No. 21-7314

ORIGINAL



IN THE

SUPREME COURT OF THE UNITED STATES

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WILLIAM WELDON JONES,
Petitioner

vs

THE STATE OF TEXAS,
Respondents

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

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# PETITION FOR WRIT OF CERTIORARI

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William Weldon Jones
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## QUESTIONS PRESENTED

1) Is Petitioner actually innocent in a subsequent prosecution when in the previous prosecution another District Court in another county convicted, pronounced and imposed sentence, and issued a cumulation order to that offense? Does jeopardy attach in the previous prosecution even though the District Court did not issue a formal judgment, but incorporated it in the judgment for another cause?

2) State and Federal Circuit Courts are intractably split on what constitutes "New" in new reliable evidence under Schlup-type claims. Is it newly discovered or newly presented?

3) In order to resolve the frequently recurring issue dealing with neuroscience and evolving standards of decency analysis for the legal categorical class of offenders 18-21 years of age, should offenders receive a mitigation hearing before the imposition of a de facto or de jure life without parole sentence?

4) Should Harmelin v Michigan be overruled in part since it was decided 14 years prior to the first inklings of neuroscience data and today, 30 years later, we have a firmer grasp of brain development to determine culpability for crime?

5) How long should a life with parole sentence be that meaningful rehabilitation is still possible?

## LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

## RELATED CASES

The State of Texas v William Jones, 93CR0904, 212th Judicial District Court of Galveston County, Texas. Judgment entered October 14th, 1996.

The State of Texas v William Jones, 93CR0568, 212th Judicial District Court of Galveston County, Texas. Judgment entered October 14th, 1996.

The State of Texas v William Jones, 94CR0354, 212th Judicial District Court of Galveston County, Texas. Judgment entered October 14th, 1996.

The State of Texas v William Jones, 79689-41, 212th Judicial District Court of Galveston County, Texas. Judgment entered October 14th, 1996.

William Weldon Jones v The State of Texas, Court of Appeals Number 08-97-00011-CR, cause number 79689-41, 8th Court of Appeals, Court denied relief on August 21st, 1998.

Ex Parte William Jones, 79689-41, Texas Court of Criminal Appeals granted jail time credit on June 6th, 2002.

Ex Parte William Jones, 94CR0354-83-1, Texas Court of Criminal Appeals dismissed as noncompliant in 2002.

Ex Parte William Jones, 94CR0354-83-2, Texas Court of Criminall Appeals denied without a written order in 2002.

Ex Parte William Weldon Jones, 79689-41, Texas Court of Criminal Appeals dismissed as noncompliant in 2008.

Ex Parte William Jones, 79689-41, WR-51,597-04, WR-51,597-05, Texas Court of Criminal Appeals denied without a written order on August 21st, 2019.

Ex Parte William Weldon Jones, 94CR0354-83-3, WR-51,597-06, Texas Court of Criminal Appeals dismissed on March 17, 2021 as noncompliant.

William Weldon Jones v The State of Texas, Courttof Appeals number 14-21-00330-CR, Cause No. 94CR0354, 14th Court of Appeals, dismissed the appeal in August 2021.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

## OPINIONS BELOW

[ ] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix A-1 to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the 8th Dist. Court of Appeals court appears at Appendix D to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

## JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[X] For cases from **state courts:**

The date on which the highest state court decided my case was DEC. 22, 2021. A copy of that decision appears at Appendix A.

[X] A timely petition for rehearing was thereafter ~~denied~~ filed on the following date: January 3rd, 2022, and a copy of the order denying rehearing appears at Appendix C.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment states, "Nor shall any person be subjected for the same offence to be twice put in jeopardy of life or limb;"

The Fifth Amendment states, "Nor be deprived of life, liberty, or property, without due process of law;"

The Sixth Amendment states, "In all criminal prosecutions, the accused shall," "have the assistance of counsel for his defense."

The Eighth Amendment states, "Nor cruel and unusual punishments inflicted."

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

## STATEMENT OF CASE

On October 14th, 1996 Petitioner was convicted in Galveston's 212th District Court of 79689-41, Capital Murder, and sentenced to life in the Texas Department of Crimianl Justice to run consecutive to Galveston's causes. (See Exhibit 2 of Petitioner's State application for habeas corpus. See also Appendix B)

On October 28th, 1996 Petitioner was again convicted in El Paso's 41st District Court of 79689-41, Capital Murder, and sentenced to life in the Texas Department of Criminal Justice to run consecutive to cause no. 94CR0354. (See Exhibit 5 of Petitioner's State application for habeas corpus. See also Appendix B.)

Petitioner sought to appeal in Galveston and was denied for being 1 day late. In El Paso, Petitioner received a Motion for New Trial hearing and direct appeal but Appellate counsel did not investigate the Galveston plea and mischaracterized Petitioner's argument, and never notified Petitioner of the 8th Circuit Court of Appeals decision. In June 2019, Petitioner filed his initial habeas corpus that was prematurely transmitted to the Court of Criminal Appeals and thus denied the Court of its original jurisdiction, but the Texas Court of Criminal Appeals still denied without a written order Petitioner's application. (See Appendix E).

