IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-40,541-07

EX PARTE MICHAEL DEAN GONZALES, Applicant

**ON APPLICATION FOR WRIT OF HABEAS CORPUS
IN CAUSE NO. D-23,730
IN THE 358TH DISTRICT COURT
ECTOR COUNTY**

PARKER, J., filed a concurring opinion in which FINLEY, J., joined.

CONCURRING OPINION

I join the Court's order. I write separately to further expound upon the statutory basis for the merits standard articulated in *Blue*[1]—upon which the Court relies to deny relief. The capital-habeas statute generally prohibits subsequent habeas applications.[2] To evade the subsequent-application prohibition, a habeas

[1] *Ex parte Blue*, 230 S.W.3d 151 (Tex. Crim. App. 2007).

[2] TEX. CODE CRIM. PROC. art. 11.071, §5(a).

applicant must meet an exception.[3] There are four exceptions: (1) new facts, (2) new law, (3) "innocence gateway," which involves a showing that no rational juror could have found the defendant guilty beyond a reasonable doubt, and (4) "punishment gateway," which involves a showing that no rational juror would have answered one or more of the punishment special issues in the State's favor.[4] As in the present case, the exception at issue in *Blue* was the punishment-gateway exception.[5] And as in the present case, the habeas applicant in *Blue* was seeking to use that exception to justify considering, and granting relief on, an intellectual-disability claim.[6]

For an intellectual-disability claim brought under the punishment-gateway exception, *Blue* set forth a two-stage inquiry. First, before this Court will even remand such a claim for a merits inquiry, the habeas applicant must make

> a *threshold* showing of evidence that would be at least sufficient to support an ultimate conclusion, by clear and convincing evidence, that

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[3] *Id.*

[4] *See id.* § 5(a)(1) (new facts or new law), (2) (innocence gateway), (3) (punishment gateway).

[5] *See Blue*, 230 S.W.3d at 162-63.

[6] *See id.* Applicant also contended that he satisfied the "new facts" exception, but this Court rejected that contention in its remand order.

> no rational factfinder would fail to find [intellectually disability].[7]

Second, during the merits inquiry, the habeas applicant must

> present a case for [intellectual disability] that actually *does* convince this Court by clear and convincing evidence that no rational factfinder would fail to find him [intellectually disabled].[8]

This *Blue* merits inquiry for a subsequent application contrasts with the standard for determining intellectual disability in a merits inquiry for an initial habeas application—proving intellectual disability *to the habeas factfinder's satisfaction* by a *preponderance of the evidence*.[9]

Blue focused mainly on the first stage of the inquiry and concluded that the habeas applicant in its case failed to make the threshold showing.[10] The Court explicitly found the threshold showing to be anchored in the statute.[11] The Court did not explicitly say where the second-stage merits standard came from, but that standard obviously paralleled the standard for the threshold showing that the Court

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[7] 230 S.W.3d 151, 163 (Tex. Crim. App. 2007) (emphasis in original, bracketed material substituting current term for original).

[8] *Id.* at 163 (emphasis in original, bracketed material substituting current terms for original).

[9] *Id.* at 162.

[10] *See id.* at 162-63, 167-68.

[11] *Id.* at 162-63.

had said was statutory. An examination of the text of Section 5 confirms the statutory basis for the second-stage inquiry.

The statutory text of the general subsequent-application prohibition, combined with the punishment-gateway exception, provides:

> If a subsequent application for a writ of habeas corpus is filed after filing an initial application, 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 clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071, 37.0711, or 37.072.[12]

The statutory text thus contains *two* prohibitions: (1) against "considering" a subsequent habeas application, and (2) against "granting relief" on a subsequent habeas application. These two prohibitions correspond respectively to the "threshold" and "merits" inquiries in *Blue.* Under this two-fold language, the punishment-gateway exception applies to both.[13]

Other aspects of the capital-habeas statute help to confirm this construction.

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[12] TEX. CODE CRIM. PROC. art. 11.071, §5(a)(3)(various emphases added).

[13] Because the two-fold language is contained in the general prohibition in the text, it would apply to *all* the exceptions, and not just the punishment-gateway exception. Whether or how a merits inquiry could manifest for one of the other exceptions is not a concern in the present case.

If a convicting court receives a subsequent capital-habeas application, it cannot then act on the application but must immediately forward a copy of it to this Court.[14] This Court must then make an initial inquiry on whether an exception has been met before proceedings on the merits can occur.[15] And this inquiry has to be made and resolved *even before the State has filed an answer*.[16] Consequently, at the threshold inquiry, this Court will have only the habeas applicant's side of the story, plus whatever is in the trial and appellate records. That a habeas applicant can make a "clear and convincing" showing when only his side of the story has been heard does not mean that such a showing will hold up in the face of adversarial

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[14] *Id.* § 5(b)(3)(A)("If the convicting court receives a subsequent application, the clerk of the court shall . . . immediately send to the court of criminal appeals a copy of . . . the application.") (ellipses inserted), (c) ("The convicting court may not take further action on the application before the court of criminal appeals issues an order finding that the requirements have been satisfied."); *In re Texas Dep't of Criminal Justice* (*"TDCJ"*), 710 S.W.3d 731, 738 (Tex. Crim. App. 2025).

[15] TEX. CODE CRIM. PROC. art. 11.071, § 5(c) ("On receipt of the copies of the documents from the clerk, the court of criminal appeals shall determine whether the requirements of Subsection (a) have been satisfied. The convicting court may not take further action on the application before the court of criminal appeals issues an order finding that the requirements have been satisfied. . . . If the court of criminal appeals determines that the requirements have not been satisfied, the court shall issue an order dismissing the application as an abuse of the writ under this section.") (ellipsis inserted); *TDCJ*, *supra*.

[16] TEX. CODE CRIM. PROC. art. 11.071, § 6(b) (" If the convicting court receives notice that the requirements of Section 5 for consideration of a subsequent application have been met, a writ of habeas corpus, returnable to the court of criminal appeals, shall issue by operation of law."), 7(a) ("The state shall file an answer to the application for a writ of habeas corpus not later than the 120th day *after the date the state receives notice of issuance of the writ.*") (emphasis added).

testing and further record development.

Notably, the successive-application statute does not say that the habeas applicant must "allege" facts that "tend to show" that no rational juror would answer a given punishment issue in the State's favor. The statute says that the application must "contain" facts that are "sufficient" to "establish" that no rational juror would do so. If after a merits inquiry, the record no longer supports a conclusion by clear and convincing evidence that no rational juror would answer a given punishment issue in the State's favor, then a court could not "grant relief" because, at the merits-inquiry stage, the facts contained in the application are no longer "sufficient" to "establish" the punishment-gateway exception. In a different context, we have specifically held that the word "sufficient" requires accounting for countervailing circumstances apart from the defendant's case.[17] That understanding is appropriate, here, given the two-fold nature of the subsequent-application prohibition.

With these comments, I join the Court's order denying relief.

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[17] *Mosley v. State*, 983 S.W.3d 249, 263 & n.18 (Tex. Crim. App. 1998) (In determining whether a mitigating circumstance is "sufficient" to warrant a life sentence, aggravating circumstances can be considered.).

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

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EX PARTE MICHAEL DEAN GONZALES, *APPLICANT*

ON APPLICATION FOR WRIT OF HABEAS CORPUS
IN CAUSE NO. D-23,730 IN THE 358TH DISTRICT COURT
ECTOR COUNTY

YEARY, J., filed a concurring opinion in which FINLEY, J., joined as to Parts I and II.

Today, in a subsequent post-conviction application for writ of habeas corpus brought under the auspices of Section 5 of Article 11.071 of the Texas Code of Criminal Procedure, TEX. CODE CRIM. PROC. art. 11.071, § 5, the Court concludes that Applicant has failed to meet the exceedingly rigorous standard for proving intellectual disability established for such a belated writ application in *Ex parte Blue*, 230

S.W.3d 151 (Tex. Crim. App. 2007). I join the Court's order today, but with certain caveats.

I. We Could Revisit the Prima Facie Case Determination

First, the Court could revisit its order remanding this case in the first place and simply dismiss this subsequent writ application. *See* Tex. Code Crim. Proc. art. 11.071, § 5(c) (prohibiting the convicting court from acting on a subsequent application for writ of habeas corpus in a capital case until this Court issues an order declaring that at least one of the Section 5(a) requirements has been met). This Court issued its order permitting Applicant to proceed to the merits of his intellectual disability claim in this subsequent application on March 3, 2022. *Ex parte Gonzales*, No. WR-40,541-07, 2022 WL 628505 (Tex. Crim. App. del. Mar. 3, 2022) (order not designated for publication). Four judges, however, dissented to the Court's decision to proceed with the intellectual disability claim, albeit without explaining why. *Gonzales*, 2022 WL 628505 at *1–2. For my part, I believed, among other things, that Applicant had failed to make a prima facie showing that he could meet the stringent *Blue* standard. *Cf. Ex parte Staley*, 160 S.W.3d 56, 64 (Tex. Crim. App. 2005) (an applicant citing *Atkins v. Virginia*, 536 U.S. 304 (2002), as "new law" for purposes of Section 5 of Article 11.071 must make a prima facie case of facts that would establish such a claim before he may proceed to adjudication of the merits). I was unconvinced that Applicant would be able to show, by clear and convincing evidence,

that no rational factfinder would fail to find he was intellectually disabled based upon his proffer of available evidence. *Blue*, 230 S.W.3d at 163.

