NO. ________________

IN THE SUPREME COURT OF THE UNITED STATES

Richard Allen Masterson, Petitioner

VS.

The State of Texas, Respondent

CAPITAL CASE
MR. MASTERSON'S EXECUTION IS SCHEDULED FOR JANUARY 20, 2016, at 6:00 pm CST

PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

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QUESTION PRESENTED

Does the Texas Court of Criminal Appeals' (TCCA) denial of Petitioner's Motion for Leave to File a Writ of Prohibition deny Petitioner due process and right of access because it prevents Petitioner any avenue for challenging the constitutionality of Texas Government Code §552.1081?

LIST OF PARTIES

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NO. ________________

IN THE SUPREME COURT OF THE UNITED STATES

Richard Allen Masterson, Petitioner

VS.

The State of Texas, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

Petitioner respectfully prays that a writ of certiorari issue to review the TCCA's denial of leave to file a writ of prohibition.

OPINION BELOW

TCCA's denial of petitioner's writ of prohibition appears at Appendix A. Judge Alcala's published concurrence appears at Appendix B.

JURISDICITON

Any challenge to the method an execution is to be carried out is not ripe until execution is imminent. *Ex parte O'Brien*, 190 S.W.3d 677, 679 n.2 (Tex. Crim. App. 2006); *Doyle v. State*, No. 74, 960, 2006 WL 1235088 (Tex. Crim. App. May 10, 2006) (not designated for publication). And the TCCA has explicitly established that it maintains exclusive jurisdiction over a capital conviction and sentence of death. *State ex rel. Holmes v. Third Court of Appeals*, 885 S.W.2d 389, 395-96 (Tex. Crim. App. 1994).

However, the TCCA has refused petitioner leave to file a writ of prohibition, leaving petitioner with no other option for state court review.

Additionally, Supreme Court Rule 10 provides that a writ of certiorari may be issued when "a state court...has decided an important question of federal law that has not been, but should be, settled by this Court." Several other states have statutes similar to Texas, which keep the identity of the manufacturers and suppliers of death penalty drugs a secret. This Court should assert its jurisdiction in order to consider an issue that may potentially affect hundreds of prisoners facing a sentence of death.

This petition is timely and the jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment to the United States Constitution: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fourteenth Amendment to the United States Constitution: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner was found guilty of capital murder and sentenced to death. Petitioner filed a motion for leave to file a writ of prohibition, and a writ of prohibition, seeking a stay of execution and an opportunity to mount a challenge to Texas Government Code §552.1081, enacted four months ago. §552.1081 prohibits the dissemination of the identity of "any person or entity that manufactures, transports, tests, procures, compounds, prescribes, dispenses, or provides a substance or supplies used in an execution." TEX. GOVMT. CODE §552.1081. The TCCA denied petitioner's motion for leave to file, implicitly finding that petitioner failed to meet the requirements for a writ of prohibition.

REASON FOR GRANTING THE PETITION

The TCCA's denial of leave to file a writ of prohibition denies petitioner right of access to the courts under the First Amendment, and due process under the Fourteenth Amendment

A writ of prohibition is an extraordinary remedy. It is available only to those who can establish a "clear right to the relief sought because the facts and circumstances dictate but one rational decision under unequivocal, well-settled, and clearly controlling legal principles," and there is "no adequate remedy at law." *In re Medina*, ___ S.W.3d ___, 2015 WL 6722175, at *10 (Tex. Crim. App. Nov. 4, 2015). An issue of first impression can qualify for prohibitive relief "when the factual scenario has never been precisely addressed but the principle of law has been clearly established." *Id.* (citing *In re State ex rel. Weeks*, 391 S.W.3d 117, 122 (Tex. Crim. App. 2013)). While a challenge

to §552.1081 presents a case of first impression to the TCCA, petitioner's fundamental right to challenge the constitutionality of any restriction of the government is "positively commanded and so plainly prescribed under the law as to be free from doubt." *In re Allen*, 462 S.W.3d 47, 50 (Tex. Crim. App. 2015).

