No. 24-5233

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

JOSE CARLOS BELMONT-- PETITIONER

VS.

BOBBY LUMPKIN-- RESPONDENTS

Et Al.: JACEY WINGET, ASSISSTANT ATTORNEY GENERAL OF TEXAS

ON PETITION FOR WRIT OF CERTIORARI TO

THE FIFTH CIRCUIT UNITED STATES COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

JOSE CARLOS BELMONT, #1590304

Memorial Unit, 59 Darrington Road

Rosharon, TX-77583

QUESTIONS PRESENTED FOR REVIEW

Question #1: May State prisoners, burdened with first-time innocence showings, proffer as new facts, State vacatur orders for the innocence gateway where definition of "new facts" in 5th circuit excludes them; other circuits permit its use for innocence showings; first state habeas court granted the order; and State uses color of law to shirk its burden of proof?

Question #2: May the Supreme court answer whether Tex.Code.Crim.Proc.,Art.11.07 §4 is unconstitutional where there has been no amendment to the Statute in light of precedents like McCuiggin, House, and Magwood; and the lower courts answered the federal question?

Question #3(Circuit Splits)

Question #3-a: What is the proper evidentiary standard for first-time innocence claims where the first State forum of review, by Statutory Construction, is a second or successive writ: is it "newly discovered" or "newly presented"?

Question #3-b: Is a vacation order of one count of a multi-count conviction, in plea bargain context, a new judgment for both counts, or only a new judgment for the count vacated by the order?

Question #3-c; Should a State Statute for successive writs have an exception for Magwood claims-- that an application is not successive if there is an intervening new judgment between habeas petitions?

Question #4: Is the Court of Appeals' denial of Certificate of Appealability debatable or wrong where (1) factual showing for actual innocence would have been accepted in other circuits; (2) its definition of "newly discovered" evidence is the source of circuit contentions; and (3) Application cites many circuit splits and federal questions that only SCOTUS can resolve?

PARTIES TO THE PROCEEDINGS

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CERTIORARI

State case #2008-CR-4397

State habeas # 76,932-W5

Federal Case # 24-50102

RELATED CASES

Belmont v.State of Texas, 2012 Tex.Crim.App.LEXIS 1334

Belmont v.Lumpkin, 2024 U.S.Dist.LEXIS 9570

Belmont v.Lumpkin, 2024 U.S.App.LEXIS 11657

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TABLE OF AUTHORITIES

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 A to the petition and is

[X] reported at Belmont v.Lumpkin,2024 U.S.App.LEXIS 11657; 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 B to the petition and is

[X] reported at Belmont v.Lumpkin,2024 U.S.Dist.LEXIS 9570; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

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

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

[XX] reported at Ex Parte Belmont, 2012 Tex.Crim.App.LEXIS 1334; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the Texas Court of Criminal Appeals court appears at Appendix C to the petition and is

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

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was May 13, 2024.

[ ] 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).

Petition for rehearing En Banc, and Motion for reconsideration were filed on May 22, 2024. Fifth Circuit has not responded as of this writing, but Sup.Crt. Rule 11 says certiorari may be taken before court of appeals decides the case.

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

The date on which the highest state court decided my case was JUNE 2022. A copy of that decision appears at Appendix ___C___.

[ ] 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).

The original copy of the State Court's order was attached to my original §2254 application. However, I filed a motion in district court to transmitt the record on appeal to the 5th circuit, but they never did. See attachment C in the appendix.

LIST OF PROCEEDINGS IN
STATE AND FEDERAL COURT

Plea/Tial Court: 399th District Court of Bexar County, Texas >> Case #2008-CR-4397>> Belmont v.State of Texas>> Judgment entered 07/27/09

First State Habeas Writ: Court of Criminal Appeals. Austin, Texas>> Writ # AP-76,932-W1>> Ex Parte Belmont,2012 Tex.Crim.App.Unpub. LEXIS 1334>> Judgment entered Dec.19, 2012

Second State Habeas Writ: Court of Criminal Appeals. Austin, Texas>> Writ # AP-76,932-W2>> Ex Parte Belmont>> Judgment entered 2015

Third State Habeas Writ: Court of Criminal Appeals. Austin, Texas>> Writ # AP-76,932-W3>> Ex Parte Belmont>> Judgment entered 2019-2020

Fourth State Habeas Writ: Court of Criminal Appeals. Austin, Texas>> Writ # AP-76,932-W4>> Ex Parte Belmont>> Judgment entered 2022

Fifth State Habeas writ: Court of Criminal Appeals. Austin, Texas>> Writ# AP-76,932-W5>> Ex Parte Belmont>> Judgment entered 2022

First federal Habeas Writ: Federal District Court for Western District of texas>> Belmont v.Lumpkin, 2024 U.S.Dist.LEXIS 9570>> Civil No. SA-23-CA-0496-OLG>> Decided Jan.17,2024

Certificate of Appealability: U.S.Court of Appeals for Fifth Circuit, New Orleans, LA>> Case No.24-50102>> Belmont v.Lumpkin, 2024 U.S.App.LEXIS 11657>> Decided May 13,2024

Motion for reconsideration and En Banc reivew: U.S.Court of Appeals for Fifth Circuit>> Case No.24-50102>> they have not responded as of this writing

BASIS OF JURISDICTION

Supreme Court of the United States may review Certiorari Applications of Judgment rendered by the 5th Circuit in Case No.24-50102, May 13, 2024 [Supreme Court Rule 10(a) and (c)].

Time for filing certiorari expires August 13,2024, and the 5th Circuit has not responded to my motion for reconsideration and rehearing En Banc which I filed on May 24,2024. I may seek Certiorari while a decision is pending in the lower courts [Sup.Crt.R.11].

The Statutory provisions conferring jurisdiction on this Court to review on Certiorari the Judgment and order in question are:

(1) Sup.Crt.R.10(a): A United States Court of Appeals has entered a decision in conflict with the decisions of other United States Courts of Appeals on the same important matter, where the circuit majority would have granted review of my actual innocence claims;

S.Ct.R.10(a): The Fifth Circuit Court of Appeals has "sanctioned such a departure by" the State Courts "as to call for an exercise of This Court's supervisory powers", where rule of Comity unduly bypassed my right to McQuiggin, and House in my first federal filing;

(3) S.Ct.R.10(c) State of Texas and the 5th Circuit have "decided an important question of federal law that has not been, but should be, settled by this Court", where the Majority of Circuits would grant my Magwood claims, and Majority recognises vacatur order as new fact-- only SCOTUS can establish uniformity of decisions by restoring Due Process;

(4) S.Ct.R.10(c): Texas and 5th Circuit have "decided an important federal question in a way that conflicts with" This Court's decisions in Johnson,544 U.S. 295; Magwood, 561 U.S.320,339; McQuiggin, 569 U.S.383 [1][2][12]; House v.Bell, 547 U.S.518.;

(5) 28 USC §1254(1) Cases by the Court of Appeals may be reviewed by the Supreme Court by (1) writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.;

(6) 28 USC §1251(b)(2): "The Supreme Court shall have original but not exclusive jurisdiction of: (2) All controversies between the United States and aState." <<Applicable where Texas does not recognise Schlup as binding Supreme Court precedent [Ex Parte Villegas, 415 S.W.3d.885]>>;

(7) Supreme Court Rule 11: Certiorari may be taken before judgment of 5th circuit. (They have not responded to my petition for rehearing En Banc).

STATEMENT OF THE CASE

This is a certiorari petition seeking to overturn two capital murder convictions [Belmont v.State of Texas, 2008-CR-4397]. On July 27, 2009 I pled no contest to the capital murders of Joe and Esmerelda Herrera, tenants at my grandmother's trailor park. My grandmother allowed me to stay with her rent-free if I helped her manage the property.

