No. 24-0884

In the Supreme Court of Texas

In re Texas House of Representatives,
Relator.

On Petition for Writ Injunction

RESPONDENTS' MOTION FOR RECONSIDERATION AND TO DISMISS PETITION FOR LACK OF JURISDICTION

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Introduction

The Texas Department of Criminal Justice, Executive Director Bryan Collier, Texas Department of Criminal Justice—Correctional Institutions Division, and Members of the Board of Criminal Justice (together "TDCJ") move this Court to reconsider its order awarding a temporary injunction and dismiss this original writ action for lack of jurisdiction.

The Court's grant of a temporary injunction enjoining TDCJ and its executive director from carrying out a lawfully imposed death sentence at the eleventh-hour at the urging of a single House committee, poses grave constitutional consequences and pushes the State to the brink of a constitutional crisis. Under the precedent set by this Court, a handful of members of the Legislature may run to this Court on the eve of an execution with a legislative subpoena in hand and thereby countermand decades-old criminal court judgments that no state or federal court has seen fit to disturb, after the Constitution's assigned body—the Board of Pardons and Paroles—has rejected pleas for clemency, and in disregard of the Governor's express constitutional authority to grant one 30-day reprieve in a capital case.

If left undisturbed, this Court's recent order will have written the playbook for stopping any execution in its tracks going forward. After all, this Court's temporary injunction blocking TDCJ from carrying out the warrant of execution now requires the State to seek a new execution warrant, which by law may not set a new execution date any earlier than three months from the issuance of that warrant. *See* TEX. CODE CRIM PROC. art. 43.141 (c). In other words, this Court has now set the precedent that the condemned may win a three-month stay of execution by enlisting allies in the

Legislature to call upon this Court for extraordinary relief. Such "last-minute attempt[s] to secure a stay of execution are an abuse," *In re Cantu*, 94 F.4th 462, 474 (5th Cir. 2024) (Jones, J., concurring), that are regrettably common in federal court and before the CCA. But this Court's order now invites such abuse in *this Court* through the front door.

Worse yet, the Court may have created an end-run around *any criminal laws*. Consider a prisoner in pre-trial custody awaiting his trial for murder. With a phone call to a House Committee, the prisoner could obtain a subpoena commanding him to testify on the day his criminal trial is slated to begin. During that hearing, the witness could describe how he murdered the victim, claim that this testimony may incriminate him, and—incredibly—obtain complete immunity from criminal prosecution. Under the legislative-subpoena statute, a "person may not be indicted or prosecuted" for anything about which he testifies. TEX. GOV'T CODE § 301.025(c).

This Court's order temporarily enjoining TDCJ and its executive director should be reconsidered, and because the Petition itself is fatally flawed, the Court should dismiss it for lack of jurisdiction. For one, this Court lacks jurisdiction *four times over*. The relief already granted, as well as the relief ultimately sought, invites Separation of Powers Clause violations from all angles; it represents an improper exercise of criminal habeas jurisdiction; an unlawful effort to exercise mandamus jurisdiction over the CCA; and does not fit within this Court's original jurisdiction to issue writs of injunction. Even if the Court had jurisdiction, though, the face of Relator's petition demonstrates that it is not entitled to the extraordinary writ relief it seeks. At the outset, a petition for a writ of habeas corpus constitutes an adequate

remedy at law; neither this Court nor the trial court had authority to issue coercive orders to an agency that is not even the subject of the subpoena; the subpoena is defective on its face; and, at minimum, the House Committee's 21-year delay in seeking Roberson's testimony disentitles it to the extraordinary remedies it now seeks.

Background

I. A Texas Jury Convicts Roberson of Beating His Two-Year-Old Daughter to Death and Courts Repeatedly Reject Efforts to Upset His Conviction and Sentence.

In 2002, Robert Roberson brought his two-year-old daughter, Nikki, to the hospital. Upon arrival, Nikki had extensive bruising to her chin, face, ears, eyes, shoulder, and mouth, and the back of her skull was "mushy." An autopsy concluded Nikki died from "blunt force head injuries," not mere shaking. A Texas jury ultimately agreed. Roberson was the only adult with Nikki in the hours before her death, and evidence at trial indicated that Nikki suffered external blows—again, not mere shaking. The jury disbelieved Roberson's alternative explanation that, despite these injuries indicating abuse, the little girl simply died from a 22-inch fall out of bed.