This Court has said that it remains at liberty to revisit the propriety of an initial order to remand a subsequent capital writ application for fact development—even after the factual development has taken place and the case has returned to us. *Ex parte Hood*, 211 S.W.3d 767, 773 (Tex. Crim. App. 2007); *Ex parte Gallo*, 687 S.W.3d 517, 521 n.8 (Tex. Crim. App. 2024) (Yeary, J., dissenting). Given the closeness of the vote to remand in the first place, the Court could choose to revisit its remand order. The Court instead rejects the claim on the merits for having failed to ultimately satisfy the *Blue* standard. And I certainly do not disagree with *that* conclusion.

II. WE PROPERLY REJECT THE CONVICTING COURT'S RECOMMENDED CONCLUSION

In concluding that Applicant may not constitutionally be executed because he was intellectually disabled when he committed his offense, the convicting court articulated the wrong standard of review. The convicting court concluded that Applicant "has proved, by clear and convincing evidence, that he has Intellectual Disability that first manifested during his developmental years." Findings of Fact and

Conclusions of Law at 25.[1] This is decidedly *not* the *Blue* standard, which governs any time an applicant could have raised intellectual disability at trial or in a previous capital post-conviction writ application (as Applicant could have) but did not. *See Blue*, 230 S.W.3d at 162 ("For the post-*Atkins* applicant who bypassed the opportunity to raise [intellectual disability] at trial or in an initial writ, Section 5(a)(3) mandates that his subsequent application 'contain sufficient specific facts' that, if true, would establish 'by clear and convincing evidence' *that no rational fact finder would fail to find him [intellectually disabled].*") (emphasis added).

Indeed, this is Applicant's *second* subsequent writ application filed since his sentencing proceeding in 2009,[2] and he failed to raise an *Atkins* claim either at trial or in his earlier writ application. Even so, in recommending to this Court that it grant Applicant relief on his intellectual disability claim, the convicting court nowhere in its

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[1] After setting out the evidence, the convicting court judge then announced that he *himself* was convinced that Applicant had shown by clear and convincing evidence the three diagnostic criteria for intellectual disability. Findings of Fact and Conclusions of Law at 21. As I have pointed out before, however, "convincing the judge, even to that level of confidence, is not the same as presenting ID evidence that is *so* clear and convincing that *no rational factfinder could fail to find ID.*" *Ex parte Mays*, 686 S.W.3d 745, 752 (Tex. Crim. App. 2024) (Yeary, J., dissenting).

[2] Applicant was originally tried and sentenced to death in 1995, prior to the time *Atkins* was decided in 2002. But the Fifth Circuit reversed the sentencing phase of his trial, and that phase was repeated in 2009, well after *Atkins*.

conclusions of law even cites to *Blue*, much less does it purport to apply the *Blue* standard. Even if the record did support relief under the diluted standard of review that the convicting court used, whether it supports relief under the actual *Blue* standard is another thing altogether. It most decidedly does not, as the Court's order today demonstrates!

The *Blue* standard is admittedly a heavy burden, but it was designed to be. Applicant had several previous opportunities to raise an *Atkins* claim and bypassed them all. For my part, as I have indicated *ante*, I do not believe Applicant originally made even a prima facie showing of intellectual disability so compelling that no rational fact finder would have failed to find him to be so impaired. I certainly agree that, on remand, he has not ultimately satisfied that burden.

III. PROCEDURAL DEFAULT?

Moreover, because Applicant could have raised intellectual disability at the trial court level, unlike in *Blue* itself, an additional question arises whether his failure to do so should be regarded as an utter forfeiture of the claim for post-conviction habeas corpus purposes. Once again, the Court evaluates an *Atkins* claim for relief without even addressing this predicate question. *See Ex parte Mays*, 686 S.W.3d 745, 750–51 (Tex. Crim. App. 2024) (Yeary, J., dissenting) ("Because Applicant was tried eight years after *Atkins*, unlike Blue, he *could have* raised ID at trial. And yet, this Court still has not explicitly said why an applicant in this posture should not be deemed simply to have

procedurally defaulted his ID claim by failing to litigate it at trial."); *Ex parte Jean*, 667 S.W.3d 766, 766–69 (Tex. Crim. App. 2023) (Yeary, J., dissenting) (questioning whether Applicant's claim of intellectual disability raised in his initial writ application should be considered forfeited because he could have, but did not, raise it at trial); *Ex parte Long*, 670 S.W.3d 685 (Tex. Crim. App. 2023) (Yeary, J., dissenting) (same). But because the Court denies *Atkins* relief in any event, I will say no more about procedural default here.

IV. The Current Diagnostic Manuals

In assessing the weight and credibility of the evidence to establish intellectual disability, the convicting court utilized the latest diagnostic manuals, exclusively. Today, the Court does too. I have elsewhere registered my deep skepticism that these represent a valid current assessment of the Eighth Amendment's tolerance for executing those who claim to be intellectually disabled. *Ex parte Segundo*, 663 S.W.3d 705, 712–15 (Tex. Crim. App. 2022) (Yeary., J., dissenting). But I agree with the Court that Applicant has not shown he is entitled to relief even under the latest manuals, so I will not dwell on that issue here either.

V. The Proper Remedy, If Any?

Finally, what I have said before concerning the proper remedy for intellectual disability claims still abides:

> [I]t [still] remains unclear to me whether, even if Applicant has met whatever burden he should have to

> shoulder to prove intellectual disability, the proper disposition is for this Court to just unilaterally reform his death penalty to life without parole. The Court has still not expressly addressed the question of whether the more appropriate disposition, at least for capital cases that were tried post-*Atkins*, might be to remand the case to the convicting court to empanel a new jury to determine the issue of intellectual disability there, in the first instance. *Ex parte Lizcano*, 607 S.W.3d 339, 340–41 & n.6 (Tex. Crim. App. 2020) (Yeary, J., dissenting); *Segundo*, 663 S.W.3d at 711–12 (Yeary, J., dissenting); *Ex parte Long*, 670 S.W.3d [at] 686 . . . (Yeary, J., dissenting).

Mays, 686 S.W.3d at 752. Because the Court denies Applicant any remedy at all, of course, it need not address this question today either.

VI. Conclusion

With these qualifications, I join the Court's order.

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IN THE 358TH JUDICIAL DISTRICT COURT
ECTOR COUNTY**

Per curiam. **YEARY, J., filed a concurring opinion in which FINLEY, J., joined as to Parts I and II. PARKER, J., filed a concurring opinion in which FINLEY, J., joined. SCHENCK, P.J., filed a dissenting opinion. NEWELL, J., dissented.**

ORDER

We have before us an application for a writ of habeas corpus filed under Texas Code of Criminal Procedure Article 11.071, Section 5. The application raises four claims:

1. "[Applicant] has intellectual disability, and because of this, his death sentence cannot stand." *See Atkins v. Virginia*, 536 U.S. 304 (2002); *Ex parte*

Blue, 230 S.W.3d 151 (Tex. Crim. App. 2007).

2. "The State suppressed material exculpatory and impeaching information in violation of *Brady v. Maryland* and [Applicant's] due process rights." *See* 373 U.S. 83 (1963).

3. "The State knowingly elicited multiple instances of false testimony in violation of [Applicant's] due process rights." *See Giglio v. United States*, 405 U.S. 150 (1972).

4. "[Applicant] is actually innocent and satisfies both *Elizondo* and Article 11.071, Section 5(a)(2)." *See Ex parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1997); TEX. CODE CRIM. PROC. art. 11.071, § 5(a)(2).

When we first reviewed Applicant's pleading, we determined that his first and second claims met the dictates of Texas Code of Criminal Procedure Article 11.071, Section 5. *See Ex parte Gonzales*, No. WR-40,541-07 (Tex. Crim. App. Mar. 3, 2022) (not designated for publication). We therefore remanded those claims to the convicting court "for a merits' review." *Id.* We also stayed Applicant's execution "pending resolution of the remanded claims." *Id.*

The case is now back from remand with the convicting court's recommendation that we grant relief on Applicant's first claim and deny relief on the second. But the record does not support relief on either claim. Therefore, we deny relief on both of the remanded claims and dismiss the remaining claims as abuses of the writ. *See* TEX. CODE CRIM. PROC. art. 11.071, § 5(c). We also lift our prior stay of Applicant's execution. *See Gonzales*, No. WR-40,541-07.

PROCEDURAL BACKGROUND

In December 1995, a jury convicted Applicant of the April 1994 capital murder of Merced Aguirre and her husband Manuel Aguirre. *See* TEX. PENAL CODE § 19.03(a). Based on the jury's answers to the special issues submitted pursuant to Article 37.071, the trial court sentenced Applicant to death. *See* TEX. CODE CRIM. PROC. art. 37.071, § 2(b), (e), (g). This Court affirmed Applicant's conviction and sentence on direct appeal. *Gonzales v. State*, No. AP-72,317 (Tex. Crim. App. June 3, 1998) (not designated for publication). We denied relief on Applicant's initial postconviction application for writ of habeas corpus. *Ex parte Gonzales*, No. WR-40,541-01 (Tex. Crim. App. Mar. 10, 1999) (not designated for publication). And we denied his freestanding motion for stay of execution. *Ex parte Gonzales*, No. WR-40,541-02 (Tex. Crim. App. Jan. 11, 2001).

On federal habeas, a federal district court denied relief as to Applicant's conviction but granted punishment-phase relief. *Gonzales v. Cockrell*, No. MO 99 CA 073 (W.D. Tex. Dec. 19, 2002). The United States Court of Appeals for the Fifth Circuit affirmed the federal district court's judgment. *Gonzales v. Quarterman*, 458 F.3d 384 (5th Cir. 2006), *cert. denied*, 549 U.S. 1323 (2007). The case was therefore remanded for resentencing.