When my grandmother told me she was selling the property she revealed to me that the tenants had not been paying rent. I deduced from my temporary stay awat from my grandmother's house that they had not payed rent for about six months.

My grandmother refused all my suggestions: I suggested evicting them; she said no. I suggested suing them; she said no. I suggested calling the police; she said we will just sell the property.

I began to believe Joe was threatening and extorting my grandma because there was one time, as was her custom after finishing the decad, she openly supplicated God. She asked God to protect us from the "becinos" [neighbors]. Why would you ask God for divine protection, but refuse to call the police? I believe she was afraid enough to be cowed into silence, the kind of fear that only comes by threats of violence.

Joe had a tattoo of a pouncing panther on his forearm which is associated with a gang tied to Texas Syndicate. Any gang profiler can confirm it. I believe he used that over my grandmother, who was getting too old to manage the property herself.

Part of the reason I left California is because I use to drive for a cartel that smuggled people over the border, and I became disenchanted with that life when I saw how they extort people. One strip club owner sold the strip club, but the extortion did not stop for him and I believed selling the propwerty would not stop the threats on my grandma-- the threats would probably get worse. In fact, the police reports prove the first distress call made by Esmerelda was not to the police, but to a friend or relative associated to Syndicate. I believe she was calling Syndicate. I believed the only way to protect me and my family was to kill them both. I've seen how cartels mobilize and swarm a target. They are like military. I was afraid for my family.

I pled no contest in 2009 because the state was unwilling to waive death unless they recieved two convictions. The terms of the agreement turned out to violate double jeopardy.

In 2012 I filed my first state habeas writ, claiming Double jeopardy, I.A.C. and involuntary plea. The trial court, as habeas factfinder, found double jeopardy, and denied the other grounds. How can you find D.J. and not aknowledge my plea was uncounseled. Finding the answer, I filed a second writ based on Magwood.v.Patterson.

State writ #2008-CR-4397-W2/ 76,932-W2 was filed around 2015. I attacked the erroneous basis of the Trial court's findings (Trial court was habeas factfunder). Although I did not cite Magwood v. Patterson in writ #2, this writ was an attack of a new judgment intervening between petitions. The second state writ did attack the court's lack of jurisdiction to enter its vacatur order.

State Writ #3 [2008-CR-4397-W3/ AP-76,932-W3] is the first time I raised actual innocence according to Schlup, and McQuiggin. The State, for its part, completely evaded the question; made no findings or conclusions of law for this claim. Statutory construction of Art.11.07§4 allows Texas to funnel all innocence claims into their successive writ doctrine. The first time I claim innocence, they ignored the ground. So I filed a fourth and supplemental writ (writ #5) attacking the unconstitutionality of Art.11.07§4, and raising innocence again.

The fourth and fifth writs were also denied. Texas claims my challenge to the statute is a challenge to infirmities in state habeas proceedings, and thus noncognizable in §2254. This finding is therefore a determination of a federal question, which gives SCOTUS jurisdiction. This issue is dispositive: I claim my challenge is substantive, whereas the State claims it is a procedural challenge.

The federal district court also made findings and conclusions of law answering ground two and three of my application. These grounds cover the constitutional challenge to Art.11.07§4, and the circuit split concerning the proper standard of review for first time innocence claims when statutory construction is a factor in application of a more stringent standard. The district court's determination answers a federal question that can only be decided by SCOTUS, which gives This Court jurisdiction.

The procedural landscape shifted in federal proceedings which caused me to file other circuit splits which were points of contention among the circuits: (1) is the vacatur order an amended judgment in my case; (2) if other circuits permit vacatur orders for the innocence showing, why does not the 5th circuit recognise it? These questions form the bases of circuit splits.

The factual nature of the evidenhce in my case, which supports the innocence showing, is the vacatur order. I showed supreme court cases supporting this conclusion, and what it comes down to is this: The fifth circuit's basis of denial, of my 2254, is its definition of evidence as a whole, which excludes vacatur orders and Magwood claims. Also it is texas' construction of 11.07§4, that raises the burden of proof, and the procedural framework in this circuit, that conhtributes to impeding all petitioner's ability to present meaningful innocence claims; and it is these constructions and frameworkings that violate due process by denying me innocence review under McQuiggins-- this is my first federal filing and I raise innocence.

ARGUMENTS

Question #1: May State prisoners, burdened with first-time innocence showings, proffer as new facts, State vacatur orders for the innocence gateway where definition of "new facts" in 5th Circuit excludes them; other circuits permit its use for innocence showings; first State habeas court granted the order; and State uses color of law to shirk its burden of proof?

STANDARD OF REVIEW

Johnson v.United States,544 U.S.295(Vacatur orders are new facts);
McQuiggin v.Perkins, 569 U.S.383(First-time innocence claim standard);
House v.Bell,547 U.S.518(evidentiary Standard for first-time claims of innocence);
Magwood v.Patterson, 561 U.S.320(New judgment equals new application);
Goldman v.Winn,565 F.Supp.2d.200(Vacatur order used for innocence showing)

DEFINITIONS

Evidence as a Whole: @ Will v.Lumpkin,2023 U.S.Dist.LEXIS 52455 at*39-40(Citing Circuit Split); See also Charboneau v.Davis,87 F.4th.443,at 453-455,HN[13][14]

ARGUMENT: SCOTUS SAID IN Johnson, State vacatur orders are new facts in a criminal case history, subject to proof or disproof like any other fact, and resets the AEDPA clock in certain circumstances [Johnson,544 U.S.295, at Syllabus, para (a)] ;Appendix A, and B]

Johnson's success in State court conferred upon him the due process rights announced in precedents like Magwood, Jennings, and Statutes like 28 USC§2255(h)--the right to renewed collateral attack of the underlying conviction.

The circuits agree §2255 proceedings for federal prisoners has its State counterpart in §2254 applications [Shannon v.Newland, 410 F.3d.1083[8][10][11]]. Thus, the due process rights conferred on Johnson are applicable to State prisoners via §2254. Vacatur orders are thus, new facts, and new factual predicates for relief pursuant to 28 USC §2244(d)(1)(D). It's an exception the 5th circuit did not recognise--and as I'll explain-- only because their definition of "new" excludes Magwood claims and vacatur orders[Will,2023 U.S.Dist.LEXIS 52455 at *39-40]. Unlike Johnson, whose vacatur order was the basis of future relief, my vacatur order is the relief granted, and the basis of collateral attack of new constitutional injuries. The difference in factual predicates [§2244(d)(1)(D)] shifts the legal landscape from Johnson's jovial joints to one resembling the murky marshes in Magwood.

This intuitive understanding of Magwood caused me to file a second Habeas writ in State Court, attacking the erroneous basis of the vacatur order granted in writ #1 [See Writ #2: AP-766,932-W2].

State writ #2 was the first challenge to a new set of constitutional violations according to Magwood. Also according to Magwood, and the circuit split majority, my vacatur order constitutes a new judgment [See Magwood, at HN [6]].

That a single judgment has been entered in my case contradicts the 5th circuits' stance on the split, and is supported by Texas' Statutes, caselaw and my plea agreement on Cause #2008-CR-4397:

(1)Morales v.State, 974 S.W.2d.191: (abuse of discretion for a trial court to enter multiple judgments in a single criminal action where Tex.Penal.Code 3.03, and T.C.C.P.,Art.42.08(a) apply to the case);

(2) Tex.Pen.Code.3.03: (If a defendant elects to enter a single court action then the State may enter concurrent sentences in one Judgment);

(3)Tex.Code.Crim.Proc.,Art.42.08(a) (Multiple judgments and sentences entered in a single court action are to be treated as a single conviction [Although this statute confuses primacy of Judgments and its component parts it is like Deal v.United State];

(4) Deal v.United States, 508 U.S.at 132: (the components of a Judgment are (1)the conviction;and (2) the sentence [Synonymous with adjudication of guilt and the punishment recieved].