After the jury rendered its verdict, the district court entered final judgment in 2003 sentencing Roberson to death. It ordered the following: "The Defendant is now remanded to the custody of the Sheriff of Anderson County, Texas, to be transported to the Texas Department of Criminal Justice, Institutional Division at Huntsville, Texas, there to await the action of the Court of Criminal Appeals and the further orders of this Court." Judgment and Sentence at 3 (emphases added).

The Texas Court of Criminal Appeals affirmed Roberson's conviction and sentence on direct appeal in 2007. *See Roberson v. Texas*, No. AP-74,671 (Tex. Crim. App. June 20, 2007). Since that time, Roberson has repeatedly sought to enlist various courts to undo his conviction and sentence. After five state habeas applications, one federal habeas application, four certiorari petitions, seven motions to stay his execution, and countless other filings, judges in state and federal court have cast more than 100 votes against his arguments. Two days ago, the Supreme Court of the United States rejected claims that these failed attempts have somehow deprived Roberson of due process. *See Roberson v. Texas*, Nos. 24-5753 & 24A349 (Oct. 17, 2024).

On July 1, 2024, the 3rd Judicial District Court of Anderson County issued an Execution Order directing that Roberson "shall be kept in custody by the Director of the Correctional Institutions Division of the Texas Department of Criminal Justice, Huntsville, Texas, until Thursday, the 17th day of October, 2024, upon which day . . . at some time after the hour of 6:00 p.m. . . . the said Director, acting by and through the executioner designated by said Director as provided by law, is hereby commanded, ordered and directed to carry out this sentence of death by intravenous injection of a substance or substances in a lethal quantity sufficient to cause the death of the said Robert Leslie Roberson, III and until the said Robert Leslie Roberson, III is dead." 2024 Execution Order at 1–2 (emphases added).

Consistent with that order, the Clerk of Court issued a Warrant of Execution the same day. It likewise provided that "[t]he Director of the Correctional Institutions Division of the Texas Department of Criminal Justice is hereby commanded … to

keep Robert Leslie Roberson, III and to execute the sentence of death at any time after the hour of 6:00 p.m., on October 17, 2024, as provided in Texas Code of Criminal Procedure Article 43.14." 2024 Execution Warrant at 3.

II. The House Committee on Criminal Jurisprudence Waits More Than Twenty Years to Wield Subpoena Power to Upset a Final Criminal Judgment.

Texas law provides that a legislative committee "authorized by . . . the rules of procedure of the creating house" may issue process to compel a witness to testify concerning matters within that committee's jurisdiction. TEX. GOV'T CODE §§ 301.014, 301.024. The Rules of the Texas House of Representatives, in turn, provide that a standing committee—like the Criminal Jurisprudence Committee—may issue subpoenas. H.R. 4, § 21(a), 88th Leg., at 64 (2023). The Criminal Jurisprudence Committee's subject-matter jurisdiction includes, among other things, "criminal procedure in the courts of Texas." H.R. 3, § 7, 88th Leg., at 33 (2023). Although state law provides that a subpoena should be issued "in the name of the committee," TEX. GOV'T CODE § 301.024(b), the House's rules separately provide that "all subpoenas" must "be signed by the speaker," H.R. 1, § 13, 88th Leg., at 13 (2023).

If necessary to obtain compliance with a subpoena, a committee may issue writs of attachment. TEX. GOV'T CODE § 301.024(c). Failing that, the committee may take steps toward holding the person targeted by the subpoena in criminal contempt. Namely, the committee may notify the Speaker of the House about a witness's failure to testify, the Speaker of the House shall certify facts about that failure to a

prosecuting attorney, and the prosecuting attorney shall bring the matter before a grand jury. TEX. GOV'T CODE § 301.026.

Texas law provides no similar mechanism to coerce state agencies that are *not* the target of a committee's subpoena. Instead, the Government Code provides only that a standing committee "may request necessary assistance" from an agency and the agency shall provide it. TEX. GOV'T CODE § 301.028. Unsurprisingly, however, state law nowhere provides that a state agency must violate the law to assist a committee with a subpoena request.

Here, the House Committee on Criminal Jurisprudence claims Roberson's testimony is necessary because: it is considering proposing legislative amendments to Article 11.073 of the Texas Code of Criminal Procedure; Roberson's conviction supposedly rests on a disputed theory of "shaken baby syndrome" and his efforts to invoke Article 11.073 have failed; and his legal claims "are unique because he is a person with autism in a case unlike any other in the State of Texas."

