IN THE COURT OF CRIMINAL APPEALS OF TEXAS
IN AUSTIN, TEXAS

State ex rel. Ken Paxton, Relator, v. The Honorable Catherine Mauzy, 419th District Court of Travis County, Texas, Respondent.	§ § § § § § § § § § §	CAUSE NO. WR-94,432-01 Original Proceeding to Cause No. D-1-GN-22-007149 Pending in the 419th District Court of Travis County, the Honorable Catherine A. Mauzy, Presiding[1]

RESPONSE TO MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF PROHIBITION AND PETITION FOR WRIT OF PROHIBITION TO THE 419TH DISTRICT COURT OF TRAVIS COUNTY

Real party in interest Robert Alan Fratta, makes the following response to putative Relator's Motion and Petition.

I. THIS COURT LACKS JURISDICTION

This Court is without jurisdiction to issue the requested relief, and Real Party in Interest is simultaneously seeking a writ of mandamus or prohibition from the Texas Supreme Court, which has jurisdiction under

[1] The underlying case has been reassigned.

Section 3, Article V of the Texas Constitution, Section 22.002 of the Government Code, and case law from this Court and the Texas Supreme Court.

As the Attorney General argued in an analogous case:

> "'For a court to act, it must have jurisdiction to do so. This is fundamental.'" *State ex rel. Millsap v. Lozano*, 692 S.W.2d 470, 482 (Tex. Crim. App. 1985) (quoting *State v. Klein*, 224 S.W.2d 250 (Tex. Crim. App. 1949)). Jurisdiction emanates either from the Texas Constitution or statute. *See Ex parte Golden*, 991 S.W.2d 859, 861 (Tex. Crim. App. 1999) ("The Legislature may define, expand, or limit this Court's original writ jurisdiction."); *see also* Tex. Const. art. V, § 5(c) ("*Subject to such regulations as may be prescribed by law*, the Court of Criminal Appeals shall have the power to issue . . ., in criminal law matters, the writs of mandamus, procedendo, prohibition, and certiorari.") (emphasis added [by Attorney General]).

Respondent's Opposition to Relator's Motion for Leave to File Petition for Writ of Prohibition and Motion for Stay of Execution at 1-2, *In re Patrick Henry Murphy*, WR-63,549-02 (Tex. Crim. App. Mar. 22, 2019).

As the Attorney General also pointed out in *Murphy*, challenges to the manner in which a State carries out an execution are civil matters that, if they raise constitutional claims, can be brought under 42 U.S.C. § 1983. *Nance v. Ward*, 142 S. Ct. 2214 (2022). "[S]tate as well as federal

courts have jurisdiction over suits brought pursuant to … § 1983." *Haywood v. Drown*, 556 U.S. 729, 731 (2009). When those suits are brought in Texas state courts, they fall within the jurisdiction of the Texas Supreme Court, *see*, *e.g.*, *Tex. Dept. of Pub. Safety v. Petta*, 44 S.W.3d 575, 577 (Tex. 2001), and not this Court because the Texas Supreme Court "is the court of final review for civil matters." *In re Reece*, 341 S.W.3d 360, 372 (Tex. 2011). On the other hand, in Texas, unlike the federal system, habeas "proceedings are characterized as 'criminal' for jurisdictional purposes" and "as criminal proceedings by statute." *Ex parte Rieck*, 144 S.W.3d 510, 516 (Tex. Crim. App. 2004). Thus, this Court has consistently held that challenges to the manner in which an execution is carried out are not cognizable on habeas review. *Ex parte Alba*, 256 S.W.3d 682, 685-86 (Tex. Crim. App. 2008); *Ex parte Chi*, 256 S.W.3d 702, 703 (Tex. Crim. App. 2008).

In a pair of cases concerning analogous litigation by a prisoner challenging an order entered as part of a criminal judgment, this Court and the Texas Supreme Court issued opinions directly adverse to Relator's position. Although those cases were decided after the principal case Relator relied on, *State ex rel. Holmes v. Honorable Ct. of Appeals for Third*

Dist., 885 S.W.2d 389 (Tex. Crim. App. 1994), no party presented those dispositive decisions to this Court previously.

