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Death Penalty: Texas Law - Subsequent Writs and Abuse of the Writ Doctrine in Texas

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DEATH PENALTY: TEXAS LAW—SUBSEQUENT WRITS AND ABUSE OF THE WRIT DOCTRINE IN TEXAS

CHARLES M. MALLIN†

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Introduction

The purpose and scope of this paper is to introduce the practitioner to the concept of the "abuse-of-writ" doctrine as made applicable to death penalty habeas litigation via the recent enactment of article 11.071, section 5(a) of the Texas Code of Criminal Procedure.[1] It is generally pertinent in the context of serial or subsequent writ filings by the applicant. It is hoped that this article will help guide both the State's and defendant's habeas attorney through the various intricacies of the subsequent application for a writ of habeas corpus in death penalty litigation.

Part I of this article examines the subsequent writ from a historical perspective, revealing the necessity for a procedure that not only preserves the rights of the condemned, but promotes judicial economy and finality as well.

Part II explains the "abuse-of-writ" doctrine and discusses the operation of the exceptions to procedural bar under the statute.

I. Historical Perspective

For the practitioner, it is important to understand the "abuse-of-writ" doctrine in the context of the somewhat inconsistent history of

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1. Tex. Code. Crim. Proc. Ann. art. 11.071, § 5(a) (Vernon Supp. 1999).

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habeas corpus relief. As the right to habeas corpus relief has narrowed considerably in recent decades, properly raising and exhausting all adequate state grounds becomes ever more critical.

The writ of habeas corpus, often called the Great Writ, is an extraordinary remedy and has, since pre-colonial times, been regarded as a matter of right. Habeas corpus relief issues upon a showing of probable cause that one is illegally restrained in his liberty or confined. Notably, however, the Constitution of the United States confers no affirmative right to habeas corpus relief, but rather restricts the federal government from suspending the right. Article I of the United States Constitution provides, "[T]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[2] This articulation reflects the Framers' early fears that the powers of the court to issue habeas relief could be arrested by legislative action as the English Parliament did in 1688 and 1696, and later again in the colonies during the American Revolution.[3] These same apprehensions were carried over by delegates to the Constitutional Convention.[4] Prompted by concerns that Article I was intended only to restrict Congress from suspending operation of state habeas relief for federal prisoners, the Convention affirmatively granted habeas power to courts of the United States through section 14 of the Judiciary Act of 1789.[5] In 1845, however, applying a plain meaning construction to the language of the Act, the Supreme Court, in *Ex parte Dorr,*[6] held that it lacked power to issue habeas relief to prisoners under sentence by a state court conviction.[7] To correct this jurisdictional defect Congress overruled *Dorr* with the Judiciary Act of 1867[8] by extending the writ to "any person . . . restrained of his or her liberty in violation of the

2. U.S. CONST. art. I, § 9, cl. 2. See Max Rosenn, *The Great Writ — A Reflection of Societal Change*, 44 OHIO STATE L. J. 337 (1983), for an excellent article describing the evolution of the writ of habeas corpus.

3. *See* Rosenn, *supra* note 2, at 338. In *Fay v. Noia*, 372 U.S. 391, 405-06 (1963), Justice Brennan examined the implied power of habeas corpus through Article I as recognized in prior Supreme Court jurisprudence. While Justice Brennan passed on the issue of whether congressional refusal to permit the federal courts to exercise the full power accorded the writ at common law would amount to an unconstitutional suspension, he observed that "the Constitution invites, if it does not compel, a generous construction of the power of the federal courts to dispense the writ conformably with common-law practice." *Id.* at 406 (citations omitted).

4. *See* Rosenn, *supra* note 2, at 339.

5. *See id.* Section 14 provides "[t]hat writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into a court to testify." Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 82 (1789) (current version at 29 U.S.C. § 2241(c) (1994)) (providing limitations to writs of habeas corpus).

6. 44 U.S. (3 How.) 103 (1845).

7. Rosenn, *supra* note 2, at 340.

8. Ch. 28, 14 Stat. 385 (1867).

Constitution . . . or law of the United States."[9] Significantly, the Act also empowered the federal courts to inquire into the facts underlying the detention, thus developing the basis of modern federal habeas law.[10] The breadth of the Act was acknowledged by the Court in *Ex parte McCardle*,[11] in which it observed, "[i]t is impossible to widen [the Act's] jurisdiction."[12]

In 1885,[13] the United States Supreme Court was given jurisdiction to review the final decision of the circuit courts on issuance of habeas corpus and was forced to confront the dilemma of whether federal courts were to exercise their habeas jurisdiction narrowly or expansively.[14] Only a year after its passage, the Court in *Ex parte Royall* held that while the federal courts do have jurisdiction to issue habeas corpus relief where a person is confined under state law, as a matter of comity, they should stay their hand until all state remedies have been exhausted.[15] In the wake of a line of cases culminating with the Court's pronouncement in *Ex parte Hawk*,[16] Congress passed the Judiciary and Judicial Procedure Act of June 25, 1948,[17] and through it codified the common law right to habeas corpus in its current form.[18] Now designated Title 28 U.S.C. § 2254, a petitioner for a writ of habeas corpus held in custody pursuant to a valid state court judgment must show that he has exhausted all remedies available in the courts of that state, that there is an absence of corrective state procedures, or that there are in existence circumstances rendering the process ineffective to protect the applicant's rights.[19]

Throughout the sixties and early seventies, federal circuit courts were enjoying the broadest exercise of discretion under 28 U.S.C.

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9. *Id.* One year after the Act was passed, Senator Trumbull, Chairman of the Senate Judiciary Committee, observed plainly of the Act, "[i]t was passed to authorize writs of *habeas corpus* to issue in cases where persons were deprived of their liberty under State laws or pretended State laws." CONG. GLOBE, 40th Cong., 2d Sess. 2096 (1868).

10. *See* Rosenn, *supra* note 2, at 341.

11. 73 U.S. (6 Wall.) 318 (1867).

12. *Id.* at 326, *quoted in Fay*, 372 U.S. at 417.

13. Act of March 3, 1885, ch. 353, 23 Stat. 437.

14. *See Ex parte* Royall, 117 U.S. 241, 245 (1886).

15. *See* Wainwright v. Sykes, 433 U.S. 72, 80 (1977) (citing *Ex parte* Royall, 117 U.S. 241 (1886)). *Ex parte Royall* involved a state defendant's petitions for habeas relief before trial challenging the indictment on a constitutional basis rather than a subsequent writ challenging a conviction. *See Ex parte* Royall, 117 U.S. at 243. However, the "exhaustion principle has been applied and continues to be an obstacle affecting subsequent writs." Coleman v. Thomas, 501 U.S. 722, 731-32 (1991).

16. 321 U.S. 114 (1944).

17. Ch. 646, § 1, 62 Stat. 869; *see also* 28 U.S.C. § 2254 Historical and Statutory Notes (observing that this section is a declaration of existing law as affirmed by the Supreme Court in *Ex parte Hawk*, 321 U.S. 114 (1944)).

18. *See Wainwright*, 433 U.S. at 80 (noting the incorporation of the common-law rule into the language of 28 U.S.C. § 2254).

19. *See* 28 U.S.C. § 2254(b)(1) (Supp. IV 1998).

§ 2254 that they would see. In *Fay v. Noia*,[20] the defendant sought habeas review of his state conviction on the grounds that his confession had been coerced, although he had allowed the time for direct appeal in state court to lapse without seeking review.[21] Undertaking a historical analysis of the federal courts' power to issue the writ, Justice Brennan concluded that "[t]he breadth of the federal courts' power of independent adjudication stems from the very nature of the writ . . . ."[22] Therefore, while the court observed that "[i]t is a familiar principle that this Court will decline to review state court judgments which rest on *independent and adequate state grounds*,"[23] it held that the prisoner's failure to appeal his conviction was not an "intelligent" and "understanding" waiver of his right to appeal and did not justify withholding of federal habeas corpus relief.[24] The Court limited the application of 28 U.S.C. § 2254 to those cases where state remedies have not been exhausted at the time application is made to the federal court.[25] Nevertheless, the Court reserved a limited discretion in the federal courts to deny relief to an applicant under certain circumstances.[26] Justice Brennan explained that:

> [H]abeas corpus has traditionally been regarded as governed by equitable principles. Among them is the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks . . . . We therefore hold that the federal habeas judge may in his discretion deny relief to an applicant who has deliberately bypassed the orderly procedure of the state courts and in so doing has forfeited his state court remedies.[27]

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20. 372 U.S. 391 (1963).

21. *See id.* at 394. Two co-defendants in *Fay* were acquitted on the same grounds at the state court level. *See id.*

22. *Id.* at 422.

23. *Id.* at 428 (emphasis added).

24. *Id.* at 439.

25. *See id.* at 435.

26. *See id.* at 438.

27. *Id.* at 439. Justice Brennan further explained this standard as follows:

> The classic definition of waiver enunciated in *Johnson v. Zerbst*, 304 U.S. 458, 464—"an intentional relinquishment or abandonment of a known right or privilege"—furnishes the controlling standard. If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits . . . . At all events we wish it clearly understood that the standard here put forth depends on the considered choice of the petitioner.

Id. As Justice Brennan further observed, the defendant's choice to forego appeal in *Fay* was justified considering the circumstances because, under state law as it existed, he could have faced the death penalty had he been found guilty on remand. *See id.* at 440.

Thus, under *Fay v. Noia*, if the defendant had "deliberately bypassed" an "orderly procedure of state courts" he would be *procedurally barred* from federal habeas relief on a constitutional claim he had not raised in the state court proceeding.

In the same term that the Supreme Court decided *Fay*, it also broadened the federal courts' exercise of discretion with *Townsend v. Swain.*[28] In *Townsend*, the Court held that, where the facts are in dispute, the federal court in a habeas proceeding must conduct an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in the state court.[29] Moreover, the federal court could develop an independent record and redetermine material facts in addition to compelling production of the entire state proceedings.[30] Echoing its sentiments in *Fay*, the Court observed that, in determining whether the defendant received a full and fair hearing, particularly where evidence not in the State record is asserted as a grounds for constitutional error, the district judge is under no obligation to grant a hearing upon a frivolous or incredible allegation.[31] However, in determining whether the allegations are frivolous, the district court should apply the inexcusable default standard articulated in *Fay* and consider the evidence if its absence in the record was not the result of inexcusable neglect by the petitioner.[32] The Court further held that, if the state court fully developed the facts, the federal court may defer to its findings of fact, but it cannot defer to its findings of law.[33] Prophetically, perhaps, the Court warned that "too promiscuous grant of evidentiary hearings on habeas corpus could both swamp the dockets of the District Courts and cause acute and unnecessary friction with state organs of criminal justice . . . ."[34] Following *Fay* and *Townsend*, federal district courts were besieged by a volley of habeas petitions

28. 372 U.S. 293, 319 (1963).

29. *See id.* at 312. The Court held that an evidentiary hearing was required under the following circumstances:

> If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Id. at 313.

30. *See id.* at 319.

31. *See id.* at 317.

32. *See id.*

33. *See id.* at 318.

34. *Id.* at 319. The Court went on to note that "too limited use of such hearings would allow many grave constitutional errors to go forever uncorrected. The accommodation of these competing factors must be made on the front line, by the district judges who are conscious of their paramount responsibility in this area." *Id.*

originating from state court convictions.[35] Later in that same term, the "abuse-of-writ" doctrine made its first appearance under the Judiciary and Judicial Procedure Act of 1948 in *Sanders v. United States*.[36]

In *Sanders*, the Supreme Court was called on to determine for the first time what significance the sentencing court should attach to any record of prior habeas proceedings in deciding whether to grant a hearing on a successive habeas petition.[37] At issue was the level of review that would be applied under the legislatively created "abuse-of-writ" doctrine embodied in 28 U.S.C. § 2255, which allowed a federal district court to dismiss a second or successive petition for habeas corpus, coming after a federal court judgment on a petition seeking "similar relief."

