IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-87,660-01

Ex parte KRISTOPHER JOSEPH LALONDE, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS CAUSE NO. F1420932-A IN THE 145TH DISTRICT COURT FROM NACOGDOCHES COUNTY

KELLER, P.J., filed a concurring opinion in which SLAUGHTER, J., joined.

This Court has not been consistent about how to analyze false-evidence claims, and the Court's opinion in this case reflects those inconsistencies. I write separately to clarify how to categorize and treat various types of false-evidence claims.

False-evidence claims have three components: (1) the prosecution's use of false evidence, (2) the culpable mental state with respect to the falsity (knowing or unknowing), and (3) the materiality of the evidence.[1] Conducting a harm analysis is also sometimes required, depending on the nature of the false-evidence claim and when that claim is presented.[2]

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[1] *See infra*.

[2] *See infra*.

As to component (1), evidence is "false" if, taken as a whole, it gives the factfinder a false impression.[3] As to component (2), a prosecutor "knows" the evidence is false if he knew or should have recognized the misleading nature of the evidence.[4] Also, knowledge is imputed to the prosecution if falsity is known by a member of the prosecution team.[5]

As to component (3), the standard for determining materiality depends on whether the prosecution's use of false evidence is "knowing" or "unknowing."[6] If the prosecution's use of false evidence is "knowing," the evidence is material unless the court is convinced beyond a reasonable doubt that the false evidence did not contribute to the verdict (on conviction or punishment).[7] This standard of materiality is the same as the harm standard for constitutional error on direct appeal.[8]

When the use of false evidence is "knowing," this beyond-a-reasonable-doubt standard of *materiality* applies on both direct appeal and on habeas, but the standard of *harm* to apply on habeas corpus depends upon whether the false evidence claim could have been raised on direct appeal.[9] If the "knowing use" claim could not have been raised on direct appeal, then establishing materiality

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[3] *Ex parte Chavez*, 371 S.W.3d 200, 208 (Tex. Crim. App. 2012) (citing *Alcorta v. Texas*, 355 U.S. 28, 31 (1957)).

[4] *Ex parte Ghahremani*, 332 S.W.3d 470, 477 (Tex. Crim. App. 2011).

[5] *Ex parte Napper*, 322 S.W.3d 202, 243 (Tex. Crim. App. 2010).

[6] *Id.* at 241-42. *See also Ghahremani*, 332 S.W.3d at 478, 482.

[7] *Ghahremani, supra* at 478.

[8] *Id.*

[9] *Id.* at 481-83. *See also Napper*, 322 S.W.3d at 242. By raised on direct appeal, we mean, that the claim was or could have been raised at trial or in a motion for new trial, which would make it raisable on direct appeal. *See Ghahremani*, 332 S.W.3d at 482 (discussing the failure of a defendant in a prior case to "raise this matter at trial, in a motion for new trial, or on direct appeal").

is sufficient to establish harm, just as it would be on direct appeal.[10] But if the "knowing use" claim could have been raised on direct appeal but was not, then the habeas applicant must meet the usual, higher, burden on habeas: to show harm, he must show by a preponderance of the evidence that the false evidence contributed to his conviction or punishment.[11]

This Court has not been clear about the materiality standard that applies to the "unknowing use" of false evidence, but logic and an assessment of the holdings in various opinions indicate that the materiality standard is the same as the harm standard used on habeas for late "knowing use" claims: for the false evidence to be material, the defendant must show by a preponderance of the evidence that it contributed to his conviction or punishment. We have held that this preponderance standard applies to a habeas claim of "unknowing use" even if the habeas applicant could not have raised the claim on direct appeal.[12] Although we have suggested that this may be a harm standard,[13] it actually has to be a materiality standard, as I shall explain.

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[10] *Ghahremani*, *supra* at 482-83.

[11] *Id.* at 481. While this is still the standard, we have also recently indicated that, in general, claims that could have been raised on appeal cannot be raised at all on habeas. *Ex parte Jimenez*, 364 S.W.3d 866, 880 (Tex. Crim. App. 2012) ("[W]e recently noted our trend to draw stricter boundaries regarding what claims may be advanced on habeas petitions because the Great Writ should not be used to litigate matters 'which should have been raised on appeal or at trial.") (ellipses, internal quotation marks, and bracketing omitted). I have suggested that the knowing use of false testimony is a "rare exception" to that rule because a defendant's negligence in raising such a claim should not be a complete bar when the State has knowingly subverted the system. *Ex parte Chavez*, 371 S.W.3d 200, 215 (Tex. Crim. App. 2012) (Keller, P.J., dissenting). Instead, the habeas applicant should be allowed to raise a late "knowing use" claim but be required to meet the more onerous habeas harm standard: preponderance of the evidence. *Id.*

[12] *Napper*, 322 S.W.3d at 242 (discussing *Ex parte Chabot*, 300 S.W.3d 768 (Tex. Crim. App. 2009)).

[13] *See id.*

A necessary component of any Fourteenth Amendment due process claim is "state action."[14] Even the most outrageous behavior by a private citizen will not by itself establish "state action" for due-process purposes.[15] False evidence presented by a private citizen does not ordinarily implicate state action. Nevertheless, in *Chabot*, we held that a defendant could get habeas relief on a claim of unknowing false evidence if he proved by a preponderance of the evidence that the false evidence contributed to his conviction or punishment. The Court did not explain why the State was responsible for presenting false evidence unknowingly, but the theory seems to have been that if a trial is more likely than not corrupted by false evidence, due process just requires that we grant relief. The unknowing use of false evidence could be said to implicate state action through the actual subversion of the court proceedings if it is more likely than not that the evidence affected the outcome of the proceedings.[16]

But if false evidence is insignificant, we would not find a due process violation and then perform a harm analysis and find it harmless; we would say that there was no due process violation at all. And we have said as much. In *Ex parte De La Cruz*, we said, "[T]his Court has recognized that the use of material false evidence to procure a conviction violates a defendant's due-process

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[14] *United States v. Morrison*, 529 U.S. 598, 621 (2000).

[15] *Colorado v. Connelly*, 479 U.S. 157, 165 (1986).

[16] *See Sanders v. Sullivan*, 863 F.2d 218, 224 (2d Cir. 1988) ("It is simply intolerable in our view that under no circumstance will due process be violated if a state allows an innocent person to remain incarcerated on the basis of lies. A due process violation must of course have a state action component. We believe that Justice Douglas accurately articulated the appropriate definition that accords with the dictates of due process: a state's failure to act to cure a conviction founded on a credible recantation by an important and principal witness, exhibits sufficient state action to constitute a due process violation.").

rights under the Fifth and Fourteenth amendments to the United States Constitution."[17] There is no due process violation at all if evidence is not material.

Having said all of that, it appears that Applicant is raising a "knowing use" claim and that he may not have had the opportunity to raise this claim on appeal (if it was not discovered in time to develop in a motion for new trial). Assuming those facts, I agree with the Court that the record shows beyond a reasonable doubt that the evidence did not affect the outcome of Applicant's proceedings.

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[17] 466 S.W.3d 855, 866 (Tex. Crim. App. 2015).