



## **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**

**ALCALA, J., filed a concurring opinion in which HERVEY and RICHARDSON,  
JJ., joined.**

### **CONCURRING OPINION**

I join the Court's majority opinion. I write separately to address whether it would be prudent to raise the burden of proof required of applicants seeking to establish actual-innocence claims from clear and convincing evidence to proof beyond a reasonable doubt. I conclude that this Court's current standard of clear and convincing evidence to establish actual innocence is proper and that it would be inappropriate to elevate that burden to something more onerous.

Although it has been suggested that the recent expansion of available avenues for

habeas relief is a consideration that weighs in favor of elevating the burden of proof for actual-innocence claims to proof beyond a reasonable doubt, I am unaware of any legislative history supporting the view that the enactment of new grounds for habeas relief correlates to a need or intent to narrow the availability of habeas relief in actual-innocence cases by elevating the burden of proof for those cases.<sup>1</sup> And the proposal to elevate the burden of proof essentially revives what this Court already rejected as unworkable about twenty-five years ago. Before announcing the current standard, this Court effectively applied a beyond-a-reasonable-doubt standard imported from a sufficiency of the evidence analysis to resolve actual-innocence claims. In *State ex. rel. Holmes v. Hon. Ct. of Appeals for Third Dist.*, this Court stated,

[I]n order to be entitled to relief on a claim of factual innocence the applicant must show that based on newly discovered evidence and the entire record before the jury that convicted him, no rational trier of fact could find proof of guilt beyond a reasonable doubt.

885 S.W.2d 389, 399 (Tex. Crim. App. 1994). This standard made it virtually impossible for applicants to succeed on actual-innocence claims, and this Court later modified that standard in *Ex parte Elizondo*, 947 S.W.2d 202, 205 (Tex. Crim. App. 1996). Professors Dix and Schmolesky described the evolution of this standard as follows:

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<sup>1</sup> Other avenues of habeas relief now available include claims based on new science under Article 11.073 or on false evidence under this Court's decision in *Ex parte Chabot*. See TEX. CODE CRIM. PROC. art. 11.073; *Ex parte Chabot*, 300 S.W.3d 768 (Tex. Crim. App. 2009). But it does not follow that the expansion of other avenues for habeas relief means that the actual innocence ground for habeas relief should be returned to its prior status of a virtually unwinnable claim by imposing a beyond-a-reasonable-doubt burden of proof.

The criterion for determining whether relief is warranted under *State ex. rel. Holmes v. Third Court of Appeals* was obviously an extremely stringent one. It may have been so stringent as to be illusory.

In *Ex parte Elizondo*, the court acknowledged that the [*Holmes*] criterion would make relief impossible to obtain and reconsidered the standard to be applied in these cases. Since these cases necessarily require the weighing of new evidence tending to show innocence against the evidence of guilt produced at trial, it reasoned, the approach to assessing “legal” sufficiency of the evidence is not appropriate for the task. Therefore, the court rejected the “implication” of [*Holmes*] that newly discovered evidence of innocence justifies relief only if it renders the State’s case legally insufficient for conviction.<sup>2</sup>

Recognizing that the *Holmes* standard made relief effectively unattainable for allegations of factual innocence, this Court in *Ex parte Elizondo* devised the now-familiar standard applicable here: A habeas applicant is entitled to relief on a claim of actual innocence only if he proves by clear and convincing evidence that no rational jury hearing the new evidence as well as the evidence actually introduced at trial would return a verdict of guilty. *See Elizondo*, 947 S.W.2d at 205, 209.

Actual innocence already imposes a greater burden of proof—clear and convincing evidence—as compared to other habeas claims that have a preponderance of the evidence standard. Additionally, new evidence raising the prospect of actual innocence must offer some affirmative proof towards an applicant’s innocence. *Ex parte Franklin*, 72 S.W.3d 671, 677 (Tex. Crim. App. 2002). Thus, while actual innocence may provide a greater form of relief in terms of restoration of reputation and monetary compensation than do other claims,

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<sup>2</sup> George E. Dix & John M. Schmolesky, 43B TEX. PRAC., CRIMINAL PRACTICE AND PROCEDURE § 59:34 (3d ed.).

establishing an actual-innocence claim already requires a more rigorous showing of entitlement to relief by clear and convincing evidence as compared to other habeas claims requiring proof by a preponderance of the evidence. In short, it is already difficult enough to establish a freestanding claim of actual innocence, and it is the unusual exception rather than the rule for this Court to grant that type of extraordinary relief. I, therefore, respectfully disagree that it would be appropriate to elevate the already “Herculean” burden of proof for actual-innocence claims.<sup>3</sup>

Furthermore, although I agree that the clear-and-convincing burden of proof is appropriate under this Court’s current jurisprudence, I would further hold that, when an applicant, the State’s elected district attorney, and the trial court all affirmatively represent in writing that an applicant meets the standard for actual innocence, as here, this Court should always adopt that recommendation, absent a suggestion of a gross misunderstanding of the applicable law or misconduct by the parties or judge. The parties are in the best position to evaluate the strength of the evidence used to convict the defendant and to assess the credibility and weight of the new evidence of innocence. This Court should reserve its evidentiary analysis for only those cases where the parties have an actual dispute about whether an applicant is entitled to relief on the basis of factual actual innocence.