On August 26th, 2021 Petitioner filed a subsequent writ of habeas corpus in cause number 79689-41. Said writ contained nine constitutional claims predicated on a Schlup-type actual innocence claim. (3 distinct double jeopardy claims, 2 ineffective

assistance of counsel claims, 1 structural error claim, and a due process claim that the Texas Court of Criminal Appeals lacked original jurisdiction of first habeas application, and an 8th Amendment claim that Petitioner is of vulnerable class of offenders and an evolving standards of decency analysis dictate that his de facto life without parole sentence is unconstitutional without a mitigation hearing to determine culpability.)

On December 22nd, 2021 the Texas Court of Criminal Appeals dismissed Petitioner's application based on T.C.C.P., Art. 11.07 §4(a)-(c), but did not give a written order (See Appendix A). Without any explanation it appears the Texas Court of Criminal Appeals (TCCA) applied an erroneous standard of review to Petitioner's claims. The TCCA applied "newly discovered" standard of review to Petitioner's Schlup-type actual innocence claim. This is contrary to Federal Law. The TCCA never held an evidentiary hearing, even though the habeas court in this case never looked at the application as it was again prematurely transmitted to the Texas Court of Criminal Appeals (a common practice in Texas for Pro Se litigants), thus the TCCA never reached any of the merits of Petitioner's application. An evidentiary hearing would have produced further conclusive evidence that would entitle Petitioner to relief as it proves his actual innocence.

On January 3rd, 2022 Petitioner timely filed a Motion for Rehearing that went ignored by the TCCA as there is not statutory obligation for the Court to entertain a Motion for Rehearing. This case has never been properly looked at and adjudicated on

the merits. Today, the Texas Court of Criminal Appeals relies on the Circuit Court split over what constitutes "new" reliable eviodence and the restrictions of AEDPA to continue to perpetuate the miscarriage of justice of convicting Petitioner twice for the same offense when evidence shows they indeed did this violation of our Constitution's 14th and 5th Amendment.

## REASONS FOR GRANTING THE WRIT

In Schlup v Delo, 513 U.S. 298 (1995), this Court held that new reliable evidence not presented at trial coupled with a constitutional violation could prove actual innocence. The District Courts are intractably split over what constitutes "new," and this case gives this court the opportunity to declare clearly established federal law and resolve the split on this issue.

Also, Harmelin v Michigan, 501 U.S. 957 (1991) holds that a life without parole sentence is constitutional for adults. That was thirty years ago and today we have neuroscience data that gives us a better understanding of brain development and culpability. This case gives this Court the opportunity to apply the evolving standards of decency and determine whether Harmelin should be overturned in part for the categorical class of prisoners (18-21 years of age).

## I. FEDERAL COURTS ARE INTRACTABLY SPLIT OVER WHAT IS "NEW" RELIABLE EVIDENCE IN SCHLUP-TYPE ACTUAL INNOCENCE CLAIMS AND THIS CASE PROVIDES THE SUPREME COURT THE OPPORTUNITY TO RESOLVE SPLIT AND PRONOUNCE CLEARLY ESTABLISHED FEDERAL LAW ON THIS ISSUE.

A. The Supreme Court has not explicitly defined what constitutes "new reliable evidence" under the Schlup actual-innocence standard and there is a split on what is "new" evidence between Federal Circuit Courts Wright v Quarterman, 470 F.3d 581, 591 (5th Cir 2006).

The Fifth Circuit has not weighed in on the Circuit split Fratta v Davis, 889 F.3d 225, 232 (5th Cir 2018). Federal District Courts in Texas routinely quote Moore v Quarterman, 534 F.3d 454; 2008 U.S. App. Lexis 14284, and apply the "newly discovered" standard of review to actual-innocence claims:

> "the information in Huel's affidavit is not "new" (given that it was always within the reach of Moore's personal knowledge or reasonable investigation)" ID at 465. (See also Hancock v Davis, 906 F.3d 387, 389-90 (5th Cir 2018).

Without clearly established federal law on what constitutes "new" reliable evidence, the "newly discovered" standard of review is used as a procedural mechanism to bar review of claims where there exists a miscarriage of justice. Examples of this can be seen where a Texas Federal magistrate judge encouraged the dismissal of an actual-innocence claim based on the "newly discovered" standard of review and took unfair advantage of the Federal Court split. (See Findings, Conclusions, and Recommendations of United States Magistrate Judge in Jones v Director, TDCJ-ID, No. 3:21-

cv-1445-s-BN in the United States District Court Northern District of Texas, Dallas Division.)

B. Under Schlup-type actual innocence claims, "Newly Presented" should be the standard of review. This case is a good example for why "newly presented" is the best standard of review. Petitioner has been incarcerated 28 years. While he could arguably make a case that documentation from the State Counsel for Offenders and the Transcripts provided by the 212th District Court in 2021 are newly discovered evidence; equitable justice is better served by highlighting that if the "newly discovered" standard of review is made clearly established federal law then many potentially innocent people will find themselves barred from ever being able to have their Schlup-type actual-innocence claims reach the merits.

