IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. WR-45,746-04

EX PARTE DAVID LEONARD WOOD, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. 58486-171
IN THE 171ST DISTRICT COURT
EL PASO COUNTY

SCHENCK, P.J., concurring in part and dissenting in part.

CONCURRING AND DISSENTING O P I N I O N

The Court today has issued a remand to the lower court for further development of the evidence the Applicant presents. While I concur in this decision insofar as it at least portends some meaningful development of the merits here and agree that the Court acts within its authority, I write separately to offer my reasons for joining in view of its conspicuous lack of stated rationale.

Our remand order cites the eight claims the Applicant raises in his instant habeas application, yet the order simply states we remand the application "to the trial court for development of the claims." The order provides no guidance for what exactly should be developed, timeline for development, requirement of proceedings, or any other direction supporting our ultimate decision to dismiss or determine the application on the merits. If a remand is intended to assist the Court with its decision, I find it odd we offer no explanation to the lower court as to what exactly we need assistance accomplishing. For this reason, though I believe a remand appropriate in that it prevents Texas from prematurely executing an applicant whose claims cast doubt on the appropriateness of his sentence, I dissent from the lack of direction conferred within our remand, including and especially omitting any directive to reconsider Applicant's request for DNA testing.[1]

I also write separately to explain why this Court should reconsider its earlier decision denying that relief and to address the critical question of the standard applicable to this subsequent writ: whether the Texas Constitution's protection

[1] To that extent, while I join in the remand, I agree with Judge Yeary that it would be odd for this Court to either implicitly indicate "Applicant's subsequent-writ-application has satisfied Section 5's pleading criteria for proceeding…since even our most generic remand orders in the past have at least expressly asserted that, and to what extent, the application has met those criteria so that the convicting court may begin fact development on the merits," and equally odd to the extent "the Court has not concerned itself with whether Applicant has met his mandatory pleading requirement, and the Court is exercising its brute ability (if not authority) to order a remand notwithstanding the strictures of Section 5."

against erroneous deprivation of life permits the execution of an individual who has proven that a reasonable jury would not convict him in the first place. This Court has not addressed this question, though I would urge it to do so, and, in all events, also urge that we evaluate the Applicant's claims against a more appropriate measure than the clear and convincing standard this Court announced in *Ex parte Elizondo*.[2]

BACKGROUND

I see two questions essential to the disposition of the case before us. First—should Texas courts be open to habeas corpus claims presenting new evidence relevant to the applicant's actual innocence, particularly those directed at a sentence of death? Second, once we've accepted that review as cognizable under our habeas corpus writ, what standard should govern its issuance in capital cases?

This Court has already answered the first question in the affirmative—regardless of whether the claim of innocence arose in conjunction with an otherwise procedurally barred constitutional challenge—and set the applicant's burden at "clear and convincing." Twenty years ago, in *Ex parte Elizondo*,[3] we found that review to be dictated by the U.S. Constitution as construed by the U.S. Supreme Court in *Herrera v. Collins.*[4]

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[2] 947 S.W.2d 202, 209 (Tex. Crim. App. 1996).

[3] *Id*. at 209.

[4] 506 U.S. 390 (1993).

Herrera, however, did not make any such holding, and the Supreme Court has not since answered whether a "bare" claim of innocence would be cognizable as a matter of federal law. It has clearly held a claim of innocence *is* cognizable on federal habeas review where the petitioner shows a reasonable jury would "more likely than not" acquit him in light of the new evidence ***but only when that claim travels with a separate claim of federal constitutional error***, as most do. *Schlup v. Delo*, 513 U.S. 298, 327 (1995). That innocence claim is sufficient to overcome federal barriers to justiciability. *Id.*; *see also House v Bell*, 547 U.S. 518, 538 (2006) (finding this form of innocence review available despite procedural default for failure to raise claim in first state habeas proceeding); *McQuiggin v. Perkins*, 569 U.S. 383, 399 (2013) (same as to claim filed beyond AEDPA limitations period). Our Legislature has also recognized *federal* innocence claims as exempt from its successive writ bar.

As detailed below, for this Court to retreat from undertaking review of a "bare innocence" claim at this point—and especially in connection with review of a death sentence—would raise Suspension Clause concerns and be unwise in all events. Instead, I believe we should first address and provide a sound answer to a separate, lingering question: whether our Texas Constitution will permit the state to execute,

if not incarcerate,[5] someone who has shown his actual innocence[6] to the extent that reasonable jurors would likely acquit him of the underlying charge. I would reach that question first, and answer with an actionable "no" under Article I, Sections 12, 13, and 19 of the Texas Constitution, in a case involving a potentially erroneous deprivation of life, if not liberty, and see no extant or possible legislative bar to its application.

DISCUSSION

I will begin with what I see as the proper respective roles of both constitutions in our habeas jurisprudence.

I. FEDERALISM CONCERNS COMPEL US TO INCLUDE OUR OWN CONSTITUTION IN OUR HABEAS FRAMEWORK

No fewer than six Constitutions have governed our state's operation before 1876. Despite more than 500 attempts to amend it, that Constitution still begins today as it did in 1876: with a Bill of Rights compelling us to act as "a free and independent State," and the insistence that its officials remain committed to "the

[5] As I explain below, the due course of law assurance treats these matters separately and requires different levels of confidence in the result that may counsel in favor of retaining the *Elizondo* standard in connection with deprivation of liberty.

[6] I believe the concept of "factual" innocence is what matters here and is dependent on how the evidence (old and new) would likely weigh in the minds of hypothetically reasonable jurors. The metaphysical question of "actual innocence" by which this body of law has come to be popularly known resembles an unascertainable asymptote that, at best, can only be approached by actual jurors at trial. Courts and judges operate in the realm of law and on habeas review are properly confined to the question of the availability of relief in the form of a new trial.

preservation of the right of local self-government." TEX. CONST. art. I, § 1. It should come as little surprise then that it also provided a series of very specific substantive and procedural provisions specific to the question presented in this and other capital habeas applications that are completely distinct from its federal counterpart.

A. The Rights Enumerated in Our Bill of Rights Were Expected to Provide the Rule of Decision in Our Courts

The Texas Constitution spells out a number of important freedoms specific to the realm of criminal law, including the assurance of "effectual" habeas corpus available as a "writ of right" free from "suspension." *Id.* § 12. Our Constitution also prohibits cruel and unusual punishment and guarantees its citizens access to its courts for a remedy for "injury done to [his person]" and freedom from deprivation of *life* without due course of law. *Id.* §§ 13, 19. In fact, the "due course of law" assurance appears twice in our Bill of Rights. The first is in a guarantee of access to the state's courts for remediation and the second parallels the federal protection against erroneous deprivation. For several reasons, it seems highly unlikely that those writing these clauses could have expected their courts to pretermit those provisions in deference to the *federal* Constitution or its reading by federal courts.

While the U.S. Constitution's Bill of Rights also assured against deprivation of life, liberty, or property without due process when the Fourteenth Amendment was ratified in 1868 (less than a decade before our own Constitution was adopted),

and protected against cruel and unusual punishment, the federal Bill of Rights had just been held—twice no less[7]—*not to apply* to the states at all. In fact, the Eighth Amendment's prohibition of cruel and unusual punishment was not held to apply to the states until 1962. *Robinson v. California*, 370 U.S. 660 (1962). Its prohibition of excessive fines remained applicable only to the federal government until 2019. *Timbs v. Indiana*, 586 U.S. 146, 150 (2019).

Meanwhile, the federal Constitution, unlike our own, refers to habeas corpus as a mere "privilege" subject to potential suspension. U.S. CONST. art. I, § 9. The Texas Constitution also draws a much firmer line on the state and its courts. The Texas habeas writ is one "of right," perpetually free from *any* form of suspension, and that "shall" be rendered "speedy and effectual." And Texas courts, unlike their federal counterparts, are mandated by that same constitution to be open to remediate—by habeas writ or any other means necessary to the task—any deprivation of life, liberty, or property. These distinctions are not mysterious or formalistic. As Justice Scalia has noted, the U.S. Constitution contains no like mandates of "open courts" or of substantive efficacy of the writ, and thus may be read fairly to permit essentially complete legislative abrogation without triggering the suspension limits. *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001) (Scalia, J., dissenting)

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[7] *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873); *Cruikshank v. United States*, 92 U.S. 542 (1876).