Resentencing occurred in May 2009. Though the United States Supreme

Court decided *Atkins* in 2002, Applicant did not raise a claim of what was then called mental retardation at his 2009 resentencing. Based on the jury's answers to the special issues, the trial court again sentenced Applicant to death. Applicant thereafter stated that he wanted no appeals filed on his behalf and no attorneys appointed. The trial court appointed counsel to represent Applicant on direct appeal, but found that Applicant had elected to proceed pro se on habeas.

This Court affirmed Applicant's sentence on direct appeal. *Gonzales v. State*, 353 S.W.3d 826 (Tex. Crim. App. 2011). When Applicant failed to timely file a postconviction application for writ of habeas corpus, this Court issued an order stating:

> Because of applicant's expressed desire to waive habeas, the lack of any vacillation of that waiver appearing in the record, and applicant's failure to timely file an application, we hold that applicant has waived his right to the review of an initial Article 11.071 habeas application. Any writ application filed hereafter by applicant or on applicant's behalf will be labeled a subsequent application and reviewed under Article 11.071 § 5.

Ex parte Gonzales, No. WR-40,541-03 (Tex. Crim. App. Nov. 10, 2010) (not designated for publication).

In September 2014, Applicant filed a subsequent 11.071 application in the convicting court. He did not raise a claim of intellectual disability. We found that Applicant failed to satisfy the requirements of Article 11.071, Section 5 and

dismissed the application as an abuse of the writ. *Ex parte Gonzales*, No. WR-40,541-04 (Tex. Crim. App. June 3, 2015) (not designated for publication).

Applicant later initiated, and we disposed of, a pair of mandamus proceedings unrelated to the instant claims. *See In re Gonzales*, No. WR-40,541-05 (Tex. Crim. App. Mar. 3, 2022) (motion for leave to file denied without written order); *In re Gonzales*, No. WR-40,541-06 (Tex. Crim. App. Mar. 3, 2022) (motion for leave to file dismissed without written order). The convicting court ultimately entered an order setting Applicant's execution for March 8, 2022.

THE INSTANT APPLICATION

Applicant filed the instant habeas application in the convicting court on February 28, 2022—nine days before his scheduled execution. As mentioned, on reviewing Applicant's pleading we "determined that . . . claims 1 and 2 (regarding intellectual disability and [the alleged non-]disclosure of *Brady* evidence)" met the dictates of Article 11.071, Section 5(a). *Gonzales*, No. WR-40,541-07.

On remand, the convicting court received evidence on the intellectual disability issue, and the parties submitted "Agreed Findings of Fact and Conclusions of Law on the Issue of Intellectual Disability." The convicting court adopted those agreed findings and conclusions. The parties thus agreed, and the convicting court concluded, that Applicant "has proved, by clear and convincing

evidence, that he has Intellectual Disability that first manifested during his developmental years." The convicting court recommended that this Court grant relief on this issue and vacate Applicant's death sentence.

Meanwhile, the parties disagreed on the *Brady* issue. The convicting court adopted the State's proposed findings of fact and conclusions of law. Accordingly, the convicting court recommended that this Court deny relief on this issue.

CLAIM ONE

In claim one, Applicant asserts that he "has intellectual disability, and because of this, his death sentence cannot stand."

Law

The Eighth Amendment to the United States Constitution prohibits the execution of intellectually disabled offenders. *See Atkins*, 536 U.S. at 317. The legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community's diagnostic framework. *Hall v. Florida*, 572 U.S. 701, 721 (2014); *see also Moore v. Texas* (*Moore I*), 581 U.S. 1, 13 (2017) ("*Hall* indicated that being informed by the medical community does not demand adherence to everything stated in the latest medical guide. But neither does our precedent license disregard of current medical standards."); *cf. also Moore v. Texas* (*Moore II*), 586 U.S. 133 (2019).

The United States Supreme Court has said that "current manuals offer the best available description of how mental disorders are . . . recognized by" the medical community. *See Moore I*, 581 U.S. at 20. Two such manuals are the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* and the American Association on Intellectual and Developmental Disabilities' publication *Intellectual Disability*. As of the date of this order, the most current edition of the DSM is the Text Revision to the Fifth Edition (DSM-5-TR), and the most current edition of *Intellectual Disability* is the twelfth edition (AAIDD-12).

Per the DSM-5-TR, the essential features ("Criteria") of intellectual disability are:

(A) Deficits in intellectual functioning;

(B) Deficits in adaptive functioning; and

(C) The onset of these deficits during the "developmental period."

DSM-5-TR at 37–38.

Criterion A refers to intellectual functions that involve reasoning, problem solving, planning, abstract thinking, judgment, learning from instruction and experience, and practical understanding. *Id.* at 38. It is typically measured with individually administered and psychometrically valid, comprehensive, and

culturally appropriate tests of intelligence. *Id.* Individuals with intellectual disability have IQ scores of approximately two standard deviations or more below the population mean, including a margin for measurement error (generally ±5 points). *Id.* On tests with a standard deviation of 15 and a mean of 100, this involves a score of approximately 65–75 (70±5). *Id.*

That said, "an individual's intellectual functioning cannot be reduced to a single numerical score." *Hall*, 572 U.S. at 713. Rather, "[f]or purposes of most IQ tests . . . an individual's score is best understood as a range of scores on either side of the recorded score." *Id.*

Criterion B, deficits in adaptive functioning, refers to how well a person meets community standards of personal independence and social responsibility, in comparison to others of similar age and sociocultural background. DSM-5-TR at 42. According to the DSM-5-TR, there are three "domains" of adaptive functioning: the conceptual (or academic) domain, the social domain, and the practical domain. *Id.* A person has adaptive deficits (and so meets Criterion B) when at least one of these domains is sufficiently impaired that the person needs "ongoing support . . . to perform adequately across multiple environments, such as home, school, work, and community." *Id.*

Criterion C, onset during the developmental period, is met if the person's

intellectual and adaptive deficits were present during childhood or adolescence. *See id.*

As mentioned, Applicant raises his intellectual disability claim in a subsequent habeas application subject to the requirements of Article 11.071, Section 5. Under that provision, this Court "may not consider the merits of or grant relief" on a claim unless the claim satisfies one of three statutory exceptions. *See* TEX. CODE CRIM. PROC. art. 11.071, § 5(a). A claim may proceed past the Section 5 bar on subsequent applications if:

- The claim has not been and "could not have been presented previously . . . because the factual or legal basis for the claim was unavailable on the date the applicant filed [his] previous application." *See id.* § 5(a)(1).

- "[B]y a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt." *Id.* § 5(a)(2) (not applicable here). Or

- "[B]y clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071, 37.0711, or 37.072." *Id.* § 5(a)(3).

If proceeding under Section 5(a)(1), an applicant claiming intellectual disability must make a prima facie showing of intellectual disability in his pleading. *See Blue*, 230 S.W.3d at 162. Then, if granted leave to proceed to the merits by this Court, he must ultimately establish that he is intellectually disabled by a preponderance of the evidence. *Id.*

But an applicant proceeding under Section 5(a)(3) must do more. First, the applicant must file an 11.071 application alleging "sufficient specific facts that, if true, would establish by clear and convincing evidence that no rational fact finder would fail to find him" intellectually disabled. *Id.* Then, if this Court permits his case to reach the second, on-the-merits step, the applicant must develop a case for intellectual disability "that actually *does* convince this Court by clear and convincing evidence that no rational factfinder would fail to find him" intellectually disabled. *See id.* at 163. So for an applicant to obtain relief on an intellectual disability claim proceeding under Section 5(a)(3), it is not enough for him to prove that he is intellectually disabled *full stop*. Under our state procedural law, such an applicant must prove *that no rational fact finder would fail to find him* intellectually disabled. *See id.* And he must prove it by clear and convincing evidence. *Id.*

Here, evidence supporting an intellectual disability claim was readily available to Applicant in September 2014, when he filed his previous 11.071 application. And the law enabling such a claim—*Atkins*—has been available since at least 2002. Therefore, Applicant's intellectual disability claim does not satisfy Section 5(a)(1). *See* TEX. CODE CRIM. PROC. art. 11.071, § 5(a)(1), (d). For Applicant to obtain relief on the merits of his intellectual disability claim, his

evidence must satisfy the more demanding burden imposed by Section 5(a)(3). *See Blue*, 230 S.W.3d at 162–63.

Facts

In April 1994, Applicant stabbed his next-door neighbors—an elderly couple—to death in their home. He stabbed 73-year-old Manuel Aguirre eleven times and stabbed 65-year-old Merced Aguirre so many times that the medical examiner stopped counting. Applicant stole various belongings, including a .22 caliber pistol, a microwave, a VCR, a camera, and a stereo. The trial evidence suggested that Applicant deliberately stole items that could be easily sold.

Evidence admitted at the punishment phase of Applicant's 1995 capital murder trial showed the following. In July 1988, when Applicant was fourteen years old, he took an IQ test called the Wechsler Intelligence Scale for Children-Revised (WISC-R). This testing yielded a full-scale IQ score of 81, with a verbal IQ score of 70 and a performance IQ score of 95. A report by psychological assistant JoAnne Stillman indicated that Applicant had a history of drug abuse by this point. Stillman also suggested that, while Applicant functioned at the "Low Average Range" of intelligence, his functioning "may be more reflective of an impoverished home and school environment than an inability to learn and retain information."

In November 1995, in anticipation of Applicant's capital murder trial,

forensic psychologist Dr. Mark Cunningham administered an IQ test called the Wechsler Adult Intelligence Scale-Revised (WAIS-R). Applicant was twenty-two years old when he took this test. This testing yielded a full-scale IQ score of 79, with a verbal IQ score of 78 and a performance IQ score of 86.

