23-6265

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Timothy Dean Stone — PETITIONER
(Your Name)

vs.

State of Texas — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Texas Court of Criminal Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Timothy Dean Stone
(Your Name)

Michael Unit, 2664 FM 2054
(Address)

Tennessee Colony, Texas 75886
(City, State, Zip Code)

None
(Phone Number)

QUESTION(S) PRESENTED

Whether the Texas Court of Criminal Appeals' holding that Texas Code of Criminal Procedure Article 11.07 section 4 (a) (2) precluded consideration of the merits of subsequent writ application asserting Schulp-type of actual innocence is an adequate and independent state procedural ground for the judgement of dismissal.

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

Ex parte Timothy Dean Stone, Tr. Ct. No. 02-1078-K277A

Ex parte Timothy Dean Stone, Tr. Ct. No. 02-1078-K277B

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STATUES AND RULES

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[ ] is unpublished.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[ ] is unpublished.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 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[X] is unpublished.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 _____ 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[ ] is unpublished.

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 9/06/2023. A copy of that decision appears at Appendix A.

[ ] A timely petition for rehearing was thereafter denied 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. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Constitutional Amendment provides:

> "No state shall..deprive any person of life, liberty or property, without due process." U.S.CONST. amend. XIV.

The Double Jeopardy Clause of the Fifth Constitutional Amendment provides:

> "No person shall...be subject for the same offence to be twice put in jeopardy of life or limb." U.S.CONST. amend V.

Texas Code of Criminal Procedure Article 11.07 Section 4 (a) (2) provides:

> "If a subsequent application for writ of habeas corpus is filed after final disposition of an initial application challenging the same conviction, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that ...by a preponderance of the evidence, but for a constitutional violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt." CCP Article 11.07 Section 4 (a) (2).

STATEMENT OF THE CASE

I. LEGAL BACKGROUND

In Schulp v. Delo, 513 U.S. 298 (1995), this Court ruled that the Federal habeas corpus petitioner must show that a constitutional violation "more likely than not" resulted in the conviction of an innocent person, which was an adoption of the standard set forth in Murray v. Carrier, 477 U.S. 478 (1986). 513 U.S. at 326-27. The more stringent standard set forth in Sawyer v. Whitley, 505 U.S. 333 (1992) was rejected, and this Court reasoned that, in a case in which the petitioner claims that a constitutional error resulted in the conviction of one who is actually innocent of the crime, the Carrier standard strikes the balance between the societal interest of finality and the individual interest in justice. Id. at 324. This Court underscored its consistent reaffirmation of the existence and importance of the miscarriage of justice exception. Id. at 320-21. "To ensure that the fundamental miscarriage of justice exception would remain 'rare' and would only be applied in the 'extraordinary case', while at the same time ensuring that the exception would extend relief to those who were truly deserving, this Court explicitly tied the miscarriage of justice exception to the petitioner's innocence." Id. at 321. A credible claim of actual innocence serves to bring the petitioner within the "narrow class of cases" implicating a fundamental miscarriage of justice. Id. at 315. In other words, showing actual innocence by preponderance of evidence is a gateway through which a habeas petitioner must pass in order to have an otherwise-barred constitutional-violation claim considered on the merits. Id. (citing Hererra v. Collins, 506 U.S. 390, 404 (1993)).

In response to Schulp, the Texas legislature enacted CCP Article 11.07 Section 4, codifying Schulp in Subsection (a) (2) and adopting the abuse-of-the-writ doctrine used in federal practice, which limits an inmate to one application for writ of habeas corpus except in exceptional circumstances. Ex parte Brooks, 219 S.W. 3d 396, 400 (Tex.Crim.App.2007). Section 4 (a) (2) provides: "If a subsequent application for writ of habeas corpus is filed after final disposition of an initial apllication challenging the same conviction, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains specific facts establishing...by 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." CCP Article 11.07 Section 4 (a) (2).

In Brooks, the Texas Court of Criminal Appeals ("TCCA") expressly filed and set the case there to explain the application of Section 4 (a) (2). Brooks, supra, at 398. After underscoring the Schulp decision, the TCCA determined that "[w]hile Schulp involved a federal habeas corpus petition in a death penalty case, the reasoning can be equally applied to both [CCP] Articles 11.07, section 4 (a), and 11.071, section 5 (a) (2). Id. at 399-400. In applying Schulp's reasoning, the TCCA concluded that in order for it to consider the merits of a subsequent writ application under Section 4 (a) (2), an applicant must accompany his otherwise-barred constitutional violation claim with a prima facie showing of actual innocence. Id. at 401.