(stressing that federal suspension clause in not accompanied by any assurance of content beyond what Congress has authorized or of a jurisdictional grant to remedy).

As a matter of logic, therefore, the framers and ratifiers of our Texas Constitution could not have expected the *federal* habeas or Eighth Amendment standards would somehow supply the rule of decision in Texas courts. It also bears repeating that the framers choose to begin our Constitution by declaring their purpose as "preserv[ing] . . . ***self government***."

The 1876 Constitution was also the first in the Nation to create a bifurcated appellate court system by which this Court was given final and exclusive jurisdiction over (and hence accountability for) criminal law matters. Thus, the task of recognizing and applying the state constitutional framework, insofar as deprivations of life and liberty are implicated by the state's criminal laws, was in a Court specialized in its focus and aptly named "Court of Criminal Appeals." While the state's executive and legislative departments play roles in developing and implementing our Bill of Rights, the judicial function rests here and we are commanded to remain "open" to that purpose.

For all of these reasons, I believe *federal* case law applying the *federal* writ to the U.S. Constitution is not our primary object here. Instead, the textual equivalents (and subsequent construction of them) are merely that—parallels that are potentially instructive of the substantive intent of the Texas framers in 1876—not a

displacement or downgrading of *our* own freestanding Constitution, *our* writ of habeas corpus, or *our* courts. "State courts . . . should not hide under the umbrella of federal precedent in construing . . . their own constitutions." Sutton, Nathaniel, *Lockstepping Through Stop-and-Frisk: A Call to Independently Assess Terry v. Ohio Under State Law*, 107 VA. L. REV. 639, 642 (2021).

B. The Entire Point of the 1876 Constitution Was to Limit the Power of State Government

Our state's Bill of Rights was drafted in the wake of frustration over the power of central authority during the reconstruction era and with the abiding intention of reducing the power of centralized government. Those crafting it stated their aim in its preamble as the "great and essential principles of liberty and free government." That those same draftsmen would have embraced either the idea that their highest specialized criminal court would defer to its federal counterpart, as a matter of procedure, or that their newly formed state government was somehow reserving to itself the authority to extract the ultimate punishment from its citizens who had proven that they were *probably* not guilty, seems equally farcical.

Still, for some reason, our many cases bearing on the question of the state's power to take its peoples' lives over the last three decades omit any reference to the text of (or hints at any role for) our Texas Constitution. Instead, we have simply

divined a claim from a U.S. Supreme Court opinion that assumed *arguendo*, some like claim *might* obtain under the U.S. Constitution.

C. Recognition of the Federal Constitution Is Appropriate, But Not Sufficient to the Task Our Framers Set for this Court

I believe we should begin any analysis of an issue as central to the case before us as this one by delineating the power of the state relative to its own citizens via thorough consideration of the procedural and substantive provisions of the Texas Constitution and its Bill of Rights. While the federal Constitution compels us as state judges to recognize and adhere to its organic federal law and the Supreme Court's reading of it, U.S. CONST, art. VI, cl. 2 it does not even purport to require us to eschew our own or to reduce ourselves to the role of law clerks preparing a file for our friends in the federal judiciary.

I applaud my colleagues for their commitment to the ideals of federalism and join in their commitment to uphold the federal Constitution. I likewise applaud our counterparts in Washington for their commitment to the text of the federal Constitution and their growing (and welcome) recognition of the limited role it envisions for the federal government. *See* U.S. CONST. amends. IX, X. Indeed, the U.S. Supreme Court in recent decades has reiterated the core structural under-pinning of our federal system that

> "our citizens would have two political capacities, one state and one federal, each protected from incursion by the other"—"a legal system unprecedented

> in form and design, establishing two orders of government, each with its ***own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it***."

Printz v. United States, 521 U.S. 898, 920 (1997) (emphasis added) (quoting *U.S. Term Limits*, *Inc. v. Thornton*, 514 U. S. 779, 838 (1995) (Kennedy, J., concurring)). "The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens." *Id.*

While these observations most often arise in connection with general encroachments on the role of state legislatures, *see id.*; *New York v. United States*, 505 U.S. 144 (1992), they obtain greater force where federal legislation reaches into the realm of criminal law, which is the "clearest example of traditional state authority." *Bond v. United States,* 572 U.S. 844, 858 (2014); *United States* v. *Bass*, 404 U.S. 336, 350 (1971). That federalism deference does not apply only to the U.S. Congress. It also heavily informs the judicial reading of the federal writ and constitution as reflected in statutes like AEDPA[8] and decisions like *Herrera* and *Schulp* addressing actual innocence claims. *E.g., Schlup,* 531 U.S. at 318 (stressing role of comity and finality in AEDPA and the Court's own innocence jurisprudence).

As the Supreme Court observed in one of its early dispositions of actual innocence claims under the federal writ, "[f]ederal habeas review creates friction

[8] The Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. §§ 2241–2255.

between our state and federal courts" and "states hold the initial responsibility for vindicating constitutional rights." *Kuhlmann v. Wilson*, 477 U.S. 436, 454 n.16 (1986); *see also Herrera,* 506 U.S. at 421 (O'Connor, J., concurring) (presuming a freestanding federal constitutional violation would stem from executing someone actually innocent of a crime but stressing the question is a "sensitive" one that "implicates . . . the nature of federal-state relations"). This deference to state sovereign primacy is not limited to interpretation of the federal Constitution. It operates as a complete bar to federal courts applying or developing state constitutional claims at all. 28 U.S.C. §2254(a). As a result, if those constitutions are to operate as a check on erroneous judgments, it can only be by the hands of state courts themselves.

Unlike our federal colleagues, our role under the U.S. Constitution is meant to be plenary and primary. THE FEDERALIST No. 45 (Madison) ("The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people."). While it is now obvious some form of actual innocence claim is cognizable under the *federal* constitution and *federal* and *state* writs, it is concerning that the U.S. Supreme Court defers to us and our understanding and application of our own Constitution while we appear to defer (or least cite only) to federal decisions

applying the U.S. Constitution. In the aviation business this is known as a "Crew Resource Management" issue, and often explains why airplanes fly into mountains.

At a minimum, our practice of isolated fixation on the federal Constitution in this setting deprives our people of the bargain struck centuries ago in ratifying that document and has the tendency to operate our death penalty at what is essentially the federal red-line at all times. *See* THE FEDERALIST NO. 51 (James Madison) (stressing dual protection of citizens in the form of state and federal authority and separation of powers within the sphere of each).

Before addressing precisely what the Texas Constitution permits or requires, I must first address the question whether legislation purports to foreclose its consideration.

II. THE STATUTORY WRIT BAR DOES NOT ADDRESS THE STATE CONSTITUTION AND COULD NOT ABROGATE IT IN ANY EVENT

As I see it, our state judiciary is obligated by *both* the federal and the Texas Constitutions, including their protections against unlawful government deprivation of life and liberty and the assurance of the availability of the writ.

To its credit, the Texas Legislature has crafted the "writ bar" found in Article 11.071, Section 5, providing for dismissal of writs of habeas corpus when an applicant's filings essentially flood the justice system time and time again but fail to say anything cognizably new. TEX. CODE CRIM. PRO. ANN. art. 11.071, § 5. In these

cases, this Court will not consider the merits of an application for habeas corpus, as we would not have prior to its enactment where we found the application to constitute an abuse of the writ. *See Ex parte Carr*, 511 S.W.2d 523, 525–26 (Tex. Crim. App. 1974). Despite having codified our earlier abuse of writ jurisprudence, the legislative writ bar mirrors our own death jurisprudence in making no reference to the Texas Constitution or the right to access to the courts for relief under it. The reason for this should be obvious: this Court has yet to recognize that the Texas Constitution prohibits the execution of someone who is innocent no matter whether that conclusion is likely, obvious or certain. Thus, the Legislature has never had occasion to consider the issue.