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<sup>3</sup> See *Ex parte Brown*, 205 S.W.3d 538, 545 (Tex. Crim. App. 2006) (“Establishing a bare claim of actual innocence is a Herculean task. We have stated that ‘any person who has once been finally convicted in a fair trial should not be permitted to wage, and we do not permit him to wage, a collateral attack on that conviction without making an exceedingly persuasive case that he is actually innocent.’”) (quoting *Ex parte Elizondo*, 947 S.W.2d 202, 205 (Tex. Crim. App. 1996)).

My view that it is appropriate for this Court to abide by the agreement of the parties and the habeas court that an applicant is factually actually innocent is supported by the statutory scheme describing compensation for an actually innocent person who is wrongfully convicted of offenses. A mechanism for resolving claims by agreement of the parties is already embodied in the statute for civil compensation for wrongful incarceration which, in addition to other situations, provides for compensation when two circumstances occur: (1) this Court grants habeas relief on any grounds, and then (2) the trial court dismisses the charge in accordance with the State's motion to dismiss that states that no credible evidence exists that inculpates the defendant and, either in the motion or in an affidavit, the State's attorney indicates his belief that the defendant is actually innocent of the crime for which he was sentenced.<sup>4</sup> TEX. CIV. PRAC. & REM. CODE § 103.001.

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<sup>4</sup> The relevant statute provides,

(a) A person is entitled to compensation if:

(1) the person has served in whole or in part a sentence in prison under the laws of this state; and

(2) the person:

(A) has received a full pardon on the basis of innocence for the crime for which the person was sentenced;

(B) has been granted relief in accordance with a writ of habeas corpus that is based on a court finding or determination that the person is actually innocent of the crime for which the person was sentenced; or

(C) has been granted relief in accordance with a writ of habeas corpus and:

(i) the state district court in which the charge against the person was pending has entered an order dismissing the charge; and

(ii) the district court's dismissal order is based on a motion to dismiss in which the state's attorney states that no credible evidence exists that inculpates the defendant and, either in the motion or in an affidavit, the state's attorney states that the state's attorney believes that the defendant is actually innocent of the crime for which the person was sentenced.

In the instant case, this Court grants actual-innocence relief due to clear and convincing evidence based on new facts, and applicant will be entitled to a money judgment under Section 103.001(a)(2)(B). *See id.* But even if this Court were to deny the actual-innocence claim and instead grant relief only on applicant's remaining claims, it appears to me that applicant would almost certainly be entitled to a finding of actual innocence and a money judgment under Section 103.001(a)(2)(C), as long as the State filed the appropriate paperwork described in the two steps above. Thus, with respect to civil compensation for wrongful incarceration, there is a discrepancy between the burdens of proof that apply when the State agrees that the defendant is innocent versus when it disagrees. When the State agrees with the applicant and files the required paperwork in the habeas court, the burden of proof to justify compensation on actual innocence under the civil statute is by a preponderance of the evidence because an applicant need only obtain habeas relief from this Court on any claim and he need not obtain an actual innocence finding from this Court.<sup>5</sup> But when the State does not agree with an applicant's claims on actual innocence, the burden of

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TEX. CIV. PRAC. & REM. CODE § 103.001.

<sup>5</sup> I note that this is what happened with Hannah Overton following her wrongful conviction and incarceration for the 2006 death of her foster son. This Court denied her actual-innocence claim but granted her relief on the basis of ineffective assistance of counsel. *Ex parte Overton*, 444 S.W.3d 632, 633 (Tex. Crim. App. 2014). After that, based on the dismissal of her charges and the district attorney's agreement that she was actually innocent, she was awarded almost \$600,000 in compensation. *See* Lauren Effron and Juju Chang, *Mom convicted in salt poisoning death to get nearly \$600K for wrongful incarceration*, ABC NEWS (Mar. 7, 2018, 11:08AM ET), available at <https://abcnews.go.com/US/texas-mother-murder-conviction-overturned-receive-500k-state/story?id=53578422>.

proof to establish actual innocence is by clear and convincing evidence before an applicant may be found actually innocent by this Court and thereby entitled to a money judgment. *Id.* Because the civil statute permits a finding of actual innocence and financial compensation under circumstances in which any habeas claim has been shown by a preponderance of the evidence when the State and trial court agree that an applicant is actually innocent, I conclude that it would be improper to elevate this Court's standard of proof from a standard of clear and convincing evidence to a standard of beyond a reasonable doubt. The latter standard is too far removed from the preponderance of the evidence standard and it has already essentially been recognized as unworkable.

Here, the State agrees with applicant that he is actually innocent and the trial court adopts that agreement. Although I do not disagree with this Court's evidentiary analysis of the factual issues, I believe that this Court's analysis of applicant's actual-innocence claim is ultimately unnecessary to justify a civil finding of innocence and monetary compensation, given that this Court unanimously agrees that there are other grounds for habeas relief that would entitle applicant to relief, and given that the State and trial court agree that applicant is actually innocent. In short, the dispute amongst the members of this Court as to applicant's actual innocence, even if the concurring opinions were correct, will almost certainly be inconsequential to a civil determination that applicant is actually innocent and entitled to financial compensation under the applicable statute.

With these comments, I join this Court's majority opinion.

Filed: December 19, 2018

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