Roberson was convicted and sentenced to death in 2003, not for shaking a baby, but for beating his two-year-old daughter to death. The Texas Legislature, for its part, added Article 11.073 to the Texas Code of Criminal Procedure in 2013 to allow state habeas courts to consider whether new scientific evidence would have resulted in a finding of innocence by a jury. Since that time, state courts have repeatedly (and rightly) rejected Roberson's efforts to shoehorn his conviction into Article 11.073.

For some reason, however, the House Committee never saw fit to exercise the free-wheeling subpoena power it now asserts to request Roberson's testimony—not until the day before he was set to be executed, anyway. Despite claiming to care about

this particular conviction and this particular code provision, the House Committee waited *twenty-one years* after his conviction, and *eleven years* after Article 11.073 was codified, to claim Roberson's testimony was "necessary."

As far as TDCJ is aware, the House Committee has never issued a writ of attachment in this case, whether against Roberson or anyone else. Instead, it sued in district court for injunctive relief against TDCJ—even though TDCJ was never named in any subpoena by the House Committee and even though TDCJ was operating under independent state court judgments commanding it to hold Roberson in custody and execute his death sentence.

Despite the House Rules which permit a witness to appear via remote means, H.R. 4, § 20(g), 88th Leg., at 62–63 (2023), the House Committee has publicly stated its expectation that TDCJ will present Roberson for testimony before the committee at noon on October 21, 2024, https://perma.cc/9KFH-KBTA. Again, that sounds a lot like habeas. As TDCJ has made clear to the House Committee, an in-person appearance will not occur given the myriad security and logistical concerns that come with delivering a death-row inmate for in-person testimony inside the Texas Capitol, which lacks a secure holding area and is not within 80 miles of a TDCJ facility.

III. The Texas Court of Criminal Appeals Lawfully Exercises Its Jurisdiction to Deny Habeas Relief, but this Court Nevertheless Orders the Warden to Disregard Binding Criminal Judgments.

On October 17, 2024, the Travis County District Court granted the House Committee's request for a temporary restraining order—even though the CCA had just

denied Roberson's fifth state habeas application. The CCA's denial of habeas relief meant that TDCJ remained bound to hold Roberson in its custody (pursuant to the final criminal judgment) and to execute his death sentence (pursuant to the execution order). Accordingly, TDCJ sought an order from the CCA confirming that the district court had no authority to award habeas relief that the CCA had already denied. The CCA granted a writ of mandamus vacating the TRO because "[t]he effect of [the district court's] order was to stay Roberson's execution, circumvent our decision, and disobey our mandate." *In re TDCJ*, No. WR-96,121-01 (Tex. Crim. App. Oct. 17, 2024) (per curiam).

Contemporaneous with these proceedings before the CCA, the House Committee sought a so-called "Writ of Mandamus, Writ of Prohibition, and Writ of Injunction to Preserve the House's Constitutional Authority." In its petition, the House Committee could not agree with itself on who the relator even was. In the caption and signature block, the House Committee indicates that it seeks relief on behalf of the full "Texas House of Representatives." Elsewhere it appears to describe relator as the "Texas House of Representatives Committee on Criminal Jurisprudence." Meanwhile, before the district court, the House Committee sought relief on behalf of individual house members, namely, "Representative Joe Moody" and "Representative Jeff Leach." Pet. at 1.

Hours after the CCA granted a writ of mandamus and vacated the district court's TRO, though, this Court granted a temporary injunction. Among other things, it ordered that: "The Texas Department of Criminal Justice and its executive director Bryan Collier, the Texas Department of Criminal Justice Correctional

Institutions Division, and the members of the Texas Board of Criminal Justice are temporarily enjoined from impairing Mr. Roberson's compliance with the Subpoena and Writ of Attachment issued by the Committee on Criminal Jurisprudence, including by executing Mr. Roberson, until further order of this Court." *In re Texas House of Representatives*, No. 24-0884, Order (Tex. Oct. 17, 2024). Despite characterizing its order as a "writ of injunction"—and despite the House Committee's telling admission that it sought writs of mandamus and prohibition—this Court countermanded the CCA's earlier opinion and ordered TDCJ to disregard Roberson's binding criminal court judgment.

This Court's order proclaims that "[t]he petition for writ of injunction remains pending before this Court," and portends some "further order of this Court." *Id.* Accordingly, TDCJ now asks this Court to reconsider and vacate the temporary injunction and dismiss the House Committee's petition.