The defendant in *Sanders*, representing himself pro se, waived indictment and assistance of counsel before pleading guilty to the information.[38] He later filed his first motion for a writ of habeas corpus setting out bare conclusions.[39] The judge denied a hearing, and the defendant then filed a second motion alleging that he was mentally incompetent at the time of his plea and sentencing as a result of medication administered to him while in custody.[40] The trial judge denied a hearing once again for lack of a reason why the facts could not have been raised on the first motion.[41] The Supreme Court reversed, holding that the trial court should have granted a hearing on the second motion.[42]

The Court had previously considered the standard of review it would apply to the "abuse-of- writ" provisions under 28 U.S.C. § 2244, which allowed a district court to dismiss a successive petition that "presents no new ground not theretofore presented and determined."[43] Examining the judicial basis for the "abuse-of-writ" doc-

35. *See* Rosenn, *supra* note 2, at 354 (citing ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL CONFERENCE OF THE UNITED STATES REPORT-ANNUAL REPORT OF THE DIRECTOR 1971, at 135 (1971)).

36. 373 U.S. 1 (1963).

37. *See id.* at 6. Section 2255 is the functional equivalent of the writ of habeas corpus. *See* Hill v. United States, 368 U.S. 424, 427 (1962) (quoting United States v. Haymon 342 U.S. 205, 219 (1957)). Unlike § 2254, which deals with applications to federal courts from a state court judgment, § 2255 deals with motions within the federal courts attacking a federal court judgment. *Compare* 28 U.S.C. § 2254 (1994), *with* 28 U.S.C. § 2255 (1994). Like § 2254, § 2255 provides that on a successive application for habeas corpus relief, the application "shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255.

38. *See Sanders*, 373 U.S. at 4.

39. *See id.* at 5.

40. *See id.*

41. *See id.* at 5-6.

42. *Id.* at 6.

43. 28 U.S.C. 2244 (1948).

trine, the Court noted that at common law the judicial doctrine of res judicata was inapplicable to successive petitions for habeas relief.[44] However, unlike modern courts, courts at common law had no power of appellate review over the denial of habeas relief.[45] As appellate review became available, these courts began to realize the need to modify the common law rule which allowed for an endless succession of repeated applications. By the time *Sanders* was before the Court, several touchstone principals were already emerging as a justification for denying successive applications. The Court observed that, "'[a]mong the matters which may be considered, and even given controlling weight, are . . . a prior refusal to discharge on a like application.'"[46] While the Court had previously rejected res judicata in a strict sense as precluding a later habeas petition, it clarified that the prior determination holds pivotal relevance to the Court's exercise of discretion in its determination whether to grant the petition.[47] Thus, by the time Congress passed the Judiciary and Judicial Procedure Act of 1948, the "abuse-of-writ" doctrine was already maturing. In response to this evolving law, Congress enacted 28 U.S.C. § 2244. The Court noted, that while the legislation was silent with regard to the judicially created standards that predated the Judiciary and Judicial Procedure Act of 1948, it confirmed that the Act was not intended to foreclose the application of those principles.[48] Finding those principles equally consistent as applied to both statutes, the Court concluded that the standard of review under 28 U.S.C. § 2255 was materially equivalent to "deliberate bypass" under § 2244.[49]

In addition to determining the level of review to apply under 28 U.S.C. § 2255, the Court articulated more general principles to help guide district courts in considering successive habeas applications. Citing *Fay* and *Townsend*, the Supreme Court observed:

> To say that it is open to the respondent to show that a second or successive application is abusive is simply to recognize that "habeas corpus has traditionally been regarded as governed by equitable principles. Among them is the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks. Narrowly circumscribed, in conformity to the historical role of the writ of habeas corpus as an effective and imperative remedy for detentions contrary to fundamental law, the principle is unexceptionable." Thus, for example, if a prisoner deliberately with-

44. *See Sanders*, 373 U.S. at 7 (citations omitted).

45. *See id.* at 8.

46. *Id.* at 9 (quoting Salinger v. Loisel, 265 U.S. 224, 230-31 (1924)) (alteration in original) (internal quotation omitted).

47. *See id.* (quoting *Salinger*, 265 U.S. at 231).

48. *See id.* The common-law principles examined by the Court in *Sanders* were derived from its decisions in the cases of *Price v. Johnson*, 334 U.S. 266 (1948) and *Woo Dong v. United States*, 265 U.S. 239 (1924).

49. *See Sanders*, 373 U.S. at 14.

> holds one of two grounds for federal collateral relief at the time of filing his first application, in the hope of being granted two hearings rather than one or for some other such reason, he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground. The same may be true . . . [when] the prisoner deliberately abandons one of his grounds at the first hearing. Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay.[50]

Applying these principles to the defendant's claim, the Court concluded that, while the trial judge could deny the first motion for failing to state evidentiary facts in its support, it could not be said that the defendant waived his grounds stated in the second motion because that waiver was not "intelligent" or "understanding."[51]

Three years after the Court decided *Sanders*, Congress amended 28 U.S.C. § 2244 to provide a qualified application of the doctrine of res judicata through subsection (b). In *Smith v. Yeager*,[52] the Supreme Court held that the essential question under 28 U.S.C. § 2244(b) was whether the applicant deliberately withheld a newly asserted ground or otherwise abused the writ.[53] In conjunction with 28 U.S.C. § 2244(b), Congress promulgated the Rules Governing Habeas Corpus Proceedings. Through Rule 9(b), Congress spoke to the case of subsequent writs, providing:

> A second or successive petition may be dismissed if the judge finds that it failed to allege new or different grounds of relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert the grounds in the prior petition constituted an abuse of the writ.[54]

In its Advisory Committee Notes, Congress expressly observed that a new claim in a subsequent petition should not be entertained if the judge finds the failure to raise it earlier inexcusable.[55]

By the late 1970s, defendants no longer were enjoying the broad discretion federal courts had exercised under *Fay* and *Townsend*.[56]

50. *Sanders*, 373 U.S. at 17-18 (citations omitted). The Court observed of *Fay* and *Townsend* that "[t]he principles developed in those decisions govern equally here." *Id.* at 18.

51. *Id.* at 20.

52. 393 U.S. 122 (1968).

53. *See id.* at 125.

54. 28 U.S.C. § 2254 Rule 9(b) (1994).

55. *See id.* § 2254 Rule 9 advisory committee's note.

56. *See* Stone v. Powell, 428 U.S. 465, 481-82 (1976). In *Stone*, the Court held that federal courts would be restricted from hearing habeas claims arising out of a state's failure to correctly apply the exclusionary rule because it did not apply to the merits of the case. Such challenges would be heard on direct appeal only. *See id.*

With its decision in *Francis v. Henderson*,[57] the Court rejected *Fay*'s "deliberate bypass" standard as it applied to constitutional challenges to the composition of a grand jury and applied instead a "cause" and "actual prejudice" standard.[58] Considering its prior decision in *Davis v. United States*,[59] where it held that 28 U.S.C. § 2255 precluded a prisoner convicted under a federal judgment from seeking collateral relief for failing to timely challenge a grand jury defect, the *Francis* court concluded that state comity required the same result when reviewing a petition challenging a state judgment.[60] After *Francis*, in a collateral attack on a state court judgment, a prisoner who failed to make a timely challenge to the composition of the grand jury had to show cause for his failure to challenge it before trial, as well as "actual prejudice" that would result if his petition were denied before he could obtain habeas relief through 28 U.S.C. § 2254 from a waiver of his rights under state law.

In 1977, the Court expressly overruled *Fay* with its decision in *Wainwright v. Sykes*,[61] and extended its holding in *Francis* to include relief from most other waivers that resulted under state law, rather than merely those arising from failure to challenge the grand jury composition.[62] Observing that it was the sweeping "deliberate bypass" language in *Fay* that it was rejecting, the Court concluded that the "cause"[63] and "prejudice"[64] standard in *Francis* "will not prevent a

57. 425 U.S. 536 (1976).

58. *Id.* at 542.

59. 411 U.S. 233 (1973).

60. *See Francis*, 425 U.S. at 543 (citing *Davis*, 411 U.S. at 245). The Court's holding in *Davis* revolved around its interpretation of Rule 12(b)(2) of the Federal Rules of Criminal Procedure which required a defendant to raise an objection to the constitutional validity of a grand jury prior to trial except for "cause shown." *See id.* at 539. Moreover, the Court in *Davis* held that, in addition to cause, the defendant must demonstrate "actual prejudice" in the face of a statutorily provided waiver. *See Davis*, 411 U.S. at 245.

61. 433 U.S. 72 (1977).

62. *See id.* at 72-91.

63. The concept of "cause" in the context of procedural default requires the petitioner to establish that the default was the result of some "objective factor" that was an "external impediment" to his efforts to comply with the state procedural requirements. *See* Coleman v. Thompson, 501 U.S. 722, 753 (quoting Murray v. Carrier, 477 U.S. 478, 492 (1986)). In other words, the courts want to be assured that the default was not a strategical or tactical decision by defense attorneys to engage in a process of "sandbagging." *See Wainwright*, 433 U.S. at 89.

64. The prejudice prong requires more than a "possibility of prejudice." *See* United States v. Frady, 456 U.S. 152, 170 (1982) (rejecting the notion that the petitioner's burden was discharged by merely demonstrating alleged defaulted error created the "possibility of prejudice"). The applicant must demonstrate that actual prejudice was produced by defaulted error. *See id.* The prejudice prong gets unique treatment in one particular set of cases, those relating to "*Brady*" claims. These claims are based on the case of *Brady v. Maryland*, 373 U.S. 83 (1963), in which the Supreme Court held suppression of evidence by the prosecution in some circumstances can constitute a due process violation. *See id.* at 87. To obtain a reversal on the basis of a *Brady* claim, the defendant must show among other things that the

federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a *miscarriage of justice*."[65] Nevertheless, the Court made clear that "the rule of *Fay v. Noia*, broadly stated, may encourage 'sandbagging' on the part of defense lawyers, who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off."[66]

At the end of 1982, procedural default under *Fay*'s "deliberate bypass" standard became history.[67] The Court revived the "exhaustion rule" of *Ex parte Royall* with its decision in *Rose v. Lundy*,[68] requiring a defendant to amend his petition for habeas corpus to drop all unexhausted claims.[69] In the same term, the Court decided in *Engle v. Isaac*[70] that a defendant was required to exhaust his constitutional claim in the state court, even if doing so would be a futile exercise.[71] Similarly, the "abuse-of-writ" principles embodied in 28 U.S.C. § 2244(b) had worked themselves into the Court's habeas jurisprudence with the cases of *Delo v. Stokes*[72] and *Antone v. Dugger*,[73]

suppressed evidence was material, i.e. that there was a "'reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" Kyles v. Whitley, 519 U.S. 419, 433-434 (1995) (quoting United States v. Bagley, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.)). In *Strickler v. Greene*, 527 U.S. 263 (1999), the Supreme Court, in addressing whether the applicant came within the prejudice prong for a defaulted "Brady" claim, seems to have merged that prong with the materiality requirement of "Brady." *See id.* at 296. After finding that Strickler satisfied "cause" for his procedural default, the Court rejected a finding of prejudice because he failed to demonstrate "that there [was] a reasonable probability that his conviction or sentence would have been different had [the withheld] materials been disclosed." *Id.*

65. *Wainwright*, 433 U.S. at 91 (emphasis added). Thus, a habeas petitioner who has procedurally defaulted may be excused from the default in federal court in order to obtain review of a federal constitutional claim by demonstrating "cause" and "prejudice" or, in the alternative, establishing that the court's failure to consider the claim will result in a "fundamental miscarriage of justice." *See* Coleman v. Thompson, 501 U.S. 722, 750 (1991); *see also* Murray v. Carrier, 477 U.S. 478, 495-96 (1986); Engle v. Isaac, 456 U.S. 107, 135 (1982).

