IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NOS. WR-90,980-01 & WR-90,980-02

EX PARTE OTIS MALLET JR., Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NOS. 1164940-A & 116248132-A
IN THE 338TH DISTRICT COURT
FROM HARRIS COUNTY

NEWELL, J., filed a concurring opinion in HERVEY, RICHARDSON and WALKER, JJ., joined.

Applicant has consistently maintained that he did not commit this crime. He has presented affirmative new evidence that the officer—the sole witness to the offense—not only hid evidence of Applicant's innocence, but also testified falsely against him. The State, the defense, and the habeas court are all in agreement that Applicant deserves to have his conviction set aside and have his innocence declared by this Court. I join the Court's order doing so. I write separately to reiterate why I

believe the current standard works.

The practical effect of the many different requirements for establishing innocence already provides a sufficiently rigorous standard that ensures an applicant proves his or her innocence under the law. It is not mere legal sufficiency review.[1] A deficiency in the record regarding a single element of the offense can render the evidence legally insufficient.[2] But innocence relief requires a stronger, more persuasive showing.

First, an applicant must present new and compelling evidence, unknown at the time of the trial, to establish innocence.[3] This new evidence cannot have been ascertainable through reasonable diligence and cannot merely muddy the waters by undermining credibility of existing witnesses.[4] In this way, the new evidence presented in a habeas

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[1] *See Ex parte Tuley*, 109 S.W.3d 388, 392 (Tex. Crim. App. 2002) ("An applicant claiming innocence is not claiming the evidence at trial was insufficient to support the conviction."); *see also Ex parte Mayhugh*, 512 S.W.3d 285, 298 (Tex. Crim. App. 2016) (plurality op.) (noting that the *Jackson v. Virginia* standard for legal sufficiency cannot be used for determining actual innocence because no one could ever be found actually innocent on habeas review if the original trial evidence was legally sufficient to support guilt).

[2] *See, e.g., Britain v. State*, 412 S.W.3d 518, 520 (Tex. Crim. App. 2013) (noting that under the legal sufficiency standard "evidence may be legally insufficient when the record contains either no evidence of an essential element, merely a modicum of evidence of one element, or if it conclusively establishes reasonable doubt") (citing *Jackson v. Virginia*, 443 U.S. 307, 320 (1979)).

[3] *Ex parte Brown*, 205 S.W.3d 538, 545 (Tex. Crim. App. 2006) (noting that a habeas applicant must not only make a truly persuasive showing of innocence, he must also prove that the evidence he relies upon is "newly discovered").

[4] *Id.* (explaining that a habeas applicant must also prove that the evidence he relies on was not known to him at the time of trial and could not have been known to him even with the

petition based on actual innocence ensures that the focus is on the affirmative evidence of innocence of the applicant rather than the mere undermining of the State's evidence at trial.[5] Second, a claim of innocence will not lie if an applicant could have been guilty of a greater or lesser included offense of the one charged.[6] In this way, the standard requires the applicant to establish that he is not just "not guilty" of the offense charged, but also that he did not engage in conduct that might have made him culpable for any variants of the charged conduct. Finally, the standard of clear and convincing evidence, rather than a preponderance, ensures a showing of more than probable innocence.[7] I believe that these requirements combine to ensure an applicant did not commit the crime and to justify a judicial declaration of innocence.

What is often left out of our case law when discussing these standards is the fact that an applicant must make this showing after there has been a police investigation into the case and the applicant has been

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exercise of due diligence); *Ex parte Harleston*, 431 S.W.3d 67, 89 (Tex. Crim. App. 2014) (holding that newly discovered evidence that merely "muddies the waters" or only casts doubt upon an applicant's conviction is insufficient).

[5] *See Ex parte Harleston*, 431 S.W.3d at 70 ("[B]efore the habeas court can make a proper recommendation to this Court, the court must assess the probable impact of the new evidence, and then weigh the newly discovered evidence against the old inculpatory evidence to determine whether the applicant has met the burden of proof necessary to unquestionably establish his innocence.").

[6] *Ex parte Kussmaul*, 548 S.W.3d 606, 641 (Tex. Crim. App. 2018).

[7] *Ex parte Elizondo*, 947 S.W.2d 202, 209 (Tex. Crim. App. 1996).

found guilty through a plea of guilty or a jury trial. If an applicant can sufficiently undermine all that work with new, affirmative evidence of innocence to show that no rational jury would have convicted, I do not believe that the State will or even can, as a practical matter, re-prosecute that applicant for that crime unless some new, more compelling evidence of guilt comes to light. It may be theoretically possible to do so even after a particular crime has been so thoroughly examined, but I see no reason to heighten the standard to allow for such a rare and exceptional circumstance.[8]

As the United States Supreme Court recently observed, the presumption of innocence lies at the foundation of our criminal law.[9] Innocence is the default in American society. Once a conviction has been erased through a finding of innocence the presumption of innocence is restored.[10] In this case, Applicant could only be convicted through the testimony of a single police officer who we now know lied to a jury about the offense ever taking place and withheld evidence that would have

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[8] Indeed, in this case, the State actually agrees that innocence relief is appropriate. If this Court grants habeas relief on some basis other than actual innocence, the State can still file a motion to dismiss the case based on actual innocence. TEX. CIV. PRAC. & REM. CODE § 103.001. Raising the burden of proof is unlikely to accomplish anything except perhaps rendering this Court's refusal to declare innocence in such cases irrelevant.

[9] *Nelson v. Colorado*, 137 S. Ct. 1249, 1255–56 (2017).

[10] *Id.* at 1255.

exposed his dishonesty and exonerated Applicant. Appellant has carried his "Herculean" burden to establish his innocence.[11] I join the Court in declaring him so.

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[11] *See Ex parte Brown*, 205 S.W.3d at 545.