

No. 01-24-00520-CR

**In The Court of Appeals
First District of Texas
At Houston**

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***Ex parte* FORREST GREENBERG**

**On Appeal from Cause No. 1865734
488th District Court of Harris County, Texas
The Honorable Mark Kent Ellis, Visiting Judge**

APPELLANT/PETITIONER GREENBERG'S BRIEF

ORAL ARGUMENT REQUESTED

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IDENTITY OF PARTIES AND COUNSEL

Pursuant to TEX. R. APP. P. 38.1(a), the following is a complete list of the names of the parties and their counsel.

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Petitioner/Appellant

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STATEMENT OF THE ISSUE

- I. The trial court erred in denying relief on Mr. Greenberg's pre-trial writ of *habeas corpus* because the Amendment to Penal Code 12.01 (1)(B) violates the *ex post facto* clause of the U.S. and Texas Constitutions by removing a possible defense that was available under the limitations clause in effect at the time of the alleged offense.

STATEMENT OF THE CASE

I. Nature of the Case

This is an interlocutory appeal of the Order denying relief on Mr. Greenberg's pre-trial writ of *habeas corpus* seeking dismissal of criminal charges on grounds that they violate his rights under the *ex post facto* clause. ("Order") (CR¹ 23, 25) signed on June 3, 2024.

II. Trial Court

The Honorable Mark Kent Ellis, Visiting Judge of the 488th District Court of Harris County, Texas.

III. Course of the Proceedings and the Trial Court's Disposition of the Case

Mr. Greenberg was charged with the offense of sexual assault of a child, a felony, in Cause No. 179367801010 in the 488th District Court of Harris County, Texas. Prior to trial, Mr. Greenberg filed a writ of *habeas corpus*

¹ The record in this case consists of one volume of the Clerk's Record, one volume of the Clerk's Supplemental Record and a volume of the Reporter's Record. Throughout this brief, the Clerk's Record is referenced as "CR," while the Clerk's Supplemental Record is referenced as "CSR." The Reporter's Record is referenced as "RR," with the page number of the record following "RR." For example, "RR 54" refers to page number 54 of the volume of the Reporter's Record.

alleging violation of the *ex post facto* clause and the statute of limitations. The writ issued and the matter was heard by Judge Ellis on June 3, 2024. Judge Ellis denied the relief requested and this appeal followed. Mr. Greenberg remains on bond in the underlying case pending the resolution of the same.

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APPELLANT/PETITIONER GREENBERG'S BRIEF

TO THE HONORABLE COURT OF APPEALS:

Forrest Greenberg, Appellant/Petitioner in docket number 01-24-00520-CR, respectfully submits this Brief seeking reversal of the denial of relief requested in his pre-trial writ and remand with instructions that the *habeas* court dismiss the charges he face as barred by the *ex post facto* clause.

SUMMARY OF THE ARGUMENT

The trial court erred in denying relief on Mr. Greenberg's pre-trial writ of *habeas corpus* which showed that he was charged with the offense of aggravated sexual assault of a child - under 14 years old, in violation of Texas Penal Code § 22.021. The Indictment alleged that the offense occurred "on or about November 13, 1996." Under Tex. Code Crim. Pro. Art. 12.01, at the time the offense allegedly occurred, the statute of limitations for this offense was 10 years. Although the statute of limitations was extended in 1999 and again in 2007, Mr. Greenberg argued that applying the extended limitation period amounted to an *ex post facto* violation as prohibited in the constitutions of both the United States and the State of Texas. By extending the limitations period and applying the longer statute of limitations, Mr. Greenberg was deprived of a viable, constitutionally-guaranteed defense. Mr. Greenberg argued that as result, the Indictment was barred by the *ex post facto* clauses of the United States and Texas constitutions.

ARGUMENT

- I. The trial court erred in denying relief on Mr. Greenberg’s pre-trial writ of *habeas corpus* because the Amendment to Penal Code 12.01 (1)(B) violates the *ex post facto* clause of the U.S. and Texas Constitutions by removing a possible defense that was available under the limitations clause in effect at the time of the alleged offense.**

A. Standard of Review

In reviewing a trial court's decision on a pretrial application for writ of *habeas corpus*, the facts are reviewed in the light most favorable to the trial court's ruling and, absent an abuse of discretion, the ruling is upheld. *Ex parte Wheeler*, 203 S.W.3d 317, 324 (Tex. Crim. App. 2006). An abuse of discretion does not occur unless the trial court acts “arbitrarily or unreasonably” or “without reference to any guiding rules and principles,” *State v. Hill*, 499 S.W.3d 853, 865 (Tex. Crim. App. 2016) (quoting *Montgomery v. State*, 810 S.W.2d 372, 380 (Tex. Crim. App. 1990)), or unless the trial court's decision “falls outside the zone of reasonable disagreement,” *Johnson v. State*, 490 S.W.3d 895, 908 (Tex. Crim. App. 2016).

