Docket No. 24-6967

ORIGINAL

SUPREME COURT OF THE UNITED STATES

ROBERT CRIDER

PRO SE PETITIONER

vs

BOBBY LUMPKIN, DIRECTOR, T.D.C.J. -C.I.D.

RESPONDENT

On Petition for Writ of Certiorari to

the United States Court of Appeals for

the Fifth Circuit USAP5 23-50918

PETITION FOR WRIT OF CERTIORARI

Robert Crider, Pro Se T.D.C.J. -I.D. 2230764

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Lead Counsel for Respondent:

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I: (BOLD) QUESTIONS PRESENTED

(BOLD) Question # 1:

When Crider showed the district court that his 1990 convictions were not defined as authorized elements of the instant offense within the true meaning of Acts 2005. 79th Leg., Ch. 996, Secs. 3, 4, eff. 9-1-2005, but that it was only by ex post facto application of the 2005 law to CONTROL THE USE of his 1990 convictions that the trial court claimed felony jurisdiction: and when Crider demonstrated to the Fifth Circuit that reasonable jurists would find the district court's assessment of his constitutional claims debatable or wrong because EVERY caselaw the district court applied to excuse the State's constitutional violations was error or abuse due to its misunderstanding of law: but the Fifth Circuit then necessarily evaluated Crider's petition under an erroneous theory of law because it misunderstood what Crider's claim was and failed to liberally construe his pleadings. did the Fifth Circuit abuse its discretion in denying Crider COA?

(BOLD) Question # 2:

When jurisdiction of the subject matter exists solely by reason of the authority vested in the court by the constitution and statutes and Acts 2005, 79th Leg., Ch. 996. Secs. 3 and 4 conferred authority on the trial court to act only in some situations but did not confer authority to act when the statute's requirements were not satisfied, but the trial court issued a judgment of felony conviction under the statute when its requirements were not satisfied. was the trial court's felony jurisdiction only a product of the ex post facto application of the 2005 law, meaning Crider is actually innocent of both felony DWI and habitual criminal enhancement, and did the Fifth Circuit consider his claim under the wrong theory of law when it denied him COA on a misunderstanding of his claim?

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SECONDARY SOURCES

Texas Criminal Practice and Procedure Texas Practice: Texas Criminal Law Senate Research Center

Reading Law: The Interpretation of Legal Text. Antonin Scalia + Brian A. Gamer, with associated page numbers.

II: LIST OF PROCEEDINGS

In October 2018 Crider was found guilty of felony DWI (enhanced as a habitual offender) and sentenced to seventy years of imprisonment. *State v Crider, No. B1873 (198th Dist. Ct., Kerr Cnty, Tex.* Oct. 26, 2018). The Texas Fourth Court of Appeals affirmed Crider's conviction in an unpublished opinion on direct appeal. *Crider v State,* No. 04-08-00856-CR (Tex App, San Antonio Sept. 4, 2019, pet. granted Jan. 15, 2020). After granting Crider's petition for discretionary review and hearing oral argument, the Texas Court of Criminal Appeals affirmed the judgment of the court of appeals in a published opinion delivered September 16, 2020. *Crider v State,* 607 SW3d 305 (Tex Crim App 2020). The United States Supreme Court then denied Crider's request for writ of certiorari. *Crider v Texas.* 141 S.Ct. 1384 (2021). Following direct appeal proceedings, on Application for State Habeas Corpus under C.C.P. 11.07 Crider presented his ex post facto/due process claim challenging the constitutionality of his conviction for the first time. It was "denied without written order." Ex parte Crider, No. 92-095-01 (Tex Crim App May 26, 2021). Thereafter. Crider filed a second state habeas corpus application on actual innocence challenging the same constitutional violations under *Schlup v Delo* but the TCCA dismissed the application as a successive petition pursuant to Tex. Code Crim. Proc. Art. 11.07, Sec. 4. Ex parte Crider, No. 92-095-02 (Tex Crim App April 27, 2022). Following State proceedings, on May 11, 2022, Crider filed a 28 USC 2254 petition for federal habeas corpus challenging the violation of his ex post facto/due process rights. The federal district court denied both habeas and COA. *Crider v Lumpkin,* 2023 U.S. Dist. LEXIS 208255 (W.D. Tex. Nov. 20, 2023). Then, under 28 USC 2253 Crider petitioned, and on July 24, 2024 the Fifth Circuit denied COA. *Crider v Lumpkin,* No. 23-50918 (5th Cir. July 24, 2024).

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 pp. 13-14 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 pp. 1-12 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

The Court has certiorari jurisdiction under 28 USCS 1254(1). Crider first presented his ex post facto/due process claim on state habeas. It was "denied without written order." Ex parte Crider, No. 92-095-01 (Tex Crim App May 26, 2021). Crider now seeks review of Crider v Lumpkin, no. 23-50918, 2024 U.S. App LEXIS 32655 (5th Cir. July 24, 2024 unpublished) the CA5 denial of C.O.A. on Crider v Lumpkin, 2023 U.S. Dist. LEXIS 208255 (W.D. Tex 11-20-2023 unpub).

CONSTITUTIONAL PROVISIONS

"For an ex post facto violation to occur, two elements must be present: (1) a law must be retrospective, that is, it must apply to events occurring before its enactment, and (2) the new law must create a sufficient risk of increasing the punishment attached to the defendant's crimes." *Crider v Lumpkin*, 2023 U.S. Dist. LEXIS 208255, *8-9 (W.D. Tex. 2023) (quoting *Warren v Miles*, 230 F3d 688, 692 (5th Cir. 2000) (citing Cal. Dept. of *Corr. v Morales*, 514 US 499, 509 (1995)).

"The [ex post facto] clause is, of course, also aimed at other concerns, 'namely, that legislative enactments give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed' " [by the Legislature]. *Weaver v Graham*, 450 US 24, 29 (1981); *Miller v Florida*, 482 US 423, 430 (1987) (citations omitted); and at reinforcing separation of powers." *Weaver v Graham*, 420 US 24, 29 n. 10 (1981).

STATEMENT OF THE CASE

Acts 2005, Sec. 4 makes proof of the date a conviction was committed requisite to determining which version of the felony DWI law defines it as authorized or prohibited from use as an element. Relying on a case that erroneously applied the absurdity doctrine to mask its due process violation, the district court redefined "authorized element" by declining effect to the "proof of date" requirement of the 2005 law, and violated ex post facto/due process by retroactively applying the 2005 law to define Crider's 1990 convictions as "authorized," contrary to the 2005 law itself. Then, refusing to distinguish prior conviction

punishment enhancers from prior conviction elements, the court erred in applying recidivism caselaw to excuse the ex post facto application of the 2005 law. Minus the ex post facto application of the 2005 law, Crider could have been convicted of a misdemeanor at most. The Fifth Circuit erred in denying Crider COA.

REASONS TO GRANT CERTIORARI

Apprendi v New Jersey, 530 US 466 (2000) unfairly referred to prior convictions as if they were all the same. Because this Court has not authoritatively distinguished prior convictions employed as elements of resulting offenses from those used in recidivism cases, State and federal courts below refuse to PROPERLY distinguish them. Thus, this Court's intervention is necessary to ensure that the circuits, federal district courts and the States correctly recognize constitutional rights in the context of prior conviction elements. Also, in a case of first impression, the court should authoritatively define a courts abuse of the absurdity doctrine as a due process violation that deprives the defendant of a fair and impartial trial, as lightly touched on in *Pulsifer v United States*, 601 US 124, 180-181 (2024), because it permits the knowing the use of false evidence."