Argument

Relator's petition, and this Court's temporary injunction implicitly accepting its theories, is beset by a multitude of jurisdictional and merits-based errors that demand this Court's careful and expeditious attention—and subsequent correction. As an initial matter, this Court lacks jurisdiction over this case *four times over.* Even if it has jurisdiction, the face of Relator's petition reveals multiple, fatal merits-based defects that bar extraordinary writ relief. Accordingly, the Court should grant this motion for reconsideration of its order temporarily enjoining TDCJ and dismiss this case for lack of jurisdiction.

I. The Court Lacks Jurisdiction Over this Case Based on the Relief the House Committee Seeks.

Multiple jurisdictional barriers preclude this Court from entertaining the Petition. At the outset, Relator's effort to enlist the judiciary in the efforts of a handful of legislators to undo a decades-old, lawful state-court conviction runs afoul of the Separation of Powers Clause in multiple directions. Moreover, the order this Court issued—regardless of how it is styled—was in fact an exercise of criminal habeas jurisdiction and mandamus authority over the CCA. Even if that is wrong, this Court has authority to issue original writs of injunction only where it has independent mandamus authority, which it does not under the circumstances here.

A. An order enjoining TDCJ to violate a lawfully imposed criminal-court judgment flouts the separation of powers.

At the outset, any order from this Court enjoining TDCJ and its executive director to disregard a lawfully imposed death sentence would violate the Constitution's Separation of Powers Clause. *See* TEX. CONST. art. II, § 1. Pursuant to that Clause, the "governmental authority vested in one department of government cannot be exercised by another department unless expressly permitted by the constitution." *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993). Likewise, "the interference by one branch of government with the effectual function of another raises concerns of separation of powers." *In re Turner*, 627 S.W.3d 654, 660 (Tex. 2021). "Concerns over the separation of powers involve not only disagreements between the executive and legislative branches, when they arise, but also the judiciary's intervention." *Id.*

That is precisely the case here. For one, by permitting an eleventh-hour legislative subpoena to halt a lawful execution, this Court elevated a single committee of a single chamber of the state legislature to a perch above binding and final criminal judgments of the *judiciary*, including the Court of Criminal Appeals, whose "determinations shall be final, in call criminal cases of whatever grade." Tex. Const. art. V, § 5(a); *see id.* art. V, § 5(b)-(c). In the process, this Court also reassigned to the lawmaking branch power that our Constitution assigns exclusively to the *executive*—namely, the power to grant limited reprieves from criminal sentences. *See* TEX. CONST. art. IV, § 11(b). And it seeks to enlist the judiciary in efforts to enforce a legislative subpoena in ways reserved only to the Legislature. *See supra* at 5–6. This Court's temporary injunction—and any future permanent injunction—would run roughshod over the Separation of Powers Clause from multiple directions.

B. This Court's temporary injunction to Texas Department of Criminal Justice impermissibly exercises criminal habeas jurisdiction.

Even if this Court's intrusion into the executive's carrying out of a lawfully imposed sentence of death would not violate the Separation of Powers Clause, it would nevertheless constitute an impermissible exercise of criminal habeas jurisdiction. Historically, the writ of habeas corpus provided a vehicle "for asking '*why* the liberty of [a] subject[ ] is restrained.'" *Edwards v. Vannoy*, 593 U.S. 255 (2021) (Gorsuch, J., concurring) (quoting 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 131 (1768)). For a prisoner held in custody pursuant to a final judgment of conviction, habeas had very little to do. That's because a final criminal judgment

furnished the prototypical, lawful basis to restrain an individual's liberty and "was 'conclusive on all the world.'" *Brown v. Davenport*, 596 U.S. 118, 127–129 (2022) (quoting *Ex parte Watkins*, 3 Pe. 193, 202–203 (1830)).

For better or worse, Texas has seen fit to expand this historic office of the writ to allow even convicted prisoners to contest their custody and undo final criminal judgments via the writ of habeas corpus. *See Ex parte Rivers*, 663 S.W.3d 683, 691 (Tex. Crim. App. 2022). But state law nevertheless imposes important restrictions on this post-conviction use of habeas power, like abuse-of-the-writ doctrine. Most importantly, state law says that "[t]he writ of habeas corpus is *the* remedy to be used when any person in restrained in his liberty." TEX. CODE CRIM. PROC. art. 11.01 (emphasis added). As a general matter, "[t]he court of criminal appeals, the district courts, the county courts, or any judge of those courts may issue the writ of habeas corpus." TEX. CODE CRIM. PROC. art. 11.05. But in death-penalty cases, *only* the CCA is authorized to award habeas relief. *See, e.g.*, TEX. CODE CRIM. PROC. art. 11.071, §§ 4(a), 5(c), 6(a)–(b), 11. This Court, by contrast, has narrow authority to issue writs of habeas corpus only "when a person is restrained . . . on account of the violation of an order . . . entered by the court or judge in a *civil case*." TEX. GOV'T CODE § 22.002(e) (emphasis added).