66. *Wainwright*, 433 U.S. at 89.

67. Finally, in 1991, the Supreme Court in *Coleman v. Thompson*, 501 U.S. 722 (1991), officially confirmed this when it stated:

> We now make it explicit: In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Id. at 750.

68. 455 U.S. 509 (1982).

69. *See id.* at 522.

70. 456 U.S. 107 (1982).

71. *See id.* at 130.

72. 495 U.S. 320 (1990) (per curiam).

73. 465 U.S. 200 (1984).

where it denied habeas relief on the basis of "inexcusable neglect."[74] Thus, by the end of the 1980s, the Court had erected significant obstacles for all prisoners seeking habeas relief in federal courts.

The Supreme Court's holding in *McCleskey v. Zant*[75] adopted and applied the "cause" and "prejudice" standard of state procedural default to the doctrine of "abuse-of-writ."[76] In reviewing its habeas corpus precedents, the Supreme Court held that the "unity of structure and purpose"[77] in the jurisprudence of state procedural defaults and the "abuse-of-writ" doctrine compelled a determination that the "cause" and "prejudice" standard for procedural default under *Wainwright v. Sykes* applied equally to both contexts, including abuse of the writ through "inexcusable neglect."[78] Thus, after *McCleskey*, to proceed with a subsequent application for habeas relief in federal court, a prisoner under a state law conviction was required to show that he was: (1) alleging a new ground, factual or otherwise; (2) that he did not deliberately or negligently withhold; *and* (3) that he had exhausted all state law remedies (unless he could show cause for not raising them and actual prejudice if the court chose to reject his application).[79] To raise the bar higher, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996.[80] This act amended 18

74. *Delo*, 495 U.S. at 321-22; *see also Antone*, 465 U.S. at 205-06.

75. 499 U.S. 467 (1991).

76. *Id.* at 490.

> The prohibition against adjudication in federal habeas corpus of claims defaulted in state court is similar in purpose and design to the abuse-of-the-writ doctrine, which in general prohibits subsequent habeas consideration of claims not raised, and thus defaulted, in the first habeas proceeding. The terms "abuse of the writ" and "inexcusable neglect," on the one hand, and "procedural default," on the other, imply a background norm of procedural regularity binding the petitioner. This explains the presumption against habeas adjudication both of claims defaulted in state court and of claims defaulted in the first round of federal habeas. A federal habeas court's power to excuse these types of defaulted claims derives from the court's equitable discretion.

Id.

77. *Id.* at 493. In reaching its conclusion, the Court observed:

> Our procedural default jurisprudence and abuse of the writ jurisprudence help define this dimension of procedural regularity. Both doctrines impose on petitioners a burden of reasonable compliance with procedures designed to discourage baseless claims and to keep the system open for valid ones; both recognize the law's interest in finality; and both invoke equitable principles to define the court's discretion to excuse pleading and procedural requirements for petitioners who could not comply with them in the exercise of reasonable care and diligence.

Id.

78. *Id.* at 496.

79. *See id.* at 486-87. By the time it had decided *McCleskey*, prior decisions of the Court had held that a defendant could not only knowingly and deliberately waive a claim but could do so negligently as well. *See id.* at 488 (citing *Delo*, 495 U.S. at 321-22; *Antone*, 465 U.S. at 205-06).

80. Pub. L. No. 104-132, 110 Stat. 1214.

U.S.C. § 2244(b) to: (1) require dismissal of a claim presented in a state prisoner's second or successive federal habeas application if the claim was also presented in a prior application; (2) compel dismissal of a claim that was not presented in a prior federal application unless the prisoner shows that the claim was unavailable at the time of the earlier omission; and (3) create a "gatekeeping" mechanism whereby a prospective applicant files in the court of appeals a motion for leave to file a second or successive habeas application in the district court.[81] Thus, the concept of "cause" and "prejudice," as made applicable to federal "abuse-of-writ," may be a defunct doctrine under the new federal statute.[82] Nevertheless, in keeping with the general equitable principles behind procedural bar, the doctrines of "cause" and "prejudice" or "manifest injustice" continue to apply in the context where a petitioner has failed to exhaust state remedies or has been the subject of state procedural bar.[83]

The nexus between the action taken by the state court in the context of procedural bar and the assertion of the defaulted claim in fed-

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81. Antiterrorism and Effective Death Penalty Act § 106. As amended by section 106 of the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2244(b) in relevant part provides:

> (b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless -
>
> > (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> >
> > (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
> >
> > (ii) the facts underlying the claim, if proven and viewed in the light of the evidence as whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.
>
> (3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

28 U.S.C. § 2244(b) (Supp. II 1997).

82. *See* Burris v. Parke, 95 F.3d 465, 469 (7th Cir. 1996) (holding that as to successive writs, the gatekeeper provisions have supplanted the "abuse-of-writ" procedure under habeas Rule 9); *see also In re* Magwood, 113 F.3d 1547, 1548 (11th Cir. 1997) (holding the only excuses that would permit the filing of a successive writ are: (1) a showing that the claim relies upon a new rule of constitutional law, previously unavailable or (2) newly discovered evidence that no reasonable finder of fact could have found the defendant guilty except for constitutional error).

83. *See* Wainwright v. Sykes, 433 U.S. 72, 91 (1977); Camarano v. Irvin, 98 F.3d 44, 46 (2d Cir. 1996) (holding that gatekeeper provisions of Anti-Terrorism and Effective Death Penalty Act are inapplicable to a second petition filed after the first was dismissed for failure to exhaust state remedies).

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eral habeas proceedings becomes crucial. If the state court has procedurally barred the federal habeas petitioner on a federal claim, and the state procedural bar rule is deemed "adequate" and "independent," the petitioner will still be procedurally barred in federal court.[84]

Although the Texas Court of Criminal Appeals has always had accessible some type of abuse sanction, "abuse-of-writ" is actually of recent vintage in Texas. Like the federal courts, the requirement of a showing of "good cause" in order to bring successive applications for a writ of habeas corpus has long been available to the Court of Criminal Appeals, notwithstanding that the rule was inconsistently applied.[85] In 1977, the legislature first enacted article 11.59 of the Texas Code of Criminal Procedure, providing that "[a] party may obtain the writ of habeas corpus a second time by stating in a motion therefor that since the hearing of his first motion important testimony has been obtained which it was not in his power to produce at the former hearing."[86] However, unlike 28 U.S.C. § 2254, the statute was never utilized in the context of a final conviction. Rather, the Court of Criminal Appeals used the requirement only in the context of pretrial writs of habeas corpus.[87]

The Texas Court of Criminal Appeals first articulated the modern "abuse-of-writ" notion in *Ex parte Carr*.[88] Recognizing that the federal courts have frequently dealt with the question, the Court quoted extensively from *Sanders v. United States*.[89] Thus, applying principles from the federal "abuse-of-writ" doctrine, the Court of Criminal Appeals concluded that "[a] petitioner seeking habeas corpus is not entitled to burden the courts with his process . . . . If he has grounds which would justify the granting of the relief he seeks, he should present them with dispatch for determination, rather than doling them out one-by-one . . . ."[90]

The last enunciation of the "abuse-of-writ" precept by the Court of Criminal Appeals prior to its codification was in *Ex parte Barber*.[91]

84. To be considered "adequate," a procedural bar rule must be "strictly and regularly" applied by the state court to the "vast majority of similar claims." *See* Amos v. Scott, 61 F.3d 333, 339 (5th Cir. 1995). Moreover, the state court must "clearly and expressly rely" on the state procedural bar if the bar is to be considered independent. *See* Coleman v. Thompson, 501 U.S. at 735.

85. *See* Lowe v. Scott, 48 F.3d 873, 875-76 (5th Cir. 1995).

86. TEX. CODE CRIM. PROC. ANN. art. 11.59 (Vernon 1977); *see also* TEX. CODE CRIM. PROC. ANN. art. 11.64 (Vernon 1974) (providing that provisions of chapter 11 apply to "all cases of habeas corpus").

87. *See Ex parte* Vance, 608 S.W.2d 681, 682 (Tex. Crim. App. 1980) (finding no abuse of discretion by the trial court in allowing subsequent habeas corpus in bail hearing based on testimony).

88. 511 S.W.2d 523, 526 (Tex. Crim. App. 1974).

89. *See id.* (quoting Sanders v. United States, 373 U.S. 1, 16 (1963)).

90. *Id.* at 525; *see also Ex parte* Dora, 548 S.W.2d 392, 394 (Tex. Crim. App. 1977).

91. 879 S.W.2d 889 (Tex. Crim. App. 1994).

Citing a bevy of federal cases, the court affirmed that, where a habeas petitioner on a subsequent writ complains of error that existed when the first writ application was filed, it is abuse of the writ process.[92] However, the second writ will not be considered an abuse if the applicant can show "good cause" for raising a new point after one writ of habeas corpus has already been filed.[93] "Good cause" can be shown for hearing the merits of a successive writ in at least two situations: (1) where the applicant raises an issue that, through no fault of his own, is not adjudicated or where a point of error was raised but not decided by the court and (2) where the failure of counsel to object to the admission of testimony at trial is not a waiver of error because a constitutional defect has not been identified at the time of trial.[94] Despite the court's clear articulation of the "abuse-of-writ" standard, it chose to apply it prospectively, having found "good cause" for the petitioner's failure to raise his claim in his first writ.[95] The court noted:

> In the future, if an applicant for a subsequent writ raises issues that existed at the time of his first writ, this Court would be inclined to hold as a general rule, and as a matter of policy, that this would be an abuse of the writ and, would likely dismiss the writ unless good cause can be shown for the delay.[96]

This observation would later delay federal recognition of the Texas "abuse-of-writ" doctrine.

In the years following *Barber*, state petitioners began challenging Texas's judicially created "abuse-of-writ" doctrine in federal court on grounds that *McCleskey* did not answer. While *McCleskey* established "cause" and "prejudice" as the hurdle in obtaining habeas relief from a waiver of a federal or constitutional claim in state court, it did not establish what constituted an "independent and adequate state ground" for holding the error waived. In *Coleman v. Thompson*,[97] the Supreme Court reiterated the long-held rule spawned out of *Ex parte Royall* that a federal court will decline to hear a state prisoner's federal claim where the prisoner has waived error through an "indepen-

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92. *See id.* at 891 n.1.

93. *Id.*

94. *Id.*; *see also Ex parte* Torres, 943 S.W.2d 469, 474 (Tex. Crim. App. 1997) (en banc) (holding that a "final disposition" of an initial writ must entail a disposition relating to the merits of all claims raised and not a dismissal under TEX. CRIM. PROC. ANN. art. 11.07 § 4). Additionally, although it is the general rule that claims which were previously raised and rejected on direct appeal are not cognizable on habeas corpus, this doctrine is not applicable where direct appeal cannot be expected to provide an adequate record to evaluate the claim in question, and the claim might be substantiated through additional evidence gathering in a habeas corpus proceeding. *See id.* at 475.

95. *Barber*, 879 S.W.2d at 891 n.1.

96. *Id.*

97. 501 U.S. 729 (1991).

