IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. WR-84,091-01

Ex parte STEVEN MARK CHANEY, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. W87-95754-K(A) IN CRIMINAL DISTRICT COURT NO. 4
DALLAS COUNTY

KELLER, P.J., filed a concurring opinion.

Should a convicted person be declared "actually innocent" merely because the State's case has completely fallen apart? Or should the evidence also affirmatively show that the defendant did not in fact commit the crime? I believe that the latter is the case, and that we should think carefully about what constitutes actual innocence in light of the evolution of actual-innocence from (1) a safety-valve claim for relief when relief would not otherwise be possible to (2) a claim that affords greater relief than other claims available to the convicted person.

When this Court first recognized a freestanding claim of actual innocence in *Ex parte Elizondo*, we framed the standard for obtaining relief in language reminiscent of a sufficiency review: whether the defendant has shown "by clear and convincing evidence that no reasonable juror

would have convicted him in light of" newly discovered evidence.[1] In focusing the actual-innocence standard on whether a reasonable juror would convict, we envisioned its application in a case in which the trial had been "error-free."[2] For an error-free trial, this standard could seem like a good fit for two reasons: First, there needed to be a way to grant relief when no other cognizable error could be shown. And second, if there was nothing wrong with the evidence at the trial and that evidence was originally sufficient to convince a reasonable juror that the defendant was guilty, new evidence would have to clearly demonstrate innocence in order for it to meet the standard. For example, new evidence from DNA testing might be used to challenge a sexual assault conviction that was based on the testimony of a victim who identified the defendant as the attacker. DNA evidence excluding the defendant from culpability would not directly attack the victim's identification testimony, but a reasonable juror would no longer believe the victim's otherwise credible testimony because the DNA evidence unquestionably shows that the defendant did not commit the crime.

Elizondo involved a different situation: a complaining witness recanting his claim that the defendant had committed a crime against him.[3] In that situation, however, *Elizondo*'s standard still seemed to fit. First, there was no other way to grant relief: It would be thirteen years before this Court would recognize the State's unknowing use of false testimony as a valid claim.[4] Second, a

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[1] 947 S.W.2d 202, 209 (Tex. Crim. App. 1996). *Compare to Jackson v. Virginia*, 443 U.S. 307, 319 (1979) ("whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt") (emphasis removed).

[2] *See Elizondo*, *supra* at 208.

[3] *See id.* at 209-10.

[4] *See Ex parte Chabot*, 300 S.W.3d 768 (Tex. Crim. App. 2009).

court would have to be clearly convinced that the recantation was true for it to preclude a reasonable juror from finding guilt,[5] and the recantation being true would mean that the defendant did not commit the crime.

In *Ex parte Franklin*, we recognized that *Elizondo*'s statement of the actual-innocence standard was not a complete statement of what was required to obtain relief: "Although not explicitly stated in the holding, it is clear that *Elizondo* requires that applicants presenting *Herrera*-type [freestanding innocence] claims offer evidence that goes towards *affirmatively proving applicant's innocence*."[6] *Franklin* involved a recantation that did not directly bear on the defendant's guilt: The complaining witness recanted a statement that she had never had sexual relations with anyone other than the defendant.[7] As it turned out, she had. Her stepfather had been sexually abusing her.[8] Although this new evidence undermined the complainant's credibility, it "only collaterally affect[ed] her accusation against [the defendant]."[9] We held that the evidence was, therefore, not sufficient to establish actual innocence.[10]

At one time, actual innocence was the only claim that could be advanced when there was no misconduct by the State and there were no errors by defense counsel. But that has changed. Now,

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[5] *See Ex parte Brown*, 205 S.W.3d 538, 547-48 (Tex. Crim. App. 2006) (recantation was not convincing enough to be found true to establish actual innocence).

[6] 72 S.W.3d 671, 677 (Tex. Crim. App. 2002) (emphasis added).

[7] *Id.* at 673.

[8] *Id.*

[9] *Id.* at 678.

[10] *Id.*

there are at least two other avenues of relief: a claim involving new scientific evidence under Article 11.073[11] and a claim that the State unknowingly used false evidence.[12] As the present case illustrates, actual innocence is now often one of several claims advanced by an applicant on the basis of new evidence.[13] And actual innocence is now considered a claim for greater relief than these other claims because of the impact a declaration of actual innocence has on an applicant's reputation[14] and because such a declaration can also give rise to civil compensation.[15]

Judge Yeary has observed that a person who satisfies the *Elizondo* standard is not necessarily "innocent" because the literal statement of that standard just means that the current mix of evidence is such that a reasonable juror could not declare him guilty.[16] But actual innocence has always meant more than just a literal satisfaction of the *Elizondo* standard, which explains our more recent decision not to include as an actual-innocence situation a case in which a defendant is convicted under a statute that is facially unconstitutional.[17] In her concurring opinion in that case, Judge Alcala commented that the interrelationship between an actual-innocence declaration and civil compensation made it "necessary for this Court to apply the term 'actual innocence' strictly and

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[11] TEX. CODE CRIM. PROC. art. 11.073.

[12] *Chabot*, 300 S.W.3d 768.

[13] *See supra* at nn. 11-12.

[14] *Ex parte Reyes*, 474 S.W.3d 677, 681 (Tex. Crim. App. 2015).

[15] *Ex parte Fournier*, 473 S.W.3d 789, 797 (Tex. Crim. App. 2015) (Alcala, J., concurring).

[16] *Ex parte Cacy*, 543 S.W.3d 802, 803 (Tex. Crim. App. 2016) (Yeary, J., concurring).

[17] *Fournier*, 473 S.W.3d at 792-93.

consistently as a term of art."[18]

I think it is time to recognize that *Elizondo*'s formulation of the actual innocence standard was inadequate and to reformulate the standard to comport with what actual innocence really is. Instead of saying that "no reasonable juror would have convicted the applicant," we should say that an applicant must establish his innocence beyond a reasonable doubt. Of course, even when a defendant is unable to show innocence, he could still be entitled to relief. When new evidence falls short of showing innocence but wholly undermines the evidence supporting the conviction, an applicant could still seek relief under Article 11.073 or our false-evidence jurisprudence.[19]

In this case, Applicant's new evidence does not even meet *Franklin*'s requirement: it eviscerates the State's case against him but it does not affirmatively prove his innocence. He has alibi evidence, but it is not new. Even assuming that old alibi evidence could be so compelling that, when combined with new evidence undermining the State's case, a reasonable juror would necessarily conclude beyond a reasonable doubt that the defendant was innocent, that is not this case. Applicant's alibi evidence was from interested witnesses (mostly relatives), and it is possible for a reasonable juror to discount it. I also need not address whether innocence would be established if an applicant's new evidence so undermined the State's case as to eliminate any evidence of any possible connection between the defendant and the crime. That is not the case here because the defendant had at least some connection to the victim, and in fact had a potential motive to kill: The

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[18] *Id.* at 797 (Alcala, J., concurring).

[19] In the unlikely event that new evidence eviscerates the State's case but cannot be raised under one of those two areas of the law, I would not foreclose the possibility that the applicant has nevertheless raised a cognizable claim for relief. We can address that unlikely scenario if and when it ever comes before us.

victim was his drug supplier and Applicant owed him money. Because Applicant has not established his innocence beyond a reasonable doubt, I would not grant relief on his actual innocence claim. But because he has shown that he is entitled to relief under Article 11.073, I agree with the Court's decision to grant him a new trial.

I concur in the Court's judgment.

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