IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-83,873-02

EX PARTE MALCOLM JAMON EVANS, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS FROM BELL COUNTY

KEASLER, J., filed a dissenting opinion.

DISSENTING OPINION

I agree with the concurrence that *Hill v. Lockhart* is not controlling.[1] The issue in this case is—or should be—whether the rule announced in *Moussazadeh III* applies retroactively.[2] The concurrence considers it "more appropriate to accord retroactive status to a new rule that once was the rule than to a new rule that is truly new, in the sense that it

[1] Concurring Opinion at 1-2 (Keller, P.J., concurring) (citing *Hill v. Lockhart*, 474 U.S. 52, 60 (1985)).

[2] *See Ex parte Moussazadeh*, 361 S.W.3d 684 (Tex. Crim. App. 2012) (hereinafter *Moussazadeh III*).

has never been the rule before."[3] This point is well-taken, but there is another consideration that I believe weighs in favor of this Court's adherence to the *Teague v. Lane*[4] retroactivity standard: the State's reliance interest in the finality of its plea bargains. In light of our holding in *Moussazadeh II*, from at least 2002 to 2012 the State was on notice that any time parole eligibility was not an "element of the plea agreement," it could safely leave the plea record silent as to this point.[5] It did so with the understanding that this Court would typically interpret this silence as an indicator of the non-elemental status of parole eligibility.[6] The State should not now suffer the consequences of this potentially deliberate silence when it had good reason to rely upon *Moussazadeh II*—or at least good reason to think that any clear "break[]" from this law (such as occurred in *Moussazadeh III*) would mean that *Teague* weighs against retroactivity.[7]

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[3] Concurring Opinion at 2 (Keller, P.J., concurring).

[4] 489 U.S. 288 (1989).

[5] *See Ex parte Moussazadeh*, 64 S.W.3d 404, 411 (Tex. Crim. App. 2001) (hereinafter *Moussazadeh II*).

[6] *See id.* ("Parole eligibility must be an essential element of the plea agreement, though it need not be formally incorporated into the record at the time the plea is consummated. Therefore, unless the prosecutor testifies or otherwise acknowledges that parole eligibility was indeed an essential term of the plea agreement to both parties, it is most unlikely that an 'implicit' plea bargain term can later be incorporated into the plea agreement.").

[7] *See Chaidez v. United States*, 568 U.S. 342, 347 (2013) (citing *Teague*, 489 U.S. at 301) ("*Teague* makes the retroactivity of our criminal procedure decisions turn on whether they are novel. When we announce a 'new rule,' a person whose conviction is already final may not benefit from the decision in a habeas or similar proceeding. . . . '[A]

The plea in this case took place in 2009—after *Moussazadeh II* but before *Moussazadeh III*. Because I would hold *Moussazadeh III* non-retroactive on collateral review, *Moussazadeh II* requires Evans to show that parole eligibility rose to the level of an "affirmative element of the plea agreement."[8] I do not believe Evans has made this showing. His claim should be denied. Because the Court grants relief, I respectfully dissent.

Filed: September 20, 2017

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case announces a new rule,' *Teague* explained, 'when it breaks new ground or imposes a new obligation' on the government.").

[8] *Moussazadeh II*, 64 S.W.3d at 406.