BACKGROUND

Crider's 1990 (CR89-1510 and CR90-502) Kerr County Texas Court at Law convictions were committed under Texas Revised Civil Statutes 6701/-1(i), which provides in pertinent part:

"(i) A conviction may not be used for purpose of enhancement under Subsection (d) or (e) of this article if: (1) the conviction was a final conviction under the provisions of Subsections (g) and (h) of this article and was for an offense committed more than ten years before the offense for which the person is being tried was committed; and (2) the person has not been convicted of an offense under Subsection (2), Subsection (a), Section 19.05, Penal Code or

Article 6701/-1, or Article 6701/-2, Revised Statutes, committed within 10 years immediately preceding the date on which the offense for which the person is being tried was committed."

Subsections (d) and (e) of Revised Statutes 6701/-1 provide: "(d) If it is shown on the trial of an offense under this article that the person has previously been convicted one time of an offense under this article, the offense is punishable by ...

Rev. Stat. 6701/-1(i) was enacted by Acts 1983, 68th Leg., Ch. 303, Sec. 3, eff. 1-1-1984, which contained its own savings clause: see Acts 1983, 68th Leg., Ch. 303, Secs. 28(b) and (c) eff. Jan. 1, 1984:

"(b) The changes in law made by this Act for the punishment of an offense under Article 6701/-1, Revised Statutes, as amended, apply only to the punishment for an offense committed on or after the effective date of this Act. For purposes of this section, an offense is committed before the effective date of this Act only if any element of the offense occurs before the effective date. (c) 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 effect for this purpose."

In the 1993 felony DWI amendment, Rev. Stat. 6701/-1(i) became Penal Code 49.09(e). Acts 1993, 73rd Leg., Ch. 900, eff. 9-1-1994, Sec. 1.15 repealed Rev. Stat. 6701/-1, Sec. 1.01 reenacted 6701/-1(i) in substantially the same form as Penal Code 49.09(e), and Sec. 1.18 limited application of that repeal and continued 6701/-1(i) in effect exclusively to CONTROL THE USE of Crider's 1990 convictions as "elements" of a resulting felony DWI. Acts 1993, 73rd Leg. Ch. 900, Sec. 1.18(a) and (b), eff. Sept. 1, 1994:

"(a) The change in law made by this article applies only to an offense committed on or after the effective date of this article. For purposes of this section, an offense is committed before the effective date of this article if any element of the offense occurs before the effective date. (b) An offense committed before the effective date of this article is covered by the law in effect when the offense was committed, and the former law is continued in effect for that purpose."

Then, in 2001 the Penal Code 49.09(e) provisions were amended but Sec. 3 of Acts 2001, 77th Leg, Ch. 648, eff. Sept. 1, 2001, limited application of that amendment and continued 6701/-1(i) in effect exclusively to CONTROL THE USE of Crider's 1990 convictions as "elements" of a resulting felony DWI:

"The change in law made by this Act applies only to the enhancement of punishment at the trial of an offense committed on or after the effective date of this Act. The enhancement of punishment at the trial of 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 effect for that purpose. For purposes of this section, an offense was committed before the effective date of this Act if any element of the offense occurred before that date."

Finally, in Acts 2005, 79th Leg., Ch. 996, eff. 9-1-2005, Sec. 3 repealed Pen. Code 49.09(e) and Sec. 4 limited application of that repeal and continued 6701/-1(i) in effect exclusively to CONTROL THE USE of Crider's 1990 convictions as "elements" of a resulting felony DWI: Acts 2005, 79th Leg., Ch. 996, Secs. 3 and 4, eff. 9-1-2005 provide: "SECTION 3. Sections 49.09(e) and (f), Penal Code, are repealed."

"SECTION 4. The changes in law made by this Act apply only to the penalty [...] for an offense under Chapter 49, Penal Code, that is committed on or after the effective date of this Act. The penalty [...] for an offense under Chapter 49, Penal Code, that was committed before the effective date of this Act are covered by the law in effect when the offense was committed, and the former law is continued in effect for that purpose. For purposes of this section, an offense was committed before the effective date of this Act if any element of the offense was committed before that date."

Crider was arrested for the instant offense of felony DWI on Oct. 3, 2017.

To charge a felony the State alleged as "elements" in Crider's indictment his 1990 convictions. The 1990 convictions are prohibited from that very use by the "continued in effect" Rev. Stat. art. 6701/-

1(i) because there exists no "intervening conviction" that can authorize use of the remote convictions as elements of the instant offense. See Rev. Stat. 6701/-1(i).

ARGUMENT

The key section of Acts 2005. 79th Leg., Ch. 996 (HB 51). is Sec. 4. Interpreted as a whole, specific controlling the general, every word effective, Sec. 4 modifies the substantive provisions of the felony DWI law, including Sec. 3 of the Act and Penal Code 49.09(b)(2). In other words, unless a prior conviction was committed on or after 9-1-2005 as mandated by Sec. 4, Sec. 3 and the 2005 Penal Code 49.09(b)(2) are inapplicable. Thus, coverage under the Act is limited to offenses in which every element of the offense was committed on or after 9-1-2005. In any event. two prior convictions committed on or after 9-1-2005 are prerequisites to coverage under the Act. See Acts 2005. 79th Leg., Ch. 996 (HB 51), Secs. 3. 4, eff. 9-1-2005 also *Dickens v State*, 981 SW2d 186, 188 (Tex Crim App 1998):

> "The savings clause unambiguously provides that the former law [...] applies to an offense when any element of the offense was committed before the effective date of the new law. [....] The savings clause does not pertain to the completion of the offense but rather to the commission of the offense for the purpose of classification and penalty. [...] This interpretation does not lead to absurd results because one could reasonably conclude that the legislature intended for the old penalties to attach to a scheme or continuing course of conduct that was begun before the effective date of the new law."

Also cf. *United States v Harriss* 347 US 612, 619 (1954) (construing savings provisions). The Government's construction is much broader -namely that, considering the date the prior conviction was committed as an element produces the absurd result of preventing the change in law from applying retroactively to prior convictions committed before 9-1-2005. so the date is not an element and the prior conviction was committed after 9-1-2005, regardless of when it was

actually committed. *Crider v Lumpkin*, 2023 US Dist. LEXIS 208255. *6-7 (WD. Tex. 2023) (applying *State v Mason*, 981 SW2d 635, 640 (Tex Crim App 1998):

"Viewing the date of the prior conviction as being an element of [Sec.] 46.04 would result in the absurd consequence of omitting all felons who committed their prior felonies before September 1, 1994 from the coverage of [Sec.] 46.04. The legislative history of [Sec.] 1.18 of Senate Bill 1067 reveals it was written to make application of the revisions of the Penal Code prospective. SENATE RESEARCH CENTER, BILL ANALYSIS OF ENROLLED LEGISLATION. S.B. 1067. 73rd Leg., R.S. (17).").

That construction does violence to the language and terms of Sec. 4 as well as its statutory and legislative history. See *Dickens v State*, 981 SW2d 186, 188 (Tex Crim App 1998):

"The savings clause unambiguously provides that the former law (i.e. second-degree felony punishment) applies to an offense when any element of that offense was committed before the effective date of the new law (i.e. third-degree felony punishment). Appellant's argument calls for an extrapolation of the law that defies the plain meaning of the amendatory legislation. [...] Furthermore, we need not resort to [...] extraneous means when the plain meaning of the statute is evident. The savings clause does not pertain to the completion of the offense but rather to the commission of the offense for the purpose of classification and penalty."