Furthermore, if "Newly Discovered" is made clearly established Federal Law, miscarriages of justice will be unfairly perpetuated because Texas has enacted statutory laws that create unconstitutional barriers and impediments which prevent prisoners who may possess factual knowledge of evidence and its location from accessing that evidence to support and carry the burden of proof for their actual-innocence claims. Two examples of these barriers are: Texas Government Code, §552.028 and Texas Code of Criminal Procedure, Art. 39.14(f). Tex. Gov. Code §552.028 prevents one who is incarcerated or their family members from obtaining information from Government Agencies. The only exception is if it is the prisoner's attorney.

But see the next example. T.C.C.P., Art. 39.14(f) prevents one's attorney from providing copies of documentation to the

defendant in their case. These impediments to obtaining documentation oppressively restrict a Pro se litigant and unfairly prejudice the prisoner who most commonly cannot afford to hire a lawyer. This makes meaningful access to the courts available only to those who have the financial means to hire a lawyer. These unconstitutional State Laws are reminicient of Jim Crow laws passed during darker periods of our Nation's history.

It took a writ of mandamus before a District Clerk was forced to comply with a simple records request In re Bonilla, 424 S.W.3d 528 (Tex. Crim. App. 2014)(A district clerk's denial of a cost estimate may deny access to the courts). In a more recent case Texas Courts refused to provide copies of drug analysis reports In re Fields, No. 10-21-00066-CR (Tex. App.--Waco, April 7th, 2021). Pro se litigants spend their time seeking documentation to prove their claims and valuable government resources are expended in an effort to prevent pro se litigants from obtaining documents he has factual knowledge of and needs to carry the burden of proof required. In case at hand, Petitioner sought to obtain copies of his judgment in cause No. 94CR0354 both from the Texas Department of Criminal Justice and the Texas Board of Pardon of Paroles. He believed the original judgment in the possession of these agencies would show different than the one he received from the 212th District Court because TDCJ's calculations of sentences was different than judgment (See Exhibit 3 of Petitioner's State writ of habeas corpus). TDCJ refused and directed Petitioner to the District Clerk's office and the Parole Board cited the Texas Government code, §552.028 to refuse request.

The effect of these unconstitutional laws and the use of the "newly discovered" standard of review is that miscarriages of justice are not being reviewed and/or corrected.

The plight of a Pro se litigant in Texas looks like this. The prisoner has a factual knowledge of documentation but no access because of unconstitutional laws that prevent the prisoner from accessing them. (Notice that prisoners in above cases had to go to the extent to file a writ of mandamus to seek compliance.) Prisoners who attempt to file their pro se application and direct the court to the evidence, (as Petitioner did in this case), the habeas court ignores prisoner and the application is forwarded to Texas Court of Criminal Appeals where the Court denies writ without a written order because "the burden of proof in a writ of habeas corpus is on applicant to prove by a preponderance of the evidence his factual allegations" Ex Parte Thomas, 906 S.W.2d 22, 24 (Tex. Crim. App. 1995); Ex Parte Kimes, 872 S.W.2d 700, 703 (Tex, Crim. App. 1993)(Applicant bears the burden of proof at a habeas hearing to show constitutional violation); Ex Parte Peterson, 117 S.W.3d 804, 818 & n. 60 (Tex. Crim. App. 2003)(Per Curiam)(Defendant bears the burden of proving double jeopardy on writ of habeas corpus).

The prisoner then files a 28 U.S.C.A. §2254 habeas writ and under §2254(d)(1) the Federal Courts must defer to the State Court's decision. The merits of the prisoner's claim are never properly reviewed. AEDPA was enacted for the purpose of cutting down frivoulous writs and conserving valuable resources, not to deny review of meritous claims of miscarriages of justice.

A narrow defining of what is "new" to mean "newly discovered" thwarts the intent, principles, and reasoning of cases like Schlup v Delo, 513 U.S. 298 (1995); House v Bell, 547 U.S. 518 (2006); McQuiggin v Perkins, 569 U.S. 383 (2013). When, as in this case, Texas has enacted unconstitutional laws to prevent a litigant from obtaining the new reliable evidence he may have factual knowledge of, justice is denied, when the Texas Court of Criminal Appeals will not even order an evidentiary hearing.

On the contrary, the "newly presented" standard provides an equitable avenue to correct miscarriages of justice. This is even more important when one includes the fact that many miscarriage of justice claims under Schlup rely on Ineffective Assistance of Counsel claims (as this case well could), but not only does Texas not provide counsel on initial-habeas proceedings, but evidence needed to prove Ineffective assistance of counsel are usually found outside the record. This Court has acknowledged its dissatisfaction with Texas' handling of Ineffective Assistance of Counsel claims on an initial habeas proceedings in Trevino v Thaler, 133 S.Ct 1911 (2013).

Therefore, Petitioner asks this Court to grant this petition to create clearly established law on what is "new" in context of Schlup-type actual innocence claims and grant Petitioner all relief entitled.

II. 28 U.S.C. §2254(d)(1) would deprive Petitioner of obtaining de novo Federal review of Petitioner's Constitutional claims as the defferential application of §2254(d)(1) would bar the correction of a miscarriage of justice.

