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
FROM DALLAS COUNTY

YEARY, J., filed a concurring opinion.

CONCURRING OPINION

I.

I agree with the Court's conclusion that Applicant has established entitlement to relief on the basis of his claim that is predicated on Article 11.073. TEX. CODE CRIM. PROC. art. 11.073. Having so held, the Court today need not go on to address his false evidence claim or his *Brady* claim,[1] and I express no opinion with respect to those. I disagree that Applicant has satisfied *Elizondo*,[2] and I would not also grant relief on that basis, even assuming that we must address that claim independently under *Reyes*. *Ex parte Reyes*, 474 S.W.3d 677, 681

[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

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

(Tex. Crim. App. 2015).

Although I joined the Court's opinion in *Reyes*, I have since had second thoughts about the idea that a successful claim under *Elizondo* should be regarded as calling for "a greater form of relief." *Id*. As I made clear in my concurring opinion in *Ex parte Cacy*, 543 S.W.3d 802 (Tex. Crim. App. 2016) (Yeary, J., concurring), I do not regard the *Elizondo* standard as sufficiently rigorous to justify the nomenclature of "actual innocence." As Presiding Judge Keller suggests today, we may very well want to keep the door open to making habeas corpus relief available for any applicant who can satisfy the *Elizondo* standard. *See* Presiding Judge Keller's Concurring Opinion at 5 n.19. But I would not call that basis for relief "actual innocence," and I do not believe an applicant who satisfies that standard has necessarily restored his "reputation," as *Reyes* assumed. 474 S.W.3d at 681. And, in any event, I have serious doubts that this Court is either constitutionally or statutorily empowered to grant relief in habeas corpus proceedings that is any more extensive than setting aside a judgment and remanding an applicant to face the underlying charging instrument. The restoration of an applicant's reputation and/or the propriety of granting monetary recompense are not determinations within the scope of our review.

I am intrigued by Presiding Judge Keller's suggestion that we should adjust the habeas applicant's burden of proof for so-called "actual innocence" claims—to make it even more rigorous. Presiding Judge Keller's Concurring Opinion at 5. I am open to a dialogue with my colleagues about that possibility in an appropriate case. An applicant who can show beyond

a reasonable doubt that he did not commit the offense for which he was convicted would be far more justified in calling himself "actually innocent." *See Cacy*, 543 S.W.3d at 803 (Yeary, J., concurring) (satisfying the *Elizondo* standard "is not the same as establishing that the applicant is manifestly *innocent*"). In this case, however, I do not agree that Applicant has even established entitlement to relief under *Elizondo*, much less that he is "actually innocent" in any definitive sense. It is enough today that the Court grant him relief under his Article 11.073 claim, and be done with it.

Because the Court in this case ultimately grants no greater relief than it would in any event for a successful claim under Article 11.073—setting aside the judgment and remanding to the custody of the sheriff to answer anew to the charges—I concur in the result.

II.

Judge Richardson does not appear to understand my position. Here is the critical legal flashpoint in our debate that must be clearly understood: It is Criminal Law 101 that *a determination by a jury that a person is "not guilty" does not amount to a declaration that he is "actually innocent" of the crime*. The person may have actually committed the offense—factually, historically, and morally—but he cannot lawfully be convicted or punished by the State unless the State first proves his guilt to a level that will satisfy each juror beyond a reasonable doubt. We must not forget that principle.

I have said more than once that I have no problem with applicants obtaining relief from this Court from their judgments of conviction and sentence if they satisfy what has

come to be known as the *Elizondo* standard. To satisfy that standard, an applicant must produce new evidence that satisfies this Court that, based on all *known* evidence, no reasonable juror would have found him guilty beyond a reasonable doubt. There is no doubt that, satisfying the *Elizondo* standard is a Herculean burden. And when an applicant satisfies it, he ought not to be required to continue living under the penalties imposed by his judgment of conviction.

But some members of this Court seem determined to declare to the world that all persons who satisfy *only* the *Elizondo* standard are also "actually innocent"! When a court declares an applicant to be "actually innocent," reasonable people will assume that the applicant so declared has satisfied at least some burden with regard to the question of his actual, factual, historical, and moral innocence. But, that may very well *not* be the case. The fact that a juror would not find a person guilty beyond a reasonable doubt—the functional test required to be met by *Elizondo*—is not remotely the same thing as a demonstration of factual, historical, and moral innocence of a crime. Juries do not even declare defendants who have been acquitted after a trial to be "actually innocent." Instead, a jury is only permitted to declare that a defendant is *legally* "not guilty," which is another way of saying only that the State has failed to prove the person to be guilty beyond a reasonable doubt. A jury that acquits a defendant—and thereby calls him "not guilty"—might indeed have been convinced of his guilt by a preponderance of the evidence, or even to the level of clear and convincing evidence, but it would have still been required to find the person legally "not

guilty" if it was not satisfied of the defendant's guilt to the level of beyond a reasonable doubt. And most people who have spent any time at all working in the criminal justice system know that there are times when defendants are found "not guilty" by a jury, but not a person in the room—including the jurors—really believes them to be "actually innocent."