Thus, if the construction urged by the Government is to become law, that is for the Legislature to accomplish by further legislation. Cf. *United States v Harriss*, 347 US 612, 619-620 (1954) (construing savings provisions).

The statutory history of the Act makes clear that the Legislature's demand for proof of the date on which the prior conviction was committed is to not abate the former law but instead to ensure that none other than the law under which a conviction was committed CONTROLS THE USE of the prior conviction as an element of a resulting felony, thereby classifying and penalizing Crider's particularly charged DWI. *Dickens v State*. 981 SW2d 186. 188 (Tex Crim App 1998). Therefore, the date the prior conviction was committed is part of the statutory

definition of the instant offense. It is likewise clear that the Legislature did not intend for Sec. 3's change in law, by application to the primary offense, to be indirectly and retroactively applied to CONTROL THE USE of prior convictions committed before 9-1-2005 as elements, as the Government's expanded construction permits, or else it would not have employed in the amending legislation of Acts 2005, 2001, 1993, and 1983, precisely crafted statutory construction tools (-savings clauses-) specifically forbidding that very application. See *Quick v City of Austin*, 7 SW3d 109, 128-129 (Tex. 1999):

"The general rule is that when a statute is repealed without a savings clause limiting the effect of the repeal, the repeal of that statute is usually given immediate effect. See *Knight v International Harvester Credit Corp.*, 627 SW2d 382, 384 (Tex. 1982). When a right or remedy is dependent on a statute, the unqualified repeal of that statute operates to deprive the party of all such rights that have not become vested OR REDUCED TO FINAL JUDGMENT [emphasis added]. [...] The repeal of the statute in such instances deprives a court of subject matter jurisdiction over the cause. See Knight, 627 SW2d at 384 Dickson, 139 SW2d at 259. THIS COMMON LAW RULE OF ABATEMENT MAY BE MODIFIED BY A SPECIFIC SAVINGS CLAUSE IN THE REPEALING LEGISLATION or by a general savings statute limiting the effect of repeals. [emphasis added]."

DUAL PURPOSES OF THE ACT

By its own terms, Acts 2005, Ch. 996 has dual Legislative PURPOSES: (1) Sec. 3 is intended to prevent the attachment of any limitation of use to DWI's committed AFTER 9-1-2005. And, (2) Sec. 4 is intended to prevent the Sec. 3 change in law from being retroactively applied, either directly or indirectly, to convictions that were committed BEFORE 9-1-2005, thereby ensuring that THE ONLY LAW THAT EVER CONTROLS THE USE OF ANY CONVICTION as an element of a resulting felony is the law that was in effect when the prior

offense was committed. Acts 2005, 79th Leg., Ch. 996, Secs. 3, 4, eff. 9-1-2005. See also *Pulsifer v. United States*, 601 U.S. 124, 179 (2024):

"We do not presume that a law performs only one "function" or "role," but recognize that almost every piece of legislation seeks to serve many competing purposes. *Perez v. Sturgis Pub.* Sch., 598 U.S. 142, 150 [...] (2023) [other citations omitted]. We do not suppose that a law pursues any of those competing purposes to its logical end, acknowledging instead that almost every law is the product of compromise. *Perez v. Sturgis Pub.* Sch., 598 U.S. 142, 150 [...] (2023). And we do not displace ordinary statutory terms with judicial "speculation as to Congress['s] intent," *Magwood v. Patterson*, 561 U.S. 320, 334 [...] (2010), because the American people have consented to be governed by the written laws their elected representatives adopt, not by the conjecture of others, see *United States v. Bass*, 404 U.S. 336, 348 (1971). For all these reasons and more, "it is quite mistaken to assume," as the government does, "that whatever may appear to further the statute's primary objective must be law." *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 89 (2017) (internal quotation marks and alterations omitted)."

EX POST FACTO IN DISTRICT COURT

The district court (hereafter "DC") in Crider provided:

"For an ex post facto violation to occur, two elements must be present: (1) a law must be retrospective, that is, it must apply to events occurring before its enactment, and (2) the new law must create a sufficient risk of increasing the punishment attached to the defendant's crimes.' [citations omitted]. Here, the new law creates a sufficient risk of increasing the punishment attached to [Crider's] crime. Therefore, the only issue is whether the new law, as applied to [Crider's] case, is retrospective." *Crider v Lumpkin*, 2023 U.S. Dist. LEXIS 208255, *8-9 (W.D. Tex., Nov. 20, 2023).

RETROACTIVE APPLICATION and INCREASE IN PENALTY

The 2005 law is undeniably applied retroactively to CONTROL THE USE of Crider's 1990 convictions, contrary to the explicit prohibition of the 2005 law itself; because prospectively applied the 2005 law requires the State to prove the dates the convictions were committed, which

demands that Rev. Stat. 6701/-1(i) controls the use of the 1990 convictions and that law requires proof of an intervening conviction. See Rev. Stat. 6701/-1(i). See also *Warren v Miles*, 230 F3d 688, 692 (5th Cir. 2000) (citing *Garner v Jones*, 120 SCt 1362, 1370 (2000):

"In evaluating an alleged violation of the ex post facto doctrine, the court must rigorously analyze the level of risk that an inmate's prison stay will be longer because of a change in law that applies retroactively."

Because there is no intervening conviction available Crider could have been convicted of no more than a misdemeanor, but the retroactive application and circumvention of the burdens of proof increased Crider's two-year maximum possible jail sentence to seventy years in prison. So truly the only issue is whether the DC erred and abused its discretion in excusing Texas' ex post facto violation.

FAILURE TO DISTINGUISH

Crider begins with an issue the Supreme Court has not, but should, settle, i.e., distinguishing prior conviction "elements" from prior conviction "punishment enhancers." The DC erred when rather than recognizing the use of prior convictions as "elements" under Penal Code 49.09(b)(2), it considered them punishment enhancers. *Crider v Lumpkin*, 2023 U.S. dist. LEXIS 208255, *6-9 (W.D. Tex. 2023). See *Barfield v State*, 63 SW3d 446, 448 (Tex Crim App 2002):

"The two previous convictions of DWI are jurisdictional elements of the offense of felony DWI, which must be alleged to invoke the jurisdiction of the felony court and which must be proved to obtain a conviction of felony DWI."

"A statutorily prescribed aggravating fact plays one of three roles in enhancing an offense: (1) creating a new aggravated offense in which the aggravating fact is an element, (2) enhancing the level of the offense, or (3) enhancing the punishment for the offense. If the two prior convictions that elevate DWI from a misdemeanor to a felony are elements of a resulting offense of felony DWI, then they are facts required to prove felony DWI [...]. But if the two prior convictions merely enhance the offense level or the punishment for DWI from that of a misdemeanor to

that of a felony, then they are not facts required to prove the offense of DWI, and there really is no offense of "felony DWI" but an offense of DWI that is enhanced to or punished as a felony." Ex parte Benson, 459 SW3d 67, 74-75 (Tex Crim App 2015).

"A prior conviction alleged for enhancement is not really a component element of the primary offense. Instead, it is an historical fact to show the persistence of the accused, and the futility of primary measures of punishment as related to him. An enhancement increases the punishment range to a certain range above that ordinarily prescribed for the indicted crime. It does not change the offense, or the degree of the offense, of conviction. There can be no enhancement until a person is first convicted of an offense of a certain degree." [internal quotes and citations omitted]. Calton v State, 176 SW3d 231, 233-34 (Tex Crim App 2005).