The Eighth Amendment prohibits the imposition of cruel and unusual punishment. While §552.1081 does not, on its face, subject petitioner to cruel and unusual punishment, it does limit petitioner's ability to investigate and litigate the issue. Further, both the First and Fourteenth Amendments provide petitioner the uncontroverted means to challenge unconstitutional government restrictions. *See LaChance v. Erickson*, 522 U.S. 262, 266, 118 S. Ct. 753, 756, 139 L. Ed. 2d 695 (1998) ("The core of due process is the right to notice and a meaningful opportunity to be heard."); *see also Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982) (The well-settled right of access to governmental proceedings results from "the common understanding that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.").

Although the constitutionality of the specific statute at issue has yet to be determined, the fundamental right to do so is unequivocal. Thus, the TCCA's order denying leave to file the writ of prohibition violated petitioner's right to access the courts and due process.

Further, there is simply no other time, or vehicle, to challenge the validity of §552.1081. In Texas, any writ of habeas corpus filed in a death case must be in

accordance with article 11.071 of the Texas Code of Criminal Procedure. However, such a writ must attack the judgment of conviction only and is not the proper method for a challenge to the way a sentence is to be carried out. *Ex parte Alba*, 256 S.W.3d 682, 685 (Tex. Crim. App. 2008) (A claim raised in a writ of habeas corpus must challenge the judgment against the applicant or seek to change his sentence). And, since the constitutionality of §552.1081 has yet to be determined, petitioner cannot meet the stringent requirements for a writ of prohibition. *See In re Masterson*, Nos. WR-59,481-04 & 59,481-05 (Tex. Crim. App. Jan. 15, 2016) (Alcala, J. concurring) (Appendix B) ("Given that [§552.1081] has never been litigated before, ..., relator cannot meet the requirement that he show a clear right to relief.").

Judge Alcala's concurrence recognizes that petitioner is now placed in a judicially-created catch-22.

> Although I agree with the Court's ultimate holding today, I recognize that this places relator and other similarly situated litigants in what may be a problematic position. Relator's complaint challenging the State's refusal to disclose the particular supplier and manufacturer of a drug to be used in his execution is likely not ripe until immediately before the execution is set to take place. But once an execution date grows imminent and the claim is ripe, it is likely too late for a death-sentenced individual to challenge the validity of the statute in a civil proceeding. Furthermore, a civil court would lack the authority to stay an execution. And, as this Court effectively holds today, a petition for a writ of prohibition directed to this Court is also an ineffective vehicle for raising such a claim, given the novel nature of the claim and the stringent requirements for obtaining extraordinary relief. I thus recognize that relators' motion gives light to difficult questions that may need to be addressed by either the judicial or legislative branches in the future. In this case, however, in which relator has presented nothing more than a desire to discover the identity of the drug supplier without any more compelling facts to demonstrate a need

> for that information, I agree that he has failed to meet the strict requirements for a writ of prohibition.

In re Masterson, Nos. WR-59,481-04 & 59,481-05.

In an attempt to gain the "more compelling facts" that Judge Alcala notes, her concurrence demonstrates the hamster wheel that petitioner will continue to ride straight into the death chamber. The TCCA's denial of leave to file petitioner's writ of prohibition denied him his First Amendment right to access the courts and his Fourteenth Amendment right to due process. Should this Court also refuse to consider petitioner's claim, neither he, nor any other defendant awaiting execution in Texas, are provided a means to challenge the constitutionality of Texas Government Code §552.1081, effectively barring them from ever litigating a lethal injection claim in any state court.

CONCLUSION

For the reasons stated above, this Court should grant petitioner's writ of certiorari.