Instead, the statutory writ bar offers two grounds of relief from its operation relative to innocence. *First,* the U.S. Supreme Court's opinion in the *Schlup* decision applies (by which the applicant shows "by a preponderance of the evidence, but for a violation of the *United States Constitution* no rational juror could have found the applicant guilty beyond a reasonable doubt"), *or, second* its opinion in *Sawyer* does (a still earlier U.S. Supreme Court opinion precluding capital punishment but not criminal responsibility for the offense under the federal Constitution). TEX. CODE CRIM. PROC. ANN. art. 11.071, § 5(a)(2) (emphasis added); *see Schlup*, 513 U.S. at 329–30; *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992).

Should my colleagues feel Article 11.071 prevents the Court from considering the Applicant's writ before us under the federal case law established in *Schlup* and other like decisions, I believe Applicant in the case before us would satisfy the requirements of Article 11.071's exception, allowing us to reach the merits of that federal constitutional claim.[9]

I believe Applicant has presented a prima facie case for relief sufficient to permit evaluation of his constitutional claim. *Brady v. Maryland, 373 U.S. 83, (1963)*. Applicant has presented a number of potentially serious *Brady* concerns relating to, among other things, inducements to critical witness testimony, and the fact Applicant was under live surveillance during the period of these abductions without any indication of his involvement. All the more, Applicant adheres to his argument—many times made—that DNA recovered from the crime scene has never implicated him as a suspect, and, in at least one instance, affirmatively excluded him as a possible contributor. Finally, Applicant also raises issues with the integrity of orange fibers found at one crime scene which were said to have "matched" fibers of a blanket used in the crime, and yet no fibers were discovered in the initial crime

[9] Putting to one side my constitutional concerns with the standard and scope of the legislative writ bar, the existing statutory standard requires only a *prima facie* showing of actual innocence to support a remand in connection with a potentially viable constitutional claim. *Ex parte Brooks,* 219 S.W.3d 396 (Tex. Crim. App. 2007). As the majority takes no position with respect to whether Applicant has satisfied this or any other standard, nor addresses my state constitutional concerns, I will continue to explain why this standard alone may not suffice under the Texas Constitution.

scene search, and similar fibers were located elsewhere in places unaffiliated with the crimes.

However, as stated above, of at least equal importance in our ruling on any of Applicant's claims are the rights provided by—and concomitant judicial responsibilities assigned to this Court (and not the Legislature) under—the Texas Constitution.

Tackling that question starts with recognizing our writ of habeas corpus has long been held to reach not only to void judgments, but to convictions and sentences that "violate fundamental or constitutional rights." *Ex parte Shields*, 550 S.W.2d 670, 675 (Tex. Crim. App. 1976). This reading of the Texas writ and Constitution comports with the understanding of the writ in federal courts from before the time of its adoption in 1876. *See* Habeas Corpus Act of 1867, 14 Stat. 385–86 (1867) (federal writ available "where any person may be restrained of his or her liberty in violation of the Constitution"). I therefore assume our Suspension Clause is also best understood, like its federal counterpart, to target the substantive reach of the writ as it exists today, though procedural regulation remains. *See Felker v. Turpin*, 518 U.S. 651, 663–64 (1996).

Accordingly, I doubt, by way of example, the Texas Legislature could divest this Court of authority to issue the writ to prevent the execution of a prisoner who has become so mentally deficient as to not understand the sentence or why it is being

imposed, much as that might assist us with our heavy docket or frustrate interests in finality. *Ex parte Mines*, 26 S.W.3d 910, 915 (Tex. Crim. App. 2000) (citing *Ford v. Wainwright*, 477 U.S. 399 (1986)). Such an effort, if undertaken by the Legislature, would likely violate our Constitution's Suspension Clause.

Similarly, I do not believe that the Legislature could bar access to this Court to pursue habeas relief to a factually innocent capital defendant—such as one filing an initial habeas application—if our Constitution substantively prohibits the execution of someone who has made that showing. Of course, it has not attempted to do so. Instead, it has merely relieved the applicant of the successive writ bar on the same standard applied in federal habeas cases on the relatively lighter showing that it is "more likely than not" reasonable jurors would not convict the defendant if they had access to both the original evidence at trial and the new evidence, but *only where the claim is also appended to a federal constitution claim*. TEX. CODE CRIM. PROC. 11.071; *Schlup*, 513 U.S. at 327.

In all events, I do not believe and would not accept that the Texas Legislature, by adverting specifically to the *federal* Constitution but omitting the explicit right to present like or identical claims under the *Texas* Constitution, can be seen as intentionally abrogating the writ under circumstances where the Texas Constitution would command the remedy. Rather, because the Legislature is aware that access to Texas courts to pursue the former *at all* necessarily includes the right to present

the latter under the direct operation of Article I, Section 13 of the Texas Constitution, explicit reference would not have been necessary. I would find such a construction preferable, if not compelled in all events, so as to avoid a reading of the Article that would cause it conflict with the substantive Constitution itself, including its Suspension Clause and Article II's assignment of responsibility among the respective Judicial and Legislative Departments. TEX. CONST. art. II, § 1.

Thus, *if* the *Texas Constitution* forbids the execution of a person who has shown his innocence under any controlling legal standard, then it would follow the Legislature either has not attempted to foreclose access to this Court to seek that relief or that it could not do so. *See* TEX. CONST. art. I, §§ 2;12; 13.

I now turn to what I see as the critical *if* question; to wit, *if* the Texas Constitution provides its own protection against the government executing someone who has proven that they are not guilty.

III. WHILE THE FEDERAL CONSTITUTIONAL MINIMUM MAY NOT PROVIDE A DEFINITIVE ANSWER HERE, IT (AND LIKE STATE CONSTITUTIONS) IN PLACE AT THE TIME ARE INSTRUCTIVE

While the question of whether the federal Constitution provides access to merits consideration in this Court has been addressed by our Legislature in the writ bar, I believe this consideration should inform our own reading of our like provisions in our own Constitution. As the framers of our 1876 Constitution consciously selected a like substantive protection against deprivation of life without "due course"

of law and combined that guarantee with more fortified procedural assurances—that the writ "shall never be suspended" and must remain "effectual" for pursuit in courts "that shall be open" for that remedy—any analysis of it should begin with the proper reading of its federal counterpart.

A. Federal Innocence Claims

In *Kuhlman v. Wilson,* the U.S. Supreme Court attempted to clarify the question of when a state prisoner might pursue federal constitutional relief from his conviction despite earlier unsuccessful petitions. 477 U.S. 436 (1986). Embracing earlier invocations of its own amorphous "miscarriage of justice" standard, the Court observed:

> Even where, as here, the many judges who have reviewed the prisoner's claims in several proceedings provided by the State and on his first petition for federal habeas corpus have determined that his trial was free from constitutional error, a prisoner retains a powerful and legitimate interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated. That interest does not extend, however, to prisoners whose guilt is conceded or plain.
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> *Id.* at 452.

Balancing that interest against the state's right to finality and judicial efficiency, the Court found "the 'ends of justice' require federal courts to entertain such petitions only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence." *Id.* at 454. Where the claim, even if accepted, would not in fact fatally undermine confidence in the jury's verdict, as in

Kuhlman, on account of the evidence of guilt remaining "nearly overwhelming," the state's right to finality should prevail as there is no independent constitutional violation in punishing a person who would still likely be found guilty. Chief Justice Rehnquist, later writing for the Court in *Sawyer*, described the standard in positive terms as follows:

> [T]he prisoner must show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded *or to have become available only after the trial*, the trier of the facts would have entertained a reasonable doubt of his guilt.

Sawyer, 505 U.S. at 349 n.5 (citing *Kuhlman*, 477 U.S. at 455 n.17).

In *Sawyer*, the Court addressed whether a state inmate might obtain relief from a death sentence under the general rubric of "actual innocence" if only to attack the federal constitutional authorization of imposition of the death penalty. *Id.* at 335–36. In essence, turning back to *Gregg v. Georgia*, 248 U.S. 153 (1976), and the narrowing process enabling states to reinstitute the death penalty in light of concerns of possible arbitrary application, the Court allowed a habeas petitioner to attack the propriety of elevating his sentence to death. The Supreme Court embraced that review despite the petition being successive. As the claim by its nature did not attack the petitioner's guilt of the underlying charge, the Court adopted a rigorous review standard: "clear and convincing evidence that but for constitutional error, no

reasonable juror would have found him eligible for the death penalty under the applicable state law."