Thus, for all intents and purposes, when the State entered vacatur of count two in my first habeas writ, they entered a new judgment in my case [Magwood]. For the State, or 5th circuit, to argue that two judgments were entered in my case they would be contradicting legislative intent of Penal code 3.03 and article 42.08 of the TCCP [Morales v.State]. Neither will the terms of my agreement support that argument. And there is only one jdugment of conviction entered in Cause #2008-CR-4397.

Please recall, here in the 5th circuit, a vacatur order only removes the taint of the double jeopardy violation from the Sentence component ~~from~~ of the Judgment, and does not fix the due process violations associated with the convictions that violate double jeopardy [See Austin v.Cain,660 F.3d.880[6][11]].

BEFORE the vacatur order, my Judgment looked like this:

[Count #1(CONVICTION + SENTENCE) + Count #2(CONVICTION + SENTENCE)]

AFTER the vacatur order this is my Judgment:

[Count #1(CONVICTION + SENTENCE) + Count #2(CONVICTION)]

In the 5th circuit's holding, my judgment looks like this:

Judgment #1 Judgment #2

[Count #1(CONVICTION + SENTENCE)] + [Count #2(CONVICTION + SENTENCE)]

As such, the vacatur order of count two leaves me convicted of two capital murders and does not redress the rights inherent in plea bargain proceedings: the right to competent counsel (6th & 14th Amend.); the right to a voluntary plea(5th & 14th Amend); the right to withdraw if Court rejected terms of agreement(See terms of agreement) [United States v.McIntosh, 580 F.3d.1222[6]].

State Writ #2 [AP-76,932-W2] was denied as successive. I argue that Magwood applied to the second State writ, and it is impossible to raise grounds in a prior

application that did not yet exist. More importantly, Texas' Successive writ doctrine does not have an exception for Magwood claims, and it ought to, since a positive Magwood finding would mean a petitioner's application is not successive.

The vacatur order is based on erroneous findings and conclusions for many reasons:

(1) Tex.Code.Crim.Proc.,Art. 1.14(b) says that a petitioner cannot raise in habeas proceedings a claim about defective indictments, nor can the court grant relief for the same [Court alleges indictment caused jeopardy violation];

(2) I did not raise such a claim [See application for 1st writ];

(3) Trial court commits abuse of discretion by Sua Sponte raising relief for defective indictment [Owen v.State,851 S.W.2d.398 at 401 [4][5]];

(4) Indictment "on its face" cannot "cause" jeopardy violation [Ex Parte William, 2007 Tex.App.LEXIS 463];

(5) Alternate pleadings and methods of commiting the same offense is permitted in one indictment, contrary to State's findings [Johnson v.State,2016 Tex.App. LEXIS 13305 (13305)

(6) Trial court did not have jurisdiction to vacate any count in excess of the one-offense-per-indictment rule [Owens v.State,851 S.W.2d.at 401].

Trial court only made these findings after she admitted "trial error" when she sentenced me beyond the D.J. Proscription; trial court's findings,that plea was voluntary, and counseled, was contrary to double jeopardy finding [See Habeas court's findings in 2008-CR-4397-W1]

Eventually I filed another State habeas writ [AP-76,932-W3] raising for the first time actual innocence akin to Ex Parte Milner, 394 S.W.3d.502, which acknowledges, I should have been acquitted for the second conviction to remove the taint of the violation from the conviction. The State, for its part in Writ #3, completely ignored my actual innocence claim [See Writ #3>>ground #4]; just made no findings or conclusions of law.

Thus far, the State has denied me Magwood review in Writ #2, and review of my innocence claim under the McQuiggin standard for first time claims.

I mulled over why Texas would not review my innocence claim. The constitution says the Habeas Corpus remedy will never be suspended [U.S.Const., Art.1 Sec.9 Cl.2], so why refuse to review my claim in the first instance? The answer came TO ME ONCE I understood the meaning of Statutory Construction, and how construction of Statutes can impede petitioners from filing meaningful claims [Trevino v. Thaler, 569 U.S.413 [6]]. If Statutory construction, and the procedural framework of a State, unduly impedes a person's rights, or increases State interests, then the construction is unconstitutional [id.]. Trevino also occurred in Texas, which is to say, and is no State secret, their constructions favor finality. I simply take it as an opportunity to find the point where due process has been sacrificed.

I then asked the question, "does statutory construction of Texas' successive writ Doctrine [Art.11.07§4] impede me from filing meaningful innocence claims, and can it be shown the construction affects ALL prisoner's ability to file meaningful claims? The answer came to me when I read Ex Parte Villegas, 415 S.W.3d.885, 887,888. A short five minute read that highlights Texas disdain for SCOTUS precedent, its statutory stance on Schlup claims in Texas, and its practice of funneling ALL innocence claims into successive applications, which, not for nothing, has a more stringent standard.

I thought it would be hard to correlate Texas' evasion of my innocence claim in writ #3 with a proof, any proof, that they do it to every petitioner, but Ex Parte Villegas made clear that whether they ignore the ground in the first instance (as in my case), or they grant it (as in Villegas), Texas will funnel all claims into the successive category, even if they have to overturn a trial court's finding of innhocence[ex Parte Villegas].

When I re-raised my innocence claim in State writ #5, Texas applied to it the stringent standard reserved for successive claims (even though it was the first time they made findings and conclusions on the ground).

Note: State Writ #5 was actually a supplemental filing to State writ #4, but the clerk filed it as a fifth application, contrary to Ex Parte Saenz, 491 S.W.3d 819(Suppl. filings are timely if filed before decision renders).

By the time this Appeal reached Federal Court comity and deference stepped in in a manner that adopts the successive writ findings-- even though it is my first federal filing raising actual innocence. and McQuiggin applies.

Deference should be inapplicable in District Court where McQuiggin applies, especially where Texas is the CAUSE for the innocence claim being successive, and the resulting PREJUDICE is that petitioners lose the benefit of a less stringent standard, and the State gains the benefit of the same.

Next, I will talk about the circuit split on "evidence as a whole" [Will, 2023 U.S.Dist.LEXIS 52455 at *39-40], and how the 5th circuit, along with the 10th, and 7th circuits, exclude vacatur orders, and Magwood claims, by use of their definition; and how the 2nd,3rd, 4th, 6th, and 9th circuit's definition would include the same. This difference in defining new evidence means the difference of having my innocence claim denied in this circuit, or having it granted in the greater part of this country. Specifically, the Split Minority uses the Sawyer standard, whereas the Majority uses the Schlup standard. Who is right?

After that, I will discuss how State interests in comity and finality increases, while mine diminish, by construction of Art.11.07§4 of Tex.Code.ofCrim.Proc..

The construction violates Due Process because the State also has a burden of proof at each stage of appellate and post conviction proceedings. The State's burden gets lighter with each appeal. This burden of proof has been called a "constitutional Safeguard" of due process [In re Winship, 397 U.S.358, 370-372[6]].

The State's construction removes this constitutional safeguard by skipping a valid step in Habeas proceedings: A first-time claim of innocence, wherein it has been recogised in McQuiggin v.Perkins that a petitioner has a less stringent burden, and by implication, it means the State's burden at this stage is more stringent. [In re Winship, at 370-372] T.C.C.P.,Art.11.07§4 is unconstitutional in light of McQuiggin, House, and Magwood.