"But the Legislature's decision to treat the prior [DWI] convictions as elements has substantial procedural consequences. As we have explained above, according the prior convictions the status of elements has the effect of conferring jurisdiction in district court and requiring that the prior convictions be listed in the indictment, proved at the guilt stage of trial, and submitted in the guilt stage jury charge. Further, the requirement that the prior convictions be in the indictment means that a grand jury must pass on them and that the defendant will be guaranteed pretrial notice of them. BY CONTRAST, IF THE PRIOR CONVICTIONS WERE MERE PUNISHMENT ENHANCERS [emphasis added], the prosecutor could simply give written notice of them, and such notice would not necessarily be required prior to trial. [...] The procedural and substantive effects that the prior convictions have on how we treat the resulting offense of felony DWI seriously undermine the notion that we can recharacterize them as punishment enhancers [...]."

Ex parte Benson, 459 SW3d 67, 76-77 (Tex Crim App 2015). Felony DWI is one offense, and two prior DWI convictions are components of that one offense of felony DWI. Felony DWI is the sum of all its parts. A part is a completed DWI whose elements have all been proven. Cf. *Dickens v State*, 980 SW2d 186, 188 (Tex Crim App 1998). A conviction or punishment for felony

DWI cannot occur until these elements are proved at the guilt stage of trial. *Barfield v State*. 63 SW3d 446. 448 (Tex Crim App 2002).

Penal Code 49.09(b)(2) does not set forth a higher punishment range for the offense when the prior convictions are proved. Cf. *Calton v State*. 176 SW3d 231, 233-34 (Tex Crim App 2005). Therefore, when a felony DWI is punished, because THEY ARE PART OF THE CRIME BEING PUNISHED, it is impossible to not punish the prior DWI convictions along with all the other elements of the crime. Crider suggests that the reason the Legislature includes in felony DWI amendments, savings clauses exclusively ensuring that use of a prior conviction as an element is governed only by the law under which the conviction was committed, is because under that former law notice was provided of a conditional future jeopardy or re-punishment. And by using the prior conviction only by the terms of the former statute the re-punishment is authorized as part of the original punishment. And in this manner the Legislature avoids violating either double jeopardy or ex post facto. This argument is supported by the fact that savings clauses do not apply to prior conviction punishment enhancers which are not punished again but instead are precisely crafted to cover ONLY prior conviction elements which are punished again, because no other "element" of felony DWI has the independent offense date that is requisite for coverage of the savings clause.

The DC abused its discretion when it applied its misunderstanding of *Oliva v State*. 548 SW3d 518, 531-532 (Tex Crim App 2018) to Crider for the erroneous proposition that prior convictions used under Penal Code 49.09(b)(2) are not elements, but merely punishment enhancers. *Crider v Lumpkin*. 2023 U. S. Dist. LEXIS 208255. *8 (W.D. Tex. 2023). Properly read, the TCCA in Oliva distinguished the single prior conviction "punishment enhancer" used to

elevate a misdemeanor DWI from Class B to Class A under Penal Code 49.04, from the two-prior conviction "elements" used to charge and convict of a felony DWI under Penal Code 49.09(b)(2). See *Oliva v State*, 548 SW3d 518, 533 (Tex Crim App 2018):

"We have rejected the notion that there is a special category of 'jurisdictional' elements that are not elements for all purpose. For the phrase 'are not jurisdictional' to have meaning, then, something that would otherwise be a punishment issue must become an element because it is jurisdictional. In fact, our prior-conviction jurisprudence in both DWI and theft cases has emphasized the jurisdictional nature of certain prior-conviction provisions in concluding that they prescribe elements. Under this view, the jurisdictional nature of the prior-conviction provision for felony DWI converts what would otherwise be a punishment issue into an element of the offense. Because the single prior conviction provision for misdemeanor DWI is not jurisdictional, that conversion effect does not occur, so the provision retains its character as prescribing a punishment issue."

Relying on its erroneous legal conclusions, the DC applied a "recidivism" case, *Gryger v Burke*, 334 US 728, 732 [...] (1948), to Crider's elements case and referred to Penal Code 49.09(b)(2) as a "recidivist statute" for the proposition that "because they 'penalize the new criminal offense being enhanced rather than the prior offense used for enhancement[.]' recidivist statutes, like the one in question in this case, do not violate the Ex Post Facto Clause." *Crider v Lumpkin*, 2023 U.S. Dist. LEXIS 208255, *9 (W.D. Tex., Nov. 20, 2023). But when a felony DWI is punished, BECAUSE THEY ARE PART OF THE GUILT AND PUNISHMENT OF THE CRIME BEING TRIED, it is impossible to NOT punish the prior DWI convictions along with all the other elements of the crime.

RECIDIVISM CASES INAPPLICABLE

Gibson v State, 995 SW2d 693, 695-696 (Tex Crim App 1999):

[At 695] "We shall first address the validity of appellant's assertion that the use of the prior intoxication-related offenses in [Pen. Code] Section 49.09(b) serve the purpose of an "enhancement scheme of punishment." THIS WILL DISTINGUISH THE "SCHEME" OF SECTION 49.09(b) FROM THE "ENHANCEMENT SCHEME OF

PUNISHMENT" OF [Pen. Code] SECTION 42.12(d) [emphasis added]. [...]. The prior intoxication-related offenses, whether they are felonies or misdemeanors, serve the purpose of establishing whether the instant offense qualifies as felony driving while intoxicated. The prior intoxication-related offenses are elements of the offense of [felony] driving while intoxicated. THEY DEFINE THE OFFENSE AS A FELONY and are admitted into evidence as part of the State's proof of its case-in-chief during the guilt-innocence stage of the trial [emphasis added]. 42 GEORGE E. DIX and ROBERT O. DAWSON, TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE Sec. 38.73, at 651-652 (1995 and Supp. 1999).

In contrast, the State can use any prior felony conviction under Section 12.42(d) TO INCREASE THE POTENTIAL RANGE OF PUNISHMENT FOR SOMEONE ALREADY CONVICTED OF A FELONY [emphasis added]. The prior felony convictions do not determine whether the case will be tried in district court or county court. As felonies, those cases were already set in the district courts. The prior felony convictions are not admitted into evidence until the punishment stage of a trial after the defendant has already been convicted of the primary felony offense. 6 MICHAEL B. CHARLTON, TEXAS PRACTICE: TEXAS CRIMINAL LAW Sec. 29.4, at 388 (1994 and Supp. 1998). [...]. OUR READING OF THE PLAIN LANGUAGE OF SECTION 49.09(b) ALSO INDICATES IT SHOULD NOT BE VIEWED AS A PUNISHMENT-ENHANCEMENT STATUTE SIMILAR TO SECTION 12.42(d) [emphasis added]."

Because Penal Code 49.09(b) is not a recidivist statute, Crider's 1990 convictions are not punishment enhancers, and recidivism caselaw is inapplicable. See Ex parte Benson, 459 SW3d 67, 77, 74-77 (Tex Crim App 2015) ("The procedural and substantive effects that the prior convictions have on how we treat the resulting offense of felony DWI seriously undermine the notion that we can recharacterize them as punishment enhancers [...]."). thus, the DC's reasoning regarding the modification of Penal Code 49.09(b)(2) by Sec. 4 of the 2005 amendment, proper treatment of Crider's 1990 prior conviction elements, and the DC's own ex post facto analysis, are all based on erroneous legal conclusions and application of *Gryger v Burke*, 334 US 728, 732 [...] (1948) to Crider is abuse of discretion. *Koon v United States*, 518 US 81, 100 (1996) (overruled on other grounds) ("A district court by

definition abuses its discretion when it makes an error of law. [...] The abuse of discretion standard includes review to determine that the discretion is not guided by erroneous legal conclusions."). Under the abuse of discretion standard Crider is entitled to review, and both the DC and Fifth Circuit abused their discretion in denying him COA.