In *Herrera v. Collins*, 506 U.S. 390 (1993), the Supreme Court considered a habeas petition challenging the petitioner's guilt in a capital case unaccompanied by an underlying procedural error in violation of the Constitution. *Herrera* simply argued that new evidence not available at trial proved his innocence; he did not have an appended claim of constitutional trial error. *Id.* at 395. While the Court appeared to accept, at least in a capital case, that executing a person who was not guilty would violate the Fourteenth Amendment standing alone, a majority of the Court did not find any basis for relief for *Herrera* under any standard, and thus it did not attempt to fashion one. *Id.* at 417 (majority willing to assume arguendo that "in a capital case a truly persuasive demonstration of actual innocence made after trial would render the execution of a defendant unconstitutional and warrant. . . relief").

Next, in *Schlup v. Delo*, the Court settled on the preponderance standard outlined years earlier in *Kuhlman*, though it did so in a case involving a death sentence *and* involving a claim of constitutional error as a means of reaching the merits despite the successive nature of his petition. *Schlup*, 513 U.S. at 326. The Court rejected *Sawyer*'s clear and convincing test because, unlike *Sawyer*'s attack aimed only at his eligibility to be executed for his crime, *Schlup*'s attack went to his to his guilt.

I pause here to wonder aloud how proof in a federal court that a state jury would more likely acquit than convict *in a death case* could be sufficient to overcome the state's right to comity and finality on what is in essence *res judicata* repose in the federal habeas system, while it would not suffice as a basis for relief under the state's own constitution. In all events, it should come as little surprise that cases holding a jury would most likely find a habeas petitioner not guilty also invariably grant relief when moving on to address the appended constitutional claim.[10] Nor is it surprising the Supreme Court, when acting without the constraints of federalism, is more than willing to accept actual innocence review on collateral attack from a federal conviction, despite the presence of a procedural default. *See Bousley v. United States*, 523 U.S. 614 (1998).

B. The Federal Statutory Framework

In 1996, Congress codified the Antiterrorism and Effective Death Penalty Act (AEDPA), codifying much of the Supreme Court's earlier "abuse of writ"

[10] *Fontenot v. Crow*, 4 F.4th 982, 1056–57, 1082 (10th Cir. 2021) (holding that petitioner made a sufficient showing of actual innocence and granting relief on petitioner's constitutional claims, affirming the district court's order of either permanent release or a new trial); *Floyd v. Vannoy*, 894 F.3d 143, 162, 167 (5th Cir. 2018) (holding petitioner demonstrated actual innocence and affirming the district court's award of habeas relief on petitioner's constitutional claims); *Rivas v. Fischer*, 780 F.3d 529, 532–33 (2d Cir. 2015) (reversing the district court's denial of relief on constitutional claims after a previous finding of actual innocence and instructing it to issue a writ of habeas corpus and retry the case).The reverse seems to be true as well. For example, *Calderon v. Thompson*, 523 U.S. 538 (1998), addressed some of the tension between its *Sawyer* and *Schlup* standards, holding to the extent a capital habeas corpus petitioner claims he did not kill the victim, *Schlup*'s "more likely than not" standard would apply. It saw no need to develop the issue further as the petitioner would not meet even that standard.

jurisprudence, requiring deference to state court findings insofar as they are worthy of it, all while leaving the federal courts generally open to claims of actual innocence notwithstanding the federalism concerns outlined above.

C. Other States' Constitutions and Laws Are Also Informative

While U.S. Supreme Court decisions applying the federal Constitution are informative insofar as they apply language similar to our 1876 Constitution and hence likely to have informed its understanding, those opinions are hardly alone in in recognizing some form of post-conviction innocence review. Other states with like constitutions, and operating within their respective police powers, have also considered this question.

By 2016—two decades after *Herrera* sparked a national debate over the right to pursue habeas review of actual innocence claims—all 50 states and the District of Columbia had recognized the right to such review under their laws or, like *Holmes*, by virtue of the reading of the federal constitution. Justin Brooks, Alexander Simpson, Paige Kaneb, *If Hindsight is 20/20, Our Justice System Should not be Blind to New Evidence of Innocence: A Survey of Post-Conviction New Evidence Statutes and a Proposed Model*, 79 ALBANY L. REV. 1053, 1063–1088 (2016). Most have adopted a standard recognizing a right to post-conviction relief where the applicant demonstrates either it is "more likely than not" that a jury would acquit in view of the new evidence or simply that there is "a reasonable probability" of a different

result. *Id.*; *see, e.g.,* ALA R. CRIM P. 32.1(e)(4); *Jones v. State*, 591 So. 2d 911, 915 (Fla. 1992); *Aguirre-Jarquin v. State*, 202 So. 3d 785, 790 (Fla. 2016); *Smith v. State*, 826 P.2d 615, 617–18 (Okla. Crim. App. 1992); 22 Okla. Stat. §1080 (2024).

A minority of states, including Texas, add a requirement that this conclusion must also be shown clearly and convincingly. Among those, Alaska, Connecticut, Delaware, New Mexico, and Virginia, do not employ the death penalty. Delaware lawmakers recently considered legislation to abandon the clear and convincing requirement.[11]

IV. *HOLMES* CORRECTLY IDENTIFIED THE RIGHT TO RELIEF FROM ERRONEOUS APPLICATION OF THE DEATH PENALTY, THOUGH IT MAY HAVE MISPLACED ITS SOURCE

In *State ex rel. Holmes v. Court of Appeals*, 885 S.W.2d 389, 397 (Tex. Crim. App. 1994) this Court, relying on what it perceived as a holding in in *Herrera,* held a habeas applicant facing a sentence of death to have a cognizable, *federal* constitutional right to relief on grounds of actual innocence.[12] *Holmes* set the standard at nearly stratospheric levels to mirror the post-conviction direct appellate

[11] S.B. 57, 2025 Gen. Assemb., 153rd Reg. Sess. (De. 2025).

[12] It should come as no surprise that reasonable and fair-minded jurists have struggled to describe target of this inquiry much less the standard that applies to it. *See* J. Brooks, et al., *If Hindsight is 20/20, Our Justice System Should not be Blind to New Evidence of Innocence: A Survey of Post-Conviction New Evidence Statutes and a Proposed Model,* 79 ALBANY L. REV. 1046 (2016) (collecting state standards); *Henderson v. State*, 2024 MT 253, ¶ 18, 418 Mont. 431, 454–55, 558 P.3d 749, 763–64 (adopting multi-part regime for evaluation of innocence claims).

sufficiency standard of *Jackson v. Virginia*. According to *Holmes*, "in order to be entitled to relief on a claim of factual innocence the applicant must show that based on the newly discovered evidence and the entire record before the jury that convicted him, ***no rational trier of fact could*** find proof of guilt beyond a reasonable doubt." *Id*. at 398 (emphasis added).[13]

While *Holmes* appeared to answer the question of *whether* miscarriage of justice relief on account of innocence might be obtained, problems with its holding remained. Most immediate among those problems was that the U.S. Supreme Court decision supplying *Holmes'*s rule as a matter of federal constitutional law did not actually reach that holding. Instead, as noted, the *Herrera* majority *assumed,* for sake of argument, that executing a person who could show that he was not guilty of a crime would so blatantly violate the Fourteenth Amendment that a state reckless enough to press the question would likely so discover this violation in the rare case where no viable separate constitutional argument is appended. Regardless of how that federal question would be answered, I believe our *Holmes* decision essentially led us to the right church if not the right pew in announcing that Texas would not be that state.

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[13] The problem with that standard becomes evident in a case like this one where at least some of where the new evidence would go to the jury's credibility determinations of critical witnesses and other evidence substantively probative of innocence. Because no juror had the opportunity to receive that evidence presuming that they would resolve the credibility questions in keeping with the verdict makes the inquiry essentially pointless.