CIRCUIT SPLIT ON "EVIDENCE AS A WHOLE"

Will v.Lumpkin,2023 U.S.Dist. LEXIS 52455 at *39-40; and Charboneau v.Davis, 87 F.4th.443,453-55[13][14]

The 2nd, 3rd, 4th, 6th, and 9th circuits definition of evidence as a whole follows a broad Schlup-like review of all the range of evidence, even that which became available only after trial[Charboneau, at 454, citing Schlup, at 327-28].

Granted, the definitions in Will and Charboneau are for successive claims, but this only bolsters my argument: If a vacatur order could be used in an innoncence showing in another circuit [Goldman v.Winn, 565 F.Supp.2d.200] under the successive standard [§2244(b)(2)], then a habeas court's assessment under McQuiggin would cause the gateway to grind open on rusted, seldom-used, hinges--if McQuiggin were gatekeeper. And, if State construction were not as it is, then the impediment to filing meaningful [Trevino] innocence claims would be removed.

All these circuits would recognise my fact showing, and Magwood claim:

Long v.Hooks, 972 F.3d.442,470(4th Cir.); Clark v.Warden, 934 F.3d.483,496 (6th Cir); United States v.MacDonald, 641 F.3d.596, 612(4th Cir); Lott v.Bagley, 569 F.3d.547(6th Cir); Bellon v.Superintendent Benner TWP.SCI, 2024 U.S.App. LEXIS 854(3rd Cir); Burrell v.United States, 467 F.3d.160(2nd Cir)[2]; Lesko v. Sec'y Pa.Dept.of.Corr., 34 F.4th.211,223; In re Gray, 850 F.3d.139,141(4th Cir); King v.Morgan, 807 F.3d.154,158(6th Cir); Insignares, 755 F.3d.1273,1281 (11th Cir); Wentzell v.Neven, 674 F.3d.1124,1127-28(9th Cir); Johnson v.United States,623 F.3d.41,45-46(2nd Cir)

The fifth circuit has not chimed in on the circuit split and, as of this writing, has not responded to my motion for rehearing En Banc, or reconsideration, wherein I ask them to answer that which is also the content of this petition. But the Fifth Circuit has approved of the 10th Circuit's Sawyer-esque standard [Will, at *39-40]. The Sawyer standard "excludes the consideration of evidence unconnected to the constitutional violation at trial", and interprets evidence that became available only after trial, but does not include facts not produced

as a whole to mean a "factual universe [that] does not encompass either new facts that became available only after trial, nor does it include facts not rooted in constitutional errors at trial" [Will, at *39-40].

The 5th circuit's definition of "newly Discovered evidence", thus, effectively excludes vacatur orders as new facts, and the definition also excludes Magwood claims because they're not rooted in Trial errors[Will, at *39-40]. This is the only reason my application was denied. SCOTUS has said they will not grant certiorari just because the State used the wrong standard of review, but what about if they are using the wrong standard by statutory construction? Statutory construction affects all prisoners, aLL PRISONERS. I can't cuss but I can write in all caps. Sorry, I know it is not the legislators intent to usurp citizens' rights, but the judiciary constructs, and interprets, it in a manner that unduly increases State's interests in finality beyond what was intended by enaction of AEDPA.

I hope you overlook my passion on this subject and at least empathise with me if you understand, once you understand, my claim would have been granted if I were in Massachusets [Goldman v.Winn,565 F.Supp.2d.200]. And the root of the difference of holdings is how the circuits interprets "new evidence".

The 5th circuit might say, under their definition, that my federal application is not successive, but the claims are, according to the State. The claims-based approach to evaluating an application has been rejected in Magwood v.Patterson, at 334-335. This means the State would not even consider my argument that I challenge a new Judgment. Under the 5th circuit's definition, I cannot attack a new judgment, or claim new constitutional errors stem from a new judgment, because they will only accept a fact-showing tied to trial errors.

The 5th Circuit might say they did not apply the successive writ standard to their evaluation of the New fact showing. If that were true then they still deferred to State findings, and those findings do apply the more stringent standard. Even if SCOTUS remands me back to district court for a proper evaluation of my fact, the "Newly Discovered" evidence standard would still be improper because it always ties a diligence padlock on the gateway showing. Diligence, in turn demands Clear-and-convincing evidence [McQuiggin, at HN [6]]. This is my first federal filing claiming innocence, and McQuiggin applies. Statutory construction in Texas, and the procedural frameworkings in the 5th circuit, have robbed me of McQuiggin's review. That is why I ask for resolution from SCOTUS before remand.

McQuiggins supports the notion that innocence review is broken into two different stages, with differing burdens of proof, differing levels of equitable interests

which manifest as the framework of the proceeding: The scaffolding rises in the midst of hammer and chisel, wherein the judges and lawyer ascend and descend among the stages before them. What would happen to a building that was constructed on the 1rst floor, and the third floor, but you neglect the second floor? That tower would fall, right? Well, that is what happens when Texas funnels all innocence claims into the successive writ [11.07§4].

[In re Winship, at HN [6]] said that a burden of proof, (for the State) represents a "constitutional safeguard" of my due process rights[Id.]. When Texas skips a burden of proof for first time innocence claims, they are skipping my constitutional safeguards of due process [Id.]. If this were not true then McQiggin would not have clearly made the differentiation they did. They didn't just do this to me, an isolated case, no, they do it to everyone.

The universal unconstitutionality of State construction, procedural framework, and definition of evidence as a whole, prevents all petitioners from filing meaningful I.A.C. claims [Trevino v.Thaler]; meaningful appeal-based claims [Sexton v.Wainwright, 968 F.3d.at 612,613 n.4(6th Cir)]; meaningful claims of erroneous state court decisions[Cabrera v.Price, 2014 U.S.Dist.LEXIS33297]; meaningful constitutional claims committed after relief is granted[Magwood v. Patterson]; and any of the plethora of reasons why errors occur after trial [Garcia v.Quarterman, 573 F.3d.at 222 nn.39-42]. There are too many circuits that would have granted my appeal to understand how Texas and the 5th circuit can have an unyielding interest in comity and finality. So I tried to understand. I did not want to waste this Court's time, or mine, if their interests in finality were irreproachable. I found State interests to be in ensuring society that they have not convicted an innocent person, so their interests are in my interests, but the State would have to change a few things first.

EQUITABLE INTERESTS IN COMITY AND FINALITY

After reading cases like Cleveland Bd.of Educ., 470 U.S.532[5][6] and Welch, 578 U.S.120 [17], I understand due process to be this:

Every right, law, Statute, rule, and authority, exists to safeguard our lives, liberty, property, and freedoms. But these rules are only legal if they negate or diminish our substantive rights in a manner called due process. The diminution of my interests is called due process. All of the above only explained a petitioners right to due process, and the burdens of proof for the petitioner. Now let's talk about the other end of the spectrum: State interests in comity and finality and how the State's burden of proof never abates.

In re Winship, 397 U.S.358 at 370-72, HN [6] are necessary readings because it explains what I ~~burde~~ bumble over.

The State, when imposing a criminal prosecution, also has a burden of proof beginning at the grand jury, proceeding to trial, appellate review, and post conviction review. The State is never left unburdened. The Burden exists to inform society of the degree of confidence it may have in the Judgment, because society would also hold blame for the conviction of an innocent person [In re Winship, at 370-72]. It is the adjustments made in the burden of proof that represents the ever adjusting interests of the parties:

Imagine two train cars on a track, one for the prosecutor, and one for the accused. The rails of the track are called "Due" and "process", with each stop representing a stage in the proceedings. Both carts cannot go over a certain weight. The prosecutions car is full in the beginning, and gets less burdensome over each stage. My car is empty in the beginning and gets more burdensome over time.