Respectfully submitted,

/s/ Mandy Miller

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APPENDIX A

In re Richard Allen Masterson,

Nos. WR-59,481-04 & WR-59,481-05

(Tex. Crim. App., January 15, 2016)

Order Denying Leave to File Petition for Writ of Prohibition

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NOS. WR-59,481-04 and WR-59,481-05

In Re RICHARD ALLEN MASTERSON, Relator

ON MOTIONS FOR LEAVE TO FILE PETITIONS FOR WRITS OF PROHIBITION AND PETITIONS FOR WRITS OF PROHIBITION IN CAUSE NO. 867834 IN THE 176TH JUDICIAL DISTRICT COURT HARRIS COUNTY

***Per curiam*. ALCALA, J., filed a concurring statement.**

ORDER

We have before us two motions for leave to file petitions for writs of prohibition and two writs of prohibition. In April 2002, a jury found relator guilty of the offense of capital murder. The jury answered the special issues submitted pursuant to Texas Code of Criminal Procedure Article 37.071, and the trial court, accordingly, set relator's punishment at death. This Court affirmed relator's conviction and sentence on direct appeal. *Masterson v. State*, 155 S.W.3d 167 (Tex. Crim. App. 2005). This Court denied relief on relator's initial post-conviction application for a writ of habeas corpus, and it

later dismissed relator's first subsequent writ application. *Ex parte Masterson*, No. WR-59,481-01 (Tex. Crim. App. Aug. 20, 2008)(not designated for publication) and *Ex parte Masterson*, No. WR-59,481-02 (Tex. Crim. App. Dec. 19, 2012)(not designated for publication). On December 29, 2015, relator filed in the trial court his second subsequent application for a writ of habeas corpus and a motion to stay his execution. This Court dismissed the writ application and denied the motion for a stay. *Ex parte Masterson*, No. WR-59,481-03 (Tex. Crim. App. Jan. 11, 2016)(not designated for publication).

On January 12, 2016, relator filed the above-referenced pleadings in this Court. After reviewing relator's pleadings, we deny leave to file in both cases.

IT IS SO ORDERED THIS THE 15th DAY OF JANUARY, 2016.

Do Not Publish

APPENDIX B

In re Richard Allen Masterson,

Nos. WR-59,481-04 & WR-59,481-05

(Tex. Crim. App., January 15, 2016)

Order Denying Leave to File Petition for Writ of Prohibition,

Concurring Statement, Alcala, J.,

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NOS. WR-59,481-04 & 59,481-05

IN RE RICHARD ALLEN MASTERSON, Relator

ON MOTIONS FOR LEAVE TO FILE PETITIONS FOR WRITS OF PROHIBITION AND PETITIONS FOR WRITS OF PROHIBITION IN CAUSE NO. 867834 IN THE 176TH JUDICIAL DISTRICT COURT HARRIS COUNTY

ALCALA, J., filed a concurring statement.

CONCURRING STATEMENT

I respectfully concur in the Court's judgment that denies the motions for leave to file two writs of prohibition filed by Richard Allen Masterson, relator. I agree with this Court's ultimate determination that relator's request for prohibition relief must be rejected in light of his failure to meet the stringent pleading requirements that attach to such a request. I write separately to explain my rationale for rejecting relator's present challenge to the newly enacted section of the Government Code that protects the confidentiality of certain

information pertaining to the State's procedures in carrying out executions. *See* TEX. GOV'T CODE § 552.1081.

At the outset, I note that relator's challenge is one of first impression in this Court. Texas Government Code Section 552.1081 is an entirely new statute that became effective just four months ago. It provides for the confidentiality of certain information regarding the State's execution procedures by excepting from public-disclosure requirements the "identifying information" of "(1) any person or entity who participates in an execution procedure, including a person who uses, supplies, or administers a substance during the execution; and (2) any person or entity that manufactures, transports, tests, procures, compounds, prescribes, dispenses, or provides a substance or supplies used in an execution." TEX. GOV'T CODE § 552.1081. In challenging the statute on both state and federal constitutional grounds, relator contends that, although the Texas Department of Criminal Justice has furnished information regarding the current execution protocol and the identity of the drug to be used in his execution, TDCJ has relied on this statute as its authority for declining to reveal any information as to the manufacturer or supplier of the drug. Relator contends that the information released by TDCJ is inadequate because "the drug used to execute [him] is only as safe and effective as the persons who manufacture, supply, and handle it." By barring him from learning the identity of the manufacturer and supplier of the execution drug, relator contends that Section 552.1081 operates in such a way as to hinder his ability to "launch[ ] an informed and thorough challenge to the integrity and safety of the

pentobarbital to be used in carrying out his death." In sum, he asserts that the "secrecy" imposed by the statute effectively curtails his ability to ensure that his execution will be carried out in conformity with the constitutional prohibition on cruel and unusual punishment, in violation of the First and Fourteenth amendments to the federal Constitution and the due course of law and open courts provisions in the Texas Constitution.