B. Discussion

The trial court erred in denying relief on Mr. Greenberg's pre-trial writ of *habeas corpus* which showed that he was charged with the offense of aggravated sexual assault of a child - under 14 years old, in violation of Texas Penal Code § 22.021. The Indictment alleged that the offense occurred "on or about November 13, 1996." Under Tex. Code Crim. Pro. Art. 12.01, at the time the offense allegedly occurred, the statute of limitations for this offense was 10 years. Although the statute of limitations was extended in 1999 and again in 2007, Mr. Greenberg argued that applying the extended limitation period amounted to an *ex post facto* violation as prohibited in the constitutions of both the United States and the State of Texas. By extending the limitations period and applying the longer statute of limitations, Mr. Greenberg was deprived of a viable, constitutionally-guaranteed defense. Mr. Greenberg argued that as result, the Indictment was barred by the *ex post facto* clauses of the United States and Texas constitutions.²

² Although recent precedent indicates that a statute of limitation issue is non-constitutional and reparable and therefore is not cognizable in a pre-trial *habeas*

The prosecution for the acts alleged in the indictment is barred by both the State and Federal Constitution, under the *ex post facto* clauses therein. See, Article 1 Sec. 9; Art. I Sec. 10, Tex. Const. Art I Sec. 16, *see also Stogner v. California*, 539 U.S. 607 (2003), and *Graham v. Florida*, 560 U.S. 48, 71 (2010). Texas Code of Criminal Procedure article 12.01 under the 1995 legislation, subsection (2)(D) provided for a statute of limitations of ten years from the date of the commission of the offense for sexual assaults under section 22.011(a)(2). This was later modified in 1997 to ten years from the 18th birthday of the victim of the offense under 12.01(5)(B) and (C). In 2007 the Legislature modified the statute of limitations for aggravated sexual assault under 12.01(1)(B) to read “no limitation.” This removed a potential defense which had been available to Mr. Greenberg at the time of the alleged offense and therefore was an *ex post facto* enactment.

proceeding, *Ex parte Edwards*, 663 S.W.3d 614, 619 (Tex. Crim. App. 2022), Appellant’s claim rises to the level of a non-reparable and constitutional violation of the *ex post facto* clause, properly raised via a pre-trial *habeas* writ.

An *ex post facto* law is one passed after the occurrence of a fact or commission of an act, which retrospectively changes the legal consequences or relations of such fact or deed. BLACK'S LAW DICTIONARY 580 (6th ed. 1990). There are four *ex post facto* categories: (1) punishes as a crime any act that was innocent when performed; (2) inflicts greater punishment than the law attached to a criminal offense when committed; (3) deprives the accused of any defense available at the time the act was committed; or (4) alters the legal rules of evidence and requires less or different testimony than the law required at the time of the commission of the offense to convict the accused. *Calder v. Bull*, 3 U.S. 386, 390-391, 1 L. Ed. 648, 3 Dall. 386 (1798); *Johnson v. State*, 930 S.W.2d 589, 591 (Tex.Cr.App. 1996).

The *Ex Post Facto* Clause was designed as “an additional bulwark in favour of the personal security of the subject, to protect against the favorite and most formidable instruments of tyranny,” that were “often used to effect the most detestable purposes.” The Federalist Papers No. 84, p. 512 ©. Rossiter ed. 1961) (A.Hamilton). A law reducing the quantum of evidence

required to convict an offender is as grossly unfair as, say, retrospectively eliminating an element of the offense, increasing the punishment for an existing offense, or lowering the burden of proof. In each of these instances, the government subverts the presumption of innocence by reducing the number of elements it must prove to overcome that presumption; by threatening such severe punishment so as to induce a plea to a lesser offense or a lower sentence; or by making it easier to meet the threshold for overcoming the presumption. Reducing the quantum of evidence necessary to meet the burden of proof is simply another way of achieving the same end. All of these legislative changes, in a sense, are mirror images of one another. In each instance, the government refuses, after the fact, to play by its own rules, altering them in a way that is advantageous only to the State, to facilitate an easier conviction. 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. *See Carmell v. Texas*,

529 U.S. 513, 522, 120 S.Ct. 1620 (2000); *In re Hall*, 433 S.W.3d 203, 214 (Tex.App. - Houston [14th Dist.] 2014, orig. proceeding).