II. FACTUAL BACKGROUND

On June 8, 2003, Petitioner Timothy Dean Stone entered a plea

of guilty to one count of aggravated sexual assault of a child before the jury in Cause No. 9650 in the 33rd Judicial District Court of Burnet Count, Texas. On June 13, 2003, the jury, it appears, assessed punishment for this single count at 20 years imprisonment. State of Texas v. Timothy Dean Stone, Trial Ct. No. 9650. The Third Court of Appeals affirmed the conviction on March 10, 2005. Stone v. State, No. 03-03-00594-CR Tex.App. LEXIS 1793 (Tex.App.-Austin 2005, no pet.). Stone did not challenge the conviction in a Texas Code of Criminal Procedure ("CCP") Article 11.07 writ for habeas corpus.

On October 7, 2003, Stone entered a plea of guilty to five counts of aggravated sexual assault of the same child before the jury in Cause No. 02-1078-K277 in the 277th Judicial District Court of Williamson County, Texas. At the conclusion of trial on punishment, the jury assessed punishment for each count at 50 years imprisonment. On October 9, 2003, the trial court sentenced Stone accordingly, ordering that the sentence imposed in count two to run consecutively to the sentence imposed in count one, the sentence imposed in count three to run consecutively to the sentence imposed in count two, and the sentences imposed in the other counts to run concurrently. State of Texas v. Timothy Dean Stone, Trial Ct. No. 02-1078-K277. The Third Court of Appeals affirmed the convictions on July 1, 2004. Stone v. State, No. 03-03-00757-CR, 2004 Tex.App. LEXIS 5776, 2004 WL 1469001 (Tex.App.-Austin 2004, no pet.). Stone retained attorney Fredrick C. Shelton to challenge the convictions in a CCP Article 11.07 writ for habeas corpus.

On August 22, 2005, Mr. Shelton filed Stone's initial writ application, raising Ineffective Assistance of Trial Counsel and Dou-

ble Jeopardy claims. See Pet.App. Appendix ("Pet.App.") B, MEMORANDUM OF LEGAL CITATIONS AND ARGUMENTS, Exhibit 2, (18) (A) and (B). In factual support of the Double Jeopardy claim, Mr. Shelton merely asserted that "[i]n the first trial in Burnet County, [Stone] was punished for all five incidents that occurred in Williamson and Burnet counties, and was then punished again for three of the same offenses in Williamson County." See Pet.App., Exhibit 2, supra, (18) (B). Mr. Shelton subsequently filed "APPLICANT'S REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW" ("the request"), attaching thereto three exhibits labeled Exhibits D, E and F. See Pet.App. B, MEMORANDUM OF LEGAL CITATIONS AND ARGUMENTS, Exhibit 3. In support of his proposed finding that "[i]n deciding punishment, the [Burnet County jury] considered [the one incident of aggravated sexual assault of a child that occurred in Burnet County and four other such incidents concerning the same child which occurred in Williamson County] in reaching their decision, initially assessing five years punishment for each incident, but then rounding it off at twenty years total", Mr. Shelton cites "Exhibits A, B and C", See Pet.App., Exhibit3, supra, first page, first paragraph, last sentence; but somehow failed to include the sworn affidavits provided by the foreman, Roger Luedtke, and two other panel members, Ralph Reyes and Vicky Rhodes, of the Burnet County jury, See Pet.App. B, MEMORANDUM OF LEGAL CITATIONS AND ARGUMENTS, Exhibit 1, first page (clearly indicating that the request comprises pages 12 through 18 of Clerk's INDEX TO 02-1078-K277A WRIT FILE); and Exhibit 3 (demonstrating that there are absolutely no documents designated as Exhibits A, B or C); stating: "I first decided in union with the other jurors to punish [Stone] with five year sentence for each ocassion presented through testimony and that [Stone] admitted guilt

to during the proceedings. The panel finally decided and agreed on a twenty (20) year sentence for [Stone], in which that punishment was a decreased accumulated sentence for punishing [Stone] for each sexual assault brought in testimony and admitted by [Stone], which involved the offenses that occurred in both Burnet County, Texas and Williamson County, Texas." See Pet.App. B, MEMORANDUM OF LEGAL CITATIONS AND ARGUMENTS, Exhibits 4, 5 and 6,