A few years later, this Court's *Elizondo* decision revisited the question and made several important changes. First, it extended the writ to non-capital claims of bare innocence. Next, it found the *Holmes* standard for relief to be essentially insurmountable and instead posed the question as whether a "reasonable juror would have convicted [the applicant] in light of the new evidence." *Elizondo*, 947 S.W.2d at 209.[14] As I recently recalled in a concurrence,[15] *Elizondo* elevated that burden by appending a "clear and convincing" requirement in capital and non-capital cases alike. It also anchored that holding in *Herrera's* exposition on the possible existence of a *federal* claim under the *federal* constitution.

For the reasons that follow, I believe the *Holmes* recognition of a right to habeas review for post-conviction actual innocence in a capital case involving the death penalty would have been proper under the Texas Constitution. *Ante* at 27. While I believe *Elizondo* was correct in rejecting *Holmes*' standard, it was nevertheless incorrect in demanding "clear and convincing" evidence that

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[14] We have since suggested that the evidence presented must constitute affirmative evidence of the applicant's innocence, suggesting trustworthy witness recantations, "exculpatory scientific evidence, trustworthy eyewitness accounts, and critical physical evidence" as examples of such evidence. *Ex parte Franklin*, 72 S.W.3d 671, 678, 678 n.7 (Tex. Crim. App. 2002). Judge Cochran writing for the Court framed the question as whether a rational jury believing "both the 'old' and the 'new' evidence, a rational trier of fact could reconcile that evidence and still reach a verdict of guilty." *Ex parte Thompson*, 153 S.W.3d 416, 429 (Tex. Crim. App. 2005).

[15] *Ex parte Cobb*, No. WR-95,984-01, 2025 WL 907737, at *1–2 (Tex. Crim. App. Mar. 26, 2025).

reasonable jurors would acquit—or at least in applying that standard to capital and non-capital cases alike. *Ante* at 34. Instead, at least in this capital setting, I believe the Texas Constitution's protection of the interest in life would at least demand preponderance standard set forth in *Schlup,* a variety of Texas statutes[16] and other states' constitutions and laws.

V. THE TEXAS CONSTITUTION'S DUE COURSE OF LAW ASSURANCE AND PROHIBITION ON CRUEL AND UNUSUAL PUNISHMENT PROHIBIT EXECUTION OF THOSE WHO ARE LIKELY NOT GUILTY

The Texas Constitution, like its federal counterpart, protects against state actions posing the risk of erroneous deprivation in three distinct circumstances: life, liberty and property. As I have noted in the past, these interests "are not positioned in equipoise." *Foster v. State*, 525 S.W.3d 898, 912 (Tex. App.—Dallas 2017, pet. ref'd) (Schenck, J., concurring). The federal Due Process Clause uses like language and was adopted shortly before our own Texas Bill of Rights. The U.S. Supreme Court's discussion in *Addington v. Texas* is highly instructive. 441 U.S. 418, 424–25 (1979).

Addington began where our Texas Constitution tells us we should as well: with the state's authority relative to any disruption of its citizens' protected interests—its initial burden at trial. That "standard of proof" is "embodied in the

[16] *E.g.,* TEX. CODE CRIM PROC. Art. 11.073(b), 11.071(5)(A)(2).

Due Process Clause" and serves to "instruct the factfinder concerning the degree of confidence . . . he should have in the correctness of factual conclusions for a particular type of adjudication." *Id.* (quoting *In re Winship,* 397 U.S. 358, 370 (1970) (Harlan, J., concurring)). When the state's action will merely affect property interests, litigants are left to "share the risk of error in roughly equal fashion." *Id.*

And where an interest in liberty is concerned, the risk, and the demand that the state get it right, escalates. First, where the proceeding seeks to deprive a citizen of liberty for their own perceived good and without condemnation, as with the civil commitment at issue in *Addington*, an intermediate standard will suffice. And, when the state aims to deprive a citizen of his liberty for purposes of punishment, due process requires proof beyond reasonable doubt. *Id.* at 424. When the state aims to deprive a citizen of his life, the same standard is applied to determine guilt, as we have recognized no other, higher standard.

Blackstone's famous ratio—that it is better ten guilty men escape than one innocent man suffer—is the rationale underlying the "reasonable doubt" standard we use at all criminal trials, whether the charge is "minor in possession of tobacco"[17] and the sentence is probation or capital murder and the sentence is death. Even accepting that this standard at trial is generous to those who are least affected by it,

[17] TEX. HEALTH & SAFETY CODE ANN. 161.252.

like my tobacco possessor, it would still leave the eleventh man to his fate and is so formless in meaning that even judges are incapable of defining for the jurors applying it. *See Paulson v. State*, 28 S.W.3d 570 (Tex. Crim. App. 2000) (forbidding definition).

Some risk of error at trial (and thereafter) by any standard of proof is of course inevitable. If mere existence of that risk, standing alone, were a basis for perpetual handwringing, we would have no finality and no system of justice at all. But assigning that risk and managing it is a core tenant of the judicial function and part and parcel of the habeas writ. That risk is qualitatively different when we deal with interests beyond property or even liberty.

To assign and manage that risk, we, as judges (and the citizens Madison promised we would doubly protect), may have to accept that we go to battle with the standard and the available record *when a case comes to rest on direct appeal*. But at least since *Holmes* our due process exercise does not stop at metering the degree of confidence necessary to render a judgment.

We would do well to recall the standards we apply here are wholly and properly of our own making. We should forge them in ways that inspire, rather than test, confidence in our pronouncements. Once we've decided to entertain post-conviction scrutiny, as we did long ago in *Holmes*, we must maintain the same

degree of confidence in carrying out the punishment in accordance with our Texas Constitution.

Assessing deprivation of liberty claims in accordance with one standard and deprivation of life claims in accordance with another reflects our Constitution's distinct recognition of that life interest, inspires confidence in our judgments commensurate with the reality that this interest, if erroneously deprived, is uniquely incapable of any form of remediation. As the Supreme Court observed in *Addington,* "[t]he essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold." *Addington*, 441 U.S. at 431.

A. The Risk of Error Carries Different Implications in Cases Involving Property, Liberty, and Life that Drive the Availability of and Standards Applicable to Post Judgment Review

Texas law and the Texas Constitution assure even those facing only a money judgment a mechanism to set it aside for the miscarriage of justice. *Alexander v. Hagerdorn*, 226 S.W.2d 996, 1001 (Tex. 1950) (extrinsic fraud will entitle complainant to relief); *PNS Stores v. Rivera*, 379 S.W.3d 267, 277 (Tex. 2012) (some evidence of extrinsic fraud warranted reversal of judgment). And, according to this Court and the U.S. Supreme Court, the *federal* Constitution, laden as it is with its federalism and comity limitations, still assures every criminal defendant convicted of any crime that impacts his liberty by confinement or "collateral consequences"—

including my juvenile possessor of cigarettes—with the right to challenge the conviction by bringing forward new evidence of innocence. *Elizondo,* 947 S.W.2d at 209.

Given the broad reach of the habeas right to *every* criminal proceeding where a mere liberty interest it seeks to vindicate, there may be little reason to challenge its recognition of a federal right to pursue relief or its "clear and convincing" trigger to my illicit possessor of tobacco, for example. But reputational and liberty interests are not the interests at stake in the case at hand.

B. Capital Cases Affect Different Due Course of Law Interests and Require Greater Confidence Because They Mete Out Qualitatively Different Punishments

"Death," as Justice Scalia once observed, "is different," and compels "protections that the [U.S.] Constitution nowhere else provides." *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991) (opinion of Scalia, J., joined by Rehnquist, C.J.). "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." *Woodson v. North Carolina,* 428 U.S. 280, 305 (1976). I agree, "because there is a qualitative difference between death and any other permissible form of punishment, '***there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.***'" *Zant v. Stephens*, 462 U.S. 862, 884–85 (1983) (emphasis added) (quoting *Woodson*, 428 U.S. at 305)).