Two experts testified at the punishment phase of Applicant's 1995 capital murder trial. Neuropsychologist Dr. Sam Brinkman testified that his "diagnostic impressions" of Applicant given the available data were: (1) "dementia due to multiple etiology"; and (2) "personality change due to multiple traumatic brain injuries and polydrug abuse, combined type labile, disinhibited, aggressive, paranoid." Brinkman did not testify that Applicant was mentally retarded or intellectually disabled. Indeed, Brinkman acknowledged that Applicant's IQ was "above the mentally retarded range."

Cunningham also testified, cataloguing Applicant's various prior mental-health diagnoses: (1) "polysubstance abuse and conduct disorder, group type moderate"; (2) "major depression with psychotic features"; and (3) "polysubstance abuse and . . . schizo-affective major depression with psychotic features or atypical psychosis." This catalogue did not include a diagnosis of mental retardation or intellectual disability. And, like Brinkman, Cunningham did not testify that Applicant was mentally retarded or intellectually disabled.

Psychiatrist Dr. J. Arturo Silva reviewed "selected legal and medical records" in anticipation of Applicant's 2009 resentencing and presented his findings in a report. Among other things, Silva reported that Applicant had previously "been diagnosed with a wide range of mental illnesses." These diagnoses did not mental retardation or intellectual disability, but they did include "Malingering." Silva also referenced the "possibility of malingering" elsewhere in his report, noting that one measure "indicate[d] that [Applicant] may have been Malingering."

At resentencing, the State called Applicant's wife to the witness stand. When Applicant's wife expressed some uncertainty about whether to invoke her Fifth Amendment right against self-incrimination, Applicant interrupted the trial:

> [APPLICANT]: If she don't want to testify, leave her alone, man. That's my wife. She has the right to plead the Fifth Amendment. She don't got to testify against nobody. You are harping her, man. You are fucking with her mind. Leave her alone. She don't want to testify.
>
> THE COURT: Retire the jury.
>
> (Jury retired from courtroom).
>
> [APPLICANT]: See how you got her all emotional. You ain't got to testify, Martha. Don't let them get in your head. You have got the right to keep the Fifth Amendment. You should be ashamed of yourself, man.
>
> THE COURT: Now, where are we?

> [PROSECUTOR]: [Applicant's wife] has told me that she is frightened, that she is scared of the defendant, and I think she --
>
> [APPLICANT]: Goddamn right she is scared because y'all put her in that fucking position, man. Just leave her alone. She don't want to testify.
>
> * * *
>
> [APPLICANT]: Your Honor, I only have one thing to say. Being that I haven't acknowledged my attorneys, there is no communication with them and I have told them already I didn't want her to get on the stand. Now, my wife doesn't know she can invoke the Fifth Amendment rights. That is all I was doing was letting her know. These mother fuckers right there, they are getting in her mind telling her she has to do that. She don't got to. She's got the right. She don't got to get on the stand. Don't nobody got to get on that stand. That is what the Fifth Amendment right is for. I was only letting her know that.

Applicant's wife eventually testified, implicating him in the murders. Applicant interrupted the trial again, saying, "Same thing's gonna happen to you, bitch. I'm gonna fucking have somebody kill your ass. . . . You fucking shit on your own, dumb-ass. Watch. 102 apartment, watch. . . . No sense in crying now."

On the last day of the resentencing trial, Applicant's counsel informed the trial court that they had originally intended to call several witnesses, including Applicant's "sister or half-sister," his daughter, and an expert, to testify on his behalf. But Applicant ordered counsel not to call these witnesses and threatened to cause a disturbance if they did. Instead, Applicant himself took the witness stand.

When asked, "Is there anything you want to tell this jury," Applicant responded, "Yeah. Y'all can fucking kill me. Makes me no fucking difference. Pass the witness."

In July 2021, when Applicant was forty-seven years old, his lawyers retained clinical neuropsychologist Dr. Adriana Strutt to conduct further testing on Applicant and prepare a report documenting her findings. Strutt administered the Test of Premorbid Functioning (TOPF), a test "based on single, atypical word reading skills." Based on Applicant's performance on this test ("TOPF SS=77"), Strutt initially estimated Applicant's "intellectual functioning . . . to be in the borderline impaired range"—"70–79." But when Strutt administered the WAIS-IV IQ test, Applicant attained a full-scale IQ score of 68. The perceptual reasoning, working memory, and processing speed subscores ranged from 77 to 79—in line with Applicant's TOPF score—but the verbal comprehension score was unusually low at 61. While acknowledging that this difference was "statistically significant," Strutt did not deem the difference "clinically significant" because "these differences are present in 9.0–12.2% of individuals at [Applicant's] ability level."

Neuropsychologist Dr. Jack Fletcher, also hired by Applicant's habeas attorneys, executed an affidavit in January 2022 concerning his evaluation of

Applicant. Reviewing Applicant's prior IQ test results, Fletcher acknowledged that the 1995 WAIS-R resulted in a full-scale IQ score of 79 and the 1988 WISC-R resulted in a full-scale IQ score of 81. But he suggested that both tests were outdated and that their scores should be adjusted for the "Flynn Effect" to 74 (95 percent confidence interval 69–79) and 76 (70–82), respectively. *See Petetan v. State*, 622 S.W.3d 321, 338 n.115 (Tex. Crim. App. 2021) ("The Flynn effect involves 'overly high scores due to out-of-date test norms.'" (quoting DSM-5 at 37)). *But see also Ex parte Cathey*, 451 S.W.3d 1, 5 (Tex. Crim. App. 2014) (for purposes of substantiating an intellectual disability claim, "[t]he preferred solution to an outdated IQ score is not to start subtracting from that score, it is to retest with a more recently normed IQ test"). Fletcher also gave less credence to the 1988 result "because of the credentialing of the administrator"—"she only had a bachelor's degree."

Fletcher also interviewed Applicant at the Polunsky Unit in December 2021. He described Applicant's vocabulary as "simple" and said that Applicant's speech consisted of "short declarative statements" that did not involve "elaborate grammatical constructions." Even so, Applicant "was able to communicate effectively." Fletcher noted indications from "multiple informants" that Applicant spoke simply, had a limited vocabulary, experienced an early delay in speech, and

received speech therapy. According to the same sources, Applicant had always had trouble reading, was not good at writing or math, struggled to manage money, never had a bank account, and had poor judgment and problem-solving skills. Some of Applicant's acquaintances characterized him as a "loner" and "retard" and described him as gullible.

At Applicant's 1995 trial, Cunningham testified that he had interviewed Applicant's wife for 65 minutes. In his affidavit, Fletcher claimed to have reviewed a "report" of this interview. But he did not quote or summarize its contents, and Applicant did not include any such report within his 11.071 application.

Instead, Applicant attached to the instant 11.071 application affidavits from a cousin, two aunts, neighborhood acquaintances, a friend, and a teacher. The teacher's affidavit suggested that, although Applicant would have been better off receiving special education, "the school did not have a formal Special Education program" (this despite the fact that, in 1995, Cunningham testified that Applicant "was involved in special education classes"). The teacher also said that Applicant was "between average and below average" and was neither "excellent" nor "very poor." The teacher pointed to Applicant sneaking out of class, which may suggest that his failure to learn could be attributed, at least in part, to a lack of motivation.

On remand, Applicant submitted additional affidavits from a former

alternative school principal and another teacher. The principal said that Applicant was frequently sent to his office for being inattentive and verbally abusive. While he described Applicant as "intellectually challenged" and "kind of slow," he nevertheless regarded Applicant as "a street-smart kid" who "did not apply himself academically." The principal noted Applicant's blank, frequently "spaced out" appearance, which he "assumed . . . was drug-related." Applicant did not, in the principal's view, have "the support system that he needed at home."

The teacher, who taught fifth grade math, said that Applicant "was not extraordinary" in the classroom, "but he was about average. He got by." While Applicant usually "did okay with following instruction," the teacher described an incident in which Applicant "was acting unusual and did not want to do anything at all. He looked dreary, his eyes looked glazed over, he had his head on his desk, and he was falling asleep." Upon being physically "carried" to "the office," Applicant "was found with marijuana on him." Per the teacher, "it turned out there was an older student who was using [Applicant] to sell drugs."

The State initially opposed habeas relief, pointing to Applicant's history of malingering, the fact that Fletcher personally interviewed only two informants other than Applicant, and the tension between the evidence Fletcher utilized in his evaluation and the evidence presented at trial and resentencing. The State stressed,

however, that it had not yet retained an expert "to assess Applicant's intellectual functioning." The State was confident that "testing and analysis by its expert" would "further refute Applicant's claim."

The State ultimately retained forensic psychologist Dr. Timothy J. Proctor as its postconviction expert. Proctor explained that he had, in the context of federal habeas litigation, retrospectively examined Applicant regarding his competency to stand trial on resentencing. Proctor's report, dated February 22, 2017, included diagnoses of antisocial personality disorder "while also noting that borderline intellectual functioning was a consideration." But this examination did not involve a "full assessment focused [on] intellectual disability." Therefore, the State asked Proctor to opine on whether Applicant "is a person with intellectual disability." Proctor relayed his opinion in a May 2024 report.

Proctor reviewed "voluminous records and related materials" in forming his opinion: hospital records, juvenile records, school records, jail records, correspondence, prison records, former examinations by other experts, lay affidavits, and more. He also met with Applicant face-to-face in May 2024. At this meeting, Proctor administered the Test of Memory Malingering, WAIS-IV, and Wide Range Achievement Test, among other measures.

Proctor's WAIS-IV testing, administered to Gonzales at age fifty, yielded a

full-scale IQ score of 73 (95 percent confidence interval 68–78). Proctor acknowledged the five-point difference between his test results (73) and Strutt's (68). He attributed this difference to: (A) the fact that Gonzales wore handcuffs during Strutt's testing but not Proctor's; (B) "practice effects"; and (C) the Flynn Effect. "Taken in total," the data led Proctor to conclude that Applicant's "intellectual functioning *likely* falls in the significantly subaverage range." (Emphasis added).