A. No evidentiary hearing was conducted in State Courts in light of the "newly presented" evidence and Texas' State and Federal Courts apply the "newly discovered" standard of review to Schlup-type actual innocence claims. (See Findings, Conclusions, and Recommendation of the United States Magistrate Judge in Jones v Director, TDCJ-CID, No. 3:21-cv-1445-S-BN in the United States District Court Northern District of Texas, Dallas Division; and Ex Parte Brown, 205 S.W.3d 538 (Tex. Crim. App. 2006).

Without a de novo review, Petitioner's constitutional claims will never reach the merits. It appears the Texas Court of Criminal Appeals denied Petitioner's habeas corpus by applying the "newly discovered" standard to Petitioner's Miscarriage of Justice/Actual Innocence claim and under AEDPA the Federal Courts must defer to State Court's ruling.

Since there is a legitimate Circuit split on the issue of what constitutes "new" it is too difficult to tell whether Texas' Court of Criminal Appeals' decision involved an unreasonable application of clearly established federal law in Schlup-type Actual Innocence claims Tunstall v Hopkins, 306 F.3d 601, 611 (8th Cir 2002); Atwood v Mapes, 325 F.Supp.2d 950, 967-68 (N.D. Iowa 2004).

Therefore, because Petitioner's claims would never reach

the merits under AEDPA's defferential policies, and the Circuit Court split on what constitutes as "new" reliable evidence, Petitioner asks this Court to grant relief and de novo review in order to correct the miscarriage of justice in this case Yellowbear v Wyoming, 380 Fed. App'x 740; 2010 U.S. Lexis 10620 (10th Cir 2010).

## III. The Supreme Court should use this case to resolve this inportant and frequently recurring issue.

A. The important and recurring issue is whether Harmelin v Michigan, 501 U.S. 957 (1991) should be overruled in part because the evolving standards of decency now require the recognition of the categorical class of offenders (18-21 years of age) who need a mitigation hearing to determine culpability for crime before the imposition of a de facto or de jure life without parole sentence.

B. Petitioner offers Harmelin should, in part, be overturned because in 1991 when Harmelin was decided we did not possess the neuroscience concerning brain development that we now possess. This information did not start accumulating until 2010:

> "People began to do research on that period of time toward the end of that decade and as we moved into 2010 and beyond, there began to accumulate some research on development in the brain beyond age 18, so we didn't know a great deal about brain development during late adolescence until much more recently." Cruz v United States, 2018 U.S. Dist. Lexis 52924, pgs 69-71.

Harmelin holds a life without parole sentence does not violate the 8th Amendment's prohibition of cruel and unusual punishments for adults. An adult is classified as anyone 18 years of age and older.

C. The Eighth Amendment's prohibition of cruel and unusual punishment requires that "punishment for crime should be graduated and proportioned to the offense." Roper v Simmons, 543 U.S. 551, 560 (2005).

This proportionality principle requires the Court to evaluate "the evolving standards of decency that mark the progress of a maturing society to determine which punishments are so disproportionate as to be cruel and unusual" ID at 561. (Quoting Trop v Dulles, 356 U.S. 86, 100-01, 76 S.Ct 590 (1958)).

D. In Atkins v Virginia, 536 U.S. 304 (2002) the Court held it violated the 8th Amendment to execute the mentally retarded. In Roper v Simmons, Supra, the Court held it violated the 8th Amendment to execute juveniles since juvenile brains are not fully developed. In Graham v Florida, 560 U.S.48 (2010) the Court held a life without parole sentence violated the 8th Amendment when the juvenile was not convicted of homicide. In Miller v Alabama, 132 S.Ct 2455 (2012) the Court held that a life without parole sentence for juveniles convicted of murder violated the 8th Amendment because juvenile brains are not fully developed. This case was interpreted as a total ban on life without parole sentences for juveniles under 18 years of age. This lasted until the Supreme Court decided Brett Jones v Mississippi, 2020 U.S. Lexis 1527. In Jones the Court broadened the holding of Miller to simply mandate the Trial Court hold a mitigation hearing to consider culpability and does not necessitate a finding of incorribility before the imposition of a life without parole sentence.

All these cases concerned the mental culpability of the offender. The case at hand brings new fact issues before the Court which Miller did not consider because it was unnecessary, (whether life without parole sentences for those over 18, but under 21 violate the 8th Amendment without a mitigation hearing to determine culpability).

Although the science could possibly have supported the finding that 18-21 year olds should have a mitigation hearing before the imposition of a life without parole sentence, the Supreme Court is traditionally "reluctant to decide constitutional questions unnecessarily." See Bowen v United States, 422 U.S. 916, 920, 95 S.Ct 2569 (1975).

Attempts to expand Miller have been rejected as Courts have overwhelmingly held the Spreme court has "chosen to draw the constitutional line at the age of 18 for mandatory minimum life sentences" United States v Sierra, 933 F.3d 95, 97 (2nd Cir 2019); Wright v United States, 902 F.3d 868, 872 (8th Cir 2018); In re Frank, 690 Fed App'x 146 (5th Cir 2017); Melton v florida Dep't of Correction, 778 F.3d 1234, 1235, 1237 (11th Cir 2015); United States v Marshall, 736 F.3d 492, 500 (6th Cir 2013); United States v Dock, 541 Fed App'x 242, 245 (4th Cir 2013).