In the "Conclusions of Law" in its Order issued on December 27, 2005, the trial court concluded that in assessing Stone's punishment in Cause 9650, the Burnet County jury merely "considered" the admitted evidence of Stone's sexually assaulting Lidsey Williams in Williamson County and, therefore, neither Stone's prosecution for those assaults in Williamson County violated his constitutional protection against double jeopardy nor did Stone's sentences in that county constitute successive punishments for the same offense as contemplated by the Double Jeopardy Clause of the Fifth Constitutional Amendment. See Pet. App. B, MEMORANDUM OF LEGAL CITATIONS AND ARGUMENTS, Exhibit 7, fourth page, "Conclusions of Law", (5) and (6). The Texas Court of Criminal Appeals ("TCCA") denied the initial writ application without written order on January 18, 2006. See Pet.App.,,MEMORANDUM OF LEGAL CITATIONS AND ARGUMENTS, Exhibit 8.

On June 12, 2007 Stone proceeding pro se filed a second writ application challenging the same convictions, raising a Double Jeopardy claim and a Hererra-type claim of actual innocence, asserting that those claims "differ from [the claims] presented in [the initial writ] application since such are established by newly discovered evidence", referencing the excluded affidavits, and that "because the...claims are based on newly discovered evidence they are new and reviewable un-

der the dictates of article 11.07 (section) 4 (a) (1) of the [CCP]." See Pet.App. B, MEMORANDUM OF LEGAL CITATIONS AND ARGUMENTS, Exhibit 9, Page 4 of 14, (4) (C) and its continuation on Page 5 of 14. Nevertheless, Stone failed to meet the requirements of Section 4 (a) (1) and his second writ application was dismissed as subsequent under that section. See Pet.App. B, MEMORANDUM OF LEGAL CITATIONS AND ARGUMENTS, Exhibit 9.

On May 26, 2003 Stone submitted his third subsequent writ application challenging the same conviction, which was filed on May 30, 2023. In this writ application, Stone asserted a Schulp-type claim of actual innocence pursuant to CCP Article 11.07, section 4 (a) (2), in which he sought the TCCA's consideration of the merits of his previously rejected Double Jeopardy claim relying on the same facts that fueled his initial and second writ application and the excluded affidavits. See Pet.App. B, APPLICATION FOR A WRIT OF HABEAS CORPUS SEEKING RELIEF FROM FINAL FELONY CONVICTION UNDER CODE OF CRIMINAL PROCEDURE ARTICLE 11.07; MEMORANDUM OF LEGAL CITATIONS AND ARGUMENTS. The State answered this writ application denominating Stone's Schulp-type claim of actual innocence as a Hererra-type claim of actual innocence and applying Section 4 (a) (1), the wrong standard, to this claim. The State also submitted its proposed findings of facts and conclusions of law. See Pet.App. B, STATE'S ANSWER TO APPLICATION FOR WRIT OF HABEAS CORPUS. The trial court adopted the State's proposed findings and conclusions and recommended that the TCCA deny relief. See Pet.App. B, ORDER. The TCCA implicitly adopted the trial court's findings and conclusions and explicitly ruled that the subsequent writ application failed to meet the requirements of Section 4 (a) (2) as applied by the TCCA in generally citing CCP Article 11.07 Section 4 (a)-(c) as the

basis of its judgement of dismissal. See Pet.App. A.