Proctor reviewed several achievement tests that consistently (from age fourteen to age forty-seven) showed relatively low scores. Notably, though, Applicant attained a reading score of 91, grade level 7.9, on the Wide Range Achievement Test at age fourteen. And while his math score of 68 on that test placed him at grade level 5.0, a Woodcock-Johnson Test taken two years later suggested he had improved in math, with a "Calculation" score of 86 (grade level 7.0), an "Applied Problem Solving" score of 90 (grade level 7.4), and a "Broad Math" score of 88 (grade level 7.1).

In the two-year period from 1988 to 1990, Applicant had many other scores in reading and math that were lower, with his reading scores fluctuating between grade levels 4.5 and 7.9, and his math scores fluctuating between grade levels 5.0 and 7.1. Applicant's 1995 achievement tests—taken after he had been indicted for

capital murder—yielded lower scores, with reading at grade level 7 and math at grade level 6. And Applicant's 2021 achievement tests—taken in anticipation of habeas proceedings—yielded even lower scores, with reading at grade level 3.9 and "math computation" in the 4th percentile.

Proctor declined to conduct adaptive behavior testing. In his opinion, "no individual suitable for completing a formal measure of this type exists in this case." He explained, "[T]here is currently no person who has had frequent, recent, prolonged contact with [Applicant], while also having the opportunity to observe the various adaptive skills at issue in a variety of settings." *But see* DSM-5-TR at 42 ("Adaptive functioning is assessed using both clinical evaluation and individualized, culturally appropriate, psychometrically sound measures."). Proctor further declined to conduct a retrospective adaptive behavior assessment because "such a procedure is so fraught with methodological problems that it renders the results invalid and therefore potentially misleading."

Based on the achievement-test scores and accounts of academic struggles from elementary school to high school, Proctor concluded that Applicant had significant adaptive deficits in the conceptual domain. He found it unnecessary to examine the other adaptive domains but suggested it was "likely" that Applicant had practical-domain deficits and noted the "possibility" of social-domain deficits.

Proctor acknowledged that those two domains would be "difficult to assess" with the current data.

Addressing whether the onset of Applicant's deficits occurred during the developmental period, Proctor conceded that "it appears that some decline in his cognitive abilities, including intelligence, has likely occurred." He nevertheless opined that "the totality of intelligence test scores available" suggested "someone who likely presented with significantly subaverage intelligence when younger, *albeit at a level near the cut-off for this range.*" (Emphasis added). While describing this case as "a difficult/complicated [one] to assess," Proctor ultimately concluded that Applicant "meets [the] criteria for mild intellectual disability."

Pursuant to the parties' "Agreed Findings of Fact and Conclusions of Law on the Issue of Intellectual Disability," the convicting court found "the opinions of experts Dr. Adriana Strutt, Dr. Jack Fletcher, and Dr. Timothy Proctor, as reflected in their reports . . . are based on the prevailing standards for diagnosing [intellectual disability] and are credible." The convicting court also found that "[t]he record contains objective, reliable evidence of [Applicant's] conceptual deficits, dating back to his childhood." It further found that the record "established that [Applicant's] significant limitations in intellectual functioning and adaptive behavior appeared prior to the age of eighteen."

Ultimately, the convicting court determined that Applicant had "proved, by clear and convincing evidence, *that he has Intellectual Disability* that first manifested during his developmental years." (Emphasis added). *Contra Blue*, 230 S.W.3d at 163 (to obtain relief on an intellectual disability claim raised under Section 5(a)(3), the applicant must "convince this Court by clear and convincing evidence that no rational factfinder would fail to find him" intellectually disabled). On that basis, the convicting court recommended that this Court reform Applicant's death sentence to a sentence of life in prison (which, because of the date of Applicant's offense, would involve the possibility of parole).

Analysis

Preliminarily, the "Agreed Findings of Fact and Conclusions of Law" utilize the wrong standard. The question in an intellectual disability claim proceeding under Article 11.071, Section 5(a)(3) is not whether, by clear and convincing evidence, the applicant *warrants an intellectual disability diagnosis*. The question is whether, by clear and convincing evidence, *no rational factfinder would fail to find* the applicant intellectually disabled.

Rather than remand this case for the convicting court to apply the correct legal standard in the first instance, however, we will simply apply it ourselves. The convicting court made fact and credibility findings that, even were we to adopt

them wholesale, still would not support a legal conclusion that, by clear and convincing evidence, *no* rational factfinder would fail to find Applicant intellectually disabled. *Cf. Ex parte Weinstein*, 421 S.W.3d 656, 664 (Tex. Crim. App. 2014) (on postconviction habeas, this Court reviews "ultimate legal conclusion[s]" de novo). In our view, a rational factfinder, duly informed by the medical community's diagnostic framework, could still quite reasonably reject Applicant's claim of intellectual disability.

As mentioned, Applicant's 1988 (age fourteen) WISC-R IQ score was 81. That score placed him outside the intellectual disability range even after accounting for the standard error of measurement (SEM). Indeed, this score remains outside the intellectual disability range even if one accounts for the SEM *and* agrees with Fletcher's decision to subtract points in an attempt to account for the Flynn Effect. *But see Cathey*, 451 S.W.3d at 5 ("The preferred solution to an outdated IQ score is not to start subtracting from that score, it is to retest with a more recently normed IQ test."). Further, a factfinder would not act irrationally to note the wide gap between Applicant's performance score of 95 and verbal score of 70.

Meanwhile, Applicant's 1995 (age twenty-two) WAIS-R IQ score was 79. That score also placed him outside the intellectual disability range. This remains true even if one accounts for the SEM.

True, if a factfinder agreed with Fletcher's practice of subtracting points to account for the Flynn Effect, that would bring Applicant's score to 74. True also, an IQ score of 74 is sometimes within (but in the upper portion of) the range of scores that might support a finding of intellectual deficits. But the question here is not what any factfinder *might conceivably* do; it is what a rational factfinder *would* do. *See Blue*, 230 S.W.3d at 163. Since we have disapproved of applying the Flynn Effect in this way, *see Cathey*, 451 S.W.3d at 5, a rational factfinder would not be compelled to do so. Rather, a factfinder could rationally regard Applicant's IQ score of 79 as an accurate (if imperfect, because of the Flynn Effect) estimation of his intellect at age twenty-two. *See also* DSM-5-TR at 42 (Criterion C, "onset during the developmental period," is met only if "intellectual and adaptive deficits are present during childhood or adolescence").

As between these two tests, a rational factfinder would likely afford greater weight to the 1988, age-fourteen test, because it was the only test conducted squarely within the developmental period and not influenced by a motive to avoid the death penalty. Applicant's score on that test placed him outside the intellectual disability range regardless of SEM or (legally improper) Flynn Effect subtractions. But even if a factfinder thought the 1995, age twenty-two test result was relevant as occurring close to the developmental period, it could still rationally conclude that

those results: (A) agreed with the 1988 results; and (B) also placed Applicant outside the intellectual disability range.

These conclusions follow even if we assume that Applicant put forth his best effort on his more recent testing, occurring in connection with an intellectual disability claim originally raised *nine days* before a scheduled execution. But we note that a looming execution poses a particularly strong incentive to score poorly.

Turning to Criterion B, a rational factfinder would not be required to believe that Applicant had deficits in intellectual functioning to such an extent that he needed "ongoing support . . . to perform adequately across multiple environments, such as home, school, work, and community." *See* DSM-5-TR at 42. On the contrary, his achievement test scores rationally support a conclusion that he did not. At age fourteen, the typical age of a ninth grader, Applicant's test results showed a reading grade level of 7.9—meaning he was approximately one grade behind. True, the same testing showed him to be four grades behind in math (grade level 5.0 for an age associated with ninth grade). But subsequent testing showed that Applicant improved at the rate one might expect. At an age associated with eleventh grade, Applicant obtained test results placing his math aptitude at grade level 7.1; two years of academics yielded two grade levels of improvement.

As for the affidavits from people who knew Applicant, a rational factfinder would likely view the statements of friends and family with skepticism. Consciously or not, these individuals would have an incentive to shade their testimony to help Applicant. Of course, one would ordinarily expect family to know someone best. But Applicant's affidavits were from more distant relations (a cousin and aunts) who might not have known him as well. Notably absent is an affidavit from Applicant's wife.

A rational factfinder would likely view the affidavits from Applicant's principal and teachers as more objective. But the statements in those affidavits mostly describe someone in the low-average range of intelligence who lacked motivation and support and was hampered by drug use. Indeed, one teacher described Applicant as "between average and below average" and neither "excellent" nor "very poor." And the other teacher agreed: "[H]e was about average. He got by."

To be sure, the DSM-5-TR cautions that "[c]linical training and judgment are required to interpret test results and assess intellectual performance." DSM-5-TR at 38. And the United States Supreme Court has said that, while "[t]he legal determination of intellectual disability is distinct from a medical diagnosis," it is nevertheless "informed by the medical community's diagnostic framework."

Hall, 572 U.S. at 721. But a rational factfinder can "inform" itself of that framework, and consider the experts' "clinical training and judgment," while still exercising its lawful prerogative to gauge credibility and decide how much weight to afford the evidence before it. *Accord Petetan*, 622 S.W.3d at 360 ("We have said that jurors are free to reject expert testimony if the testimony fails to comport with . . . concepts of sound logic. In choosing to disregard expert testimony, the jury is constrained only by the requirement that any action taken must be pursued in a nonarbitrary manner.").