In *Johnson v. Tenth Jud. Dist. Ct. of Appeals at Waco*, 280 S.W.3d 866 (Tex. Crim. App. 2008), and *Harrell v. State*, 286 S.W.3d 315 (Tex. 2009), this Court and Texas Supreme Court serially considered whether an inmate's challenge to a "withdrawal order" requiring his prison funds be used to pay costs assessed by the convicting court was cognizable as a civil or a criminal action. This reached the issue first and framed the question as whether a withdrawal order entered by a criminal court remains "a 'criminal law matter' that requires us, incidentally, to examine certain provisions of the civil law for resolution, or is it primarily a civil law matter that happens, incidentally, to emanate from a judgment in a criminal case, but is not otherwise related to criminal law at all?" *Johnson*, 280 S.W.3d at 870.

This Court concluded that challenges to withdrawal orders were not criminal law matters under Article V of the Texas Constitution. *Id.* at 874. This Court reached that conclusion in part because appellate review of matters arising under Section 501.014 of the Texas Gov't. Code, which governs prisoners' trust accounts, go to the courts of appeal and Texas

Supreme Court. The same is true for the legal issues presented to Respondent. Nothing in this Court's recent decision suggests this Court would have jurisdiction to consider an appeal by either party in this case.

In *Harrell*, the Texas Supreme Court "agree[d] that withdrawal orders are more civil in nature than criminal." 286 S.W.3d at 318. The high court's reasoning is decisive in the case before this Court:

> We start with the proposition that "[d]isputes which arise over the enforcement of statutes governed by the Texas Code of Criminal Procedure, and which arise as a result of or incident to a criminal prosecution, are criminal law matters."[2] Further, we observe that in criminal-law matters, "criminal law is the subject of the litigation."[3]
>
> The withdrawal orders here—issued nine years after Harrell's first conviction and three years after his second—may be incidental to criminal prosecutions and a mechanism to enforce criminal judgments, but they do not arise over enforcement of a statute governed by the Code of Criminal Procedure. Nor is criminal law the focus of this action.

Harrell, 286 S.W.3d at 318.

Likewise, the order setting Petitioners' execution dates are "mechanisms to enforce criminal judgments," but they issued many years after their criminal prosecutions, and neither the Penal Code nor the Code of Criminal Procedure governs Petitioner's claims.

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[2] Quoting *Curry v. Wilson*, 853 S.W.2d 40, 43 (Tex. Crim. App. 1994).
[3] Quoting *Smith v. Flack*, 728 S.W.2d 784, 788 (Tex. Crim. App. 1987)

Contrary to Relator's arguments, the injunction issued by Respondent does not violate this Court's previous order or *Holmes*. In *Holmes*, this Court held that "the entry of an order which stays the execution of a death row inmate is a criminal law matter." 885 S.W.3d at 394. The *Holmes* court based this decision on the fact that the injunction (i) "arises over the enforcement of statutes governed by the Texas Code of Criminal Procedure" and (ii) "arises as a result of or incident to a criminal prosecution." *Id.* at 393 (quoting *Curry*, 853 S.W.2d at 43). As noted above, the Real Parties' claims are based on three civil statutes. Therefore, Respondent's order does not arise over the enforcement of statutes governed by the Texas Code of Criminal Procedure. Furthermore, pentobarbital is not a drug that is unique to those who have been criminally prosecuted. Though the Real Parties here have been prosecuted, this action arises out of the failure of a state agency to demonstrate that they are compliant with statutory requirements, not the criminal prosecution of the Real Parties.

II. Relator's Filing is Facially Deficient

Relator's filings do not comply with Texas Rule of Appellate Procedure 52.3(k). *In re Mendoza*, 467 S.W.3d 76, 78 (Tex. App.—Houston [1st Dist.] 2015, no pet.)

III. Relator Has an Appellate Remedy and Therefore Cannot Satisfy the Standard for Mandamus

Relator's clients have an appellate remedy available in the Third Court of Appeals.

Even if pursuing that remedy requires a delay in executions, that is not an irreparable injury, if it is an injury at all. Were a delay in an execution an irreparable injury, any of the many, many stays of execution imposed in other cases would have produced some demonstrable irreparable harm. Relator points to no evidence of any irreparable harm.

IV. Relator has been Dilatory

Relator learned yesterday that Respondent would conduct a hearing on Real Parties' claims. If Relator believed that Respondent had no jurisdiction to enter the relief sought, Relator could have brought the instant proceeding yesterday.

It is no answer to say Relator did not know the court would rule in Real Parties' favor. If Relator is correct that Respondent lacked jurisdiction, Respondent lacked the power to hear the case at all. Relator did not dispute Respondent's jurisdiction.

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of January 2023, a copy of the foregoing application was served upon counsel for each party via efile.

/s/ Tivon Schardl
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