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dent and adequate" state procedural rule.[98] At a minimum, to be "independent" the Court observed that it should "fairly appear" from the record that the state court decision did not turn on federal claims, but rather, "clearly and expressly" relied on the grounds; otherwise, the claim may be heard by a federal court on a petition for habeas relief.[99] Nevertheless, in the years preceding *Coleman*, the Court found that an "independent" procedural ground will not be found to be "adequate" unless it is "strictly and regularly" followed.[100] Thus, in *Lowe v. Scott*,[101] the Fifth Circuit initially refused to find that *Barber*'s "abuse-of-writ" standard was adequate because it was applied only prospectively.[102] However, within two years of *Lowe*, in *Fearance v. Scott*,[103] the Fifth Circuit held that, although Texas had not "regularly and strictly applied abuse-of-the-writ" rules in the past, the "abuse-of-writ" standard articulated by the Court of Criminal Appeals in *Ex parte Barber* constituted an independent and adequate procedural bar under *Coleman*.[104] Thus, the Fifth Circuit held that the petitioner

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98. *Id.* at 729-30. In their treatise, *Federal Habeas Corpus Practice and Procedure*, Professors James Liebman and Randy Hertz thoroughly detail several specific issues related to subsequent petitions for writ of habeas corpus and provide excellent resource material for the practitioner faced with this task. Of particular relevance here is their summation in the chapter *Adequate and Independent State Grounds* of those instances where a state procedural rule is either inadequate or not sufficiently independent so as to preclude federal habeas relief. *See* 2 JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, § 26.1-.4 (2d ed. 1994). Also of particular interest are Chapter 23, *Exhaustion of State Remedies*, and Chapter 28, *Successive Petitions*. *See id.* §§ 23.1-.5, 28.1-.4f.

99. *Coleman*, 501 U.S. at 735. Nevertheless, the Court observed that the claim may not be heard if the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims to meet the "exhaustion" requirement of *Ex parte Royall* would find the claim procedurally barred. *See id.* at 735 n.1. The Court reasoned that this result is justified because a prisoner who defaults his federal claim in the state court deprives the state of an opportunity to address those claims. It explained that "[a] habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer 'available' to him." *Id.* at 732. Thus,

> [i]n the absence of the independent and adequate state ground doctrine in federal habeas, habeas practitioners would be able to avoid the exhaustion requirement by defaulting their federal claims in state court. The independent and adequate state ground doctrine ensures that the State's interest in correcting their own mistakes is respected in all federal habeas cases.

Id.

100. Johnson v. Mississippi, 486 U.S. 578, 587 (1988) (quoting Barr v. City of Columbia, 378 U.S. 146, 149 (1964)).

101. 48 F.3d 873 (5th Cir. 1995).

102. *See id.* at 876.

103. 56 F.3d 633 (5th Cir. 1995).

104. *Id.* at 642; *see also Coleman*, 501 U.S. at 750-51 (holding applicant must establish "cause" and "prejudice" to avoid procedural bar on all independent and adequate state procedural defaults). The Court of Criminal Appeals in *Ex parte Gardner*, 959 S.W.2d 189, 199 (Tex. Crim. App. 1996) reaffirmed "the State's (and society's) valid and legitimate interest in the finality of judgments" and continued to apply the "abuse-of-writ" doctrine.

must establish "cause" and "prejudice" before it could consider his federal claim.[105]

Finally, after years of frustration, article 11.071 was enacted in 1995, providing Texas with its own statutory "abuse-of-writ" provision for the first time.[106] Unlike the judicially derived "cause" and "prejudice" standard applied to subsequent writs in federal court, Texas codified its standard through section 5(a) to article 11.071.[107] While the Fifth Circuit has not specifically addressed whether article 11.071 satisfies the "independent and adequate" state ground requirement, it has done so impliedly. In *Emory v. Johnson*,[108] the petitioner's failure to anticipate the passage of article 11.071 did not constitute cause for failing to raise his federal claim because it was procedurally barred under the "abuse-of-writ" doctrine established in *Barber*.[109]

With this historical perspective in mind, the habeas practitioner should note one important hallmark. Unless and until article 11.071 is declared by the United States Supreme Court to be inadequate, a state petitioner who has been determined as having abused the writ under the statute and is unable to fall within one of the gateway exceptions of section 5 must satisfy *McCleskey's* "cause" and "prejudice" standard in federal court to obtain habeas relief. It is possible to imagine, under the most exaggerated facts, a case in which a petitioner is unable to satisfy the exceptions of section 5 and yet falls within the ambit of "cause" and "prejudice" or suffers a "manifestly unjust" result. Simply put, a defendant's first post-conviction petition for a writ of habeas corpus may end up being the one heard last. The remaining discussion focuses on how to avoid "abuse-of-writ" and procedural bar by falling within one of the gateway exceptions provided under section 5 and explores judicially-created avenues for skirting the grasp of article 11.071.

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105. *Fearance*, 56 F.3d at 642.

106. TEX. CODE CRIM. PROC. ANN. art. 11.071 (Vernon Supp. 1999). It should be noted from the outset that article 11.071 applies only to capital cases; whereas, article 11.07 applies to noncapital felony habeas petitions. *Compare id.*, *with* TEX. CODE CRIM. PROC. ANN. art. 11.07 (Vernon Supp. 1999). For an early commentary challenging the constitutionality of article 11.071, see James C. Harrington and Anne Burnam, *Texas's New Habeas Corpus Procedure for Death-Row Inmates: Kafkaesque—and Probably Unconstitutional*, 27 ST. MARY'S L.J. 69 (1995).

107. For noncapital cases, section 4 of article 11.07 provides for "abuse-of-writ."

108. 139 F.3d 191 (5th Cir. 1997).

109. *See id.* at 195-96. It should also be noted that the Supreme Court has indicated that the doctrine of "cause" and "prejudice" even applies when a state court has found the applicant has abused the state writ process. *See* Gray v. Netherland, 518 U.S. 152, 162 (1996). *Gray* concerned Virginia's writ abuse provision, which is similar to Texas's, and which provided: "[n]o writ of [habeas corpus ad subjiciendum] shall be granted on the basis of any allegation of the facts of which petitioner had knowledge at the time of filing any previous petition." VA. CODE ANN. § 8.01-654(B)(2) (Michie 1992). While applicant indeed defaulted his claim, the Court nonetheless engaged in a "cause" and "prejudice" analysis. *See Netherland*, 518 U.S. at 162.

II. ABUSE-OF-WRIT DOCTRINE

Article 11.071 of the Texas Code of Criminal Procedure, which governs the filing and disposition of applications for writs of habeas corpus in capital cases, took effect on September 1, 1995.[110] Section 5(a) of article 11.071 is the provision that generally bars the Court of Criminal Appeals from considering a second application for a writ of habeas corpus.[111] However, this statutory "abuse-of-writ" proviso allows three separate avenues by which an applicant who has already litigated one application for a writ of habeas corpus can seek the court's review on the merits of a subsequent petition.[112] Under the statute, a capital applicant may not bring a second collateral attack (i.e., a subsequent or successive writ) on his conviction unless he can establish: (1) that the claim he raises was factually or legally "unavailable;" (2) but for a federal constitutional violation, no rational juror could have found him guilty, i.e., he is "actually innocent;" or (3) but for a constitutional violation, no rational juror could have found him "death worthy."[113]

A. *Exception One: The "Unavailable Claim"*

For the purpose of the provision governing factual and legal unavailability under article 11.071, section 5(a) must be read in conjunction with subsections (d) and (e). Under subsection (d), a legal basis is "unavailable" for the purpose of the statute if the basis "was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state" on or before the date of the applicant's "previous application," which,

110. TEX. CODE CRIM. PROC. ANN. art. 11.071, § 9 (Vernon Supp. 1999).

111. *See id.* § 5(a).

112. *See id.* In *Ex parte* Davis, 947 S.W.2d 216 (Tex. Crim. App. 1997), the Court of Criminal Appeals rejected numerous constitutional attacks on article 11.071, § 5(a). The new "abuse-of-writ" provision does not violate: (1) Tex. Const., art. II, § 1—the doctrine of separation of powers; (2) Tex. Const., art. I, § 12—it does not "suspend" the writ of habeas corpus; (3) Tex. Const., art. I, § 16—it is not ex post facto; (4) Tex. Const., art. I, § 3—it is not applied retroactively; (5) due process provisions of both state and federal constitutions; (6) full effective assistance of counsel provisions of both state and federal constitutions; and (7) Tex. Const., art. I, § 13—open court provision. *See ex parte* Davis, 947 S.W.2d at 219-220.

113. TEX. CODE CRIM. PROC. ANN. art. 11.071, § 5(a) (Vernon Supp. 1999). The 76th Legislature extracted untimely applications from the "abuse-of-writ" provision. Act of May 20, 1999, 76th Leg., R.S., ch. 803 (amending TEX. CODE CRIM. PROC. ANN. art. 11.071). Instead, under the new provision, several options are available to the Court of Criminal Appeals: (1) the court can find good cause existed or that it has not been shown and dismiss the application; (2) the court can establish a new filing date not longer than 180 days; (3) the court can appoint new counsel and establish a new filing date not more than 270 days after appointment of new counsel; and (4) hold dilatory counsel in contempt. *See* TEX. CODE CRIM. PROC. ANN. art. 11.071 § 4(A)(b)(1)-(3), (c) (Vernon Supp. 1999).

in the context of the statute, means an applicant's first writ.[114] This provision is the codification of the novel doctrine that "'an omission of a claim [in an earlier habeas petition] may be excused for cause only if the question was so novel that it lacked a reasonable basis in existing law.'"[115] In *Reed v. Ross*,[116] it was recognized that where a constitutional claim is so novel that its legal basis was not "reasonably available" to counsel, a habeas petitioner has "cause" for his failure to raise the claim in accordance with the applicable state procedure.[117]

However, the assertion of a truly novel claim may be more problematic for the habeas petitioner. Notwithstanding that the applicant may come within the purview of section 5(a), the statute does not prevent the state from asserting any other common law procedural bar. One important such procedural bar is the one created by the case of Teague v. Lane,[118] in which the Supreme Court barred, with two narrow exceptions, the retroactive application on collateral review of novel or "new" rules "not dictated by precedent existing at the time the defendant's conviction became final."[119] If the claim asserted is so novel that it lacks a reasonable basis in existing law, i.e., its rationale cannot be "formulated from a final decision of the United States Supreme Court, a court of appeals of the United States," or a Texas appellate court,[120] then, in that event, the applicant should not receive

114. Tex. Code Crim. Proc. Ann. art. 11.071, § 5(d) (Vernon Supp. 1999).

115. *See* Fearance v. Scott, 56 F.3d 633, 636 (5th Cir. 1995) (quoting James v. Cain, 50 F.3d 1327, 1331 (5th Cir. 1995)); *see also* Selvage v. Collins, 975 F.2d 131, 133 (5th Cir. 1992). In its decision, the *Selvage* court credited the decision in *Reed v. Ross*, 468 U.S. 1 (1984) with resolving an issue left open in *Engle v. Isaac*, 456 U.S. 107 (1982) by holding "'where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim.'" *Selvage*, 975 F.2d at 133 (quoting *Reed*, 468 U.S. at 16). They rejected the notion that futile claims were tantamount to "novelty" and held to the contrary—futile claims are not novel because they are available. *See id.* The novelty doctrine of the "right not recognized" exception to the contemporaneous objection rule has also been the focus of several state cases. *See, e.g.*, Black v. State, 816 S.W.2d 350, 367 (Tex. Crim. App. 1991). In *Black*, the court applied the "right not recognized" exception to the contemporaneous objection rule and found the exception excuses a failure to object contemporaneously when either "the claim was so novel that the basis of the claim was not reasonably available at the time of trial, or, the law was so well settled by this Court that an objection at the time would be futile." *Id.* at 368; *see* Williams v. State, 773 S.W.2d 525, 529 (Tex. Crim. App. 1988) (following *Ex parte Chambers*, 688 S.W.2d 483 (Tex. Crim. App. 1984)); *Chambers*, 688 S.W.2d at 486 (holding that the court has recognized since 1972 that the failure of counsel to object does not constitute a waiver where a defect of constitutional magnitude has not been established at the time of trial); *see also Engle*, 456 U.S. at 130 (holding that on federal habeas corpus review, the futility of a state defendant raising an objection before state courts cannot constitute "cause" under *Wainwright v. Sykes*, 433 U.S. 72 (1977)).

116. 468 U.S. 1 (1984).

117. *Id.* at 16.