REASONS FOR GRANTING THE PETITION

"This Court will not take up a question of federal law presented in a case 'if the decision of [the state] court rests on a state law ground that is INDEPENDENT of the federal question and ADEQUATE to support the judgement.'" Lee v. Kemna, 534 U.S. 362, 375 (2002) (quoting Coleman v. Thompson, 501 U.S. 722, 729 (1991) (EMPHASIS ADDED in Kemna). The state-law ground may be a substantial rule dispositive of the case, or a procedural barrier to adjudication of the claim on the merits. Walker v. Martin, 562 U.S. 307, 315 (2011). In either case, this rule applies with equal force. Lee, supra. "This question whether a state-court decision is adequate is itself a question of fedearl law", Beard v. Kindler, 558 U.S. 53, 60 (2009) (citing Lee, supra); as is the question whether the decision is independent. See, Foster v. Chatman, 578 U.S. 488, 497-98 (2016) (citing Ake v. Oklahoma, 470 U.S. 68, 75 (1985)). An unelaborated order provides no reasoning for a state-court's decision, thus raising the question whether that order rests on an adequate and independent state law ground so as to preclude this Court's jurisdiction over the claim for which the petitioner is seeking certiorari. Foster, supra, at 497 fn. 1 (order stating, in its entirety: "Upon consideration of the Application for Certificate of Probable Cause to appeal the denial of habeas corpus, it is ordered that it is hereby denied. All the Justices concur, except Benham, J., who dissents.").

The decision below does not rest on an adequate or independent state-law ground. It is intertwined with federal questions; adopts a novel application of state law; violates federal law. It implicates the reasons this Court exercises jurisdiction over decisions that

purports to rest on state law.

I. AS APPLIED BELOW, SECTION 4 (a) (2) IS NOT INDEPENDENT BECAUSE ITS APPLICATION DEPENDS ON AN ATECEDENT RULING OF FEDERAL LAW

"[This Court] [is] not permitted to render an advisory opinion, and if the same judgement would be rendered by the state court after [this Court] corrected its view of Federal law, [this Court's] review could amount to nothing more than an advisory opinion." Herb v. Pitcairn, 324 U.S. 117, 126 (1945). "But where the non-Federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgement without any decision of the other, [this Court's] jurisdiction is plain." Enterprise Irrigation Dist. v. Farmers Mutual Canal Co., 243 U.S. 157, 167 (1917). "In such a case, the federal-law holding is intergral to the state court's disposition of the matter, and [this Court's] ruling on the issue is in no respect advisory." Ake, supra, at 75.

In Ex parte Milner, 394 S.W. 3d 502 (Tex.Crim.App.2013), a case claiming double jeopardy, the Texas Court of Criminal Appeals ("TCCA") applied Texas Code of Criminal Procedure ("CCP") Article 11.07 Section 4 (a) (2) as previously explained in Ex parte Brooks, 219 S.W. 3d 396 (Tex.Crim.App.2007). In accord with this Court's reasoning: "Schulp's claim of innocence..depends critically on the validity of his [constitutional-violation claims]", Schulp v. Delo, 513 U.S. 298, 315 (1995); the TCCA initiated its analysis of Milner's Schulp-type claim of actual innocence with determining whether the otherwise-barred double jeopardy claim was "meritorious." Milner, supra, at 506-10. After explaining in "great detail" that Milner had established by pre-

ponderance of the evidence that his conviction in a particular cause was barred by the Fifth Constitutional Amendment's Double Jeopardy Clause's protection against a second prosecution and multiple punishments for the same offense after conviction in another cause, the TCCA determined that the subsequent application met the jurisdictional requirements of Section 4 (a) (2) because Milner had shown that no rational juror could have found him guilty of the two identified offenses without violating the federal constitutional prohibition against double jeopardy and, hence, had made a prima facie case that, but for a violation of the United States Constitution, no rational juror could have found the applicant guilty beyond a reasonable doubt. Id. at 510.

Milner reaffirmed Ex parte Knipp, 236 S.W. 3d 214 (Tex.Crim.App. 2007), a case also claiming double jeopardy, where the TCCA ruled that a "meritorious double-jeopardy claim" in a subsequent writ, along with a prima facie showing of actual innocence, overcomes a Section 4 (a) (1) procedural car, Knipp, supra; demonstrating that before applying Section 4 (a) (2) procedural bar to a constitutional question, the TCCA must rule, either explicitly or implicitly, on the merits of the constitutional-violation claim. See, Ake, supra, at 74-75 (the state waiver rule is not independent because an examination of the merits of a federal law issue is required by its application). Rivera v. Quarterman, 505 F.3d 349, 359 (5th Cir. 2007) (ruling that CCP Aticle 11.071 Section 5 (a), in the Atkins context, is not independent of federal law because Texas has imported an antecedent showing of 'sufficient specific facts' to merit further review, rendering dismissal of such claims [as an abuse of the writ] a decision on the merits); Brooks, supra, at 399 (noting that, like Article 11.07, Article 11.071 was enacted in response to Schulp); CCP Article 11.071 Section

5 (a) (2) (demonstrating the language of this section is identical to Article 11.07 Section 4 (a) (2)); Ex parte Reed, 271 S.W. 3d 698, 713-734 (Tex.Crim.App.2008) (demonstrating that a Schulp-type claim of actual innocence asserted pursuant to Article 11.071 Section 5 (a) (2) is analyzed by first considering the merits of the constitutional-violation claim). "Thus, [Texas] has made the application of [Section 4 (a) (2)] depend on an antecedent ruling of federal law, that is, on the determination of whether federal constitutional error has been committed." Ake, supra, at 75.