The Courts are staunch in declaring that Miller does not apply to defendant's 18 or over Davis v Mahally, 307 F.Supp.3d 373; 2018 U.S. Dist. Lexis 62677 (3rd Cir 2018)(Miller does not apply to 20 year olds); In re Frank, supra (Court denied successive writ application because Petitioner was 18-19 years old when some of murders occured and Miller did not apply): Cormier v

State, 540 S.W.3d 185; 2017 Tex. App. Lexis 11749 (Miller does not apply); Turner v State, 443 S.W.3d 128, 129 (Tex. Crim. App. 2016); Duran v State, 363 S.W.3d 719, 723 (Tex. Crim. App. 2011) (following Harmelin in stating the Eighth Amendment does not guarantee that adult defendants, like their juvenile couterparts, must receive an individualized punishment hearing when given an automatic punishment of life without the possibility of parole for Capital murder).

In fact, in denying relief, one justice in Texas' 1st District stated, "Thomas was not a juvenile when she committed the charged offense, nor does she offer any argument that she falls within a category of defendants who, like the juvenile offenders at issue in Miller, should not be subject to a sentence of life without parole without consideration of mitigating factors." Justice Michael Massengale in Thomas v State, 2013 Tex. App. Lexis 15281 (Tex. App.--Houston[1st Dist], Dec. 19, 2013).

The case at hand does not argue Miller should be expanded, but that under the evolving standards of decency analysis, there needs to be a legal recognition of the categorical class of offenders (18-21 years of age) who need a mitigation hearing prior to the imposition of a de facto or de jure life without parole sentence. The scientific evidence and legislative enactments show national consensus that "late adolescents require extra protections from Criminal law" and more generally that society "treats eighteeen to twenty year olds as less than fully mature adults," Post-Hr'g Mem. in supp. at 38, 40 Cruz v United Staes, supra.

In Cruz, the Federal District Court completed the analysis for the exact argument Petitioner Jones is now making in this case, with the exception that here Jones seeks the Supreme Court to, in part, overturn Harmelin, and recognize the legal categorical class of offenders 18-21 years old who need a mitigation hearing to determine culpability. Petitioner asks this Court to adopt all the scientific testimony, evidence of legislative enactments, and National trends and statistics cited in Cruz v United States, supra, to support Petitioner's claim, since no evidentiary hearing was conducted on his claim in State courts.

Petitioner believes Justice Janet Hall thouroughly examined the facts and properly applied the law under the evolving standards of decency analysis, but only erred in attempting to expand Miller when the Spreme Court made clear Miller applied to those under 18. See United States v Williston, 862 F.3d 1023; 2017 U.S. App. Lexis 11951 (10th Cir 2017)(Defendant was 18 when crime occured and court said the age cut off is the law). Justice Hall performed a correct analysis but for the wrong claim. District Courts should follow Supreme Court precedent as was done in United States v Sierra, supra, not create new law. Whether our constitution is offended by new fact issues is a duty allowed to this Supreme Court Marbury v Madison, 5 U.S. 137 (1803). The District court in United States v Williston, which stated the age cut off is the law, is quoted as saying, "If the Miller ruling is to be expanded it is the province of the Supreme court to do so." Again, Petitioner reminds the Court that he does not seek to expand

Miller, but to in part overturn Harmelin. Miller is relevant only in the fact that the Supreme Court relied on neuroscience concerening brain development. Petitioner argues for protection for the legal categorical class of people 18-21-years-of-age.

This legal categorical class of people is validated by neuroscience. See Elizabeth Scott, Richard Bonnie & laurence Steinberg, Young Adulthood as a Transitional Legal Category, 85 Fordham L. Rev. 641 (2016). See also Nat'l Rifle Assoc. of Am. v Bureau of Alcohol, 700 F.3d 185, 209 n. 21 (5th Cir 2012)("Modern scientific research supports the common sense notion that 18-20-year olds tend to be more impulsive than young adults ages 21 and over.").

As pointed out in Cruz v United States, supra pgs. 47-59, there is a consistency of change in legislatures across our Nation and when Harmelin was decioded we did not have the research data we now possess. When harmelin was decided (14 years before Roper and 21 years before Miller), the Court was without the new discoveries in neuroscience research. Left with the responsibility to deter crime, punish criminal behavior, and protect society, the Court reinforced ideas of incapacitation and all but abandoned the belief in the potential for rehabilitation.

Today we cannot argue the Harmelin Court was in error. In fact, Petitioner would argue that with the lack of research and the conditions at the time, 30 years ago, it was the best decision for our Nation.

But times change, science is advancing and we are learning more and more about who we are as a people, our limitations, our potential, the truth about brain development and culpability

in young adults. Just as the Court stated in Roper, supra, "a line must be drawn" ID at 574. Petitioner requests this Court, based on the neuroscience, and using the evolving standards of decency analysis, to overturn Harmelin in part, and recognize the legal categorical class of offenders (18-21 years of age), and draw another line by declaring de facto and de jure life without parole sentences violate the 8th Amendment's prohibition against "cruel and unusual punishment" without a mitigation hearing to determine culpability before imposing a life without parole sentence.