With this in mind, we do not think that a rational factfinder, cognizant of its duty to render a decision "informed by the medical community's diagnostic framework," *see Hall*, 572 U.S. at 721, would abdicate its factfinding prerogative to experts such as Strutt, Fletcher, and Proctor. At best, Strutt's report illuminated Applicant's IQ at age forty-seven—well outside the developmental period. This alone would leave the score with questionable weight in the analysis. But that weight is even further undermined by Proctor's observations that: (A) there were "scoring errors" in Strutt's "measures of test-taking effort" and "WAIS-IV administration"; (B) Applicant "wore handcuffs during Dr. Strutt's administration" of the WAIS-IV, which "might have artificially lowered

[Applicant's] score"; and (C) "it appears that some decline in [Applicant's] cognitive abilities, including intelligence, has likely occurred."

Turning to Fletcher's report, here again much of his analysis relies on data that illuminates, at most, Applicant's age forty-seven IQ. It also depends on the practice of subtracting points for the Flynn Effect, which in legal settings this Court does not condone. *See Cathey*, 451 S.W.3d at 5. And it refers in passing to a report suggesting that the experts were not necessarily of one mind regarding Applicant's diagnosis: "Dr. Arambula stated that *there was no evidence of an intellectual disorder*." (Emphasis added). The record before us conspicuously does not contain a report from Arambula.

Finally, a rational factfinder would not necessarily afford much weight to Proctor's opinion. Much of Proctor's analysis relied on Strutt's data. And while Proctor conducted testing of his own, at best, this testing illuminated Applicant's IQ at age fifty. Further, Proctor's diagnosis was not full-throated. He placed Applicant "at a level near the cut-off" and found this to be a difficult case. And again, Proctor himself acknowledged that "some decline in [Applicant's] cognitive abilities, including intelligence, has likely occurred."

Proctor also declined to administer a "standardized measure[]" in gauging Applicant's adaptive deficits—either to a "knowledgeable informant" or to

Applicant himself. *See* DSM-5-TR at 42. True, the DSM-5-TR seems to occasionally permit a diagnosis of intellectual disability "[w]hen standardized testing is difficult or impossible." *See id.* But under those circumstances, "the individual may be diagnosed with unspecified" intellectual disability. *See id.* (emphasis added). Proctor diagnosed Applicant with "mild intellectual disability."

That is not to say that Proctor acted outside of the DSM-5-TR or prevailing medical practice generally. It is only to say that Proctor's report lacks evidence that the DSM-5-TR suggests is critical in gauging a person's adaptive functioning: "standardized measures." *See id.* Proctor attempted to explain this gap in his report, but a gap in the record is no less a gap because it can be explained. And the burden belongs to Applicant—the gap works against him even if it can be explained. *Accord Ex parte Garrels*, 559 S.W.3d 517, 526 (Tex. Crim. App. 2018) ("A silent record is, almost by definition, a lack of evidence to support either position; and a lack of evidence is held against the party bearing the burden on a particular issue.").

In sum, the best evidence of Applicant's intellectual functioning during the developmental period places him squarely outside of the recognized intellectual disability range. The only measures (assuming they were accurate) that would place Applicant within the intellectual disability range were administered when

Applicant was forty-seven and fifty years old. On this point, a rational factfinder would recall Proctor's observation that, relative to the developmental period, "some decline in [Applicant's] cognitive abilities, including intelligence, has likely occurred." When it comes to lay accounts, Applicant's evidence largely comes from individuals who likely do not want him to be put to death, and his more objective sources conveyed data cutting against a finding of intellectual disability. Further, a rational factfinder could "inform" itself of the expert opinions set forth by Strutt, Fletcher, and Proctor, and still ultimately afford those opinions little weight in the analysis. *See Hall*, 572 U.S. at 721; *Petetan*, 622 S.W.3d at 360. And, on top of everything else, Applicant has had multiple opportunities since at least 2002 to allege intellectual disability as a bar to execution—including at a full resentencing trial—but raised his first such claim just nine days before his execution. *Accord Schlup v. Delo*, 513 U.S. 298, 332 (1995) (a federal district court may "consider how the timing of the submission . . . bear[s] on the probable reliability of" the evidence purporting to satisfy a gateway exception).

By remanding this claim, we signaled that Applicant had come forward with "a *threshold* showing of evidence that would be at least *sufficient* to support an ultimate conclusion, by clear and convincing evidence, that no rational factfinder would fail to find" intellectual disability. *See Blue*, 230 S.W.3d at 163. But *Blue*

contemplates that evidence that is "sufficient" to trigger a remand may occasionally fail, even after record development on remand, to "actually . . . convince this Court by clear and convincing evidence that no rational factfinder would fail to find" intellectual disability. *See id.* So it is here.

On these facts, it cannot be said to the requisite level of confidence—clear and convincing evidence—that no rational factfinder would reject Applicant's claim of intellectual disability. Therefore, the record does not support the convicting court's recommendation to grant relief. Because Applicant has failed to convince us by clear and convincing evidence that no rational factfinder would fail to find him intellectually disabled, we deny relief. *See id.* at 162–63.

CLAIM TWO

Here, the record supports the convicting court's recommendation to deny relief. Based on the convicting court's findings of fact and conclusions of law and this Court's independent review of the record, Applicant has not shown that he is entitled to *Brady* relief from his 1995 capital murder conviction. We deny relief.

CONCLUSION

We deny relief on claims one and two. We dismiss Applicant's remaining claims as abuses of the writ. *See* TEX. CODE CRIM. PROC. art. 11.071, § 5(c). And we lift our prior stay of Applicant's execution. *See Gonzales*, No. WR-40,541-07.

IT IS SO ORDERED THIS THE 20 DAY OF AUGUST, 2026.

Publish

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-40,541-07

EX PARTE MICHAEL DEAN GONZALES, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS
IN CAUSE NO. D-23,730
IN THE 358TH DISTRICT COURT
ECTOR COUNTY

SCHENCK, P.J., filed a dissenting opinion.

DISSENTING OPINION

The ultimate question in this case is simple: whether Michael Dean Gonzales, Applicant, is intellectually disabled under the Eighth Amendment and cannot be executed. That much is easily said. What is difficult is figuring out how to go about answering that question mindful of both the controlling, substantive constitutional question and the procedural difficulties stemming from our review posture. I

dissent because I disagree with the process we have used to answer that question. I write separately to explain my concerns.

First, I believe the Court reaches the correct disposition when it "denies" Gonzales relief, given its view of the merits, rather than "dismissing" it because dismissing it will likely prevent a person who has credibly shown he is intellectually disabled under the Eighth Amendment from asserting the claim in the federal system before being executed.

Second, I'm not so sure that the Section 5(a)(3) writ bar applies to intellectual disability claims notwithstanding our earlier holding to that effect in *Ex parte Blue*, 230 S.W.3d 151 (Tex. Crim. App. 2007). I suspect that the prohibition on the execution of the mentally disabled reflects a substantive limitation on the exercise of state power and is not properly resolved on procedural grounds like the elevated burden of proof the majority deploys here.

Third, I agree that this Court is the "ultimate" factfinder but am troubled by the invocation of that authority without showing any real deference to the findings of the "original" factfinder or developing a plausible mechanism for making what amounts to new and different findings without hearing from or observing any witness, including and especially the expert witnesses who have opined that Gonzales is intellectually disabled. I worry that the Court is either abandoning the

review function inherent to our posture or pivoting to act as a plenary finder of fact without the means to find the plausibly contested (or complex) factual questions suggested in our remand order. Skeptics might develop the misunderstanding that either of these things amount to placing an outcome-oriented thumb on the scale. While the determination of whether someone is intellectually disabled under the Eighth Amendment ultimately is a legal question, its answer is dependent on critical factual antecedents.

While I have no doubt that we are free to reject "expert" declarations of the ultimate issue where there is a genuine, material question as to whether a person sentenced to death is "intellectually disabled"; parsing the bases and methodology underlying written opinions is not an acceptable substitute for live observation of testimony under cross-examination or, at a minimum, a record of that testimony and examination preserved for later review.[1]

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[1] I suspect I join many of my colleagues' skepticism of expert opinion, but I acknowledge that judicial decision-making sometimes requires anchoring to some discernable reasoning. In Texas, plaintiffs cannot get beyond dismissal of a dental hygienist malpractice case without an expert opinion supporting a breach of the requisite duty of care. *Wood v. Tice*, 988 S.W.2d 829, 830 (Tex. App.—San Antonio 1999, pet. denied). Having been handed the task of separating the intellectually disabled from the ranks of our condemned population, it would seem strange that we are able to do so without anyone hearing from the experts at all. While there may be jurisdictions

I. BACKGROUND

A jury convicted Gonzales in 1995 of capital murder and sentenced him to death. *See* TEX. PENAL CODE § 19.03(a). This Court affirmed his conviction and sentence. *Gonzales v. State*, No. AP–72,317 (Tex. Crim. App. June 3, 1998) (not designated for publication). We then denied relief on Gonzales' initial habeas application. *Ex parte Gonzales*, No. WR–40,541–01 (Tex. Crim. App. Mar. 10, 1999) (not designated for publication). He later moved to stay his execution. His motion was denied without written order in 2001.

In 2002, the United States District Court for the Western District of Texas granted Gonzales a new punishment hearing, and he was again sentenced to death. *Gonzales v. Cockrell*, No. MO–99–CA–073 (W.D. Tex. Dec. 19, 2002) (not designated for publication), *aff'd by Gonzales v. Quarterman*, 458 F.3d 384 (5th Cir. 2006). We affirmed that sentence on direct appeal in 2011. *Gonzales v. State*, 353 S.W.3d 826 (Tex. Crim. App. 2011). When asked whether he wanted counsel appointed for writ application challenging his new death sentence, he refused. *Ex parte Gonzales*, No. WR–40,541–03 (Tex. Crim. App. Nov. 10, 2010) (not

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elsewhere that permit resolution of critical fact questions hinging on expert opinion without any observation of the witness(es), I am not aware of them and question whether a contrary practice is so aberrant as to raise serious federal constitutional concerns. *Cf. Honda Motor Corp. v. Oberg*, 512 U.S. 415 (1994).

designated for publication). The trial court concluded that his "election not to accept an appointed attorney and proceed pro se was intelligent and voluntary." It's unclear whether Gonzales was represented by counsel at the May 2009 hearing, but it appears he was not.