While Justice Scalia may well have been correct in *Herrera* in finding no warrant for the *federal* writ or the *federal* constitution to inject themselves into collateral attacks on state criminal proceedings in *Herrera,* this would be so (if it is) precisely because the primary responsibility for avoiding erroneous deprivation lies with the states, state constitutions and state courts, like this one—not the U.S. Supreme Court.

i. The Clear and Convincing Standard in Capital Cases

Our *Elizondo* decision correctly posed the right question "whether a reasonable jury would convict" in light of available proof, albeit under another Constitution. Based on its understanding of federal authority in *Herrera*, it added a requirement applicable to all cases that this be shown by "clear and convincing evidence." *Herrera* did not embrace a clear and convincing standard. *Sawyer* did, but, as the Supreme Court later noted in *Schlup*, it did so in a case involving no challenge to the petitioner's actual guilt. The critical point, however, is that none of these Supreme Court decisions came to this field dressed for battle. Instead, they *all* stress that any review and any standard it might apply comes cabined by federalism deference to the role of state courts as the primary actors and the obligation to read and apply two Constitutions, only one of which—the state Constitution—was set up to be presumptively controlling.

By now, it seems quite clear that the 50 states, by reading of their constitution by their courts or by laws passed to the same ends by their respective legislatures, have all taken up the question. What matters to me is *our* Constitution and *our* role beneath it. That Constitution was crafted not just with foreknowledge of the ideas expressed in the federal Bill of Rights, but by people who remembered the execution of the surrendered at Goliad and the Alamo and who overwhelming came from a faith tradition that strongly rejected the execution of the innocent. Having just cast off a repressive state government, they crafted a new Constitution aimed at limiting state authority and assuring access to judicial relief from it. How it might be that Texas is now an outlier among the minority of states appending, by judicial decision applying federal law, a "clear and convincing" demand in capital cases seems inexplicable. Our framers were, if anything, at least as skeptical of state power as those in Alabama, Florida or Oklahoma, wherein a less-than-clear-and-convincing standard has been set,[18] and still their judiciaries retain respect for and loyalty to the principles of federalism and adherence to the federal Constitution and those of their respective state.

[18] *See* ALA R. CRIM P. 32.1(e)(4); *Jones v. State*, 591 So. 2d 911, 915 (Fla. 1992); *Aguirre-Jarquin v. State*, 202 So. 3d 785, 790 (Fla. 2016); *Smith v. State*, 826 P.2d 615, 617–18 (Okla. Crim. App. 1992); 22 Okla. Stat. §1080 (2024).

ii. The Standard and the Writ

Turning to the final question of *where* one's due course of law life interest finds substantive purchase under the writ, I turn back to my illicit possessor of tobacco. I assume that our Texas Constitution's prohibition on cruel and unusual punishment would foreclose his execution for that offense, that our courts would be open to hear such an argument, and that no law foreclosing access to this Court to pursue habeas corpus could survive, *because our Constitution says so* each step of the way. If this Court's role in capital cases includes weighing evidence post judgment—and at least since *Holmes* we have done so—I would find it even less likely that a person who is probably guilty of *no crime* could be turned away any more readily.

Requiring more may be proper if we were not primarily responsible for the determination, *see Herrera*, 506 U.S. 390, or if the applicant were not contesting his innocence at all, *see Sawyer*, 505 U.S. 333. But as we are a state court with final writ jurisdiction operating under a state Constitution that clearly demands more confidence in the product of its legal system than a toss of a coin, I believe that the execution of someone who would "more likely than not" be acquitted is cruel, unusual, and intolerable and grossly disproportionate. *E.g., Graham v. Florida,* 560 U.S. 48 (2010).

This is not to suggest that I believe the Texas Constitution is somehow imbued with a wandering penumbra of its own. Rather, I simply think we would do well to ask the same questions of its text and meaning and give the same answers that would have been obtained in 1876. If, for example, our progenitors had access to DNA testing, I have little doubt that they would have expected their courts, with or without invitation from the Legislature, to accept and act on such evidence in habeas proceedings.

The state's right to impose the death penalty is plain under our own Constitution and its federal counterpart. *See Jurek v. Texas,* 428 U.S. 262 (1976). This is so because and to the extent it is discerningly applied, *id.*, to the worst of the worst adults[19] who at the time of their execution have not shown that they are probably innocent of the charged offense. Thus, I reject the formulation accepted in some states by which relief would be granted on "a reasonable probability" of a different result as inadequate to upset the finality of the judgment in the absence of some other demonstrable error or deficiency in the trial.

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[19] *Roper v. Simmons*, 543 U.S. 551, 568, (2005) (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)) ("Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them "the most deserving of execution."); *Kennedy v. Louisiana*, 554 U.S. 407 (1987) (forbidding death penalty for crimes other than murder).

Given my conclusion that the Texas Constitution forbids the state from executing those who are not even *probably* guilty under the legal standard governing that determination, I have little difficulty concluding Article 11.071 would not prevent the Applicant in the instant case from having his merits heard before us. Indeed, I believe that conclusion would be compelled as a structural matter by this Court's obligations under Article II of our Constitution to exercise its "magistracy" of criminal law matters and the concomitant, guaranteed provisions of the Texas Bill of Rights concerning the right of access to the courts for a remedy and the efficacy of the writ. TEX. CONST. art. II; art. I, §§ 2, 13.

By contrast, foreclosing the right of writ to those who are probably not guilty imposes a state judicial burden onto the state executive branch and the federal judiciary, inevitably leading to embarrassing and awkward results from these outside governing bodies that undermines confidence in this Court, the judiciary, and our state government as a whole. This will be true, if it hasn't happened already, when the Court is rescued by an obvious, last-minute clemency or pardon, a federal court rebuke, or, worse, a post-execution discovery of innocence and subsequent outcry, accounting for our application of lesser standards.

C. Deprivation of Liberty, Elizondo*, and Incarceration Rather Than Death*

Finally, I have been careful not to tread unnecessarily on the separate question of the standard applicable to new-evidence claims involving allegations of erroneous deprivation of liberty, but not an interest in life. On that note, I acknowledge the Supreme Court's dicta rejecting *Herrera*'s attempt to avoid only the penalty of death but not his incarceration as urging a "strange" jurisprudence. *Herrera*, 506 U.S. at 405. Indeed, this is where I believe *Elizondo* got it wrong—at least insofar as the erroneous deprivations of life interests are concerned.

Rather than a standard, Herrera sought recognition of a *right of review* the Supreme Court declined to recognize. The Supreme Court rejected that right and did not set up a review standard. That right of review has since been recognized in this state and all others. That different *standards* might apply to that review in connection with different due process interests is hardly "strange." Neither is it strange that an applicant might be spared application of the death penalty but left to serve a sentence of confinement. That is precisely the holding of *Sawyer*. 505 U.S. at 338–41.

On the contrary, the potential for different standards (and results they produce) are the product of explicit text in the U.S. and Texas Constitutions treating these interests disjunctively and the holdings in *Addington* and a host of other like

decisions involving the deprivation of "life, liberty, and property." Indeed, it would be far stranger if these interests (and correlative standards) ceased to be different with respect to *actual* erroneous deprivations after a judgment.

While I am comfortable in assessing claims of deprivation of liberty pursuant to *Elizondo*,[20] I believe the standard announced in *Elizondo* is too high insofar as the Texas Constitution's protections against erroneous deprivation *life* is concerned. As to whether *Elizondo*'s recognition of a right to habeas review is correct as a matter of the federal law it applied, whether the Texas Constitution would recognize the same right of habeas review is a different question.

Separately, and regardless of whether the Texas Constitution calls for or permits *any* scrutiny in this or like cases, given the presence of a potentially viable federal constitutional claim *and* the express authorization of our consideration of an innocence claim appended to it in Article 11.071, we should reach that claim on its merits. On the evidence we have at this point, I would find the Applicant has shown: (1) potentially viable federal constitutional claims, including claims related to nondisclosure of exculpatory evidence, and (2) a colorable claim of actual innocence

[20] Thus, it should be possible for a habeas applicant to establish a right to relief from a sentence of death. but not his entitlement to release from confinement. Likewise, proving entitlement to release on account of our judgment about what hypothetical jurors would most likely do, in my view, should generally be grounds for a retrial, not an acquittal.

as detailed in *Kuhlman* and *Schlup* sufficient to permit consideration of the application on its merits under the federal embraced in Article 11.071.