118. 489 U.S. 288 (1989).

119. *Id.* at 301.

120. Tex. Code Crim. Proc. Ann. art. 11.081, § 5(d) (Vernon Supp. 2000).

the benefit of a new rule on collateral review.[121] Simply put, applicant's claims which were not finally resolved at trial or on direct appeal should almost always be forfeited forever. Naturally, it is up to the Court of Criminal Appeals to decide whether to adopt *Teague* as a procedural bar in the context of habeas proceedings. As will be seen, all indications are that the court is definitely heading in that direction.

Although the Court of Criminal Appeals has not directly addressed whether it will adopt *Teague* as a procedural bar on collateral review, it has come close. In *Geesa v. State*,[122] the court tinkered with the doctrine of retroactivity in the context of applying a new rule on direct appeal and, because of the nature of the error, developed the concept of "limited prospectivity."[123] Under this notion, the "new rule" applies to the case articulating the rule and all cases tried thereafter. But it does not apply to those individuals where the issue *might* have been pending on direct appeal. It seems that if the court keeps in mind that habeas corpus is a collateral remedy, and is not designed as a substitute for a direct appeal, it will be compelled to adopt the *Teague* holding. Therefore, new rules generally should not be applied retroactively on collateral review because the underlying considerations of finality serve an important state interest. Justice O'Connor, who wrote the majority opinion in *Teague*, stated in a part of her opinion which the Court did not adopt:

> Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect. The fact that life and liberty are at stake in criminal prosecutions "shows only that 'conventional notions of finality'

121. *See* Skelton v. Whitley, 950 F.2d 1037, 1042 (5th Cir. 1992) (holding that "newness" of a rule sufficient to excuse procedural default or writ abuse also bars retroactive application); Prihoda v. McCaughtry, 910 F.2d 1379, 1386 (7th Cir. 1990) ("[I]t is inescapable that *Teague* apparently nullifies the effect of *Reed*."); Hopkinson v. Shillinger, 888 F.2d 1286, 1290 (10th Cir. 1989) (en banc) ("[A] holding that a claim is so novel that there is no reasonably available basis for it . . . *must* also mean that the claim was too novel to be dictated by past precedent."); Ann Althouse, *Tapping the State Court Resource*, 44 VAND. L. REV. 953, 990-91 (1991); Marc M. Arkin, *The Prisoner's Dilemma: Life in the Lower Federal Courts After Teague v. Lane*, 69 N.C. L. REV. 371, 401-09 (1991); Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247, 300-02 (1988); Joseph L. Hoffmann, *The Supreme Court's New Vision of Federal Habeas Corpus for State Prisoners*, 1989 SUP. CT. REV. 165, 183.

122. 820 S.W.2d 154 (Tex. Crim. App. 1991).

123. *Id.* at 165 (noting that, notwithstanding the development of this rather novel concept, retroactivity must be decided on a case-by-case basis). In the past, on collateral review, the court had utilized the formula articulated by the Supreme Court in *Linkletter v. Walker*, 381 U.S. 618, 629 (1965). *See Ex parte* Hemby, 765 S.W.2d 791, 792 (Tex. Crim. App. 1989). The *Linkletter* test has been further explained by the Supreme Court in Stovall v. Denno, 388 U.S. 293, 297 (1967), which held that the test asked: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standard."

should not have as *much* place in criminal as in civil litigation, not that they should have *none*."[124]

Therefore, since the costs imposed on the criminal justice system by retroactive application of new rules on habeas corpus generally far outweigh any benefits that might be derived by a contrary approach, the Court of Criminal Appeals should not hesitate in applying *Teague*.[125] All signs are that *Teague* indeed is applicable. In *Taylor v. State*,[126] the Court of Criminal Appeals opined that "[t]he Supreme Court's retroactivity analysis for federal constitutional errors is binding upon the states when federal constitutional errors are involved," but *Teague* and its progeny do not bind the states on the retroactivity of new rules purely under state law.[127] In the latter situation the court opted to apply the *Stovall* analysis of retroactivity to new rules of non-constitutional origin.[128]

Thus, notwithstanding that the petitioner is able to establish that his subsequent claim falls within the unavailability portion of section 5(a), he nonetheless should be procedurally barred under a *Teague* analysis. In *Lambrix v. Singletary*,[129] the Supreme Court succinctly set out the correct analytical constructs that should guide the habeas reviewing court in determining whether a *Teague*-type procedural bar should be applied.[130] First, the court is to be directed by the general proposition that "'new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.'"[131] Second, in order to apply the *Teague* doctrine, the court must determine the date upon which applicant's conviction became final.[132] Third, the reviewing court must "'[s]urvey[ ] the legal landscape as it then existed'"[133] and "'determine whether a state

124. *Teague*, 489 U.S. at 309 (opinion of O'Connor, J.) (quoting Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U. CHI. L. REV. 142, 150 (1970)).

125. *See* Griffith v. Kentucky, 479 U.S. 314, 328 (1987) (applying its prior decision of *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court held that "a new rule for conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases" whether or not the new rule establishes an explicit or substantial break with prior precedent).

126. 10 S.W.3d 673 (Tex. Crim. App. 2000).

127. *Id.* at 679 (addressing the question of the retroactivity of a prior holding from *Blake v. State*, 971 S.W.2d 451 (Tex. Crim. App. 1998)).

128. *See Taylor*, 10 S.W.3d at 681. *But see* Griffith v. Kentucky, 489 U.S. at 320 (quoting *Linkletter*, 381 U.S. at 629) ("'[T]he Constitution neither prohibits nor requires retrospective effect' of a new constitutional rule, and . . . a determination of retroactivity must depend on 'weigh[ing] the merits and demerits in each case.'"(second alteration in original; others supplied)).

129. 520 U.S. 518 (1997).

130. *See id.* at 527.

131. *Lambrix*, 520 U.S. at 527 (quoting *Teague*, 489 U.S. at 310).

132. *See id.* (citing Caspari v. Bohlen, 510 U.S. 383, 390 (1994)).

133. *Id.* (quoting Graham v. Collins, 506 U.S. 461, 468 (1993)).

court considering the [applicant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution.'"[134] Finally, if the habeas reviewing court determines that the habeas applicant seeks the benefit of a new rule, the court must then make a determination whether the relief sought falls within one of the two narrow exceptions to non-retroactivity.[135] Thus, even if the applicant is able to craft a claim under the legal unavailability portion of section 5(a), the doctrine of non-retroactivity should present a bar to his subsequent claim.

Similarly, a factual basis under subsection (e) of section 5 is deemed "unavailable" if it was "not ascertainable through the exercise of reasonable diligence on or before" the date of the applicant's previous—or first—application.[136] The Court of Criminal Appeals must be mindful in interpreting this provision that it was legislated within the framework of a collateral review statute. It is not a motion for new trial. In the context of a motion for new trial, a "factual unavailability" claim would be asserted as "newly discovered evidence."[137] But, since the "factual unavailability" provision deals with collateral relief, the burden on the claimant must be higher than that imposed on defendants asserting a claim in a motion for new trial. In other words, an applicant cannot simply interpose that his factual claim was unavailable and was not "ascertainable through the exercise of reasonable diligence" at the time the original writ was filed.[138] After all, the

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134. *Id.* (quoting Saffle v. Parks, 494 U.S. 484, 488 (1990)).

135. *See id.* (citing Gilmore v. Taylor, 508 U.S. 333, 345 (1993)). "The first exception applies to those rules that 'plac[e] certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" *Gilmore*, 508 U.S. at 345 (quoting *Teague*, 489 U.S. at 307 (1989)). The second exception under *Teague* "permits the retroactive application of 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Id.* (quoting *Teague*, 489 U.S. at 311).

136. Tex. Code Crim. Proc. Ann. art. 11.071, § 5(e) (Vernon Supp. 1999). Subsection (e) provides:

> For purposes of Subsection (a)(1), a factual basis of a claim is unavailable on or before the date described by Subsection (a)(1) if the factual basis not ascertainable through the exercise of reasonable diligence on or before that date.

Id. If the applicant is seeking to prevent an "abuse-of-writ" bar by making a claim under either sections 5(a)(2) or (3), must he also satisfy section 5(a)(1)? In other words, can he assert an exception under section 5(a)(2) or (3) if both the factual and legal basis for the claim were available on the date applicant filed his first writ?

137. Moore v. State, 882 S.W.2d 844, 849 (Tex. Crim. App. 1994) (holding that in order to obtain a new trial based upon newly discovered evidence, the movant had to demonstrate on the record that: (1) the newly discovered evidence was unknown to him at the time of trial; (2) the failure to discover the evidence was not due to the want of due diligence; (3) the evidence would probably bring about a different result in another trial; and (4) the evidence is admissible and not merely cumulative, corroborative, collateral or impeaching); *see also* Drew v. State, 743 S.W.2d 207, 226 (Tex. Crim. App. 1987).

138. Tex. Code Crim. Proc. Ann. art. 11.071, § 5(d) (Vernon Supp. 2000).

initial burden of proving guilt beyond a reasonable doubt is on the prosecution, and the panoply of rights accorded an accused person prior to conviction supports the presumption of innocence. This is not true when one is collaterally attacking a final criminal judgment. In a collateral attack, all presumptions favor the truth, accuracy, and fairness of the conviction and sentence. Society's interest in the finality of criminal proceedings requires that the petitioner be saddled with the burden of overturning them.[139] Moreover, in Texas, habeas corpus will lie only to review jurisdictional defects or denial of fundamental or constitutional rights.[140] Thus, in order to be cognizable, the "factual unavailability" claim must be predicated on newly discovered evidence and be of such a type as to demonstrate the applicant's actual innocence.

This category of actual innocence is predicated on the Supreme Court opinion in *Herrera v. Collins*[141] in which the Court, speaking through Chief Justice Rehnquist, stated,

> [w]e may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of "actual innocence" made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim.[142]

Based on the dicta in *Herrera*, the Court of Criminal Appeals concluded that the execution of an innocent person would violate the Due Process Clause of the Fourteenth Amendment.[143]

More problematic for the court was the burden of proof concerning a claim of actual innocence in habeas cases where the applicant is predicating the claim on *newly discovered evidence.*[144] The court opted for the standard articulated by Justice White's concurring opinion in *Herrera*:

> In voting to affirm, I assume that a persuasive showing of "actual innocence" made after trial, even though made after the expiration of the time provided by law for the presentation of newly discovered evidence, would render unconstitutional the execution of petitioner in this case. To be entitled to relief, however, petitioner would at the very least be required to show that based on proffered newly discovered evidence and the entire record before the jury

139. *See* People v. Gonzales, 800 P.2d 1159, 1206 (Cal. 1990).

140. *See Ex parte* Watson, 601 S.W.2d 350, 352 (Tex. Crim. App. 1980); *see also Ex parte* Dutchover, 779 S.W.2d 76, 77 (Tex. Crim. App. 1989) (holding that habeas relief is not even available for violations of the Texas constitution unless the constitutional violation is so great that the court would not perform a harm analysis).

141. 506 U.S. 390 (1993).

142. *Id.* at 417.

143. *See* State *ex rel.* Holmes v. Court of Appeals, 885 S.W.2d 389, 397 (Tex. Crim. App. 1994).

144. *See id.* at 398.