THE DATE

Relying on *State v Mason*, 980 SW2d 635, 641 (Tex Crim App 1998) for the erroneous proposition that "the Legislature did not intend for the date of the prior conviction to be considered an element [of the offense]." Sic. The district court held: "Because the date of petitioner's prior DWI convictions were not an element of the offense for which he was ultimately convicted, no due process violation occurred. As such, Petitioner fails to demonstrate that the state court's rejection of this claim was unreasonable."

Crider v Lumpkin, 2023 U.S. Dist. LEXIS 208255, *8 (W.D. Tex. 2023). By this and contrary to the 2005 amendment, the district court applied *State v Mason*, 980 SW2d 635 for the proposition that the "date" does not have to be proved. *State v Mason*, id, is illegally applied to Crider for several reasons: (1) It violates due process to apply *State v Mason, id*, to Crider because Texas Courts of Criminal Appeals, under the subterfuge of absurdity, convicted an innocent man and violated Bouie v City of Columbia, US 347 (1964; Marks v United States, 430 v es 188 (1977); and the due process / ex post facto clauses in doing so. Therefore, Mason must be overruled and interpretation of the felony DWI statue without it, requires proof of an intervening conviction under Rev. Stat. 6701/-1(j) to authorize Crider's 1990 convictions for use of elements.

However, because Crider has no intervening conviction, his 1990 convictions are prohibited from use as elements. Thus, Crider was convicted on less than all the elements of felony

DWI, in violation of due process, because neither of two requisite jurisdictional prior conviction elements were proved.

In Re. "Winship, 397 US 358, 364 (1970) requires two prior convictions committed after 9/1/2005 to be proved before conviction under 2005 amendment for felony DWI. can be had.

(2) Mason concerned the savings clause in the "Act of May 29, 1993, 73rd Leg., R.S., Ch. 900, Sec. 1.18(a)." and though it is not a DWI case, its application to DWI cases has been superseded by felony DWI amendments in Acts 2001, 77th Leg, Ch. 648, Sec. 3, eff. Sept. 1, 2001 and Acts 2005, 79th Leg., Ch. 996, Sec. 4, eff. Sept. 1, 2005.

(3) Caselaw before and after Mason, id., clearly demonstrate that there is nothing unreasonable or absurd about the employment of a savings clause to reverse the common law presumption of abatement. *Dickens v State*, 981 SW2d 186, 188 (Tex Crim App 1998)

"(This interpretation does NOT lead to absurd results because laws are made for the future and one could reasonably conclude that the legislature intended to exclude from application of a new law that increases the penalty of prior convictions, convictions that were final before the law became effective"). "where a right or remedy is dependent on a statue, the unqualified repeal of that statue operates to deprive the party of all such sights that have not become vested or reduced to final judgment, [illegible] Quick v City of Austin, 7 SW3d109, 128-129) Tex 1999)". *United States v Uni Oil, Inc.*, 710 F2d 1078, 1082-1083, n. 3 (5th Cir. Tex. 1983) ("express savings provision [...] reverses the common law presumption of abatement.") *Quick v City of Austin*, 7 SW3d 109, 128-129 (Tex. 1999) ("This common law rule of abatement may be modified by a specific savings clause in the repealing legislation or by a general savings statute limiting the effect of repeals.").

(4) Under the guise of absurdity, the TCCA in *State v Mason*, 980 SW2d 635, 639, 640, 641 (Texas Crim App 1998) refused to give effect to the specific savings clause:

@ 639: "This interpretation of [Sec.] 1.18 by the court of appeals, that a felon whose prior conviction occurred before September 1, 1994 could not be prosecuted under [Sec.] 46.04, leads to an absurd consequence that could not have been intended by the Legislature. [...] @ 640: Viewing the date of the prior conviction as being an element of [Sec.] 46.04 would result in the absurd consequence of omitting all felons who committed their prior felonies before September 1, 1994 from the coverage of [Sec.] 46.04. The legislative history of [Sec.] 1.18 of Senate Bill 1067 reveals it was written to make application of the revisions of the Penal Code prospective. SENATE RESEARCH CENTER, BILL ANALYSIS OF ENROLLED LEGISLATION, S.B. 1067, 73rd Leg., R.S. (17). [...] @ 641: We conclude the Legislature did not intend for the date of the prior conviction to be considered an element of [Sec.] 46.04. Instead, we conclude the Legislature intended only a defendant's status as a felon to be an element of [Sec.] 46.04. Therefore, appellant was subject to prosecution under [Sec.] 46.04."

The Mason Court abused the absurdity doctrine even after finding in opposition of its desired construction while improperly resorting to legislative history, the following statement: *State v Mason*, 980 SW2d 635, 640 (Tex Crim App 1998):

"The legislative history of Sec. 1.18 of S.B. 1067 reveals it was written to make application of the revisions of the Penal Code prospective. SENATE RESEARCH CENTER, BILL ANALYSIS OF ENROLLED LEGISLATION, S.B. 1067, 73rd Leg., R.S. (17)."

(5) The Mason Court abused the absurdity doctrine according to the valid and invalid applications of the doctrine explained by Supreme Court Justice Scalia and legal scholar Bryan A. Garner in "Reading Law: The Interpretation of Legal Texts." (hereafter "RL"). Section 37, entitled "ABSURDITY DOCTRINE" provides: "A provision may be either disregarded or judicially corrected as an error (when the correction is textually simple) if failing to do so would result in a disposition that no reasonable person could approve." But then pages 237-238 provides a warning and sets boundaries to prevent such judicial error:

"Yet error correction for absurdity can be a slippery slope. It can lead to judicial revision of public and private texts to make them (in the judge's view) more reasonable. TO AVOID THIS, THE DOCTRINE MUST BE SUBJECT TO TWO LIMITING CONDITIONS [emphasis added]: (1) The absurdity must consist of a disposition that no reasonable person could intend. Something that "may seem odd . . . is not absurd." The oddity or anomaly of certain consequences may be a perfectly valid reason for choosing one textually permissible interpretation over another, but it is no basis for disregarding or changing the text." RL p 237. "(2) The absurdity must be reparable by changing or supplying a particular word or phrase whose inclusion or omission was obviously a technical or ministerial error (e.g., losing party instead of winning party). THE DOCTRINE DOES NOT INCLUDE SUBSTANTIVE ERRORS ARISING FROM A DRAFTER'S FAILURE TO APPRECIATE THE EFFECT OF CERTAIN PROVISIONS. [emphasis added]." RL p 238."

Therefore, there was no absurdity in *State v Mason* and the TCCA was not authorized to refuse to apply the former law to govern the use of Mason's prior felony as mandated by Sec. 1.18. And the courts in the instant case had no authority to refuse to apply Rev. Stat. 6701/-1(i) to CONTROL THE USE of Crider's 1990 convictions as required by Sec. 4 of Acts 2005, and thus violate Crider's ex post facto/due process rights.

(5) "There is no need for judicial revisions to the statute to avoid absurdity. If the evidence cannot support the charges [...] the accused should prevail in court." In re T. V. T., 675 SW3d 303, 309, 310 (Tex. 2023) (use of the absurdity doctrine). See also Combs v Health Care Servs. Corp. 401 SW3d 623, 630, 631 (Tex 2013) (refusing to invoke the absurdity doctrine when applying an unambiguous statute brings about a peculiar result because "mere oddity does not equal absurdity.").