And further, if culpability is deminished, what should be the length of a life sentence for one with diminished culpability? Miller, supra, left it to the States, and Graham, supra, stated a sentence of life with parole should allow for meaningful rehabilitation and the eventual return to soceity. But the States are all over the place. Texas says a life sentence with parole has eligibility after 40 calendar years Shalouei v State, 524 S.W.3d 766; 2017 Tex. App. Lexis 1885. Does this preclude meaningful rehabilitation?

In most States and in civilized Nations worldwide a life sentence consists of a maximum length of 25 years. With our advances in science, should our criminal justice be driven by notions of economics (See American Prison by Shane Bauer (2018), and politics, or the evolving standards of decency our Nation has traditionally utilized and thus led the world in moral and ethical standards when it comes to human rights.

Therefore, Petitioner requests all relief entitled.

IV. Under 28 U.S.C §2244(d)(1) Petitioner would be barred by Statute of limitations.

A. With a Circuit Court split on what is "new" evidence it is too difficult to tell whether the Texas Court of Criminal Appeals decision involved an unreasonable application of clearly-established Fedeeral law in Schlup-type actual innocence claims Tunstall v Hopkins, 306 F.3d 601, 611 (8th Cir 2002); Atwood v Mapes, 325 F.Supp.2d 950, 967-68 (N.D. Iowa 2004).

Under McQuiggin v Perkins, 569 U.S. 383, 133 S.Ct 1924, 1928 (2013) Petitioner is excused by his failure to comply with the one year statute of limitations on Federal habeas corpus review. "To be credible a Petitioner must support a claim of actual innocence with "new reliable evidence whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence--that was not presented at trial" Schlup v Delo, supra.

In this case, Petitioner presents trustworthy eyewitness accounts (transcripts of evidentiary hearing in 2002 where defense attorney testified what her notes of what actually happened at the plea were). This evidence was not presented at trial in El Paso. It proves Petitioner was previously convicted of the same offense and thus subjected to double jeopardy as she testified her notes reflected the two life sentences were stacked. (See Exhibit 4, pg 13, line 19 thru pg 14, line 3 of Petitioner's State habeas corpus). This attorney also testified there were two seperate plea agreements.

Petitioner also presents Physical evidence (documents of Motions, affidavits, judgments, and Motion for New Trial records) that were not presented at trial to prove counsel was ineffective, there was a conflict of interest, and that Petitioner's due process was violated.

Texas Federal Courts apply the "newly discovered" standard of 28 U.S.C. §2244(d)(1) to actual innocence claims. See Jones v Director, TDCJ-CID No. 3:21-cv-1445-s-BN. Petitioner's Schlup-type actual innocence/double jeopardy claim would never reach the merits. See also Smith v Stephens, 2016 U.S. Dist. Lexis 20988 for proof that Federal Courts believe Perkins claims should not apply to guilty pleas.

Therefore, since it would be fruitless to pursue relief in Federal District Courts, Petitioner seeks relief in the Supreme court so they can decide the Circuit Court split and creat "clearly established Federal Law."

## V. The Texas Court of Criminal Appeals decision is incorrect.

The Texas Court of Criminal Appeals is incorrect in their decision because they applied the wrong standard of review and possibly missapplied their own caselaw to the facts. Petitioner is a layman of the law and proceeding Pro se, but as a Pro se litigant Petitioner reads many self help legal manuals. Many of these books stress that litigants should be very precise in the claims brought forth because a common response from the prosecutor's office is to argue for the application of the wrong legal standard

to the facts. When the proper legal standard of review is not on your side, you want a broader legal standard that favors your losing position. You expect this behavior from the Prosecutor's office as our legal system is based on the adversarial process. But we do not expect our reviewing Judicial Courts to apply the wrong standard in order to deny relief. Unfortunately, it appears the Texas Court of Criminal Appeals did just this in dismissing Petitioner's writ.

Under T.C.C.P., Art 11,07 §4, which governs subsequent writs, there are two exceptions that allow a subsequent writ to reach the merits. §4(a)(1) states:

> "the current claims and issues have not been or could not have been presented previously in an original application or in a previously considered application filed under this article because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application; or"

The second exception (§4(a)(2)) states:

> "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."

These are not two steps one must pass through to have their subsequent writ reach the merits, it is an either this exception or that exception.

In Petitioner's subsequent State habeas corpus, which is now before this Court, Petitioner brought nine(9) constitutional claims. The very first claim was an actual innocence claim which is granted by statute under T.C.C.P., Art. 11.07 §4(a)(2); Ex Parte Brooks, 219 S.W.3d 396 (Tex. Crim. App. 2007).

Under Schlup v Delo, supra, which is an actual innocence

case, this case allows a procedural gateway to review the merits of constitutional claims. The Supreme Court affirmed that in Reed v Texas, 140 S.Ct 686 (2020)(holding that Schlup v Delo claims allows all constitutional claims to reach their merits).