D. Response to Judge Yeary's Dissent

Our role in upholding our state Constitution is clear. "[I]t is emphatically the province and duty of the judicial department to say what [our state constitutional] law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). This case presents us with the perfect opportunity to reexamine our jurisprudence to address the role, if any, for our Texas Constitution.

My friend Judge Yeary suggests that (1) I give insufficient weight to the state's finality interest and (2) our writ should not be open to the state constitutional claim because the framers in 1876 would have understood it to only reach to void judgments and like jurisdictional deficiencies. I accept that, relatively speaking, my weighing of the state's interest in finality may appear as "lip service" when compared to my full embrace of the state's interest in the substantive Constitution. This is because, by force of logic, we can only have one first priority. Mine is the constitutional text.

Further, he expresses great concern with the Court's authority to issue orders or instructions, such as today's remand, that the Court deems appropriate. Because I find his earlier two concerns warrant addressing in greater detail, I will only briefly pause to remind him that—while I agree it is unfortunate that the Court's remand

order does not offer more explanation for its basis or guidance in its directive for "development of the claims"—the Court is generally authorized to issue such orders, including this generic remand, pursuant to the Rule 73.4 of the Texas Rules of Appellate Procedure.

i. The Texas Bill of Rights Assures Access to State Courts for Claims Arising Under its Own Text—Not Just Those Arising Under Federal Law

I see the concept of finality as an important, indeed compelling, state interest. It may well be incorporated by implication and necessity into our Constitution's Articles II and V governing distribution of power and the creation of a judiciary. I agree with Judge Yeary that in creating courts, our framers surely must have intended that their judgments be carried into effect. But I do not see finality of judgments listed directly or indirectly within our state's Bill of Rights. What I do see are: (1) guarantees of access to courts for "effective" habeas corpus and open courts, (2) multiple due course of law guarantees, and (3) a prohibition on cruel punishment. *See* TEX. CONST. art. I, §§ 1, 12 13, 19; art. II, §§ 2, 13. More importantly, I see the following text in our Bill of Rights that, to my mind, controls the weighing of these interests:

> Sec. 29. BILL OF RIGHTS EXCEPTED FROM POWERS OF GOVERNMENT AND INVIOLATE. To guard against transgressions of the high powers herein delegated, we declare ***that everything in this "Bill of Rights" is excepted out of the general powers of government***, and shall

> forever remain inviolate, and ***all laws contrary thereto, or to the following provisions, shall be void***.

TEX. CONST. art. I, § 29 (emphasis added).

If our Constitution prohibits execution of those who have shown (by any standard)[21] their actual innocence (something we have somehow still have never addressed) because doing so would be cruel and unusual, then foreclosing access to the courts to establish that fact would constitute a problem within the reach of that text. In accordance with the clause excerpted from our Bill of Rights above, a law "contrary thereto" the provisions the Bill describes "shall be void"—including laws concerning the operation of courts and the actions of wardens.

Judge Yeary also asserts this Court has never relied on our State "Constitution as authority for granting post-conviction relief." Concurring Op. at 2. This may be so, but it is unclear to me why this habit should be regarded as a virtue. *See Grey v. State*, 298 S.W.3d 644, 646 (Tex. Crim. App. 2009) (suggesting, somewhat satirically, "it's better to be consistent than right."). I would be in complete agreement with him if we were serving on a federal court; however, I am troubled at the thought that I am not required to call for the reversal of any precedent of this Court in suggesting that our Constitution provides a mechanism for relief in a death

[21] To this point, we have not answered that even conclusive evidence of innocence would trigger relief under our own Constitution. Leaving basic questions like this unanswered invites needless oversight from the U.S. Supreme Court and our Legislature.

case presenting a claim of actual innocence—particularly when we ourselves hold the claim to be cognizable under our reading of *federal* case law. As the question currently stands, the field is open, and the ball is on the turf. I'm simply picking it up.

What is amiss here is the fact this Court has recognized an applicant's claim as cognizable under our writ *only* under the Constitution of our former occupiers. This would be very hard to explain to those involved with the formation of our former Republic and current State. These men were intimately familiar with the federal form of government, the role of state courts, and the writ of habeas corpus, as illustrated by the experience of a young attorney named William Barret Travis who, in 1832, set out in support of the Mexican Constitution of 1824 in the then-Mexican state of Coahuila y Tejas.[22] This constitution established a framework dividing powers between the central Mexican government and its many states, conferring various rights upon the states and their citizens, much like our U.S. Constitution. In 1832, a Mexican centralist regime with little regard for these rights had risen to power, and Travis and another local attorney marched to the coastal town of Anahuac in opposition of this centralist control.

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[22] Archie P. McDonald, *William Barret Travis: Hero of the Alamo*, TEX. STATE HIST. ASS'N (March 24, 2017), https://www.tshaonline.org/handbook/entries/travis-william-barret.

Mexican leadership, hardly interested in hearing about the rights of these Texians, imprisoned the men in a brick kiln shortly thereafter. Given their friends' lack of access to a writ of habeas corpus, fellow Texians marched a cannon to Anahuac to demand their friends' release, stopping on their way to draft the Turtle Bayou Resolutions, which pledged their loyalty to the rights afforded Texas under the Constitution of 1824 and condemned the centralist regime.[23] Less than one year later, the first Texas Constitution was drafted in April of 1833. Its Article IV ensured "the privilege of the Writ of Habeas Corpus shall be established by law, and shall remain inviolable."[24]

Three generations later, having suffered through the iniquities of reconstruction, Texans crafted a Constitution that begins (in Article I, Section 1) with a declaration of the supremacy of state power and moves on to a list of individual rights, including an assurance of access to state courts for remedy on account of denial. That same year, they were forced to yield to the inauguration of "his fraudulency," President Rutherford Hayes,[25] in order to assure the complete

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[23] Alamo Education Department, *Texas Revolution Timeline*, THE ALAMO, https://www.thealamo.org/remember/battle- and- revolution/revolution- timeline #:~:text =July%2018%2C%201832,at%20this%20time%20in%20history (last visited June 12, 2025).

[24] TEX. CONST. of 1824, art. I, §§ 13, 14.

[25] Democrat Samuel Tilden won the popular vote and had nineteen more electoral votes than Republican Rutherford B. Hayes. Tilden won Texas. The Compromise of 1877 gave Hayes

restoration of their right to govern their own affairs under that Constitution.

Given our state's rich history of developing and guaranteeing the freedoms within its governing document and its mistrust of government power, I suspect our framers would not look kindly on our uninhibited and exclusive resort to the federal Constitution at the expense of our own—particularly in this context where the individual due course of law interest is at its zenith and the exercise of state authority is likewise at its extreme.

ii. We Have Already Recognized the Writ's Applicability to Constitutional Claims of Innocence

Judge Yeary is certainly correct that our writ practice in 1876 was limited in reach to "void" judgments and jurisdictional defects and that exploration of actual innocence post judgment would have then seemed "alien" to our predecessors—as alien as the double helix or DNA, I suspect. If I could travel in time to 1908 to meet with his Honor Judge Von Muttonchops to ask whether his understanding of the due course of law and open courts provisions would afford access to the courts to review a claim of wrongful conviction based on a DNA mismatch combined with further, untested DNA evidence, I think I know how he would answer. He would point to the U.S. Supreme Court's decision in *Ex Parte Young*, whereby state action, such as

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the White House. Texas got funding for the Texas and Pacific Railroad and an assurance of a final end of federal supervision under reconstruction. *See Compromise of 1877*, HISTORY.COM (May 28, 2025), https://www.history.com/articles/compromise-of-1877.

enforcement of a judgment in violation of the Constitution is itself void. *Ex Parte Young*, 209 U.S. 123 (1908). This would fit nicely alongside the text in Article I, Section 29's "all laws contrary" to the provisions in the Bill of Rights are "void." This in fact is essentially the line of reasoning that led to the incorporation of "constitutional claims" as cognizable under our habeas jurisprudence in a case by the same name. *Ex parte Young,* 418 S.W.2d 824 (Tex. Crim. App. 1967).[26]

The simpler answer is the one I provided above. We have long recognized "constitutional" claims as cognizable under our writ—though we have not (yet) recognized any state constitutional claim to prevent the execution of someone who is not guilty or considered how a statutory writ bar *might* constitutionally impede it. *See Ex parte Moffett*, 542 S.W.2d 184 (Tex. Crim. App. 1976) (federal due process); *Ex parte Banks*, 769 S.W.2d 539 (Tex. Crim. App. 1989). Even Judge Clinton, whom my colleague Judge Yeary cites in his concurrence, appeared to embrace that reading in his own dissent in *Banks.* Rolling that recognition back or finding it to apply only to *federal* constitutional claims turns the Texas suspension and open courts clauses into a waste of ink.