The *Elizondo* standard does not literally require an applicant to establish that he did not commit the offense for which he was convicted by *any standard whatsoever*. Yet, we persist in declaring all applicants who satisfy *only* the *Elizondo* standard "actually innocent." In my view, we—judges on this Court—lack a humility appropriate to our true station when we declare to the public that an applicant is actually—and thus, factually, historically, and morally—innocent when—in factual, historical, and moral fact—he might very well *not* be. This is especially true when we have not required the applicants who seek such a declaration to establish their "innocence" by any legal burden that actually addresses that question.

I have also tried to be clear that this debate—whether and when to call an applicant "actually innocent"—has nothing to do with whether an applicant who has satisfied the burden established by *Elizondo* has earned a right to relief from his conviction. This Court has afforded relief from judgments imposing convictions for applicants who satisfy the *Elizondo* standard for years, and I have *not* advocated to abandon that practice. I am satisfied to provide *Elizondo* relief when applicants meet the standard established by that opinion. In fact, I have agreed with the Court to afford such relief before—several times, and even in Sonia Cacy's case.

It is evident to me, however, that some members of this Court relish being the arbiters of who is to receive monetary compensation and a lifetime of reduced-cost health care benefits after applicants have been wrongfully incarcerated. *See* Judge Richardson's Concurring Opinion at 2–3; Judge Alcala's Concurring Opinion at 5–7. Who would not want to be the bearer of great gifts to one so deserving as an actually innocent defendant who has been wrongfully convicted of a crime? And as much as those members might believe it to be so, I have *no* intent to meddle with the circumstances under which an applicant may be compensated, by tax dollars collected from the citizens of this State, for his wrongful conviction or incarceration. It is fine with me if applicants who satisfy *Elizondo* get paid and receive benefits—even if they have not established by any real legal burden their "actual innocence" of the crime for which they were convicted. But we cannot allow ourselves to be distracted by such purely civil matters when undertaking to decide whether to declare to the world that a person is "actually innocent" of a crime.

As far as I am concerned, the determination about who is entitled to compensation and benefits is none of my business as a Judge on the Court of Criminal Appeals, and none of the rest of this Court's business either. In my view, that is quintessentially a civil question. It is a matter established by the Legislature, in the Texas *Civil* Practice and Remedies Code. Cases deciding whether people have met the standard established in that code are appropriately addressed, not to this Court, but to courts with civil jurisdiction and ultimately to the Texas Supreme Court.

Recognizing the boundaries of judicial power can be difficult. But it is a simple enough matter for me to conclude that the Court of Criminal Appeals is constitutionally disentitled to engage in the settling of civil disputes. We do not do that. We do not order people to be paid compensation, nor do we pay them compensation from the State's resources. Those kinds of issues are none of our business.

There have been cases where applicants have proven to this Court that they are "actually innocent." One example I can agree with is the case of Michael Morton, who had been wrongfully convicted of murder. I would call him "actually innocent" based on the evidence he brought to the attention of the Court that established pretty darn convincingly—perhaps even to the level of beyond a reasonable doubt—that he was not the killer. And this, then, touches upon the matter that I find intriguing about Presiding Judge Keller's opinion. I have not said that I am beyond the point of discussion on the question of what burden we ought to adopt for cases in which we declare a defendant "actually innocent." In fact, I said in my opinion in this very case that I am open to dialogue about it with my colleagues. But I would still feel less uncomfortable with calling applicants "actually innocent" in a forever-lasting, published opinion if they are required to meet at least some clearly established burden with regard to the actual question of "actual innocence" rather than to the question of "whether a juror would find guilt beyond a reasonable doubt."

My concern is that, if we set the bar too low, we will make a mistake and declare someone to be "actually innocent" who is not actually—and thus not factually, historically,

or morally—innocent. If this Court does that, especially if we do it in a forever-lasting published opinion, then the Court's reputation will be tarnished in a similar way to the way in which it has been tarnished in the past when it has failed to provide relief to applicants who met the *Elizondo* standard. My concern is for the Court and for the enduring reliability of its determinations.

It is a tragedy when a person is convicted of a crime who should not be, and especially so if he is actually innocent. But the tragedy of a wrongful conviction is not the same as the conviction of an "actually innocent" person. The conviction of an "actually innocent" person is far more troubling and causes a far deeper wound to the integrity of our system. We should not persist in declaring applicants "actually innocent" who have merely demonstrated a wrongful conviction. It diminishes the importance of a declaration of "actual innocence."

This Court is the arbiter of its own "actual innocence" jurisprudence. We created it. We shepherd it. The Legislature has not codified it. Even the statute that affords compensation to wrongfully convicted persons does not compel this Court to declare anyone "actually innocent." Relief pursuant to that statute may be obtained whether or not *this Court* declares a person to be "actually innocent." *See* TEX. CIV. PRAC. & REM. CODE § 103.001 (a). The integrity of our own jurisprudence, then, ought to be our primary concern, and not whether we are pursuing good policy on the question of who deserves rewards for their wrongful convictions.

FILED: December 19, 2018
PUBLISH