(6) "Thus, what judges believe Congress 'meant' (apart from the text) has a disturbing but entirely unsurprising tendency to be whatever judges think Congress must have meant, i.e., SHOULD have meant." Zuni Pub. Sch. Dist. No. 89 v Dept. of Educ., 550 US 81, 117 (2017).

(7) Alternatively, even if the date is not an element, as with the intervening conviction, it still has to be proven to the court at some point during the State's case-in-chief. See *Weaver v State*, 87 SW3d 557, 561 (Tex Crim App 2002):

"In sum, a prior intoxication-related conviction may not be used as an element of the offense of felony DWI if that prior offense was committed more than ten years before the instant offense, unless there is an intervening intoxication-related conviction. [...] WHERE THERE ARE MORE THAN TWO PRIOR CONVICTIONS, THE STATE SHOULD USUALLY INCLUDE IN THE INDICTMENT THE TWO MOST RECENT CONVICTIONS. HOWEVER, IF FOR SOME REASON THE STATE CHOOSES NOT TO ALLEGE THE TWO MOST RECENT CONVICTIONS IN THE INDICTMENT AND THOSE CONVICTIONS ARE MORE THAN TEN YEARS OLDER THAN THE INSTANT OFFENSE, THE STATE MUST COMPLY WITH 49.09(e) [emphasis added]. Because 49.09(e) is not an element of the offense, the State need not allege the intervening conviction in the indictment or submit it to the jury. The State must, however, at some point during its case-in-chief, submit proof of the intervening conviction to the trial court."

(8) This case is brought under authority of Acts 2005, 79th Leg., Ch. 996, Secs. 3 and 4, eff. 9-1-2005, and its prosecution is limited to the provisions of that statute. "The powers of government are intended to act upon the civil conduct of the citizens, and, wherever their conduct becomes such as to offend against moral or public decency, it becomes within range of legislative authority. The policy of the law is not a matter of judicial consideration." *Sportatorium, Inc. v State*, 104 SW2d 912, 917 (Tex Civ App 1937) (against constructive crimes).

(9) "When a case implicates a [...] statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course,

there is no need to resort to judicial default rules. When, however, the statute contains no such command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result." *Landgraf v USI Film Products*, 511 US 244, 280 (1994). "Our first task is to determine whether the legislature has expressly prescribed the statute's proper reach." *Quick v City of Austin*, 7 SW3d 109, 131 (Tex. 1999). The legislature made it clear that Acts 2005 does NOT OPERATE RETROSPECTIVELY, but contrarily, the courts gave it retroactive effect that increased Crider's liability for the 1990 convictions and eliminated his right to rely on Acts 2005, Sec. 4.

(10) The two provisions of Acts 2005, 79th Leg., R.S., Ch. 996 at issue in this appeal, i.e., Sections 3 and 4, may be readily classified according to the principles of *Landgraf v U.S.I. Film Prods.*, 511 US 244 (1994). The repeal of Penal Code 49.09(e) set out in Sec. 3 is plainly a change of the sort that would ordinarily govern offenses committed after its effective date. If Ch. 996 did no more than repeal Penal Code 49.09(e), Sec. 3 and the 2005 Penal Code 49.09(b)(2) would presumably apply to all offenses that were committed after its effective date (9-1-2005), regardless of when the prior conviction elements were committed.

However, because Sec. 4 explicitly demands that: (1) Section 3 and the 2005 Penal Code 49.09(b)(2) CONTROLS ONLY THE USE of prior convictions committed on or after 9-1-2005; (2) the 2001 Penal Code 49.09(e) CONTROLS THE USE of prior convictions committed between 8-31-2005 and 9-1-2001; (3) the 1993 Penal Code 49.09(e) EXCLUSIVELY CONTROLS THE USE of prior convictions committed between 8-31-2001 and 9-1-1994; and (4) Rev. Stat. 6701/-1(i) EXCLUSIVELY CONTROLS THE USE of prior convictions committed between 8-31-1994 and 1-

1-1984, Sec. 3 must stand or fall with the attached limiting and controlling provisions of Sec. 4. Thus. Sections 3 and 4 are inseparable, and because the courts have invalidated Sec 4, Sec. 3 must necessarily be construed to have been invalidated with it. Cf. Landgraf, 511 US 244, 280-281 (1994).

This is so because:

"a legislator who supported a prospective statute might reasonably oppose retroactive application of the same statute. Indeed, there is reason to believe that the inclusion of [Sec. 4's] express retroactivity provisions was a factor in the passage of the [2005] bill. [Sec. 3] is plainly not the sort of provision that MUST be understood to operate retroactively because a contrary reading would render it ineffective." Landgraf, id., at 286 (1994).

The retroactive application of Section 3 and the 2005 Penal Code 49.09(b)(2) to CONTROL THE USE of Crider's 1990 convictions as elements of the instant offense was unauthorized as a matter of law because it was contrary to the express terms of the 2005 amendment itself, and it increased Crider's penalty from that of a misdemeanor to seventy years in prison. This ex post facto application of the law rendered every critical stage of Crider's trial and the jury's verdict fundamentally unfair because grand jury presentment through conviction and judgment was presented under an erroneous theory of law.

WESTERN DISTRICT OF TEXAS

The DC could not have understood the law applicable to Crider's case when EVERY caselaw it applied to Crider was inapplicable as either error of law or abuse of discretion, and it violated Crider's ex post facto/due process rights when it erroneously affirmed the State's denial of his claim.

FIFTH CIRCUIT

After Crider presented proof to the Fifth Circuit that any "reasonable jurist would have found the district court's assessment of [his] constitutional claims debatable or wrong," rather than liberally construing his pleadings as it should have and granting him COA the 5th Circuit necessarily denied Crider COA based on an erroneous theory of law, because it understood Crider's claim to be that "application of the amended statute violated the ex post facto clause," which implies the Legislature enacted an ex post facto law. That is contrary to Crider's claim, which is: "application of the 2005 law instead of Rev. Stat. 6701/-1(i) to CONTROL THE USE of his 1990 convictions, contrary to the terms of Sec. 4 of the 2005 amended statute, violated his ex post facto/due process rights." The 5th Circuit thereby committed error of law, abused its discretion, and violated Crider's constitutional rights anew when it denied his "Application for Certificate of Appealability for [the] United States District Court for the Western District of Texas USDC No. 5:22-CV-498" and held in *Crider v Lumpkin*, 2024 U.S. App. LEXIS 32655, *1-*2, No. 23-50918, p 1-2 (5th Cir. Filed July 24, 2024):

"Robert Lee Crider, [...], moves this court for a certificate of appealability (COA) to challenge the denial of his 28 USC 2254 application. Crider filed the application to challenge his 70-year enhanced sentence as a habitual offender for third degree felony driving while intoxicated (DWI). He contends that the use of his 1990 DWI convictions to enhance his DWI offense to a third-degree felony, pursuant to Texas Penal Code 49.09(b)(2), violated his due process rights because application of the amended statute violated the ex post facto clause. [PAGE 2] To obtain COA, Crider must make "a substantial showing of the denial of a constitutional right." 28 USC 2253(c)(2) *Slack v McDaniel*, 529 US 473, 484 (2000). Where a district court has rejected a claim on the merits, a movant "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack, 529 US at 484. Crider has not made the requisite showing. See id. We do not consider Crider's

ineffective assistance of counsel claims, and he abandons any challenge to the district court's conclusion that a freestanding claim of actual innocence is not cognizable on federal habeas corpus review. See *Black v Davis*, 902 F3d 541, 545 (5th Cir 2018) *Brinkmann v Dallas Cnty*. Deputy Sheriff Abner, 813 F2d 744, 748 (5th Cir. 1987). Accordingly, Crider's request for COA is DENIED. His motions for the appointment of counsel and to proceed In Forma Pauperis are likewise DENIED."