Roberson's restraint and sentence, of course, stem from a criminal case—not a civil one. This Court therefore has no authority whatsoever to issue orders to the TDCJ executive director, who has custody of Roberson's body, ordering that state official to do something different than the final criminal judgments that command him to restrain Roberson and execute his sentence. This Court purported to do just

that, however, even though the CCA—the only court statutorily authorized to award habeas relief in a capital case like this one—has repeatedly denied Roberson's efforts to undo his conviction and sentence. That temporary injunction—and therefore any future grant of permanent injunctive relief—is in substance, if not form, a grant of criminal habeas relief.

It is no answer to respond that any relief from this Court would not constitute a grant of impermissible habeas relief because it would not order Roberson's ultimate release. The Texas habeas statute expressly contemplates that release from a death sentence—the exact result of this Court's temporary injunction and any future permanent injunction—is a form of habeas relief. *See* TEX. CODE CRIM PROC. art. 11.071, § 1 ("relief from a judgment imposing a penalty of death"); *Ex parte Alba*, 256 S.W.3d 682, 685 (Tex. Crim. App. 2006). Consistent with Texas law, federal habeas law likewise recognizes that releasing a prisoner from his death sentence—even if his custodial confinement remains intact—nevertheless constitutes habeas relief. *See, e.g.*, *Magwood v. Patterson*, 561 U.S. 320, 323 (2010); *Penry v. Johnson*, 532 U.S. 782, 788, 792 (2001); *Herrera v. Collins*, 506 U.S. 390, 403 (1993). This Court's temporary injunction, and any future permanent injunction from this Court, does just that by forestalling a lawful death sentence. That is why Roberson has sought to intervene in this action, praying for a "stay of his execution."

In truth, though, this case is even simpler than that. Because the House Committee has indicated that it believes this Court's order requires Roberson to be presented *in person* at the Texas Capitol on Monday at noon, Part III, *infra*, the House

Committee plainly seeks even the more traditional habeas remedy of physical release from custodial confinement.

C. The Court's order also impermissibly exercises mandamus jurisdiction over the Court of Criminal Appeals.

This Court's functional exercise of criminal habeas jurisdiction points to a related problem. For the same reason this Court has effectively awarded criminal habeas relief, it has also exercised impermissible mandamus authority over the CCA. Under the Texas Constitution, this Court or its members may issue writs of mandamus (1) in aid of its appellate jurisdiction or (2) in exercise of original jurisdiction "as may be specified" in law, "except against the Governor." TEX. CONST. art. V, § 3.

This Court's order could not possibly be an exercise of its appellate jurisdiction. For one thing, the House Committee members have never appealed any lower court order to this Court. After all, they *prevailed* in the Travis County District Court and (somehow) won a TRO. There was no appellate jurisdiction for this Court to "aid" by issuing a writ. Nor did this Court issue its order *to the district court*. More fundamentally, though, the proceeding before the district court sought criminal habeas relief for the reasons just explained, and for others elaborated below. *See* Part I.B, *supra*; Part II.A, *infra*. Because the CCA alone has jurisdiction over capital habeas proceedings to disregard final criminal judgments, this Court could not properly exercise any appellate jurisdiction even if there had been an appealable order.

The Court's order must therefore be an exercise of its original mandamus jurisdiction. But on that score, as the Legislature has "specified," TEX. CONST. art. V, § 3(a), this Court may *not* issue mandamus "against … the governor, the court of

criminal appeals, or a judge of the court of criminal appeals," TEX. GOV'T CODE § 22.002(a). Or as Justice Young put it: "the statute describing this Court's general mandamus jurisdiction simultaneously announces some proper respondents ('a statutory county court judge, a statutory probate court judge, a district judge, a court of appeals or justice of a court of appeals, or any officer of state government') and excludes some potential respondents ('the governor, the court of criminal appeals, or a judge of the court of criminal appeals')." *In re Dailey*, 692 S.W.3d 480, 480–481 (Tex. 2024) (Young, J., concurring in denial of petition for writ of mandamus).