In *Peugh v. United States*, 569 U.S. 530, 133 S.Ct. 2072 (2013), the Supreme Court held that it was a violation of the *ex post facto* clause of the Federal Constitution to apply sentencing guidelines in effect at the time of defendant's trial, versus the ones in effect at the time of the commission of the indicted crime. In *Peugh*, the Court held that even if the advisory sentencing guidelines did not require imposition of a higher sentence, the possibility that they could result in a greater punishment was sufficient to trigger an *ex post facto* determination and require the use of the procedural law in effect at the time of offense versus trial. *See, Peugh*, 569 U.S. at 544; *see also, Garner v. Jones*, 529 U.S. 244, 120 S.Ct. 1362 (2000) (recognizing that parole laws which increase time in custody can violate *ex post facto* clause and remanding for additional fact finding in the lower courts).

The prohibition as to *ex post facto* laws applies not only to laws that are facially retroactive, but also to laws that are applied retroactively. *Phillips v.*

State, 362 S.W.3d 606, 610 (Tex.Cr.App. 2011). The constitutional prohibition of *ex post facto* laws has been held to be a *Marin* category-one, “absolute requirement” that is not subject to forfeiture by the failure to object. *See Ieppert v. State*, 908 S.W.2d 217 (Tex.Cr.App. 1995), *see also Sanchez v. State*, 120 S.W.3d 359, 365-66 (Tex.Cr.App.2003).

In the instant case, the Legislature changed the law to deny Mr. Greenberg a potential defense. In previous changes to the law, the Legislature increased the time in which the limitation would take effect. Under those modifications of the statutory defense, a defendant could not complain unless and until his defense had vested at the time the law was modified. *See Lindsay v. State*, 760 S.W.2d 649, 653 (Tex.Cr.App. 1988). But in that line of cases the Court of Criminal Appeals noted that the Legislature was providing for a new limitation period, and the statutory change specifically excluded any limitation that had vested at the time of the enactment period. *Id.* Here, the statute of limitations for aggravated sexual assault was not increased or modified in application, it was removed. There is no period of time which will

trigger the statute of limitations for this offense, a potential defense that did exist at the time of the alleged commission of this indicted offense. That defense was categorically removed by the State to make the prosecution of said crime easier for the sovereign. As such it is *ex post facto* violation under both type 3 and type 4 described, *supra*.

Mr. Greenberg is entitled to be prosecuted under the law in effect at the time of the commission of the alleged offense. *Ex parte Mabry*, 137 S.W.3d 58 at 60 (Tex.Cr.App. 2004). By changing the law the Legislature has changed the legal consequences or relations in Mr. Greenberg's case. In so doing, Mr. Greenberg was deprived of a defense that was in effect at the time of the alleged commission of the offense.

PRAYER FOR RELIEF

Mr. Greenberg prays that this Court will reverse the lower court's judgment and grant all relief to which he is entitled, including ordering that the charging instrument be dismissed with prejudice and that the State be barred from any further proceedings under the facts alleged in the charging instrument based upon the violation of the then existing statute of limitations which rises to the level of an *ex post facto* violation.

Respectfully submitted on this 11th day of November, 2024.

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CERTIFICATE OF SERVICE

I certify that on this 11th day of November, 2024 a copy of this brief was served on opposing counsel, Kim Ogg, Harris County District Attorney's Office, via electronic service at the address opposing counsel has listed with the electronic service provider.

D. Craig Hughes
D. Craig Hughes

CERTIFICATE OF COMPLIANCE

I certify the foregoing brief complies with Rule 9.4(i)(2)(A) of the Texas Rules of Appellate Procedure. The brief, excluding those portions detailed in Rule 9.4(I) of the Texas Rules of Appellate Procedure, is 2,825 words long. I have relied upon the word count function of Corel WordPerfect, which is the computer program used to prepare this document, in making this representation.

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