Consequently, the state-law prong of the TCCA's judgement of dismissal is not independent of federal law, and this Court's jurisdiction is not precluded. Id. ("As [this Court] ha[s] indicated in the past, when resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and [this Court's] jurisdiction is not precluded.").

II. AS APPLIED BELOW, SECTION 4 (a) (2) IS NOT ADEQUATE BECAUSE ITS APPLICATION WAS NOVEL THUS MAKING THE DECISION BELOW UNFORESEEABLE AND UNSUPPORTED BY PRIOR DECISIONS

"Ordinarily, a violation of a state procedural rule that is 'firmly established and regularly followed' ...will be adequate to foreclose review of a federal claim." Lee, supra, at 376 (quoting James v. Kentucky, 466 U.S. 341, 348 (1984). Nevertheless, in "exceptional cases", a "generally sound rule" that is applied in a manner that "renders the state ground inadequate to stop consideration of a federal question." Lee, supra, at 375. This is one of those exceptional cases.

In particular, this case implicates this Court's rule, reserved for the rarest of situations, that "an unforeseeable and unsupported state-sourt decision on a question of state procedure does not constitute an adequate ground to preclude this Court's review of a federal question." Bouie v. City of Columbia, 378 U.S. 347, 354 (1964). "Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 457 (1958). This Court has applied this rule for over a century, See, e.g., Enterprise Irrigation Dist., supra, at 165 (holding that a state ground was adequate where it was not "without fair support, or so unfounded as to be essentially arbitrary, or merely a device to prevent a review of the other [federal] ground of judgement."); and as recent as this year. See, Cruz v. Arizona, 143 S.Ct. 650 (2023) (holding that the state-court decision barring successive petition for post-conviction relief did not rest on an adequate and independent state-law ground on basis of its novel interpretation of "significant change in law").

"[The TCCA] has recognized that, [pursuant to the procedural component of the Due Process Clause of the Fourteenth Constitutional Amendment, See Headnote 2 ("HN2 Procedural Due Process, Double Jeopardy")] even if an applicant does not meet the requirements of [Section] 4 (a) (2), a subsequent application for writ of habeas corpus may overcome the procedural bar of art. 11.07, [Section] 4, if an applicant can show a constitutional violation that fulfills the requirements of [Section] 4 (a) (2)." Milner, supra, at 504 (citing Knipp, supra). As Section 4 has not been modified subsequent to Mil-

ner, the TCCA's disposition of subsequent applications demonstrate that the court has consistently respected this procedural due process right, See, e.g, Ex parte Connors, 2020 Tex.Crim.App.Unpub. LEXIS 136 (determining the claim based on "newly discovered" evidence "lacks merit and is denied. Otherwise, the claim is dismissed as subsequent.); Ex parte Navarro, 538 S.W. 3d 608 (Tex.Crim.App.2018) (applying both Subsection (1) and (2) of Section 4 (a)); Ex parte Hill, 2010 Tex.Crim.App.Unpub. LEXIS 704 (same); Ex parte Reed, 2009 Tex.Crim.App.Unpub. LEXIS 6 (same); as the court has previously done. See, e.g., Ex parte Santana, 227 S.W. 3d 700 (Tex.Crim.App.2007) (applying both Subsection (1) and (2) of Section 4 (a)); Knipp, supra.