Equitable interests is like the balancing of burdens in the cars to ensure we do not exceed the weight limits.

McQuiggin's court recognised two of those important stops on the tracks: (1) a first time claim of innocence; and (2) a second or successive claim of innocence. Both carry different burdens for the State. In fact, it may be said that State interests are at their highest when a claim [redacted] is successive.

There is no greater burden for petitioners than [§2244(b)(2)(B)(i)], right? The State has no burden to society and may demand clear and convincing evidence that errors occurred at trial.

In re Winship, HN [6] said that these stops on the trains path are equal to constitutional safeguards[Id.]. Okay, the court never mentioned a train, just bare with me. McQuiggin recognised two stops on the track, with two burdens of proof for me and the State. A criminal case is linear like a track, and when the State skips a stop on the track, they are unduly lowering their burdens of proof, while increasing mine. Recall, it is the adjustment of burdens of proof that are representative of the parties equitable interests. Thus, the State is increasing their intersts in finality in violation of due process, where (1) burdens of proof are "constitutional safeguards" [In re Winship, at HN [6]; (2) and statutory construction in Texas allows them to funnel innocence claims into the successive writ category. Thus, the State's construction skips over a constitutional safeguard.

Who is conducting this train? If there was a job for law auditing I would be able to show, statistically, how many petitioners raise innocence claims, and how many get funneled into second applications. I assure you it's all of them [Ex Parte Villegas]. "And what do you do in your spare time?" "I'm a Lawditor." "You applaud people for a living?" "Check, please."

CONCLUSION: There should be an app for law-diting. Sorry, bit of gallows humor.

CONCLUSION 2.0: The Majority of circuits would have entertained my innocence claim. The discrepancy is caused by the circuit split as set forth in the rest of this certiorari petition. Goldman v.Winn, was a court that granted an innocence showing based on the same fact I proffered, a vacatur order.

The federal district court entered findings on my challenge to Texas' Statute, and the 5th circuit refused to certify the question for Supreme court review, which gives SCOTUS jurisdiction to review the constitutional question[Socialist Labor Party,406 U.S.583 n.2; Aupreme Court Rule 10(a) and (c), and R.11] [See Dist.Crt. findings at Belmont, 2024 U.S.Dist.LEXIS 9570 at *9]

Goldman is a case where the vacatur order fits into that circuit's definition of "new", which bolsters my argument that since I could pass under another circuit's successive standard, then McQuiggins would grease the gateways hinges, and remove the diligence padlock.

This is my first federal writ claiming innocence and McQuiggin should have applied.

If SCOTUS chooses to avoid the constitutionality of my challenges, as contained in this application, I request SCOTUS reach the merits of my innocence claims:

(1) Whether I am actually innocent according to Ex Parte Milner, 394 S.W.3d.502; and (2) whether I am actually innocent pursuant to Tex.Penal Code 9.33/9.42, defense of my grandmother from tenants who were extorting her for free rent, and whose first distress call was not the police but a friend or relative I believe was Texas Syndicate [See police report]. The newspapers prove the "victim's" family threatened to kill and burn my grandmother at the plea hearing and had to be physically removed from Courtroom.

Proper resolution of these circuit splits will allow Texas to answer their burden of proof. Am I actually innocent? And I will be able to voice years of toil and proclaim "I am; try me; disprove me if you can".

T.C.C.P.,Art.11.07§4 is unconstitutional where (1) Statutory construction allows Texas to skip a burden of proof; (2) the burden of proof skipped is a constitutional safeguard of due process; (3) McQuiggin differentiated the burdens proof for first, and second time claims of innocence; and (4) the skipping of the step is not harmless when it increases State interests in finality at the expense of prisoner's due process rights, and is done without intelligent waiver of those rights.

This circuit's definition of "newly discovered" excludes vacatur orders and Magwood claims, where the majority of circuit's definition includes it, so who is right? With the second biggest prison population, Texas has a bigger prison pop. than almost all of Europe, so this question affects a big percentage of the

global community's prisoner's rights. This is a global issue worthy of U.N. consideration.

And... there should be an app for Law-diting.

QUESTION #2: May the Supreme Court answer whether Tex.Code.Crim.Proc.,Art.11.07§4 is unconstitutional, where there has been no amendment to the Statute in light of precedents like McQuiggin, House, and Magwood; the State and District Courts answered the Question; and Statutory construction funnels all innocence claims into successive default?

STANDARD OF REVIEW: Welch v.United States, 578 U.S.120[17]; Ceveland Bd. of Educ. v.Loudermill, 470 U.S.532[6]; Brockett v.Spokane Arcades, 472 U.S.491, 501-502[7]; S.Ct.Rule 10(a)&(c); S.Ct.Rule 11

DEFINITIONS:

SUBSTANTIVE: Life, liberty, property, etc. [Cleveland, at HN[5][6]]
PROCEDURES: Rules, laws, statutes, etc. [Id.]
SAFEGUARDS: Constitutionally sound rules, laws, statutes, etc. [id.]. Burdens of proof [In re Winship, 397 U.S.358[6]]
prescriptions: A deprivation of substantive rights through procedural safeguards.

ARGUMENT: Texas misuses color of law to claim review of actual innocence, in a first State habeas writ, is unripe, funneling ALL claims into .art.11.07§4, the successive writ doctrine [Ex Parte Villegas, 415 S.W.3d.885]. This procedural framework and Construction allows Texas to raise the evidentiary requirements from reliability/preponderance-of-evidence [McQuiggin/House], to the more stringent diligence/clear-and-convincing Sawyer standard.

This circuit, and its umbrella States, use the "Newly Discovered" standard, but its' definition remains veiled in allegory, and illustrrated through its esoteric Judgments. The closest definition I could find is in Will v.Lumpkin,2023 U.S.Dist.LEXIS 52455 at *39-40.

It has been almost a quarter century since the Statutorization of Schlup [Art. 11.07§4(a)(2)], but there has been no amendment to it in light of McQuiggin, House, or Magwood. These new precedents show that diligence is not always a factor at the innocence gateway [McQuiggin]; the scope of reviewable evidence is not always limited to evidence at trial [House]; and the claims presented in State Court are not always successive just because they are filed after relief is granted in a prior writ [Magwood].

The construction of the Statute, and this circuit's definition of "newly Discovered", excludes consideration of claims that are consistently reviewed in other circuits: Sexton v.Wainwright, 968 F.3d.607,612-13 n.4(Appeal-based claims); Cabrera v.Price, 2014 U.S.Dist.LEXIS 33297(Erroneous state crt. decisions); and Magwood claims.

The Newly discovered standard always padlocks a diligence showing to the innocence gateway [Ex Parte Jones, 2023 Tex.App. LEXIS 7020 [10]]. This standard has its federal counterpart, 28 USC §2244(b)(2), the successive writ statute.

Texas' statute might contain the "preponderance of evidence" language of Schlup [11.07§4(a)(2)], but it is constrained by the diligence requirement [§4(c)]. Diligence always requires Clear and convincing evidence, not preponderance [McQuiggin at [6][10]].

This is a fine balance for the equitable rights of the parties to successive claims, but the State ignored my innocence claim the first time I raised it See[Writ #3,ground #4]. They ignored it because of the procedural framework in Texas does not allow them to review it [Ex Parte Villegas,at 887-888]. The trial court, as habeas factfinder, in Ex Parte Villegas, granted his innocence claim based on a preponderance of the evidence. But the higher State court reversed the decision, claiming it was imprudent to do so; claiming innocence review was unripe. But it is no State Secret that the State's constructions favor finality, and giving teeth to Diligence.