> that convicted him, "no rational trier of fact could find proof of guilt beyond a reasonable doubt."[145]

Subsequently, the court revisited *Holmes* and concluded that the standard articulated was unfair, and that, in a case of *Herrera*-type actual innocence, "the petitioner must show by *clear and convincing evidence* that no reasonable juror would have convicted him in light of the new evidence."[146]

The rationale behind the revision seems to be that the *Holmes* standard requires a legal sufficiency analysis where the court must view the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the defendant guilty beyond a reasonable doubt.[147] Under such an analysis, the question is merely whether the evidence in favor of conviction is of sufficient magnitude; exculpatory evidence is not considered.[148] This standard was inappropriate:

> Because, in evaluating a habeas claim that newly discovered or available evidence proves the applicant to be innocent of the crime for which he was convicted, our task is to assess the probable impact of the newly available evidence upon the persuasiveness of the State's case as a whole, we must necessarily weigh such exculpatory evidence against the evidence of guilt as adduced at trial. The [standard of evidentiary sufficiency adopted by the *Holmes* court] is simply not appropriate to this purpose.[149]

In other words, the court adopted a standard of review that was more akin to a "factual" sufficiency review.[150] In any event, the court believes this new standard encompasses an "extraordinarily high" standard sufficient to protect society's interest in finality and comity.[151]

The interpretive commentary indicates that the Legislature did not intend to disturb the avenue of habeas relief opened in *State ex rel.*

145. Herrera v. Collins, 506 U.S. 390, 429 (1993) (White, J., concurring), *quoted in Holmes*, 885 S.W.2d at 398-399.

146. *Ex parte* Elizondo, 947 S.W.2d 202, 209 (Tex. Crim. App. 1996).

147. *See id.* at 206.

148. *See id.* at 206-7.

149. *Id.*

150. In Texas, the factual sufficiency review requires the evidence to be viewed in the light most favorable to the prosecution and the verdict will be set aside only upon a finding the verdict is contrary to the great weight of the evidence. *See* Clewis v. State, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996) (en banc); *see also* Cain v. State 958 S.W.2d 404, 407 (Tex. Crim. App. 1997) (en banc); Johnson v. State, No. 1915-98, 2000 WL 140257 (Tex. Crim. App. Feb. 9, 2000) (applying the complete and full civil standard of factual sufficiency to criminal cases).

151. *Elizondo*, 947 S.W.2d at 208. The court still says the new standard requires that an applicant for habeas relief on a claim of actual innocence must demonstrate that the "newly discovered evidence, if true, creates a doubt as to the efficacy of the verdict sufficient to undermine confidence in the verdict and that it is probable that the verdict would be different [on retrial]." *Id.* at 206 (quoting State *ex rel.* Holmes, 885 S.W.2d 389, 398 (1994)).

Holmes v. Third Court of Appeals.[152] In fact, it may be the only type of factually unavailable claim cognizable under section 5(a)(1).

Prior to September 1, 1999, the second most important claim cognizable under the "factual unavailability" provision was incompetency to be executed. However, the 76th Legislature, at the Court of Criminal Appeals's insistence,[153] passed a statute which took the issue of competency to be executed out of the court's writ jurisdiction and placed it in Chapter 46 of the Code of Criminal Procedure, with the trial court primarily controlling the activity.[154] Under prior law, if no execution date had been set a new claim of "incompetency to be executed" was factually unavailable because such a claim would have been premature if raised before execution was imminent.[155] Moreover, when a petitioner was proceeding under article 11.071 of the Texas Code of Criminal Procedure during the pendency of the original writ, no death date could be set. Thus, the claim of "incompetency to be executed" was generally asserted in a subsequent writ.[156]

The seminal case which addresses the issue of competency to be executed is *Ford v. Wainwright.*[157] In *Ford*, a narrow majority of the United States Supreme Court held that the Eighth Amendment prohibits a state from executing a person who is incompetent. In actuality, the case was concerned with the intricacy level of the fact-finding procedures utilized rather than the standard of competency itself.[158] It was Justice Powell, in a concurring opinion, who divined the appropriate standard to measure whether a capital applicant is competent to be executed. He suggested that it was required that the applicant

152. *See* DIANE BURCH BECKHAM, CRIMINAL LAWS OF TEXAS 181 (1999) (author's comment to TEX. CODE CRIM. PROC. art. 11.071, § 11). *Compare* TEX. CODE CRIM. PROC. ANN. art. 11.071 (Vernon Supp. 1999), *with* State *ex rel.* Holmes v. Third Court of Appeals, 885 S.W.2d 389 (Tex. Crim. App. 1994).

153. *See* Jordan v. State, 758 S.W.2d 250, 253 (Tex. Crim. App. 1988) (noting that there was a statutory void addressing the issue of incompetency to be executed and inviting the Legislature to promulgate a statute at the earliest opportunity).

154. *See* TEX. CODE CRIM. PROC. ANN. art. 46.04 (Vernon Supp. 2000).

155. *See* Ford v. Wainwright, 477 U.S. 399, 429 (1986) ("By definition, this interest can *never* be conclusively and finally determined: Regardless of the number of prior adjudications of the issue, until the very moment of execution the prisoner can claim that he has become insane sometime after the previous determination to the contrary."); Stewart v. Martinez-Villareal, 118 S.Ct. 1618, 1622 (1998) (stating if an execution is not imminent, *Ford* claims are typically dismissed on ripeness grounds); Herrera v. Collins, 113 S.Ct. 853 (1993) (holding "the issue of sanity is properly considered in proximity to the execution"); Colburn v. State, 966 S.W.2d 511, 513 (Tex. Crim. App. 1998) (holding the proper time to argue the issue of sanity or competency to be executed is when death is imminent).

156. *See* TEX. CODE CRIM. PROC. ANN. art. 43.141 § a(1)-(2) (Vernon Supp. 1999). The convicting court cannot set an execution date until the Court of Criminal Appeals denies relief on the original writ or issues a mandate after a case has been set for submission. *See id.*

157. 477 U.S. 399 (1986).

158. *See id.* at 410-13.

"know the fact of [his] impending execution and the reason for it."[159] In other words, "the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it."[160] The Fifth Circuit has formally adopted the Powell standard.[161] The Texas Legislature did not adopt a standardized procedure concerning incompetence to be executed until the 76th Legislature, though the Court of Criminal Appeals urged it to do so as early as 1988.[162] The *Jordan* court did approve the Powell standard when utilized by the trial court as being in compliance with the Ford decision.[163]

The pertinent issue dividing the *Ford* court concerned the intricacy level of the competency fact-finding procedures. Four justices required the full panoply of trial-type procedures; three favored a less elaborate type hearing; and two found that even the most minimal pro forma procedure satisfied due process fairness.[164]

In *Jordan*, the Supreme Court specifically refused to mandate any procedure and called upon the legislature to craft a scheme in compliance with *Ford*. The Court did approve the trial court's usage of a "full adversarial hearing" on the issue of competency, finding that such a procedure "comport[ed] with the constitutional considerations discussed in *Ford*."[165]

The Fifth Circuit has approved a habeas corpus hearing on the issue of competency to be conducted by affidavit—something less than a "full" adversarial hearing—but the decision implies that the capital murderer was represented by counsel.[166]

Three basics can be adduced from the *Ford* line of cases: (1) a petitioner claiming incompetency to be executed must be provided with an opportunity to be heard; (2) the fact-finder must be outside the executive branch of government—the ill remedied in *Ford*; and (3) it can constitutionally be required that the petitioner satisfy some evidentiary "threshold showing" that he has become incompetent to be executed after the trial in order to trigger the hearing process.[167] The

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159. *Id.* at 422 (Powell, J., concurring).

160. *Id.*

161. *See* Fearance v. Scott, 56 F.3d 633, 640 (5th Cir. 1995); Lowenfield v. Butler, 843 F.2d 183, 187 (5th Cir. 1988).

162. *Cf. Ex parte* Jordan, 758 S.W.2d 250, 254 (Tex. Crim. App. 1988).

163. *See id.* at 254 n.1. The *Jordan* court was careful to distinguish "insanity in the execution context" from issues of insanity at the time of the commission of the offense and incompetency to stand trial. *See id.* at 254 n.6. Each determination requires a completely different test.

164. *See id.* at 252 (dissecting the *Ford* opinion).

165. *Id.* at 254.

166. *See* Evans v. McCotter, 805 F.2d 1210, 1214 (5th Cir. 1986).

167. *See Wainwright*, 477 U.S. at 417 ("It may be that some high threshold showing on behalf of the prisoner will be found a necessary means to control the number of nonmeritorious or repetitive claims of insanity.").

new legislation incorporates all of the basics essential to comply with *Ford.*

First, the fact-finder is outside the Executive Branch because the convicting court retains jurisdiction over any and all motions filed under article 46.04.[168] Second, and most important to the applicant, the new statute gives him the opportunity to be heard and present his own evidence. Article 46.04(1)(c) requires that in support of his motion of incompetency, the applicant "attach affidavits, records, or other evidence" supporting his claim of incompetency in order to demonstrate the threshold showing entitling him to a final hearing on the issue.[169] Once the trial court deems that the applicant has made the appropriate threshold showing, a final hearing is required and the applicant may introduce evidence to discharge his ultimate burden of persuasion.[170] Finally, in order to prevent abuse by non-meritorious claims, the statute requires a threshold showing to obtain a final hearing.[171]

Prior to the adoption of article 46.04, Texas courts had not crafted a specific standard as to what level of proof would be required of the applicant in order to establish the appropriate threshold showing of incompetence. More than likely, the Legislature first examined the threshold articulated in *Ake v. Oklahoma*[172] for appointment of psychiatric experts before trial.[173] Under *Ake*, a defendant is entitled to the appointment of a psychiatric expert before trial when he has made a "preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial."[174] In order to make a threshold showing under *Ake* and its progeny, a defendant must establish that there exists "a reasonable probability both that an expert would be of assistance" to the defense and that "denial of expert assistance would result in a fundamentally unfair trial."[175]

Ake, by its very nature, applies only to pretrial and trial proceedings. However, as the courts have suggested, the standard may be adapted to fit other situations.[176] Adapting this standard for use in the context of a threshold showing of incompetence to be executed, a convicted capital felon should be required to show that there is a *substantial probability* that he is incompetent to be executed and that his

168. *See* TEX. CODE CRIM. PROC. ANN. art. 46.04 § 1(b) (Vernon Supp. 2000).

169. *Id.* art. 46.04, § c.

170. *See id.* art. 46.04, § k.

171. *See id.* art. 46.04.

172. 470 U.S. 68 (1985).

173. *See id.* at 74.

174. *Id.*

175. Moore v. Kemp, 809 F.2d 702, 712 (11th Cir. 1987) (citations omitted); *see also* Norton v. State, 930 S.W.2d 101, 106-07 (Tex. App.—Amarillo 1996, pet. ref'd).

176. *See, e.g.*, Ford v. Wainwright, 477 U.S. 426 (1986) (Powell, J., concurring).

execution without a competency hearing would be "fundamentally unfair."[177]

In the alternative, the Legislature in all probability looked to *Pate v. Robinson*[178] and its progeny, which stand for the proposition that evidence which raises a "bona fide doubt" about a defendant's competence to stand trial is evidence "that causes a real doubt in the judge's mind as to the defendant's competency."[179] Applying this standard to the context of whether the condemned is competent to be executed, the convicted capital defendant should be required to produce evidence which causes a "real doubt in the judge's mind" as to the condemned's ability to understand the fact of his impending execution and the reason for it.[180] Such evidence should consist of evidence of "recent severe mental illness or bizarre acts" by the condemned or evidence of severe mental retardation.[181]

The actual final language seems to reflect that the standard articulated in *Ake* was utilized to arrive at the statutory threshold showing. Article 46.04(d) designates that, once the applicant files a motion alleging incompetence, the trial court's duty is to determine "whether the defendant has raised a substantial doubt" of his competency to be executed as defined in the statute.[182] However, the trial court is not obligated to appoint any mental health expert unless the applicant has made "a substantial showing of incompetence."[183] Thus, the threshold showing under the statute translates into the applicant raising "a substantial doubt" by demonstrating a "substantial showing of incompetency." This would seem to be the functional equivalent of a "substantial probability."[184] Of course, once the applicant has made

177. *Fearance*, 56 F.3d at 640 (stating that a district court may "presume" that the condemned is competent and "may require a substantial threshold showing" of incompetence "merely to trigger the hearing process"); *cf. Norton* 930 S.W.2d at 107 (holding in the context of a defendant seeking a court-appointed expert that the defendant must show that there is a "reasonable probability" the expert would be of assistance and that denial of the expert would result in a "fundamentally unfair trial").