Thus, the CCA could not be a proper recipient of this Court's mandamus authority. Nor is it any answer to say that this Court's temporary injunction was nonetheless a proper exercise of this Court's authority "to issue a writ of mandamus or injunction . . . against any of the officers of the executive departments of the government of the state"—here TDCJ's executive director—to order or compel the performance of a judicial, ministerial, or discretionary act or duty that, by state law, the officer or officers are authorized to perform." Tex. Gov't Code § 22.002(c). After all, far from "authoriz[ing]," *id.*, TDCJ's executive director to halt Roberson's execution, state law—in the form of multiple state court judgments—"commanded [and] ordered" him to carry it out. Section 22.002(c), therefore, supplies no authority for this court to order TDCJ's executive director to undertake an act that state law expressly forbade.

In practice then, this Court's temporary injunction is an exercise of mandamus authority against the CCA. The CCA has repeatedly denied Roberson habeas relief, including as recently as two days ago. That means TDCJ remained bound by state

court judgments to detain Roberson and to execute his sentence. Hours later, this Court took it upon itself to countermand the CCA's judgment and command the TDCJ warden to do what the CCA prohibited him from doing. It is no answer to say that this Court stylized its order a "writ of injunction." That would obviously "exalt form over substance," which this Court has rightly eschewed before. *See, e.g.*, *CMH Homes v. Perez*, 340 S.W.3d 444, 453 (Tex. 2011) (citing *Wagner & Brown, Ltd. v. Horwood*, 53 S.W.3d 347, 351 (Tex. 2001)).

D. Even if the Court's order could properly be classed solely as a writ of injunction, jurisdiction is still lacking to issue it as an original writ.

Assuming it is even possible to treat the Court's order as anything other than an exercise of criminal habeas jurisdiction or mandamus oversight of the CCA's opinion, this Court still lacked jurisdiction to issue it. At most, the House Committee here sought an original injunction—that is, they sought relief "by their petition filed directly in this court." *Lane v. Ross*, 249 S.W.2d 591, 592 (Tex. 1952). "It is well settled," though, "that this court has no original jurisdiction to issue a writ of injunction." *Id.* at 593. Instead, this Court "has the correlative authority to issue a writ of injunction to make the writ of mandamus effective." *Id.* This Court has never overruled *Lane*. It therefore could not issue an original writ of injunction. That's because there is no permissible mandamus jurisdiction to exercise to begin with. *See* Part I.C, *supra*. And, even assuming such jurisdiction obtains, the House Committee has *not* "shown [itself] to be entitled to a writ of mandamus." *Lane*, 249 S.W.2d at 593; *see* Part II, *infra*.

II. No Matter How the Relief Sought Here Is Characterized—Whether Mandamus, Prohibition, or Injunction—the Standards for an Extraordinary Writ Were Not Met.

The Petition is likewise defective on the merits. Extraordinary writs require extraordinary showings from the parties who seek them. But for at least four reasons, the House Committee is plainly not entitled to the "extraordinary" writ relief it seeks. *See, e.g.*, *Chenault v. Phillips*, 914 S.W.2d 140, 141 (Tex. 1996) (per curiam) (mandamus); *Dunn v. St. Louis Sw. Ry.*, 88 S.W. 532, 533 (Tex. Civ. App. 1902) (prohibition); *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002) (injunction). It was therefore inappropriate for this Court temporarily enjoin TDCJ just to ensure the House Committee could enjoy underlying relief to which it was not entitled, and any permanent injunction would be similarly improper.

A. The extraordinary relief the House seeks impermissibly functions as a petition for a writ of habeas corpus.

First, the extraordinary relief sought by Relator in this Court is functionally a petition for a writ of habeas corpus directed to the wrong court. When the House Committee sought a TRO in the district court, extant criminal court orders that had never been overturned or otherwise vacated still commanded TDCJ to:

- take Roberson into TDCJ custody to commence serving his sentence and hold him pending any further orders of the convicting court, Judgment & Sentence at 3; and
- keep Roberson in custody until October 17, 2024, on which day it was "commanded [and] ordered" to carry out his death sentence until it was completed, 2024 Execution Order at 1–2.

In situations like this, "[t]he writ of habeas corpus is *the* remedy to be used when any person is restrained in his liberty," TEX. CODE CRIM. PROC. art. 11.01 (emphasis added), and *only* the CCA is authorized to award habeas relief to a capital prisoner like Roberson, *see, e.g.*, TEX. CODE CRIM. PROC. art. 11.071, §§ 4(a), 5(c), 6(a)–(b), 11.