On one ocassion, in a case it affirmatively lacked authority to grant the applicant relief, the TCCA expressed that the court was not "unsympathetic to the applicant's claim" before voluntarily applying Section 4 (a) (1) and (2) and elaborating on the reasons that the applicant failed to meet the requirements of each provision, i.e., failure to establish "either new law, new facts, or actual innocence." Ex parte Sledge, 391 S.W. 3d 104 (Tex.Crim.App.2013). On another and recent occassion, in a case where the applicant pleaded not guilty and was convicted by a jury on two counts of aggravated sexual assault of a disabled individual, the TCCA granted relief based on a subsequent application containing specific sufficient facts establishing the alleged conduct did not constitute the charged offense. Ex parte Benton, 2022 Tex.Crim.App.Unpub. LEXIS 265, *1-2. As noted in Judge Keller's dissenting opinion, the applicant "ha[d] not shown no new facts or law, and, for various reasons,..ha[d] not met the requirements of the 'innocence' exception in [Section 4]." Id. at *4-10.

Nonetheless, the TCCA respected this right, perhaps, because it implicitly determined that the applicant had met the required prima facie showing of actual innocence. See Id. at *6-12.

It must also be noted that the TCCA has consistently observed that Article 11.07 and 11.071 was an adoption of the federal "abuse-of-the-writ" or "miscarriage of justice" doctrine. See, Brooks, supra, at 399; Ex parte Blue, 230 3d 151, 160 fn.40 (Tex.Crim.App.2007); Sledge, supra, at 110. In federal practice, this doctrine has been applied to overcome successive petitions asserting previously rejected claims and abusive petitions asserting in second petitions claims that could have been raised in the first petition. See, McQuiggin v. Perkins, 569 U.S. 383, 392-93 (2013) (citing Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986) (plurality op.) and McClesky v. Zant, 499 U.S. 467, 494-95 (1991)). Similiarly, the TCCA has applied Article 11.071 Section 5 (a) (2), the direct analog to Article 11.07 Section 4 (a) (2), See Ex parte Oranday-Garcia, 410 S.W. 3d 865, 869 (Tex.Crim.App. 2013); in its disposition of a fourth subsequent application, conjunctively considering all the "gateway-actual-innocence evidence" that the applicant presented in all four of his subsequent applications. Ex parte Reed, 2009 Tex.Crim.App.Unpub. LEXIS 6. In Oranday-Garcia, the TCCA applied Article 11.07 Section 4 (a) (1) and (b) to a subsequent application in which the applicant relied on the same facts that fueled his initial writ application, noting that "[i]t is no suprise...that [the applicant] does not try to justify [the court's] review of the merits of the claim on the basis of newly discovered FACTS." Oranday-Garcia, supra, at 867 (EMPHASIS SUPPLIED IN ORIGINAL).

As all of the applicants in th respective cases underscored

above, Stone was burdened with proving by preponderance of the evidence his Schulp-type claim of actual innocence, Section 4 (a) (2); which meant proving by preponderance of the evidence his double jeopardy claim as the applicants Milner and Knipp. See Milner, supra, at 506-10 (providing the "Standard of Review" applicable to double jeopardy claims and the court's "Analysis" of the claim); Knipp, supra, at 214-17 (determining the double jeopardy claim is "meritorious" based on the "supported-by-the-record statement of facts and state's answer). "[A preponderance of the evidence standard] simply requires the [TCCA] to believe that the existence of the fact is more probable than its nonexistence before [the court] may find in favor of [Stone]." In re Winship, 397 U.S. 358, 371-72 (1970) (internal quotation marks and citation omitted). See also Kelly v. State, 824 S.W. 2d 569, 573 (Tex.Crim.App.1992) fn.13 (noting that the "preponderance of the evidence" standard includes a showing of "more probable than not").

Certainly, a double jeopardy claim based on facts established by Burnet County jury foreman Roger Luedtke's and fellow jurors Ralph Reyes' and Vicky Rhodes' undisputed testimonial statements and the affidavit(s) provided by them meets this burden. See Pet.App. B, MEMORANDUM OF LEGAL CITATIONS AND ARGUMENTS. The protection against double jeopardy is a federal right, and was specially set up and claimed pursuant to an assertion of a Schulp-type claim of actual innocence under Section 4 (a) (2). Ibid. "Whether the right was denied, or not given due recognition by the [TCCA] is a question as to which the claimant[] wa[s] entitled to invoke [this Court's] judgement, and this [he] ha[s] done in the appropriate way. It therefore is within [this Court's] province to inquire whether...[the right] was denied in substance and

CONCLUSION

The petition for a writ of certiorari should be granted for the foregoing reasons.

Respectfully submitted,

Timothy D Stone

Date: Dec. 5, 2023