178. 383 U.S. 375 (1966).

179. Mata v. State, 632 S.W.2d 355, 358 (Tex. Crim. App. 1982) (construing *Pate*).

180. *Ex parte* Jordan, 758 S.W.2d at 254.

181. *Mata*, 632 S.W.2d at 359 (requiring "evidence of recent severe mental illness or bizarre acts by the defendant or of moderate retardation" in order to raise a "bona fide doubt" of competence in the context of standing trial).

182. TEX. CODE CRIM. PROC. ANN. art. 46.04, § d (Vernon Supp. 2000).

183. *Id.* art. 46.04, § f.

184. *But see* Collier v. State, 959 S.W.2d 621, 625 (Tex. Crim. App. 1997), where the court discussed the phrase "bona fide doubt" in a pretrial context. This dichotomy is crucial. Under *Pate v. Robinson*, due process requires the trial court to conduct an inquiry into competency when sufficient information is presented indicating the defendant is incompetent. Texas procedure requires the trial court to use the "bona fide doubt" standard in making a § 2(b) hearing determination pursuant to TEX. CODE CRIM. PROC. art. 46.02. That decision involves whether to even hold a hearing. Thus, if a "bona fide doubt" is raised, a § 2 hearing is mandated. *Id.* The decision whether to empanel a jury to determine a defendant's competency is controlled by the holding

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this threshold showing of incompetence, he still must establish incompetence by a preponderance of the evidence at the final hearing.[185]

B. *Exception Two: "Gateway" Actual Innocence*

The "Gateway" actual innocence exception to the capital "abuse-of-writ" provision is a codification of the "procedural bar type actual innocence" formulated by the United States Supreme Court. This exception was developed to cover situations where a state prisoner filing a federal writ of habeas corpus cannot meet the "cause and prejudice" standard but refusing to hear the case would constitute a "miscarriage of justice."[186] Thus, the merits of a defaulted claim can be reached "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent . . . ."[187] This genre of claim does not by itself provide a basis for relief. Instead, such a claim for relief depends critically on the validity of the constitutional claim. The claim of actual innocence is "'not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.'"[188]

The *Carrier/Schlup*-type claims are reviewed by the federal courts under a standard that requires the petitioner to demonstrate that a "constitutional violation has probably resulted in the conviction of one who is actually innocent . . . ."[189] Therefore, the applicant must establish the requisite probability that *it is more likely than not that no reasonable juror would have convicted him in light of the new evidence.*[190] Section 5(a)(2) of article 11.071 was crafted in light of *Carrier* and *Schlup*.

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in *Sisco v. State*, 599 S.W.2d 607, 613 that if evidence would support a jury finding that a defendant was incompetent, a jury trial is required regardless of the amount and strength of the evidence indicating incompetence. The *Sisco* decision obviously entails that the trial court distinguish between evidence of mental impairment and evidence of incompetency. Logically, on collateral review the threshold should be higher than a pretrial threshold. For a comprehensive analysis of the pretrial procedure under art. 46.02 see *G. Dix & R. Dawson,* Texas Criminal Practice and Procedure, § 26.54, at 720, § 26.71, at 726.

185. *See* TEX. CODE CRIM. PROC. ANN. art. 46.04, § 1(f), (k) (Vernon Supp. 2000).

186. Wainwright v. Sykes, 433 U.S. 72, 87 (1977). In *Wainwright*, the United States Supreme Court held that a federal habeas petitioner who failed to comply with a state's contemporaneous objection rule at trial must demonstrate "cause" for the procedural default and "prejudice" resulting from the alleged constitutional violation in order to obtain review of his defaulted constitutional claim. *See id.*

187. Murray v. Carrier, 477 U.S. 478, 496 (1986).

188. Schlup v. Delo, 513 U.S. 298, 315 (1995) (quoting Herrera v. Collins, 506 U.S. 390, 404 (1993). This is not a *Herrera*-type actual innocence claim evaluated on the assumption that the trial that resulted in the applicant's conviction had been error free.

189. *Id.* at 321 (quoting *Murray*, 477 U.S. at 496).

190. *See id.* at 323-27.

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C. *Exception Three: "Gateway" Actual Innocence of the Death Penalty*

Although the interpretive commentary to article 11.071 indicates that section 5(a)(3) codifies the definition of "innocent of death" set by federal case law,[191] the statute actually differs in an important way. It was in *Sawyer v. Whitley*[192] that the Supreme Court sought to divine the exact meaning of this term. In emphasizing that "innocent of death" utilized in the context of subsequent writ claims was to be an extremely "narrow" exception that would be invoked only to prevent a "miscarriage of justice," the Court adopted a rather diminutive definition of "actual innocence" of the death penalty. Agreeing with the analysis of the court of appeals, the Supreme Court observed:

> [W]e must require the petitioner to show, based on the evidence proffered plus all record evidence, a fair probability that a rational trier of fact would have entertained a reasonable doubt as to the existence of those facts which are prerequisites under state or federal law for the imposition of the death penalty.[193]

It is believed by the author that the language of article 11.071 is problematic because it can be more broadly interpreted by the courts.

Put simply, the *Sawyer* standard hones in on the objective factors or conditions under state law that must be established before a defendant is eligible to have the death penalty imposed. Thus, the focus is on the elements that render a defendant death-worthy, i.e., the statutory aggravating elements of the crime used to narrow capital defendants and the special issues. Additional mitigating evidence, that was prevented from being introduced as a result of constitutional error, goes to the discretionary decision of the fact-finder between the death penalty and life imprisonment and is not part of the equation.[194] The threshold standard is whether the petitioner has shown by clear and convincing evidence that, but for constitutional error, no reasonable juror would have found him eligible for the death penalty under pertinent state law.[195] Once the petitioner makes this predicate showing, he passes through the gateway to have his otherwise barred constitutional claim considered on the merits.[196]

In contrast to *Sawyer*, section 5(a)(3) of article 11.071 seems much broader in that, to pass through the gateway to avoid procedural bar, the applicant must show:

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191. *See* Diane Burch Beckham, Criminal Laws of Texas 181 (1999) (author's comment to Tex. Code Crim. Proc. art. 11.071, § 11).

192. 505 U.S. 333, 346 (1992).

193. *Sawyer*, 505 U.S. at 346 (quoting Sawyer v. Whitley, 945 F.2d 812, 820 (5th Cir. 1991) (citations omitted)).

194. *See id.* at 347.

195. *See id.* at 336.

196. *See id.* at 335.

> [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 [the death penalty statutes] article 37.071 or 37.0711 [of the Texas Code of Criminal Procedure].[197]

Thus, the concept of "actual innocence" of the death penalty under section 5(a)(3) may be more permissive because it may not restrict the focus of the inquiry to those elements that render a defendant death-worthy.

For example, what renders a defendant death-worthy under the Texas capital scheme are the aggravating elements that elevate simple murder to capital murder[198] and satisfaction of the continuing threat

197. TEX. CODE CRIM. PROC. ANN. art. 11.071, § 5(a)(3) (Vernon Supp. 2000). *See generally* TEX. CODE CRIM. PROC. ANN. arts. 37.071, 37.0711 (Vernon Supp. 2000). Submission of the death-worthy special issues depends upon whether Texas Penal Code Article 37.071 or 37.0711 controls. Article 37.071 applies to death penalty cases after September 1, 1991, while article 37.0711 applies to cases before that date. *See* TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(i), 37.0711, § 1 (Vernon Supp. 2000).

198. *See* TEX. PEN. CODE ANN. § 19.03 (Vernon 1994). Texas Penal Code, section 19.03, Capital Murder, provides:

> (a) A person commits an offense if he commits murder as defined under Section 19.02(b)(1) and:
>
> (1) the person murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman;
>
> (2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault, arson or retaliation;
>
> (3) the person commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise for remuneration;
>
> (4) the person commits the murder while escaping or attempting to escape from a penal institution;
>
> (5) the person, while incarcerated in a penal institution, murders another:
>
> (A) who is employed in the operation of the penal institution; or
>
> (B) with the intent to establish, maintain, or participate in a combination or in the profits of a combination;
>
> (6) the person:
>
> (A) while incarcerated for an offense under this section or Section 19.02 murders another; or
>
> (B) while serving a sentence of life imprisonment or a term of 99 years for an offense under Section 20.04, 22.021, or 29.03, murders another;
>
> (7) the person murders more than one person:
>
> (A) during the same criminal transaction; or
>
> (B) during different criminal transactions but the murders are committed pursuant to the same scheme or course of conduct.
>
> (8) the person murders an individual under six years of age.
>
> (b) An offense under this section is a capital felony.

Id.

to society, deliberate, and intent to kill as a party special issues submitted under the Texas death penalty statutes.[199] The *Penry* charge submitted pursuant to article 37.071 does not ask the jury to determine the defendant's death-worthiness but requests the jury to exercise its ultimate discretionary function and determine whether he is *less* death-worthy. That is, the *Penry* charge asks whether there are sufficient mitigating circumstances to warrant a sentence of life imprisonment rather than death.[200] Thus, the plain language of section 5(a)(3) might be interpreted to require the court to focus not just on those elements that render a defendant eligible for the death penalty, but also on additional mitigating evidence that was excluded as a result of the underlying constitutional violation. That is, the Court could conclude that it will get into the "evidence weighing business" if the applicant contends that the admission of false evidence or the preclusion of true mitigating evidence caused by constitutional error resulted in a sentence of death. At first blush, this result is at least a theoretical possibility, as the language of section 5(a)(3) deals with "one or more of the special issues submitted to the jury in the applicant's trial under article 37.071 or 37.0711."[201] This plain meaning is entitled to some weight in construing the statute.[202]

1. Actual Innocence of the Death Penalty and Evidentiary Review under *McFarland*

The "gateway" exception to procedural bar is not susceptible to a sufficiency review regarding mitigating evidence in the context of actual innocence of the death penalty. A claim of "actual innocence of the death penalty" is not itself a constitutional claim, but rather, a threshold showing necessary to permit the court to review an other-

199. *See* TEX. CODE CRIM. PROC. ANN. arts. 37.071, § b, 37.0711, § b (Vernon Supp. 1999).

200. *See* Goff v. State, 931 S.W.2d 537, 556 (Tex. Crim. App. 1996); Goss v. State, 826 S.W.2d 162, 165 (Tex. Crim. App. 1992) (plurality opinion). Under article 37.071 the jury is asked to deliberate on whether the defendant would constitute a continuing threat in the future and whether the defendant actually intended to kill the victim or anticipated that another person would be killed. *See* TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2 (b)(1)-(2) (Vernon Supp. 1999). If the jury answers yes to both of these issues, the jury must then find that there is not sufficient evidence to warrant a sentence of life imprisonment rather than death. *See id.* § 2 (e)-(g). Under article 37.0711, the jury is asked whether the defendant deliberately caused or expected the death of the victim or other person, whether he would constitute a continuing threat, and whether, if raised by the evidence, the defendant's conduct was unreasonable in response to conduct by the deceased. *See* TEX. CODE CRIM. PROC. ANN. art. 37.0711, § 3(b)(1)-(3) (Vernon Supp. 1999). If the jury affirmatively answers "yes" to these issues, it is asked to determine whether there is sufficient mitigating evidence to warrant a sentence of life imprisonment rather than death. *See id.* § 3 (e)-(f).