Roberson's warden could be commanded to act contrary to those extant orders and furnish "relief from a judgment imposing a penalty of death" *only* pursuant to a writ of habeas corpus. TEX. CODE CRIM. PROC. art. 11.071, § 1. A legislative subpoena, then, could not countermand a final criminal judgment. Nor could an injunction from this Court purporting to require compliance with such a subpoena. Habeas corpus remains an adequate and available remedy at law, even when a habeas petitioner fails to win relief through that remedy. *See, e.g.*, *Jones v. Hendrix*, 599 U.S. 465, 477 (2023).

Because that adequate and alternative habeas remedy exists, extraordinary writs are simply unavailable and cannot be used to end-run the very limits that have precluded habeas relief for Roberson. It matters not that the nominal "Petitioner" in this habeas proceeding was the House Committee rather than Roberson himself. "Next friend" habeas actions are common—even if a petitioner like the House Committee would plainly lack standing to seek the relief it prays for here. *See, e.g.*, *Whitmore v. Arkansas*, 495 U.S. 149, 161–62 (1990).

As explained above, the Court's order blessing that novel use of legislative subpoena power via a district-court injunction has authorized a single committee in a single chamber of our bicameral legislature to countermand final criminal judgments

of the judiciary, and to wield the sort of clemency power lodged in the Governor alone. *See, e.g.*, TEX. CONST. art. IV, § 11(b); *Ex parte Gore*, 4 S.W.2d 38, 39 (Tex. Crim. App. 1928) ("[T]he power to parole, to pardon, etc., is one confided by our Constitution to the Governor of this state, over whose discretion in such matters this court has no control or right of review."); *R.R.E. v. Glenn*, 884 S.W.2d 189, 193 (Tex. App.—Fort Worth 1994, writ denied) (Any legislative act which "abridges or infringes upon the power granted to the Governor by Article IV, Section 11, [is] unconstitutional.").

That not only eviscerates habeas jurisprudence, but also paves the way to upend *every criminal trial*. Any pre-trial detainee who hires the right lobbyists in Austin could procure a committee subpoena permitting him to: testify instead of attending his trial; confess to the facts of the crime; and win absolute immunity from prosecution. *Supra* at 2.

B. The trial court had no authority to issue coercive orders to an agency that is not even the subject of the underlying subpoena.

On its face, the House Committee's subpoena "summon[s] Robert Roberson" to give "testimony before the Committee." It does not summon TDCJ to do anything. In fact, it does not reference TDCJ even once.

Just the same, the House Committee ran to a trial court seeking to subject TDCJ to the coercive power of a court order. That flies in the face of black-letter law and basic principles about judgments. In Texas, the "judicial power" consists of issuing coercive orders that bind *parties* and their privies. *Morrow v. Corbin*, 62 S.W.2d 641, 644 (Tex. 1933). Earlier this year, for example, this Court held that a probate court

could not require [two individuals] to transfer the[ir] shares" back to a trust because they "were not parties to the [underlying] suit." *Matter of Trust A & Trust C.*, 690 S.W.3d 80, 88 (Tex. 2024).

The House Committee here enlisted the trial court to do just what these black-letter principles prohibit. No court has authority to order TDCJ's compliance with commands issued to someone else. And statutory law is tellingly silent on enforcement mechanisms in a scenario like this one. Instead, as detailed above, Texas law authorizes a legislative committee to seek a writ of attachment against *the witness*. *See supra* at 5. It also authorizes the Legislature to take steps toward holding *the witness* in criminal contempt. *See supra* at 5–6. But when it comes to agencies that are not the object of a subpoena, it says only that a committee "may request necessary assistance" from an agency and the agency shall provide it. Tex. Gov't Code § 301.028. Instead of asking TDCJ for some sort of interbranch assistance, though, the House Committee just sued TDCJ.

The assistance sought here by the House Committee is also not "necessary" given the lengthy delay. Part II.D, *infra*. And, perhaps more importantly, it is not lawful, given the independent court orders that bind TDCJ. Part II.A, *supra*.