Then this Court, after Gonzales failed to file a timely writ application, accepted his waiver and said that any future application would be subject to the Section 5 writ bar in Article 11.071. *Id.* True to our word, when Gonzales filed another writ application after his federal proceedings were abated to exhaust state remedies, we dismissed his application under Section 5 as an abuse of the writ. *Ex parte Gonzales*, 463 S.W.3d 508, 509 (Tex. Crim. App. 2015) (per curiam).

The instant writ application followed. Now represented by counsel, he argues among other things that he is intellectually disabled. We remanded the case after concluding that his claim was sufficiently plausible to satisfy Section 5, but we said further development of the record by an "original" factfinder was necessary. *Ex parte Gonzales*, No. WR–40,541–07, 2022 WL 628505, at *1 (Tex. Crim. App. Mar. 3, 2022) (not designated for publication). While the State initially opposed relief, it changed its position when its own retained expert tendered a report agreeing with Gonzales' experts that he is intellectually disabled. The trial court found the expert opinions sufficient to preclude the need for live testimony, it

entered findings to that effect, and it recommended granting relief. Today, the Court discards those findings and denies Gonzales relief.

II. THE MAJORITY PROPERLY DENIES, RATHER THAN DISMISSES, GONZALES' INTELLECUTAL DISABILITY CLAIM

By denying Gonzales' intellectual disability claim on its merits, the Court properly permits at least limited federal review of an issue of immense importance: Whether the Eighth Amendment forbids Gonzales' execution. I think that this Court should be cautious when dismissing subsequent applications raising intellectual disability under Section 5 when such an important constitutional issue is at stake, a concern we seemingly dismissed in *Blue*. In *Blue*, we said "application of Section 5 does not violate the federal constitution just because it might deny a particular applicant review of an allegation of facts that, if true, might impose a fundamental bar to execution." *Blue*, 230 S.W.3d at 156. Thus, according to the *Blue* majority, even if the Eighth Amendment categorically prohibits a person from being executed, that constitutional right must give way to procedural default rules. *See id.*

III. DISMISSING GONZALES' SUCCESSIVE APPLICATION WOULD BE PARTICULARLY IRONIC GIVEN THE FACTS HERE.

The majority applies the greatly heightened standard of proof under Article 11.071's successive writ bar because Gonzales' first *pro se* application failed to

include the argument and accompanying expert opinion testimony on which it relies. But faulting an applicant for not properly raising an intellectual disability claim in a *pro se* application when he (or any like inmate) has later credibly proven intellectually disability by a preponderance flies in the face of common sense. Indeed, had Gonzales been capable of submitting a complete and persuasive application, we might point to its eloquence as the basis for denying relief. Joseph Heller explored a similar concept in his fictional novel, Catch–22. *See* JOSEPH HELLER, CATCH–22 (1961).

IV. APPLICATION OF THE WRIT BAR TO INTELLECTUAL DISABILITY CLAIMS SHOULD BE REVISITED, PARTICULARLY WHEN AN EARLIER PRO SE FILING IS INVOLVED.

I'm also not convinced that Section 5(a)(3) applies to intellectual disability claims for several reasons, and my discussion begins with our seminal case in this area: *Ex parte Blue*. *See Blue*, 230 S.W.3d at 151.

A. Ex parte Blue

Blue argued that he should be able to raise an *Atkins* claim at any time without regard for abuse-of-writ principles because the *Atkins* prohibition is absolute and that, alternatively, he could raise his claim in a successive writ application under Section 5(a)(3). *Id*. at 153; *see Atkins v. Virginia*, 536 U.S. 304, 317 (2002). Without too much wrangling, the Court knocked down both arguments.

We explained that an *Atkins* claim could not be raised at any time because, even if the Eighth Amendment's categorical prohibition is a systemic prohibition of the type identified in *Marin*, *Marin* is different. It's different we said because it's about appeals, not postconviction writs, and the ability to raise a Category 1 *Marin* right for the first time on appeal is predicated on having the right to appeal in the first place. *Id.* at 155; *see Evitts v. Lucey*, 469 U.S. 387, 401 (1985) (holding that when a state provides an appellate process, the process must comport with due process). We then observed that the legislature has also given Texans the right to file writ applications but did not expound on the point. *Blue*, 230 S.W.3d at 155–56.

Rather, we concluded Section 5 is the only way an applicant can raise an *Atkins* claim in a successive habeas application, shoring up our conclusion by explaining that Section 5 is not all that different than federal habeas corpus jurisprudence, which we concluded would also probably bar an applicant from raising an intellectual disability claim in a successive federal writ application.

B. *What* Ex parte Blue *Means*

In an initial writ application, an applicant must show by a preponderance of the evidence that *Atkins* prohibits his execution. *See Franklin v. State*, 579 S.W.3d 382, 386 (Tex. Crim. App. 2019); *see Ex parte Briseno*, 135 S.W.3d 1, 12 (Tex. Crim. App. 2004), *abrogated by Moore v. Texas*, 581 U.S. 1, 17–18 (2017). But since *Blue*, an

applicant in a successive writ application must prove by *clear and convincing* evidence that no rational juror would have answered any of the special issues in the State's favor in a successive writ application. The legal standard is elevated, to say the least, and serves as the basis for the majority's denial here.

C. Why Ex parte Blue *Needs to be Revisited*

1. The remedy of habeas corpus should comport with due process.

The *Blue* majority talked about how a state that provides for appellate review can withhold that right in part or altogether. *Blue*, 230 S.W.3d at 155. We said the same of habeas writs. *Id.* at 155–57. The *Blue* majority did not meaningfully address *Evitts*, and its possible application here. In *Evitts*, the United States Supreme Court held that states need not provide an avenue to appeal a criminal conviction or sentence but that, if they do, it must comport with due process. *Evitts*, 469 U.S. at 400–01.

If Texas provides for appellate review that must comply with due process, and it provides for the habeas corpus review, shouldn't the postconviction process also have to comport with due process? The United States Supreme Court almost answered this question in *Finley*. *Pennsylvania v. Finley*, 481 U.S. 551, 558 (1987). It said that, even if Pennsylvania's postconviction writ process, which was at issue in

that case, had to adhere to principles of due process, the petitioner "suffered no deprivation . . . ." *Id.*

2. Potential Texas Constitutional Problems

The *Blue* majority also did not grapple with possible conflicts between Section 5 and the Texas Constitution. While the legislature has the right to restrict access to the Great Writ, the *Blue* majority said the only thing the legislature cannot do when restricting access to it is to suspend it. *See* TEX. CONST. art. I, § 12 ("The writ of Habeas Corpus is a writ of right and shall never be suspended. The Legislature shall enact laws to render the remedy speedy and effectual."). True enough. And as I see it, there is an argument that the burden on an applicant in this context might be so high as to effectively suspend the writ (or deny due process).[2] And it is not clear to me whether a procedural default statute that bars some people who are categorically exempt from execution by resort to a nearly insurmountable legal standard effectively violates Texans' constitutional right to open courts

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[2] The due-process question would of course be most acute when the elevated standard is said to be triggered by conduct that is itself consistent with the type of intellectual disability the Eighth Amendment exempts from the death penalty in the first place. It may also be informed by the unique process we deploy to dispose of relevant expert opinion testimony no one has observed. *Supra* n.1.

because the courts are effectively closed to them. *Id.* art. I, § 13 ("All courts shall be open . . . .").

I have previously expressed the view that our Texas Constitution, including its open courts and anti-suspension provisions, would prohibit the execution of a person who has produced probative new evidence of substantive innocence proving that a jury would most likely not convict him. *See Ex parte Wood*, No. WR–45,746–04, 2025 WL 2148862 (Tex. Crim. App. July 30, 2025) (per curiam) (Schenck, P.J., concurring and dissenting). In particular, given the distinct and elevated life interest involved in such cases, I noted my belief that application of our "clear and convincing" proof standard from *Elizondo* (and the same applicable under Section 5) was inappropriate to the question unique to death cases of whether the punishment of a person shown post-judgment unlikely to be guilty is so obviously disproportionate as to be cruel and unusual given the acute risk of erroneous deprivation of the constitutionally protected "life" interest. *Id.* at 11–15; *see Ex parte Elizondo*, 947 S.W.2d 202, 209 (Tex. Crim. App. 1996).

I see no intention in the text of the Section 5 writ bar (or constitutional authority) to foreclose a person who has made such a showing access to this Court, as I do not believe either the legislature or suspension clause would allow it. I suspect the same problem obtains here with our resort to *Blue* in escalating the

burden to show intellectual disability by clear and convincing evidence on account of an earlier submission that did not present the question or adequately present it. This is especially true when the submission was *pro se* and filed by a person found by the trial court and experts to be intellectually disabled. A habeas applicant is either mentally disabled or not. If he is, *Atkins* poses a *substantive* bar to his execution.