SUMMARY

Properly read, not ~~a~~ every prior convictions ~~are~~ is authorized for use as an element under Acts 2005, Sec. 4, but only those that are AUTHORIZED by the law under which they were committed. Because Crider's 1990 convictions were committed before 9-1-2005, the 2005 amendment that remains effective today requires Rev. Stat. 6701/-1(i) to govern the use of Crider's 1990 convictions; because the 1990 convictions were committed more than ten years before the instant offense was committed. Acts 2005 Sec. 4, by continuing Rev. Stat. 6701/-1(i) in effect to CONTROL THEIR USE, authorizes them for use as "elements" only upon proof either beyond a reasonable doubt to the jury or alternately, at some point during the State's case-in-chief, of an intervening conviction that was committed within ten years immediately preceding the date the instant offense was committed. See *Weaver v State*, 87 SW3d 557, 561 (Tex Crim App 2002) (explaining intervening conviction). Because Crider has no intervening conviction, the 1990 convictions are not authorized for use as elements of the instant offense. Therefore, the trial court did not have felony jurisdiction because it did not prove either of the two required jurisdictional elements.

ISSUE #1: EX POST FACTO/DUE PROCESS VIOLATION

Crider was illegally sentenced to seventy years in prison after being illegally convicted of felony DWI and enhanced as a habitual criminal, when under the guise of construction Texas

circumvented the State's burden of proving the date the prior convictions were committed, which statutorily defines the elements of his distinct offense by assigning Rev. Stat. 6701/-1(i) to CONTROL THE USE of his 1990 convictions and instead applied the 2005 law retroactively to CONTROL THE USE of those convictions contrary to the explicit prohibition of the 2005 law itself. Even More than the actual use of the remote convictions as elements, it is this retroactive application of the 2005 law to CONTROL THE USE of the 1990 convictions as elements that violated the ex post facto/due process clauses, because it did not simply change the elements of the offense and increase the penalty, but it changed the statutory definition of what an authorized element is. This retroactive application was done in error, under authority of none other than: (1) the Mason court's abuse of the absurdity doctrine, and (2) the erroneous application of recidivism caselaw.

Erroneously overruling the State's burden of proving the date on which the 1990 convictions were committed illegally permitted the ex post facto application of the 2005 law to CONTROL THE USE of the 1990 convictions and simultaneously bypassed the 2005 legislative requirement for proof of an intervening conviction to authorize the use of Crider's 1990 convictions as elements -as manifested in the 2005 law continuing in effect Rev. Stat. 6701/-1(i) to CONTROL THE USE of the 1990 convictions as elements- which resulted in Crider's legislatively prohibited convictions being illegally used as elements by the same law that continues them under their original prohibition. And what would otherwise have been misdemeanor punishment because Crider has no intervening conviction available, was illegally increased to seventy years in prison. This retroactive redefining of "element," bypassing burdens of

proof, changing the quantum of evidence required to convict of a more serious offense, and increase in penalty violated Crider's ex post facto/due process rights.

If the evidence cannot support the charges [...] the accused should prevail in court. The court unconstitutionally and illegally convicted, enhanced, and sentenced Crider by retroactively applying the 2005 statute to CONTROL THE USE of his 1990 convictions. Based on an erroneous theory of law, every critical stage of Crider's trial was fundamentally unfair. "There is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life." *Carmell v Texas*, 529 US 513, 533 (2000). "The [ex post facto] clause is, of course, also aimed at other concerns, 'namely, that legislative enactments give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed' " [by the Legislature]. *Miller v Florida*, 482 US 423, 430 (1987) (quoting *Weaver v Graham*, 450 US 24, 29 (1981) (other citations omitted); and at reinforcing separation of powers. *Weaver v Graham*, 420 US 24, 29 n. 10 (1981).

"For an ex post facto violation to occur, two elements must be present: (1) a law must be retrospective, that is, it must apply to events occurring before its enactment, and (2) the new law must create a sufficient risk of increasing the punishment attached to the defendant's crimes." *Crider v Lumpkin*, 2023 U.S. Dist. LEXIS 208255, *8-9 (W.D. Tex. 2023) (quoting *Warren v Miles*, 230 F3d 688, 692 (5th Cir. 2000) (citing *Cal. Dept. of Corr. v Morales*, 514 US 499, 509 (1995)).

ISSUE # 2: ACTUAL INNOCENCE UNDER HALEY

A legislative amendatory act such as Acts 2005, 79th Leg., Ch. 996, Secs. 3 and 4, "confers authority on the trial court to act in some situations but does not confer authority to act when the statute's requirements are not satisfied, and a trial court that purports to act under such a statute when its requirements are not satisfied acts without jurisdiction." Ex parte White, 506 SW3d 39, 51 (Tex Crim App 2016).

Although White, id., is specifically referring to a remedial statute, the same principle of law applies to Crider's penal statute, because "jurisdiction of the subject matter cannot be conferred by agreement: this type of jurisdiction exists by reason of the authority vested in the court by the constitution and statutes." *Garcia v Dial*, 596 SW2d 524, 527 (Tex Crim App 1980) (citations omitted). Thus, because the court was not authorized to issue a sentence and judgment of conviction for a felony DWI, Crider's sentence and judgment exist only by ex post facto application of the 2005 law and he is actually innocent of the habitual criminal enhancement under *Dretke v. Haley*, 541 U.S. 386, 388-389 (2004).

HARM

Tex. Code Crim. Proc. art. 28.10 provides:

"(a) After notice to the defendant, a matter of form or substance in an indictment or information may be amended at any time before the trial on the merits commences. On the request of the defendant, the court shall allow the defendant not less than 10 days, or a shorter period if requested by defendant, to respond to the amended indictment or information. (b) A matter of form or substance in an indictment or information may also be amended after the trial on the merits commences if the defendant does not object. (c) An indictment or information may not be amended over the defendant's objection as to form or substance if the amended indictment or information charges the defendant with an additional or different offense or if the substantial rights of the defendant are prejudiced."

Flowers v State, 815 SW2d 724, 729 (Tex Crim App 1991) explains:

"Even though the amendments are not objectionable as charging an additional or different offense they may be improper if they prejudice the "substantial rights" of the defendant. In Ital, 707 SW2d 900 (Tex Cr App 1986), we discussed the analysis of prejudice to the "substantial rights" of a defendant in the context of notice defects in a charging instrument under Article 21.19, V.A.C.C.P. We held that a review of the record of the case was appropriate. Such review is likewise proper under the "substantial rights" provision of Article 28.10(c) to determine and evaluate prejudice. The "substantial right" affected may be similar to a right to notice as in Adams so that the inquiry will be whether the amendment had an impact on the defendant's ability to prepare a defense, or it may concern some other

"substantial right" claimed by a defendant so that the inquiry or focus of prejudice is different depending on the "substantial right" violated."