[26] The rationale for our holding appears rooted in the U.S. Supreme Court's holding in *Fay v. Noia* to the same effect. 372 U.S. 391 (1963). Nothing in *Smith, Fay*, or principles of logic would limit the origin of that "jurisdictional" defect to *federal* as opposed to *state* constitutional violations. As noted above, our writ is more than a vehicle for exhaustion of federal claims.

Our writ is a vehicle, not a destination, and arrives, unlike its federal counterpart, in our Bill of Rights, tied to its guarantees of judicial access and with an assurance of substantive efficacy. More importantly, our writ can "*never be suspended*." TEX. CONST. art. I, §21. Even its weaker federal counterpart *would* prohibit suspension in the form of closure once the substantive right has been recognized, and thus is assumed to be directed at its present content, and not to its past. *See Felker*, 518 U.S. at 663–64. Hence Justice Scalia's *dissent* in *St. Cyr*, lamenting the operation of what he described as a "one-way ratchet" which could not attract a majority even under that weaker federal form of protection of the writ. *See I.N.S. v. St. Cyr*, 533 U.S. 289, 326 (2001) (Scalia, J., dissenting).

However we got here, the fact is we *have* expressly recognized the writ's applicability to constitutional claims for decades. This is how we entertain claims that prosecutors withheld material exculpatory evidence at trial,[27] the use of false testimony,[28] or the trial judge's bias.[29] I do not understand Judge Yeary to be urging the closure of the writ in these constitutional settings. Instead, he appears to question its viability to claims of actual innocence. Again, that ship sailed with *Holmes* and

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[27] *Ex parte Kimes*, 872 S.W.2d 700 (Tex. Crim. App. 1993).

[28] *Ex parte Weinstein,* 421 S.W.3d 656, 665 (Tex. Crim. App. 2014).

[29] *Ex parte Halprin*, 708 S.W.3d 1, 5 (Tex. Crim. App. 2024).

Elizondo, and we have overturned many judgments on that theory in the decades since. I do not believe that our predecessors who recognized that or any other form of constitutional claim as cognizable under our writ did so in a wild hair of natural law progressiveness. On the contrary, even the most ardent proponent of legal positivism, originalism, and strict constitutional construction would recognize the role our framers placed on the writ and access to our Court in our Constitution and under the standards that same document demands.

VI. THE DISPOSITION I WOULD ORDER

Putting aside my concern with the standard we should apply to this and like applications, I believe the record we have at this stage in this case leaves open too many material and readily redressable questions. The only DNA evidence we have at this point excludes Applicant as a contributor, and a large number of potentially viable genetic samples (142 items to be precise) sit untested. Further, as noted above, it appears information probative of his guilt or innocence and of the credibility of the witnesses against him was not made available to his counsel at trial. *See Kuhlman*, 477 U.S. at 455 n.17; *Ex parte Reed*, 271 S.W.3d 698 (Tex. Crim. App. 2008) (applicant must make a prima facie showing of actual innocence to demonstrate constitutional violation at his trial resulted in a miscarriage of justice). All of this, in my view, is sufficient to warrant—indeed compel—at least a

continuation of a stay and further proceedings on the DNA issues to elucidate the question of his guilt as best we can in advance of making a final determination here.

Our earlier disposition of Applicant's appeal turned away his request to obtain DNA testing of relevant samples under Chapter 64 of the Texas Code of Criminal Procedure largely on account of the process by which the testing was requested. I have no doubt that counsel should have acted more diligently in pursuing the issue and that a ruling denying testing on this basis is generally within the trial court's discretion under that chapter. But where we are faced with a sentence of death and material questions of guilt remain, leaving them unresolved on procedural grounds makes little sense. *See McQuiggin*, 569 U.S. at 392-93.

While we might overrule that decision or recall our mandate and remand for further proceedings to develop the relevant DNA evidence,[30] I would simply address the issue directly and without further delay[31] under our constitutional "power . . . to ascertain such matters of fact as may be necessary to the exercise of [our]

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[30] *See* TEX. R. APP. P. 18.7, 31.4(c); *Housing Authority v. Midkiff*, 463 U. S. 1323, 1324 (1983) (inherent power to recall mandate); *Covell v. Heyman*, 111 U.S. 176 (1884) (jurisdiction of a court . . . continues until [its] judgment is satisfied).

[31] While I disagree Judge Yeary insofar as the need to resolve the question of innocence is concerned, I would agree with him insofar as that concern relates to delay. This case should have been resolved, one way or the other, long ago—and likely would have been had a DNA test been ordered years ago. I would address that concern by avoiding further remands and simply answering the question posed by 142 items that may conclusively resolve the singular relevant fact question on its merits.

jurisdiction"[32] and, perhaps, our statutory authority under Texas Government Code Section 22.106.[33]

Further, at this point in the proceedings, the Applicant has simply urged that he is not guilty, that the only DNA testing to date excludes him as a source, and that he would like to be heard on the merits. The Court has not allowed the Applicant to file a brief or otherwise present argument raising his own issues, because we read our statute embracing the *federal* constitutional and successive writ bar to foreclose further review. But, as detailed herein, our writ is open to the innocence argument, and, in my view, *if* that argument is viable under our state Constitution, then the *Schlup* gateway is irrelevant.

To this point, the Applicant has been unable to present any argument on the merits beyond urging he is innocent and would like his new evidence to that effect heard. He is thus hardly in a position to make, let alone waive, the operative question of the proper standard. In all events, our role as judges is to consider that claim

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[32] TEX. CONST. art. V, § 5.

[33] While I accept that the Legislature has a role in establishing the rules governing discovery and proof of facts in our courts, including in habeas proceedings, so do we. *Id.;* Tex. Gov't Code § 22.108 ("The court of criminal appeals is granted rulemaking power to promulgate rules of posttrial, appellate, and review procedure in criminal cases…"). Leaving potentially dispositive DNA material untested in a death case with a non-frivolous claim of innocence on account of counsel's intention to delay his client's execution does little to advance the cause of confidence in our most important judgments and opens the state to otherwise avoidable federal constitutional claims.

mindful of the writ bar, the standard subscribed to by our state judiciary to this point, and the litigant's right to be heard in a case involving the potential erroneous deprivation of life. This is the essence of the task of judging and often informs the decisions not just of dissenters, but of majorities as well. *See In re State ex rel. Ogg*, 630 S.W.3d 67, 69, 71 (Tex. Crim. App. 2021) (Keller, P.J., dissenting) (Newell, J., concurring) (addressing *Brady* concerns not presented by the parties).

CONCLUSION

While it has not played a featuring role in our actual innocence jurisprudence, I believe the Texas Constitution is central to our analysis here. I further believe that the framers of our Constitution, who protected "life" separately and first in its due course of law assurance, foreclosed the argument that the government reserved to itself the power to execute a person who has shown that he is most likely not guilty.

In all events, we should reach the merits here and resolve the question of the Applicant's claim of actual innocence in a way that inspires confidence in this Court and the judiciary. To do so, this Court ought to evaluate the appropriateness in assessing deprivation of life claims pursuant to the *Elizondo* standard and put aside fears of involving a lesser standard when due process begs the question. I would thus reopen the Applicant's writ and direct testing of the remaining DNA evidence without further delay as described above.

As the majority holds otherwise, I dissent from this omission from its order, though I concur in the decision to remand.

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