 (Tex.Cr. App.1994). The in-dictment never authorize the trial court to impose a life sentence upon Mr.Warner, who had never been charged with jurisdiction un-derlying "FELONY THEFT", required by Texas Law enorder to raise the offense from a misdemeanor to a felony-[Tex.Penal Code Ann.§ 38.06(c)(1)].

Mr.Warner asserts that the undisputed trial record from the tri -al id [RR.3,pp.5,8,10]-shows the State rest and closed its case and at no time did the trial judge find Mr.Warner guilty of commi -tting felony theft. The State never presented evidence before the trial judge of any felony theft committed by Mr.Warner.

Mr.Warner presented to the Court his Schlup-Strickland type claim tied to a showing of ineffectave assistance of counsel, in

voluntary pleas of guilty, and clearly made his required showing (prima facie) of actual innocence of FELONY THEFT, which does not exist, only a allegation made. Mr.Warner made the statutory requirement under [(a)(2) Tex. CCP.art.11.07] see Ex parte Knipp, 236 S.W.3d 214 (Tex.Cr.App.2007),Schlup v.Delo,513 U.S.298,314, 115 S.Ct.851, 130 L.Ed.2d 808 (1995); Strickland v.Washington, 446 U.S.668, 690, 104 SCt.2052 (1982).

Mr.Warner is currently deprived of his constitutional right to liberty without due process of law as he has made a proper showing of actual innocence and he moves the Court to vacate his illegal fife sentence, and or set the count in the judgment allegating felony theft aside in an effort to seek justice in this case.

Mr.Warner's case is indead one of these "extraordinary cases" and the errors of his counsel were not just "isolated", but manifold and did indeed prejudice Mr.Warner, and thus denied him his constitutional right to be hear in his defense at a fair trial.

Mr.Warner has shown that the constitutional error (ineffective assistance of counsel), probary resulted in the conviction of one who was actually innocent-Schlup v.Delo,513 U.S.at 315-felony theft. The idea that one could be incarcerated for "CONDUCT" THAT HAS NOT CHARGE BY STATE AS HAVING COMMITTED CRIME, INHERENTLY results in a COMPLETE MISCARRIAGE OF JUSTICE. Davis v.United 417 U.S.333. Such is the case here.

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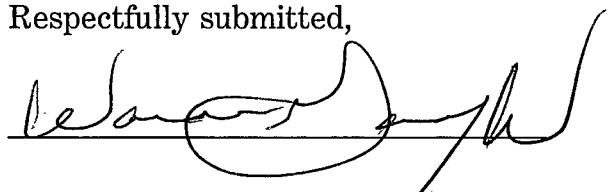
## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: 3/15/2024