This Statutory Construction affects all prisoner's ability to present meaningful claims not just at State level, but in federal Courts [Trevino v.Thaler, 569 U.S.413[6]]. Trevino illustrates how State constructions can unfairly increase Texas' interests in comity and finality in federal courts. SCOTUS held that such constructions can be impediments to filing and allowed Trevino's claim to be excepted under §2244(d)(1)(B). The District Court claims, my claim, as above, is not an impediment to filing. This ruling purports to resolve a question only SCOTUS can lawfully answer and enforce, which obliges This Court to respond [Socialist labor party, at holdings, n.2].

Construction of Art.11.07§4 allows Texas to skip a procedural stage in innocence review. McQuiggins recognised two different stages with two differing burdens of proof. Burdens of proof represent ever-adjusting equitable interests of both parties [In re Winship, at HN [6], 370-372]. If a party skips a stage of proceedings, and clearly does so by construction, they are skipping "Constitutional safeguards of due process" [In re Winship, at HN [6]]. And because it is construction,the due process ~~injuries~~ injuries suffered go beyond this individual application, and affects not just prisoner's interests, but society's interest in the degree of confidence it can have in the Judgment [In re Winship,at 370-72]. Can Society be confident that they are not complicit in the wrongful incarceration of their former citizens? We don't know because the State bypassed their burden to inform society that they have not convicted an innocent person [Id.]. Review under McQuiggin would not unduly burden the State, would it? Does not Society have an interest in Due Process?

Is the differentiation made in McQuiggin for first, and second-time claims of innocence an arbitrary recognition of substantive, or procedural, rights? The answer will determine whether my constitutional challenge to 11.07§4 is substantive or procedural; cognizable or not. Texas claims my challenge is procedural and that I challenge infirmities in habeas proceedings [See State's response in dist.crt.].

SCOTUS said in Welch v.United States, at HN [17] that if a challenge to a Statute results in amendment, and not complete invalidation, then the challenge is a substantive one. SCOTUS also said in Brockett v.Spokane arcades, HN [7], at 501-02 that part of a Statute can be unconstitutional, and another part be constitutional. The Statute has its place, it just needs to make room for McQuiggin, House, and Magwood.

The Statute puts a diligence "padlock" on the innocence gateway for all prisoners contrary to McQuiggin; the "newly discovered" standard excludes vacatur orders by definition [Will, 2023 U.S.Dist.LEXIS 52455 at *39-40] contrary to House v.Bell; and proscribes the type of claims they may review, to trial-based claims, contrary to Magwood, at 334-335.

<< See also Belmont, 2024 U.S.Dist.LEXIS 9570 at *4-7; District Court's emphasis is on the Claim instead of the facts supporting the claims; See also 5th Circuit's denial of C.O.A. for failing to State a constitutional claim to which C.O.A. may issue [Belmont, 2024 U.S.App.LEXIS 11657]; It's just not true, their definition of "evidence as a whole" does not recognise Magwood claims which occur after trial. Their definition of "evidence as a whole" is not so whole after all>>

CONCLUSION: A burden of proof is a constitutional safeguard of due process [In re Winship, at [6]], McQuiggin v. Perkins recognised two distinct stages of innocence review with two differing requirements of Due Process: a first-time claim, and a second-time claim, of innocence. To skip a stage, by statutory construction of Art.11.07§4, is to skip a constitutional safeguard of due process [In re Winship, at 370-372].

Skipping a constitutional safeguard increases STate's interests in Comity and Finality at the clear expense of my due process rights-- and I never waived the right to McQuiggin review of my innocence claim. In fact, it is the State who ignored my innocence claim the first time I raised it [State writ #3], and Texas does this to all prisoners [Ex Parte Villegas].

The Statute needs amendment in light of recent SCOTUS precedents because diligence is not always a factor to innocence showings [McQuiggin]; the scope of reviewable evidence in habeas court is not always limited to evidence in trial record [House]; and claims presented in State court are not always successive just because they are filed after relief was granted in a prior habeas writ [Magwood].

"Under 28 USC §1253 and 1257 providing for United States Supreme Court review of constitutional questions decided, respectively by three-judge federal district courts or State Courts, Supreme Court is obligated to rule on those properly presented questions that are necessary for decision of case, but when issues are not presented with clarity needed for effective adjudication, appellate review is inappropriate." Socialist Labor Party v.Gilligan, 406 U.S. 583 n.2(1972)

The District Court ruled on the merits of this claim based on deference to State findings [See Belmont, 2024 U.S.Dist.LEXIS 9570 AT *7-9], and the three-judge panel affirmed the District Court's findings, and has, of this writing, not responded to my motion for reconsideration or motion for rehearing En Banc.

This gives jurisdiction to review this claim and the other circuit splits. [Id.].

The Fifth Circuit Court of Appeals has "sanctioned such a departure" by the State Court's answer of the federal Question "as to call for an exercise of This Court's supervisory pwoers", where denial and refusal to certify this Constitutional question is an endorsement of the Statute's unconstitutionality, and contrary to Article III of the U.S.Constitution [Supreme Court Rule 10(a)].

Texas and the Fifth Circuit have "decided an important question of federal law that has not been, but should be , settled by This Court" [Supreme Court Rule 10(c)]. The Cicuit Majority has a definition that includes vacatur orders and Magwood claims , but this circuit refused to let me challenge the constitutionality of its statutes because it also undermines the 5th circuits procedural framework, which favors finality at the expense of prisoners' due process rights. This refusal to certify questions that only SCOTUS can answer, and which would balance the equitable interests of both parties, means I am a political prisoner whose next appeal will be to the world court.

Supreme Court Rule 11 permits review when the Court of appeals has not responded to my motion for reconsideration and rehearing En Banc. I don't think they will respond and I don't want time to run out on Certiorari.

QUESTION #3: (CIRCUIT SPLITS)

QUESTION #3-a: What is the proper evidentiary standard for first-time innocence claims, where the first State forum to review, by Statutory Construction, is a second or successive Writ: Is it "Newly Discovered" or "Newly Presented"??

STANDARD OF REVIEW: Hancock, 906 F.3d. at 359 (citing Circuit Split); McQuiggin v.Perkins, 569 U.S.383; House v.Bell, 547 U.S.518; Supreme Court Rule 10(a)&(c), and Rule 11; 28 USC §1253;

ARGUMENT: Texas claims I am raising a procedural due process challenge to the constitutionality of 11.07§4 [See Belmont,2024 U.S.Dist.,LEXIS 9570]

The State's argument for this being a procedural, as opposed to a substantive challenge, is only viable if I were attacking the procedures used, or not used, by the habeas court, when reaching the conclusions it did in Writ #1[2008-CR-4397-W1]. On the contrary, I challenged only the conclusions themselves, which was permitted in Magwwod v.Patterson. I challenge the new amended judgment entered by the issuance of the vacatur order, which, according to Johnson,544 U.S. 295, is a new fact and factual predicate for relief.