Flowers v State, 815 SW2d 724, 729 (Tex Crim App 1991) went on to say:

"Changing an element, such as the name of the owner, changes the evidence needed to prove the offense. If such amendment is made on the basis of the same incident upon which the original indictment is based, it will, in most cases, be permissible under the substantial rights provision after a review of the record for prejudice. See Adams, supra. Exactly what rights may be "substantial" in a given case will depend on the circumstances of the case. Of course, it is possible that an amendment such as changing the owner might reflect an entirely different incident as the basis for the allegation. If this were so, the "substantial rights" provision of Art. 28.10(c) would be implicated to protect the defendant, and the right to indictment by a grand jury under Art. 5, Sec. 10 might be implicated. For example, if the record shows that the amendment is made so as to charge a different occurrence or incident than that originally alleged in the indictment, the substantial rights of a defendant would be prejudiced in part because he has been denied any grand jury review of the offense as required by Art. 1, Sec. 10.

Crider shows not only that he was harmed when he was ILLEGALLY SENTENCED AS A FELON AND HABITUAL CRIMINAL due to the ILLEGAL USE OF HIS PROHIBITED PRIOR CONVICTIONS AS ELEMENTS, but also that replacing his 1990 convictions with his other convictions would severely prejudice his substantial rights under *Flowers v State*, 815 SW2d 724 (Tex Crim App 1991).

Crider has other prior convictions: CR04-0665 and CR04-1425 both charged in Kerr County, TX in 2004 under the 2001 Penal Code 49.09, and cause no. 4871 charged in May 2007 in Winkler County, TX. However, because the date the prior conviction element was committed determines which law defines what an "authorized element" is, if the court were to replace Crider's illegally used 1990 convictions with his other prior convictions, the court would not simply be changing the elements but would be changing the statutory definition of what is and is not an

authorized element, exactly as Texas changed the definition by illegally applying the 2005 law to CONTROL THE USE of Crider's 1990 convictions.

Furthermore, Crider chose to go to jury trial because he was charged with a felony DWI which, under proper construction of the DWI law, he absolutely could not be convicted of. But if the court traded out the illegal convictions with his other prior convictions, without presenting them to the grand jury and providing Crider a choice of plea bargain or trial on the indictment with the new elements, he would have been tricked and deceived into going to trial for a felony DWI which he absolutely could not be found NOT GUILTY of, which would equate to him refusing the plea bargain offered him in the instant case only BECAUSE HE WANTED A MUCH LARGER PRISON SENTENCE THAN THE STATE WAS OFFERING HIM. That is the epitome of prejudice.

Because Crider's "substantial rights" would definitely be prejudiced by changing the elements, because changing the elements would necessarily change the definition of the element to something other than what it was at the time Crider invoked his right to trial by jury, that change cannot be allowed and the State must shoulder the burden for its lack of due diligence in the preparation of the original indictment, which cannot sustain a felony.

Weaver v State, 87 SW3d 557, 561 (Tex Crim App 2002) "WHERE THERE ARE MORE THAN TWO PRIOR CONVICTIONS, THE STATE SHOULD USUALLY INCLUDE IN THE INDICTMENT THE TWO MOST RECENT CONVICTIONS. HOWEVER, IF FOR SOME REASON THE STATE CHOOSES NOT TO ALLEGE THE TWO MOST RECENT CONVICTIONS IN THE INDICTMENT AND THOSE CONVICTIONS ARE MORE THAN TEN YEARS OLDER THAN THE INSTANT OFFENSE, THE STATE MUST COMPLY WITH 49.09(e) [emphasis added]." Note that Rev. Stat. 6701/-1(i) is the predecessor of 49.09(e).

CONCLUSION

(1) The court's refusal to give effect to the Acts 2005, Sec. 4 requirement of proving the "date." either as an element or to the court during the State's case in chief, rested on the authority of *State v Mason*, 980 SW3d 635 (Tex Crim App 1998). But Mason claimed no authority other than that of the absurdity doctrine. And Mason's reliance on the authority of the absurdity doctrine is misplaced because "THE DOCTRINE DOES NOT INCLUDE SUBSTANTIVE ERRORS ARISING FROM A DRAFTER'S FAILURE TO APPRECIATE THE EFFECT OF CERTAIN PROVISIONS." [emphasis added]. Thus, because the Mason holding is unauthorized as a matter of law, Mason is inapplicable to Crider and therefore proof of the date on which Crider's 1990 convictions were committed as required by the terms of Acts 2005, Sec. 4, must be adhered to.

(2) It was not unintentional or unreasonable for the Legislature to make an element the date on which prior DWI convictions were committed. See 1983, 1993, 2001, and 2005 Savings Clauses in this brief; *Quick v City of Austin*, 7 SW3d 109, 128-129 (Tex 1999). And it was not absurd, see *Dickens v State*, 981 SW2d 186, 188 (Tex Crim App 1998); see also Antonin Scalia and Bryan A. Garner, Reading Law: The Interpretation of Legal Texts, Section 37, "ABSURDITY DOCTRINE." 237. Therefore, proof of the dates are required to determine which law CONTROLS THE USE as elements of the 1990 prior convictions, and Rev. Stat. 6701/-1(i) thereby has exclusive authority to control the 1990 convictions.

(3) Recidivism cases do not apply to Penal Code 49.09(b) cases because prior conviction elements go DIRECTLY TO GUILT OR INNOCENCE and recidivism goes only COLLATERALLY TO PUNISHMENT, therefore retrospective application of the 2005 law, contrary to the 2005 law, to CONTROL THE USE of Crider's 1990 convictions does violate ex post facto/due process.

(4) There is no intervening conviction available to authorize the use as elements of Crider's 1990 convictions, as required by the only authorized controlling law -Rev. Stat. 6701/-16(i), which means that the 1990 convictions proved at Crider's trial are prohibited from use as elements of a felony DWI by the 2005 and 1983 felony DWI amendments. Thus, Crider's felony DWI conviction and sentence are both illegal and unconstitutional.

(5) Because the court cannot change the prior conviction elements without changing the statutory definition of the elements and prejudicing Crider's substantial rights, he is innocent of a felony. Because Crider is innocent of a felony, he was illegally convicted and sentenced by a court which did not have felony jurisdiction. Crider is ACTUALLY INNOCENT OF BOTH FELONY DWI AND THE HABITUAL CRIMINAL ENHANCEMENT under *Dretke v Haley*, 541 US 386. 388-389 (2004).

(6) Because the district court misunderstood the law and the Fifth Circuit misunderstood Crider's complaint, both prevented consideration of Crider's petition under a valid theory of law. Therefore, both courts having committed error of law and abuse of discretion, Crider is entitled to Certiorari review of this complicated case, first on the merits, and again on the abuse of discretion standard. Alternatively, the Court has authority to remand to the Fifth Circuit with an Order to grant COA.

PRAYER

Crider prays the Honorable Supreme Court of the United States will grant him relief in one of three forms: (1) remand him back to the trial court to be resentenced for misdemeanor

DWI; (2) grant him Certiorari; or (3) remand him to the United States Court of Appeals for the Fifth Circuit, ordering that court to grant him COA, appoint him an attorney, and to consider his actual innocence claim under *Dretke v Haley*, 541 US 386, 388-389 (2004). Respectfully Submitted, /s/ Robert Crider. Robert L. Crider ~~December~~ March 10, ~~2024~~ 2025 Signature

Robert Crider, Pro Se TDCJ ID 2230764 McConnell Unit 3001 S. Emily Dr. Beeville, TX 78102.

State of Texas County of Karr

This instrument was acknowledged before me on the 10 of March 2025

By Robert L. Crider

Jordan Wi

Notary Public

JORDAN WIDENER
Notary Public, State of Texas
Comm. Expires 01-09-2028
Notary ID 134707637