201. TEX. CODE CRIM. PROC. ANN. art. 11.071, § 5(a)(3).

202. *See* Boykin v. State, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991) (holding that the court will ordinarily give effect to the plain meaning of legislation unless application of a statute's plain language would lead to absurd consequences).

wise-barred constitutional claim on the merits. Nonetheless, whether the court excludes false evidence or considers previously precluded mitigating evidence, it would be required to review a jury's normative decision on mitigation. Prior cases have concluded such a review is a logical absurdity. In *McFarland v. State*,[203] the Court of Criminal Appeals determined that it could not review the sufficiency of mitigating evidence adduced pursuant to the death-penalty statutes on direct review.[204] Specifically, the court was called upon to interpret the evidentiary review requirements of article 44.251(a) of the Texas Code of Criminal Procedure, which provides:

> The court of criminal appeals shall reform a sentence of death to a sentence of confinement in the institutional division of the Texas Department of Criminal Justice for life if the court finds that there is insufficient evidence to support an affirmative answer to an issue submitted to the jury under Section 2(b), Article 37.071, or Section 3(b), Article 37.0711 of this code or a negative answer to an issue submitted to a jury under Section 2(e), Article 37.071, or Section 3(e), Article 37.0711 of this code.[205]

Notwithstanding the plain language of the provision, the court rejected the notion that it could perform a sufficiency review of the mitigating circumstances that would warrant a sentence of life rather than death under section 2(e) of article 37.071.[206]

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203. 928 S.W.2d 482 (Tex. Crim. App. 1996) (en banc).

204. *See McFarland*, 928 S.W.2d at 498-99 (construing TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(e) (Vernon 1994) [now codified as TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(e)(1)]). In *Banda v. State*, 890 S.W.2d 42 (Tex. Crim. App. 1944) (en banc), the Court of Criminal Appeals had previously held:

> In Texas, this mitigating evidence is admissible at the punishment phase of a capital murder trial. Once admitted, the jury may then give it weight, if in their individual minds it is appropriate, when answering the questions which determine sentence. However, "[t]he amount of weight that the fact-finder might give any particular piece of mitigating evidence is left to 'the range of judgment and discretion' exercised by each juror."

Id. at 54 (Tex. Crim. App. 1994) (en banc) (quoting Johnson v. State, 773 S.W.2d 322, 331 (Tex. Crim. App. 1989) (en banc)).

205. TEX. CODE CRIM. PROC. ANN. art. 44.251, § a (Vernon Supp. 2000).

206. *See McFarland*, 928 S.W.2d at 498-99. The "mitigating circumstances" issue states:

> The court shall instruct the jury that if the jury returns an affirmative finding to each issue submitted under Subsection (b) of this article, it shall answer the following issue: Whether, taking into consideration all the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.

TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(e) (Vernon Supp. 1999). If the jury returns a negative finding on this issue, the judge shall sentence the defendant to death. *See id.* § 2(g). The jury may not answer "no" unless the jury agrees unanimously, and it may not answer "yes" unless 10 or more jurors agree. *See id.* § 2(f)(2). The jury does not have to agree on the evidence that supports an affirmative finding. *See id.* § 2(f)(3).

First, the court held that a sufficiency review could not be performed because the defendant has the burden of production.[207] He can only claim that the answer on the issue is against the great weight and preponderance of the evidence—this is not "insufficient evidence"—and the sentence can only be reformed if the evidence is insufficient on the issue.[208] Second, even if the statute mandated a factual sufficiency review, the court could not perform one because there is no way for an appellate court to review the jury's normative judgment that the evidence did or did not warrant a life sentence.[209] Third, any form of de novo review would effectively render the jury's answer to a section 2(e) special issue merely advisory.[210] Put simply, the plain language of article 44.251(a) would lead to absurd results that the legislature could not have possibly intended.[211]

2. *McFarland* and Review of the Writ of Habeas Corpus

Because *McFarland* limits direct evidentiary review of the "mitigating circumstances," the question must be raised whether *McFarland* is applicable to the review of a habeas corpus "gateway" claim of actual innocence under section 5(a)(3). Section 5(a)(3) states that an applicant can avoid procedural bar, i.e., "abuse-of-writ," by making a threshold showing by clear and convincing evidence that, but for a federal constitutional violation, no rational juror would have answered in the state's favor any special issue submitted at the punish-

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207. *See McFarland*, 928 S.W.2d at 498.

208. *See id.* at 499.

209. *See McFarland*, 928 S.W.2d at 499. This seems to hold particularly true given that the jury is not required to agree on the evidence that supports an affirmative finding that there are sufficient mitigating circumstances to warrant a sentence of life. *See* TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(f)(3) (Vernon Supp. 1999). This aspect is not expressly provided for under article 37.0711 which applies to death penalty cases before September 1, 1991. The statute merely requires that the jury "shall consider mitigating evidence that a juror might regard as reducing the defendant's moral blameworthiness." TEX. CODE CRIM. PROC. ANN. art. 37.0711, § 3(f)(3) (Vernon Supp. 1999).

210. *See McFarland*, 928 S.W.2d at 498-99; *see also* McGinn v. State, 961 S.W.2d 161, 169 (Tex. Crim. App. 1998) (holding that whether a particular piece of evidence is mitigating in the context of a special issue is a normative judgment not amenable to appellate review); Baker v. State, 956 S.W.2d 19, 21 (Tex. Crim. App. 1997) (stating that the court will not conduct sufficiency review of the evidence as regards the mitigating special issue); Poindexter v. State, 942 S.W.2d 577, 587 (Tex. Crim. App. 1996) (holding that the weighing of "mitigating evidence" is a subjective determination undertaken by each individual juror, not subject to review); Shannon v. State, 942 S.W.2d 591, 599 (Tex. Crim. App. 1996) (holding that conducting a sufficiency review of mitigating evidence "would merely amount to an exercise in speculation"). Howard v. State, 941 S.W.2d 102, 119 (Tex. Crim. App. 1996) (refusing to perform a sufficiency review of "mitigating evidence" because no burden of proof exists for either the state or defendant to prove or disprove the mitigating evidence and therefore such a review is impossible); Matchett v. State, 941 S.W.2d 922, 936 (Tex. Crim. App. 1996) (holding that the United States Constitution does not require sufficiency review of mitigating evidence and such a review would be impossible).

211. *See* Boykin v. State, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991).

ment phase.[212] This predicate "gateway" requirement entails a variation of the *Jackson v. Virginia*[213] review for legally sufficient evidence. Therefore, if such a review cannot be conducted on direct appeal, then it probably cannot be undertaken on habeas, even for a "gateway" determination. The *McFarland* rationale should be applicable. In other words, the interpretative commentary[214] is correct: section 5(a)(3) is a codification of the standard limiting review to death eligibility set out by the Supreme Court in *Sawyer*. The Court of Criminal Appeals only has the authority, in determining a "gateway" claim of actual innocence of the death penalty, to focus on those elements that render a defendant eligible for the death penalty or make him death-worthy, as opposed to worthy of life.[215]

Conclusion

There are three matters that must be emphasized. First, under section 5 of article 11.071, the court "may not consider the merits of or grant relief" on a subsequent application unless the applicant has properly pleaded and proved an exception to the bar against a subsequent application, and the Court of Criminal Appeals, after reviewing the record, has issued an "order finding that the requirements" for the filing of a subsequent application have been satisfied.[216] The habeas statute does not specifically state that a trial judge may make findings of fact on the issue of whether an applicant has proven an exception to "abuse-of-writ." However, article 43.141(d) of the Texas Code of Criminal Procedure provides that a trial court may modify or withdraw an execution date "if the court determines that additional proceedings are necessary on . . . [an] untimely application for a writ of habeas corpus."[217]

It seems implicit in this provision that a trial court has the jurisdiction to at least conduct a preliminary hearing on an untimely application; otherwise, the provision may be a nullity. Moreover, since the Court of Criminal Appeals has no jurisdiction to make findings of

212. Tex. Code Crim. Proc. Ann. art. 11.071, § 5(a)(3) (Vernon Supp. 1999).

213. 443 U.S. 307 (1979). In *Jackson*, the United States Supreme Court adopted a standard of review for legal sufficiency of state convictions challenged by habeas corpus motions which requires relief when the court finds that no reasonable trier of fact could have found proof beyond a reasonable doubt based on the evidentiary record. *See id.* at 313-24. In cases of conflicting inferences, the court must presume that the trier of fact resolved any such conflicts in favor of the prosecution. *See id.* at 328.

214. Diane Burch Beckham, Criminal Laws of Texas 181 (1999) (author's comment to Tex. Code Crim. Proc. art. 11.071, § 11).

215. *See generally* Tex. Code Crim. Proc. Ann. art. 37.071, § 2(e) (Vernon Supp. 1999). To illustrate again, under article 37.071, § 2(e), the jury must return a negative answer on the issue of whether there are mitigating circumstances that warrant life imprisonment, i.e. is he death-worthy, as opposed to an affirmative answer, or "lifeworthy," so to speak. *See id.*

216. Tex. Code Crim. Proc. Ann. art. 11.071 § 5(a), (c) (Vernon Supp. 2000).

217. Tex. Code Crim. Proc. Ann. art. 43.141(d) (Vernon Supp. 2000).

fact, some mechanism is necessary to insure that an applicant is able to establish the factual allegations he pleads as an exception to the procedural bar. The trial court's limited fact-finding of this predicate may also be implicitly recognized as section 5 provides that, along with other applicable parts of the record, the clerk should forward to the Court of Criminal Appeals "any order the judge of the convicting court directs to be attached to the application."[218]

Second, "gateway" claims of actual innocence are procedural, rather than substantive, in that the claim of innocence is merely a *threshold* predicate and, if established to the degree that the court could not have confidence in the verdict, permits the petitioner to pass through the gateway of procedural bar and argue the merits of his underlying federal constitutional claim.[219] On the other hand, a *Herrera*-type claim involves a situation where it is assumed that the trial was error-free.[220] In such cases, the applicant has been "'tried before a jury of his peers, with the full panoply of protections'" afforded criminal defendants.[221] Having received an error-free trial and having not disputed that the State met its burden of proof, the courts have, at least in theory, adopted a high enough standard to protect society's interest in comity and finality. That is why a truly persuasive demonstration of "actual innocence" is necessary to render the execution of a defendant unconstitutional.

Finally, a *Herrera*-type claim of actual innocence is cognizable under section 5(a)(1) of article 11.071 if the interpretive commentary to that article is correct.[222] Therefore, the convicting court "may not consider the merits of or grant relief on a subsequent . . . original application" unless the applicant has properly plead and proved the exception to the bar against a subsequent application, and the Court of Criminal Appeals, after reviewing the record, has issued an "order finding the requirements" for the filing of a subsequent application have been satisfied.[223]

Herrera-type claims are based on newly discovered evidence.[224] Therefore, it is essential that the applicant establish that the newly discovered evidence, i.e., factual availability, undermines confidence in the verdict to a degree that it is probable that the verdict would be different. Thus, following the same logic expressed in article 43.141(d)

218. TEX. CODE CRIM. PROC. ANN. art. 11.071, § 5(b)(3)(D) (Vernon Supp. 2000).
219. *See* Schlup v. Delo, 513 U.S. 298, 315 (1992) (quoting Herrera v. Collins, 506 U.S. 390, 404 (1992)).
220. *See id.*
221. *Id.* (quoting *Herrera*, 390 U.S. at 419 (O'Connor, J., concurring)).
222. TEX. CODE CRIM. PROC. ANN. art. 11.071, § 5(a)(1) (Vernon Supp. 2000).
223. TEX. CODE CRIM. PROC. ANN. art. 11.071, § 5(a)-(c) (Vernon Supp. 2000).
224. *See Herrera*, 506 U.S. at 417-419.

of the Code of Criminal Procedure,[225] the trial court should have limited jurisdiction to at least conduct a preliminary hearing to determine whether the applicant has made the threshold showing, thus giving the applicant the mechanism to make a threshold demonstration.

225. TEX. CODE CRIM. PROC. ANN. art. 43.141(d) (Vernon Supp. 1999) (stating the trial court may stay an execution if it determines additional proceedings are necessary pursuant to an untimely or subsequent writ of habeas corpus).

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