So the Texas Court of Criminal Appeals should have been guided first by §4(a)(2). If Petitioner could not carry the burden of proof, or present facts that merit an evidentiary hearing, then the writ would be dismissed according to §4(a)(2). The Texas Court of Criminal Appeals would never need to look at any of the other constitutional claims, which by themselves, without an actual innocence claim, would be reviewed by §4(a)(1).

But it does not appear this is what the Texas Court of Criminal Appeals did. In this case, the T.C.C.A. dismissed without a written order, but specifically stated the writ was dismissed pursuant to T.C.C.P., Art. 11.07 §4(a)-(c). See Appendix A. Without an explanation of the Court's reasoning, Petitioner is left with nothing but questions and speculations.

Parts §4(b) and (c) refer only to §4(a)(1) and have nothing to do with §4(a)(2). Each subsection begins with the phrase "For purposes of Subsection (a)(1)." For the Court to list §4(a)-(c) as the reason for the dismissal is to acknowledge their reasoning or standard of review dealt with §4(a)(1) and not §4(a)(2). Subsection 4(a)(1) is the incorrect standard of review for an actual innocence claim brought under §4(a)(2), as this writ was. The statute is clear, it is either a subsequent writ under §4(a)(1) or §4(a)(2). Petitioner made it clear in his memorandum of law that this actual

innocence claim was brought under §4(a)(2).

For Petitioner, since it has been 28 years, §4(a)(1) is the more stricter standard, and the Texas Court of Criminal Appeals erroneously applied this stricter standard in an effort to perpetuate a miscarriage of justice, and possibly with an eye on the fact that to apply §4(a)(2) would inevitably result in relief being granted under actual innocence and under the Tim Cole Act compensation would have to be made to Petitioner. It appears that Texas would rather be wrong than uphold the law and make things right.

But since the T.C.C.A. did not give an explanation, Petitioner, having done his best to fully research the law, especially Texas caselaw, can pinpoint the weaknesses in his actual innocence claim under Texas Law. None of these weaknesses would result in denying Petitioner relief, especially when compared to the Federal law. Petitioner will show this Court what these weaknesses are for off chance Texas argues they did dismiss under §4(a)(2), and simply were being misleadingly vague in their dismissal.

There are two potential weaknesses.

The first weakness is Texas' applying the "newly discovered" standard of review to Schlup-type actual innocence claims. In almost every instance where a Schlup v Delo actual innocence claim is brought Texas cites Ex Parte Brown, 205 S.W.3d 538 (Tex. Crim. App. 2006) to say there are two types of actual innocence claims and then proceeds to apply the "newly discovered" standard of review to the Schlup-type actual innocence claim.

This is contrary to Schlup v Delo, supra and McQuiggin v Perkins

Perkins, supra which apply the "newly presented" standard. REsolving this issue would clarify the legal standard for similiar situated prisoners seeking relief in Texas.

The second weakness is found under the "preponderance of evidence" element in Schlup-type claims. See Ex Parte Brooks, supra. Under this element Texas caselaw says that the defendant must make a prima facie showing from the record, but then limits the record to only documents from the County and not from another County.

In this case, Petitioner provided the critical physical evidence (judgments and sentences from Galveston County), Trustworthy eyewitness testimony (transcripts of testimony taken under oath in Galveston County where the Galveston Attorney Oktavia Carstarphen stated her records of "what actually happened at theplea were that the two life sentences were stacked." At the plea in Galveston there could not have been two life sentences stacked unless they convicted Petitioner of the El Paso Capital Murder as the Galveston Judgment corroberates. Then Petitioner provided critical physical evidence from the Texas Department of Criminal Justice that show two cumulation orders which is proof of two convictions for same offense as both judgments only issue cumulation orders for cause no. 79689-41. A cumulation order is part of the conviction, not the sentence T.C.C.P., Art. 42.01(19); Rhodes v State, 175 S.W.3d 348 (Tex. App.--Houston[1st Dist] 2004).

It is assumed the Texas Court of Criminal Appeals applied this standard to this case because based on the evidence there

is no doubt Petitioner was convicted twice for same offense and by law Petitioner is innocent of subsequent conviction Ex Parte Knipp, 236 S.W.3d 214 (Tex. Crim. App. 2007); Ex Parte Milner, 394 S.W.3d 502; 2013 Tex. Crim. App. Lexis 418. But Schlup only requires a reasonably probability but for the constitutional violation no conviction would have occurred. And that the evidence only be newly presented. As long as it is reliable it should not matter where it comes from.

This dismissal flies in the face of Federal law that holds the government is not bound to evidence presented at the plea colloquy to sustain the underlying conviction. The Government could produce any evidence Bousley v United States, 118 S.Ct. 1604, 1611-12 (1998); United States v Thompson, 158 F.3d 223, 225-26 (5th Cir 1998). If the State is allowed to produce any evidence not presented at trial to prove conviction, why is Petitioner held to a restricted standard that he can only use evidence from the record of that County to prove actual innocence and previous conviction, and thus a violation of the 5th Amendment? This gives the prosecution an upper hand in proving convictions but limits a Pro se defendant.

Therefore, these weaknesses do not cause the failure of Petitioner's actual innocence claim. And if they do not fail then all the constitutional claims brought forth in the writ are to reach their merits. But T.C.C.A. did not review the actual innocence claim under §4(a)(2), but under §4(a)(1) which is the incorrect standard of review. Petitioner asks this Court to grant all relief he is entitled.