The State's argument sidesteps the fact that gave rise to this grounmd: what is the proper standard of review for first-time innocence claimss? because texas' definition excludes facts made available only after trial and unconnnected to constitutional errors at trial [Will, at *39-40]. This excludes vacatur orders then, and is contrary to [Johnson,544 U.S.295; S.Ct.rule 10(a)(c)]. This definition also excludes challenges to the new judgment rendered after trial, contrary to Magwood [S.Ct.rule 10(a)&(c)]

It is also the cause of a circuit split [Hancock, 906 F.3d.at 389] where the circuit majority favors granting my writ, and one court even granted the innocence showing based on a vacatur order [Goldman v.Winn,565 F.Supp.2d.200]. If I would have been granted my innocence in another circuit, then this circuit split needs resolution. If SCOTUS would not grant review of this split just to help one individual prove his innocence, please consider that this circuit split affects all--ALL-- prisoner's ability to present meaningful innocence claims, not only in a case like mine. This circuit's definition excludes claims consistently accepted in other circuits: Sexton v.Wainwright, (Appeal-based claims); I only have so many pages, so see case citations for Cabrera, King, Sexton, Shannon, Wentzell, Insignares, ~~Ferreia~~, Bellon, Burrell, Lesko, In re Gray, the other Johnson, Long, Clark, United States v.MacDonald, and Lott. All these circuits used the newly presented standard which is akin to Schlup v. Delo, at 327-328.

Texas' "newly Discovered standard" does not allow "Habeas petitioner[s] who obtain a new sentencing proceeding on the basis of one error to subsequently raise, in a first habeas application, other errors repeated in that proceeding", which is almost identical to my procedural posture [Jennings v.Stephens, 574 U.S. 271,at 287].

The newly discovered definition is a "factual universe that does not encompass either new facts that became available only after trial, nor does it include facts not rooted in constitutional errors occurring at trial [Will, at *39-40]

Now let's consider equitable interests in Comity and Finality:

My equitable interest in liberty decreases and wanes with every unsuccessful appeal, right? Constitutional safeguards are always in place to ensure the diminution

of my liberty rights is legal, right?

We safeguard against racial bias by requiring a burden of proof for the State in voir dire selection; We safeguard against double jeopardy violations by codifying procedures to quash indictments; we safeguard against prosecutorial misconduct by demanding Brady material; and we safeguard against wrongful convictions by giving clear burdens of proof for first-time and second-time claims of innocence [McQuiggin].

In re Winship, at HN [6] said burdens of proof are constitutional safeguards, but not all const. safeguards are burdens of proof. The point being, that the State has a burden to society to prove the degree of confidence society may have in the conviction. Removing that burden removes the const. safeguard. Definitions work on the same premise: change the definition of New facts; play with the standards of proof; calibrate the burdens of proof and you can omit specific types of evidence-- Brady material, new witness testimony, new scientific advances-- and you can proscribe the types of claims you will review-- Magwood claims, brady claims, abuses of discretion, appeal-based claims, new judgment claims, actual innocence claims. The definition of "Newly Discovered evidence"does that.

Texas successive writ statute, as it pertains to this circuit split, has not been amended in light of House v.Bell; the Habeas court is not always limited to evidence tied to trial errors[Magwood], and the evidentiary standard for first-time innocence claims requires a holistic assessment of all the evidence, old and new, admissable at trial or not [House].

the Statute needs amendment in light of the rights announced in these precedents. Three precedents. How much longer are we going to allow Texas to sleep on the people's rights? I write this on the eve of Juneteenth, a holiday celebrating the emancipation of slavery. It took two years, and a boat load of feds on the sands of the third coast, but Texas recognised our rights. I just found out I'm 3% black, but I've always known I'm 100% American. If State prisoners are not allowed to sleep on the AEDPA clock, why is Texas permitted to sleep on our rights? How many more precedents must pass,which apply to 11.07,before SCOTUS recognises Art.11.07§4 has removed constitutional safeguards of due process? The Statute only serves STate interests in Finality.

CONCLUSION : The "newly Discovered" standard is the wrong standard for first-time claims of innocence:

(1) It excludes evidence that became available only after trial, which in the realm of possibility, may be evidence of prosecutorial misconduct, brady material, abuses of discretion, I.A.C., and other evidence that usually only comes to light after trial;

(2) It proscribes the type of claims it may recogise, which other circuits do not do-- appeal-based claims,Magwood claims, erroneous decision claims, all of which occur after trial.Apart from trial, yet relevant to the conviction.

Other circuits do not limit the types of claims one may be innocent of, even successive claims, nor do they limit the factual showwing to evidence that existed at trial;

(4) The newly discovered definition "padlocks" the diligence requirement to the innocence gateway. [11.07 §4(c)].

Resolution of this circuit split is needed before resolution of my case [Socialist labor Party, at n.2]

The 5th circuit's definition of Newly discovered evidence conflicts with other circuits, which gives This Court jurisdiction [S.Ct. Rule 10(a)].

The newly discovered evidence standard for first-time claims of innocence is a departure from McQuiggin, House, and Magwood, and the 5th circuit has sanctioned The State's departure so as to call for This Court's supervisory powers [S.Ct.Rule 10(a), and Rule 11].

Texas and the 5th circuit have decided an important question of federal law that has not been, but should be, decided by This Court[S.Ct.Rule 10(c),and R.11], where it's definition does not recognise Johnson,544 U.S.295; House v.Bell, or Magwood v.Patterson, and its statutory construction emasculates McQuiggin.

QUESTION #3-b: Is a vacation order of one count of a multi-count conviction, in plea bargain context, a new judgment for both counts, or only a new judgment for the count disturbed by the vacatur order?

STANDARD OF REVIEW: Magwood v.Patterson, 561 U.S.320 at 334-339; In re Lampton, 667 F.3d.585, 590; Insignares, 755 F.3d.1273 at 1280(citing circuit split)

DEFINITIONS: A judgment is composed of (1) a sentence/punishment, and; (2) a conviction/adjudication of guilt [Deal v.United States, 508 U.S.129, at 132].

ARGUMENT: "Our sister circuits have addressed variations of the issue. The 2nd, 5th, and 9th circuits have considered whether vacating one count of a multi-count conviction results in a new judgment that allows renewed challenge to the other counts. The 2nd and 9th circuits held it does result in a new Judgment [n.6], but the 5th circuit held it does not [n.7]." Insignares, 755 F.3d. 1273 at 1280(11th Cir.)

The 5th Circuit holds that each conviction in a plea bargain are seperate Judgments: Thus,

JUDGMENT #1 JUDGEMENT #2
[Count #1(CONVICTION + SENTENCE)]+[Count #2(CONVICTION+SENTENCE)]

This practice has its origin in the concurrent sentence doctrine [Austin v. Cain, 660 F.3d.880[6][11]].

But Texas' own Statutes, caselaw, and my plea negotiations, are proof that one judgment was entered in Cause #2008-CR-4397:

(1) Tex.Code.Crim.Proc.,Art.42.08(a) says "when the same defendant has been convicted in two or more cases, Judgment and Sentence shall be pronounced in each case in the same manner as if there had been one conviction." [This statute misplaces and inverts the primacy of Judgments over convictions, but the concept is the same as Deal v.United States];

(2) Tex.Penal Code 3.03 requires sentences to run concurrent if defendant elects to consolidate his charges into one criminal action (i.e. judgment);

(3)Morales v.State, 974 S.W.2d.191: ~~Where~~ The Court admitted error by entering multiple judgments in his case, because convictions were consolidated into one criminal action under Penal Code 3.03, and Art.42.08(a) of the T.C.C.P.. Morales court amended his judgment to reflect legislative intent of Penal Code 3.03 and Art.42.08(a);

(4)Burrell v.United States, 467 F.3d.160[2]: "When a defendant is convicted at one trial on multiple counts of an indictment, the District Court enters a single judgment of conviction.";

Morales' decision highlights the fact that it is legislative intent to enter a single judgment under Penal Code 3.03. My Judgment is singular, and it would be error for the courts to claim,as the 5th circuit does, that multiple judgments have been rendered in my case. Texas Penal code 3.03 requires me to waive right to severance of the charges for the benefit of concurrent sentences in a single judgment, and the 5th circuit's holding would make nothing of the right I waived.