This Court's order does not expressly state its reasoning for denying relator's motion. My rationale for denying his motion is that relator has failed to meet the stringent pleading requirements that attach to a request for prohibition relief. *See, e.g., In re Medina*, __S.W.3d__, 2015 WL 6722175, at *10 (Tex. Crim. App. Nov. 4, 2015) (explaining that the extraordinary remedy of prohibition is available only to one who can show both that (1) he has "a clear right to the relief sought because the facts and circumstances dictate but one rational decision under unequivocal, well-settled, and clearly controlling legal principles," and (2) he has no adequate remedy at law); *In re Allen*, 462 S.W.3d 47, 50 (Tex. Crim. App. 2015) (in parallel context of a request for mandamus relief, explaining that, for extraordinary remedy to be warranted, the act a relator seeks to compel "must be positively commanded and so plainly prescribed under the law as to be free from doubt"). Given this demanding standard, I am bound to agree with the Court's implicit determination that relator has failed to carry his burden of showing that he is entitled to prohibition relief.

To establish the first of the two requirements for obtaining a writ of prohibition, a relator must show "that the act he wishes the higher court to restrict does not involve a

discretionary or judicial decision." *See Medina*, 2015 WL 6722175, at *4. Relator's request to prohibit the State from carrying out his execution based on the existence of the allegedly unconstitutional statute necessarily would involve a judicial decision of this Court based on our having to determine whether the non-disclosure statute is in fact unconstitutional. Given that the statute at issue has never been litigated before, and given that his constitutional challenge does not fall within the exception to the general rule against determining matters of first impression in a prohibition proceeding, relator cannot meet the requirement that he show a clear right to relief. *See id.* (explaining that "'an issue of first impression can sometimes qualify for mandamus relief when the factual scenario has never been precisely addressed but the principle of law has been clearly established'") (quoting *In re State ex rel. Weeks*, 391 S.W.3d 117, 122 (Tex. Crim. App. 2013)).

To establish the second of the two requirements for obtaining a writ of prohibition, a relator must demonstrate the absence of an adequate remedy at law. It is arguable that relator has also failed to meet this prong of the prohibition standard because his complaint might be more properly addressed in a civil-rights lawsuit. After all, relator's constitutional complaint does not directly challenge the legality of his sentence or the precise manner in which it is to be carried out; instead, he challenges the deprivation of information regarding the identity of the person or entities supplying the drugs to be used. A civil-rights lawsuit, however, may not constitute an "adequate" remedy in light of the facts that any complaint would not be ripe until an execution date was set and that a civil court would lack the authority to stay an impending

execution. Given the rigorous demands of the prohibition standard, I am compelled to agree with the Court's ultimate determination that relator has failed to satisfy that standard.

Although I agree with the Court's ultimate holding today, I recognize that this places relator and other similarly situated litigants in what may be a problematic position. Relator's complaint challenging the State's refusal to disclose the particular supplier and manufacturer of a drug to be used in his execution is likely not ripe until immediately before the execution is set to take place. But once an execution date grows imminent and the claim is ripe, it is likely too late for a death-sentenced individual to challenge the validity of the statute in a civil proceeding. Furthermore, a civil court would lack the authority to stay an execution. And, as this Court effectively holds today, a petition for a writ of prohibition directed to this Court is also an ineffective vehicle for raising such a claim, given the novel nature of the claim and the stringent requirements for obtaining extraordinary relief. I thus recognize that relator's motion gives light to difficult questions that may need to be addressed by either the judicial or legislative branches in the future. In this case, however, in which relator has presented nothing more than a desire to discover the identity of the drug supplier without any more compelling facts to demonstrate a need for that information, I agree that he has failed to meet the strict requirements for a writ of prohibition.