VI. This case gives this Court an opportunity to correct a miscarriage of justice and provide guidance for similiarly situated Petitioners.

A. While in Texas, Schlup-type actual innocence claims are cognizable on habeas corpus, in Federal Courts actual innocence is not a cognizable claim. Rather, Federal Courts use the Miscarriage of Justice standard to overcome procedural bars Wainwright v Sykes, 433 U.S. 72, 77 (1977); Paredes v Quarterman, 574 F.3d 281 (5th Cir 2009).

The elements for a miscarriage of justice which Petitioner must bring forth are: 1) New reliable evidence; 2) not presented at trial; and 3) more likely than not that no reasonable juror would have convicted him in light of new evidence Schlup v Delo, 513 U.S. 298, 324, 327 (1995).

NEW RELIABLE EVIDENCE

There are three types of new reliable evidence: exculpatory scientific evidence, trustworthy eyewitness accounts, and critical physical evidence ID at 324.

Petitioner presents trustworthy eyewitness accounts from his Galveston Attorney Oktavia Carstarphen who testified under oath at an evidentiary hearing in 2002 that she could not recall what happened at the plea, but when she looked at her notes of "what actually happened at the plea--the two life sentences were stacked." See Exhibit 4, pg 13, lines 19 thru pg 14, line 3 in Petitioner's State writ.

This eyewitness account corroborates the Galveston Judgment and Sentence in 94CR0354. See Exhibit 2 in Petitiner's State Writ. This judgment shows as part of that plea Petitioner plead guilty to cause no. 79689-41. If Petitioner was NOT convicted of 79689-41 in Galveston, then the Attorney's notes would not have shown Petitioner's two life sentences were stacked. If Petitioner was not convicted the only possible sentence was a single life at that plea, and even then that would violate due process because you cannot pronounce and impose a plea bargain sentence without a conviction.

Petitioner also presented Critical physical evidence. This evidence consisted of transcripts of evidentiary hearing, Judgments and Sentences from Galveston and El Paso, and documents provided by TDCJ that show two cumulation orders. See Exhibits 2, 3, 4, and 5 in Petitioner's State Writ. One cumulation order was provided by Galveston county and corroborates the Galveston Judgment and Sentence that Petitioner was convicted in Galveston of El Paso Capital Murder. In Texas, a cumulation order is evidence of the conviction, not the sentence T.C.C.P., Art. 42.01(19); Rhodes v STate, 175 S.W.3d 348 (Tex. App.--Houston[1st Dist] 2004).

This case can be determined by looking at the cumulation orders. If El Paso only submitted a cumulation order then there was only one conviction, but if Galveston also submitted a cumulation order than Galveston also convicted Petitioner of the Capital Murder. But Texas Courts refused to even look at it. Petitioner can point to it but they ignore the claim.

The Galveston Judgment and Sentence in cause no. 94CR0354

shows the "(In Detail)" section of what actually happened. See Exhibit 2 of Petitioner's State habeas Writ and Appendix B. This judgment states that the "*" on the subsequent pages are shown on the front of the judgment. The front of the Judgment shows "P/G to El Paso county cause no. 79689-41, Capital Murder," and pronounces sentence of life in TDCJ to run consecutive. Everything else in the In Detail section occurred that day. Galveston issued a cumulation order that corroborates the Judgement. The Attorney's own notes corroborate the Judgemnt.

The fact that TDCJ received two cumulation orders and both judgments show the only two cumulation orders were to be applied to 79689-41 is evidence Petitioner was convicted twice of the same offense. It violates due process to pronounce and impose a sentence without a conviction. It violates double jeopardy to pronounce and impose a sentence and later increase the punishment that was allowed by law when the sentence was first imposed as well.

NOT PRESENTED AT TRIAL

This new reliable evidence was not presented at Trial in El Paso's 41st District Court on October 28, 1996 as Counsel failed to raise defense of double jeopardy. The testimony of Oktavia Carstarphen was not taken until August 9th, 2002 and not available. Petitioner did not obtain transcripts of evidentiary hearing until 2021 and records from TDCJ until after first habeas corpus was filed, and therefore were not available.

MORE LIKELY THAN NOT THAT NO REASONABLE JUROR WOULD HAVE CONVICTED PETITIONER IN LIGHT OF NEW EVIDENCE.

Had Judge Mary Anne Bramblett been presented with the eyewitness testimony or the critieal physical evidence that Petitioner had already been convicted in Galveston's 212th District Court as part of a seperate plea agreement, she would have possessed reasonable cause to suspect that convicting Petitioner again would be illegal and violate the 5th Amendment rights of Petitioner. See also Ex Parte Milner, 394 S.W.3d 502; 2013 Tex. Crim. App. Lexis 418; Ex Parte Knipp, 236 S.W.3d 214 (Tex. Crim. App. 2007.

CONCLUSION

For the foregoing reasons, the Petition for writ of Certiori should be granted and Petitioner should receive all relief entitled him by the United States Constitution.

Respectfully Submitted,

William Weldon Jones

Date: March 3rd, 2022

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