C. The House Committee's subpoena was defective on its face.

A standing committee of the Texas House of Representatives may issue process when authorized by the rules of procedure governing House operations. TEX. GOV'T CODE § 301.024(a). But where a subpoena is issued without authority in law, it is invalid from the outset and should be quashed. *Reader's Digest Ass'n, Inc. v. Dauphinot*, 794 S.W.2d 608, 610 (Tex. App.—Fort Worth 1990, no writ); *see also Toliver v.*

556 Linda Vista LP, No. 14-19-00206-CV, 2020 WL 4096113, at *3 n.2 (Tex. App.—Houston [14th Dist.] July 21, 2020, no pet.). That is exactly the case with the subpoena at issue here.

First, pursuant to Rule 1, Section 13 of the House Rules of Procedure, all subpoenas issued by the House "shall be signed by the speaker," namely, Dade Phelan. H.R. 4, 88th Leg., at 13 (2023). But the subpoena at issue in this case was signed by "Chair of the Committee on Criminal Jurisprudence of the House of Representatives," namely, Joe Moody. See App. Exhibit B.

Second, even if a committee chairman could properly sign the subpoena, the return of service here was signed by an agent of a different committee. The "Committee on Criminal Jurisprudence" purported to issue the subpoena. But the return was served by an agent of the "Committee on General Investigating." Either the Criminal Jurisprudence Committee is lacking a valid return, or else the General Investigating Committee is lacking an issued subpoena. It is to avoid just this sort of manifest confusion that state law requires both that a subpoena be issued "in the name of the committee" and that the return be served by an agent of "the committee." TEX. GOV'T CODE § 301.024(b), (d). State law nowhere countenances subpoenas issued in the name of some Janus-faced amalgam.

Third, state law requires that the return be served "to a witness." TEX. GOV'T CODE § 301.024(a). The only witness identified in the subpoena is Robert Roberson. The subpoena, however, was served not on witness Roberson, but instead on "Gretchen Sween, attorney of record for Robert Roberson." There is no indication that Sween operates with a blanket power of attorney to accept all service of process

on Roberson's behalf. Besides conflicting with § 301.024(a), such an approach to service of legislative subpoenas would be inconsistent with service in other contexts that typically require personal service upon the subject of the process. *See* TEX. R. CIV. P. 106(a) ("the citation must be served by delivering to the defendant in person"); TEX. R. CIV. P. 176.5 ("A subpoena must be served by delivering a copy to the witness").

D. A 21-year delay in seeking Roberson's testimony disentitles the House Committee to equitable remedies.

The House Committee claims it is "necessary" to hear from Roberson. But it has had *twenty-one years* to subpoena him. Instead, it elected to seek his critical insights only on the night before his execution. "The answer is not," as this Court's order suggests, "to reward those who interpose delay with a decree-ending capital punishment by judicial fiat." *Bucklew v. Precythe*, 587 U.S. 119, 149–51 (2019). Rather than rewarding the House Committee's sandbagging tactic, this Court ought to have used its "'equitable powers' to dismiss or curtail suits that are pursued in a 'dilatory' fashion or based on 'speculative' theories." *Id.* at 151; *see also In re Commitment of Anderson*, 692 S.W.3d 343, 347 (Tex. 2024) (Busby, J., concurring in the denial of the petition for review) (unreasonable delays in seeking habeas relief and pursuing mandamus counsel in favor of denial).

III. The House Committee's Expectation of Roberson's In-Person Appearance Necessitates a Decision from This Court Before Monday's Hearing.

Time is of the essence. This Court must correct the errors identified above prior to the committee hearing at noon on Monday, October 21, 2024. Despite House

Rules that permit a witness to appear via remote means, H.R. 4, 88th Leg., at 62–63, the House Committee has publicly stated its expectation that TDCJ will release Roberson from death-row confinement and present him for in-person testimony at a hearing room inside the Texas Capitol at noon on October 21, 2024. https://perma.cc/9KFH-KBTA.

This expectation—that TDCJ will literally produce Roberson's body outside of his prison cell—not only confirms that the House Committee seeks criminal habeas relief. It also compels this Court to act swiftly. TDCJ has made clear to the House Committee that, although remote participation via "Zoom" is feasible, Roberson will not appear in person. *See* Letter from TDCJ to House Committee (Oct. 18, 2024). This is due to the myriad security and logistical concerns associated with bringing a death-row inmate into the Texas Capitol, which lacks a secure holding area and is not within 80 miles of a TDCJ facility capable of securely housing him.

Prayer

The Court should grant this motion to reconsider its order entering a temporary injunction against TDCJ and dismiss this petition for lack of jurisdiction—and should do so before **noon on Monday, October 21, 2024**.

Respectfully submitted.

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