I also take this opportunity to note that this Court's application of the standard for granting extraordinary relief appears to be in a state of flux that has led to this Court applying a liberal standard in some cases while applying a more stringent standard in others. *Compare*

In re State ex rel. Risinger, No. WR-84,212-01 (Tex. Crim. App. Nov. 18, 2015) (granting mandamus relief to the State on basis that trial judge lacked authority under Code of Criminal Procedure Article 43.141 to withdraw scheduled execution date in the absence of active habeas pleadings, and ordering scheduled execution to proceed), *with Medina*, 2015 WL 6722175, at *11 (denying prohibition relief to death-sentenced individual on basis that he had failed to show that he had a clear right not to testify at his post-conviction writ hearing), *and Allen*, 462 S.W.3d at 53 (denying mandamus relief to the State, and holding that a defendant's request for a pretrial determination of intellectual disability "does not call for the execution of a ministerial act").

In *Risinger,* a case in the identical procedural posture as this case in that it dealt with the imminent execution of Raphael Deon Holiday and a party's last-minute request for extraordinary relief, this Court relied on an unpublished order from a previous case as a basis for holding that the statute at issue, Code of Criminal Procedure Article 43.141, clearly prohibited the trial judge in that case from withdrawing an imminent execution date. *See id.* (citing *In re John R. Roach*, No. WR-41,168-08 (Tex. Crim. App. June 17, 2008)). In its three-page order, this Court's majority held that the State had satisfied the clear-right-to-relief component of the mandamus standard, thereby granting mandamus relief and ordering the defendant's execution to proceed on schedule. *See id.* In that case, this Court's majority order did not analyze or even mention the no-adequate-remedy-at-law prong. *See id.* I issued a dissenting statement explaining my view that the law was unsettled as to whether the trial

court was authorized to withdraw the scheduled execution date and, thus, I concluded that the State was not entitled to mandamus relief. *See id.* (Alcala, J., dissenting) ("[I]t is not at all obvious to me that the plain language in Article 43.141 so clearly prohibits the judge of the convicting court from withdrawing an execution date in order to permit a death-sentenced individual to pursue additional post-conviction proceedings").[1] By contrast, in denying the requests for extraordinary relief in both *Medina* and *Allen*, neither of which involved an impending execution, this Court engaged in an exhaustive analysis in each case, going to great lengths to demonstrate why the litigants had failed to meet the rigorous demands for demonstrating an entitlement to extraordinary relief. *See Medina*, 2015 WL 6722175, at *10 ("A writ of prohibition is not the proper vehicle to settle unsettled law."); *Allen*, 462 S.W.3d at 53 (observing that "[t]his case, like all mandamus cases, must be decided on the existing law alone"; "a mandamus proceeding is not the appropriate place to interpret statutory language").

I conclude that this Court's majority orders granting or denying extraordinary relief should explain their rationale so that litigants may understand this Court's rulings. In the

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[1]Holiday was executed on schedule. On the night of Holiday's execution, Judge Newell and I each dissented from this Court's majority order that was issued less than twenty minutes after this Court had received Holiday's response to the State's petition for mandamus. Several weeks later, when this Court issued a show-cause order against Holiday's attorneys, I issued a dissenting statement as to the show-cause order, and Judge Newell issued a concurring statement. Although Judge Newell and I have disagreed as to the rationale underpinning our ultimate conclusion that this Court erred in granting the State's request for extraordinary relief to permit Holiday's execution after the trial court had withdrawn the order of execution, each of our opinions reflect our agreement as to the important matter that Holiday should not have been executed when he was because the State failed to meet the legal requirements for a petition for mandamus relief.

absence of explanations for this Court's majority orders, it may appear as though some litigants are being held to a heightened standard whereas others are not, depending on the nature and timing of their complaints.

The issues presented in this case will likely appear again before this Court. Although I am concerned about the possibility that such claims will repeatedly evade judicial review, I am bound by this Court's law under the facts of this case that demonstrate that relator has failed to carry his burden of showing that he is entitled to prohibition relief. With these comments, I concur in the Court's order as to relator's petition for a writ of prohibition in No. WR-59,481-04.

I further note that, having reviewed relator's motion for leave to file a petition for a writ of prohibition in No. WR-59,481-05, and having concluded that it lacks merit, I join this Court's order in that case.

Filed: January 15, 2016

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