Returning to the circuit split question: Should I be allowed renewed collateral of both convictions? Yes, because the vacatur order is an amended judgment , and only one judgment has been entered in my case.

Please recall, my second State writ was a renewed attack of the new judgment rendered by the vacatur order in Writ #2008-CR-4397-W1, and the STate denied me Magwood reivew.

Also, the terms of the plea agreement were intertwined such that the state was not willing to negotiate for one conviction, but offerred to waive death penalty if, and only if, I plead out to both convictions. There was no other offers.

CONCLUSIONS: The 2nd, 3rd, 4th, 6th, and 9th circuits all agree I may attack both convictions anew because one judgment was rendered , and the relif granted in State writ #1 is a new Judgment [Magwood].

"Where a first habeas petition results in an amended judgment, a subsequent petition is not successive reguardless of whether it challenges the conviction, the sentence, or both." King v.Morgan, 807 F.3d.154,155-56(6th Cir), citing Johnson, 623 F.3d.at 45(2nd Cir.); In re Gray, 850 F.3d.139,141-43(4th Cir.); Insignares, 755 F.3d.1273, 1281(11th Cir.); Wentzell v.Neven, 674 F.3d.1124,1125(9thCir)

The circuit split on this issue places my case in the Majority, meaning the 5th Circuit is refusing to entertain valid Magwood claims by imposition of the successive writ doctrine, and Comity[S.Ct.Rule10(a); 28 USC §1253,1254,1257].

The 5th Circuit has sanctioned the State's departure from Magwood as to call for an exercise of This Court's supervisory powers, so don't forget to stretch and warm up those limbs[S.Ct.Rule 10(a), and Rule 11].

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The 5th circuit has decided what SCOTUS had declined to answer in Magwood v. Patterson, 561 U.S.320 at 335-339, namely, whether a new judgment may permit renewed attack, not just of the sentence, but the underlying convictions. Well, the question is again before the Court, a little more frayed around the edges, but nonetheless ripe. [S.Ct.Rule 10(c), and Rule 11; 28 USC §1253, 1257].

Resolution of this circuit split may be necessary before final adjudication of my case [Socialist Labor Party, 406 U.S.at n.2], and necessary to promote uniformity of decisions, and due process around the States.

QUESTION #3-c: :Should a state Statute for successive writs have an exception for Magwood claims, that an application is not successive when a new Judgment has been entered in prior habeas proceedings?

STANDARD OF REVIEW: Magwood v.Patterson, 561 u.S.320; Sexton v.Wainwright, 968 F.3d.607, n.4(6th Cir); Tex.Code.Crim.Proc.,Art.11.07§4

DEFINITION: "Newly Discovered Evidence": Akin to Sawyer standard, demands diligence and clear and convincing evidence. Excludes facts made available after trial and which are unconnected to trial errors.

ARGUMENHT: Simply put, the definition above effectively excludes Magwood claims because these claims are not rooted to any errors from the Trial, but usually occur at rendition of, or after, new judgment. My vacatur order was also excluded because, by definition, it came to light after trial.

Texas has long denied my Magwood challenges to the new Judgment, beginning with its denial of my Second State writ, which challenged the erroneoius basis of the vacatur order [See 2008-CR-4397-W2].

Magwood should be an exception in Art.11.07§4 because this Statute governs whether a successive petition should issue. And since there are instances where an application is not successive [Magwood] it only follws that Magwood should be an exception equal to the innocence exception-- because it purports, and confers the same rights: Due Process.

You might be able to say a petitioner raising a Magwood claim has more of a due process interest than a petitioner claiming innocence with some new fact: An innocent person must present facts to prove a constitutional violation in relation to his innocence; whereas the Magwood claimant has already proven the merits of his constitutional claims in a prior, successful, habeas filing.

The district court gave no rationale for why the vacatur order was not enough to pass the gateway. So inference has to be drawn from this circuit's definitions and interpretations of "evidence as a whole," which excludes evidence that came to light after trial and unconnected to trial errors [Will,2023 U.S.Dist.LEXIS ***** 52455 at *39-40]. By definition, vacatur orders, and Magwood claims are excluded.

CONCLUSION: The District Court's evaluation of my factual showing is based on a definition that is the source of a circuit split. The merit in favor of resolving this split is in the fact that Goldman's court granted his innocence showing based on the same fact I offerred in my showing: A vacatur order of a State conviction. Other circuits recognise my innocence showing. Is that not debatable enough to merit certiorari? Is not the 5th Circuit, and the district court's denials debatable among the circuits? Doesn't that make their decision debatable or wrong, according to Slack?

Cut me some Slack v.McDaniel.

The 5th Circuit's denial of C.O.A. is debatable among the circuits[S.Ct.Rule 10(a)], and sanctions such a departure from precedents like JohnSON,544 U.S.295; McQuiggin v.Perkins; House v.Bell; and Magwood v.Patterson, such as to call on the execise of This Court's supervisory powers of intervention[S.Ct.Rule 10(c)and Rule 11; 28 USC §1253, 1257].

Deference to State findings should not have applied in a first-time federal habeas application which raises a claim of actual innocence, and which also makes a viable showing for the unconstitu-tionaility of Art.11.07§4 and any findings associated with the Successive writd doctrine .

Conclusion

I swear under penalty of purjury that all the above facts and Conclusion are true and correct, So help me God.

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REASONS FOR GRANTING THE PETITION

The constitutional challenges raised affect the Due Process rights, not only of those who have yet to prove they are wrongfully convicted and innocent in Texas, but the rights of citizens who have not yet been convicted. It also affects the rights of posterity-- those who will animate the dust as we return to it.

Magwood, McQuiggin, and House all have relevance and application to the successive writ doctrine, and there has been no amendment to Texas' statute in light of these subsequent SCOTUS precedents.

The Circuit Majority, of the Circuit splits I mention, supports the notion that the 5th Circuit's procedural frameworkings, and Constructions favor Comity and Finality in a manner that immolates the rights of U.S. citizens and U.S.Const.Art.III (the power to challenge unconstitutional state statutes, constructions, and framework).

Supreme Ct. Rule 10(a)and(c) apply, and I've made a showing that calls for an exercise of This Court's exclusive powers. The lower courts answer what has been considered constitutional questions in other circuits, and means this Court has the last say on these questions.

I have succeeded in proving my case is far from final by getting relief in my first state writ. Should not Comity and Finality abate for my greater interest in Liberty? Ex Parte Milner, 394 S.W.3d.502 says one is actually, factually innocent of all convictions in violation of the Jeopardy clause. I stand convicted of two capital murders because the taint of the jeopardy violation has not been removed from my judgment.

First-time innocence claims have a less stringent standard than successive writs. But for illegal Statutory constructions I would have been reviewed under McQuiggin. Goldman v.Winn,565 F.Supp.2d.200 is a case that presents the vacatur of a State conviction for the innocence showing. Also, a habeas court,for a first-time claim of innocence,may review all the evidence,old and new, admissable or not, before trial or after trial, to prove that no reasonable juror would have convicted me.

After the initial showing,the habeas court could consider whether I am actually innocent under Tex.Penal Code 9.33/ 9.42, defense of my grandmother and her property. With so many bifurcated proceedings and burdens of proof, it is easy for petitioners to lose sight of the rights being taken by statutory construction, but I believe I have sufficiently given illustrative and legal proofs that give voice to what all prisoners come to intuitively feel: something is amiss in Texas, and it has to do with STate Constructions and Procedural frameworkings.

Acquittal and unconditional release is merited, but if SCOTUS simply demands Texas to grant a new 11.07 under Magwood, then Texas will have to face my innocence claim head on. And I will be able to say "I am; try me; disprove me if you can."