3. The *Atkins* Prohibition Appears Absolute and Might Be Able to Be Raised Any Time

I also find the *Blue* majority's resolution of the *Marin*, "systemic prohibition" argument unpersuasive. First, the majority refused to answer whether the Eighth Amendment prohibition on executing intellectually disabled people is a systemic prohibition of the type identified in *Marin*. *Blue*, 230 S.W.3d at 154. It probably is. If a category of people cannot be executed under *any* circumstances, that seems to be a system prohibition of the kind that "is not option." *See Marin v. State*, 851 S.W.2d 275, 289 (Tex. Crim. App. 1993). Second, if *Marin* and systemic prohibitions can be raised for the first time on direct appeal by any party entitled to appeal, why would a postconviction writ be different? Applicants are entitled to file applications for postconviction writs of habeas corpus. I am not aware of a constitutional or statutory provision wholly preventing their filing.

So, to the extent that the *Blue* Court distinguished *Marin* and held that an intellectual disability claim made in a successive writ application is subject to Section 5 even if it were a systemic prohibition, I think this Court should reconsider its position. Instead, the Court should ask whether that construction can be supported under our Constitution and whether our past reading of Section 5 should be revisited to permit us to avoid that constitutional question.

D. Postconviction Intellectual Disability Claims Not Presented to a Jury Might Be Exempt from Section 5(a)(3).

It is not at all clear that Section 5 can be read to apply to the intellectual disability question if it is not put before a jury. While a jury answers the special issues, which touch upon the moral question of if someone is deserving of the death penalty, it is free to believe that a person is or is not morally deserving of a sentence of death even if they believe the defendant is intellectually disabled. *See* TEX. CODE CRIM. PROC. art. 37.071, § 1(e)(1).

In answering the mitigation question to which intellectual disability may be considered, jurors are not instructed that such a person may not be executed. Instead, they are instructed to "consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness." *Id.*; *id.* art. 37.071, § 1(f)(4). A defendant who is intellectually disabled is still "morally" blameworthy as a matter of both Texas and federal law to the point that may be

deprived of their liberty.[3] Jurors are thus free to answer the mitigation question however they see fit in the absence of any instruction that the intellectual disability question is unique among "mitigating" circumstances in wholly precluding a sentence of death. That legal question, while premised on its own rigorous factual inquiry, is governed by a standard that is never placed before jurors and, to my mind, might exclude the question from default under Section 5.

V. WE SHOULD DEFER TO THE "ORIGINAL" FACTFINDER'S FINDINGS UNLESS NO REASONABLE VIEW OF THE RECORD SUPPORTS THEM.

Turning to this case, I disagree with the Court's analysis. One reason is that the Court seems to be invoking its "ultimate" factfinder authority without any real guiding principles. We recently discussed this authority in *Ex parte Reed*, 670 S.W.3d 689, 744 (2023), and followed that discussion with twenty-four pages of reasons why the "original" factfinder was wrong and how we know better. *See id.* at 744–68. Here the reader is subjected to only nine pages. Our discussion of our "ultimate" factfinder authority in *Reed* started with lip service about deference to

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[3] The United States Supreme Court has held that not all intellectually disabled people are exempted from being put to death by the Eighth Amendment. *Atkins*, 536 U.S. at 317 ("Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus" that executing them would be cruel and unusual punishment).

the "original" factfinder but ended with a comment that we would review each claim "with a view toward exercising our own judgment." *Id.* at 744.

It seems obvious these are mutually exclusive. How can we defer to an "original" factfinder's findings of fact if any view of the record supports them "with a view toward exercising our own judgment" at the same time? Does it turn on how good we think the findings are? When are findings "good enough?" The former is how this Court has treated "original" factfinders and their findings for decades—any reasonable view of the record. The latter is no standard at all and seems to be akin saying "whenever we want."

Instead, I would follow the course set in *Ex parte Harleston*, 431 S.W.3d 67, 70–71 (Tex. Crim. App. 2014). In *Harleston*, this Court observed that the proper approach recognizes that we have the authority to reject a finding of fact, but we are mindful we are conducting a *review* of the findings of fact of the "original" factfinder on a cold record. *See id.* at 70. That is why this Court cited *Anderson v. Bessemer City*, 470 U.S. 564 (1985), one of the United States Supreme Court's famous decisions about appellate courts deferring to lower court credibility findings, especially when the credibility of live testimony might be relevant.

Another problem is that we appear to be engaging in our own factfinding in ways that create confusion over our decision to remand the case, and the contrary

outcome we now direct that creates the unfortunate (and I'm sure unintended) appearance of outcome-based willingness to defer on review. The practice smacks of the United States Tax Court "reviewing" factual findings of a special trial judge in *Ballard v. C.I.R.*, 544 U.S. 40, 55–56 (2005). On certiorari, the United States Supreme Court concluded the Tax Court's system of "reviewing" only after it had received a result it approved of was aberrant and unsupported by any written rule. Instead, the Court read the existing rule to respect a separation of the courts' functions and a review standard that transparently operates like summary judgment or directed verdict reversal where the decision to submit the facts to someone else has been made. *Id.* *Harleston* suggests the same answer here. This is why I believe we should defer to findings of fact if any view of the record supports them.

Here, the trial judge did not call or observe the experts, but he did not do so because he considered the intellectual disability answer to be so conclusive as to call for disposition in Gonzales' favor. That the judge did not hear live testimony does not matter, and the fact that the trial court found the weight of the expert opinion evidence so overwhelming as to require no observation of these witnesses does not mean that we should reject his findings. This is ultimately akin to a disposition on summary judgment or directed verdict that would parallel the *Anderson* standard we embraced in *Harleston.* A trial judge may enter summary judgment under the same

standards an appellate court would employ in reviewing a verdict. *See Armstrong v. City of Dallas*, 997 F.2d 62, 66 (5th Cir. 1992). When a trial court concludes, as our convicting court did here, that the evidence of intellectual disability is *conclusively* established by the weight of expert opinions, and thus renders what amounts to a "summary judgment" in that it pretermits a live hearing to observe the testimony, a rejection of that assessment does not compel a contrary disposition *unless there was no plausible prospect to warrant the referral to the trial court in the first place*. *E.g.*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256–57 (1986). That the majority spends around eighteen pages of its sixty-seven-page opinion dissecting the various experts' written submissions hardly suggests the lack of a live question.

At this stage, it is difficult for me to imagine how this Court could make the necessary contrary findings without personally calling and seeing the witnesses the habeas court found so collectively persuasive as to require no live hearing at all, something this Court has repeatedly said it is ill equipped to do.[4] *E.g.*, *Ex parte*

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[4] I do not question our authority as a terminal court to make original factual determinations. We can hold trials and call witnesses if we want. *See, e.g.*, *United States v. Shipp*, 214 U.S. 386 (1909) (original trial proceedings before the assembled Supreme Court). What I question is how we can decide this matter in this posture without either declaring that there is no possible, genuine factual question in play—posing the question of why we called for findings in the first place—or remanding to the trial court with instructions to hold a hearing.

Charley, Nos. WR–77,427–05, –06, 2013 WL 2726306, at *1 (Tex. Crim. App. June 12, 2013) (per curiam) (not designated for publication) ("[T]he trial court is the appropriate forum for findings of fact."). At least then, the Court would be in better position than the on-the-ground habeas court to decide the facts. Right now, we're not.[5]

If being the "ultimate" factfinder is a license to police habeas courts by canvassing their findings and exercising our "ultimate" factfinder authority whenever we feel like it, which I don't believe to be the case, what is the point of asking habeas courts to make findings of fact?

I worry that this "ultimate" factfinder authority has been wielded too often and without adequate explanation of its limitations, leaving Texans to wonder if this

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[5] The United States Supreme Court said in *United States v. Raddatz*, 447 U.S. 667, 681 n.7 (1980),

> [W]e assume it is unlikely that a district judge would *reject* a magistrate's proposed findings on credibility when those findings are dispositive and substitute the judge's own appraisal; to do so without seeing and hearing the witness or witnesses whose credibility is in question could well give rise to serious questions which we do not reach.

Id. (emphasis in original); *see Louis v. Blackburn*, 630 F.2d 1105 (5th Cir. 1980) (finding the Due Process Clause prohibits district courts from rendering judgment at odds with a magistrate's disposition without conducting live hearing and observation of witnesses where credibility determinations are implicated).

Court thinks it does not care what the lower courts—who do nearly all the work in our criminal justice system—think. I believe we should show those courts more respect.

VI. WHETHER A PERSON IS INTELLECTUALLY DISABLED UNDER THE EIGHTH AMENDMENT IS A LEGAL QUESTION BUT IS SO FACT-INTENSIVE THAT, OFTEN, THE ANSWER TO THE LEGAL QUESTION FOLLOWS FROM THE FINDINGS.

To reach its result, the majority seems to rely on the fact that whether a person is intellectually disabled under the Eighth Amendment is ultimately a legal question. And yet, the intellectual disability question, despite its legal nature, is as nuanced and intensively fact bound as any in criminal law, often requiring multiple hearings, briefing, live testimony, the opinion of several experts, appeals, and more. *See, e.g.*, *Hall v. Florida*, 572 U.S. 701, 710 (2014); *Petetan v. State*, 622 S.W.3d 321, 328 (Tex. Crim. App. 2021).

If there is a credible question as to whether the death penalty can be applied on the account of a defendant's mental acuity, a hearing before someone equipped to observe the witnesses and keep a record of the testimony sufficient to permit subsequent consideration for fidelity to the substantive constitutional standard is required. Because we found that credibility threshold to be passed, we remanded for findings. Because the evidence before the habeas court was perceived as conclusively demonstrating Gonzales' disability, it did not hold a hearing. Our

reversing of course under the banner of title of "ultimate" factfinder fits awkwardly with the notion of our precedent, our posture, and the way "facts" are "found." *See, e.g.*, *Ballard*, 544 U.S. at 63; *Raddatz*, 447 U.S. at 672–73; *Louis*, 630 F.2d at 1109–10.

VII. CONCLUSION

With these comments, I respectfully dissent.

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Publish