"FREEING THE INNOCENT: ACTUAL INNOCENCE AND THE WRIT OF HABEAS CORPUS"

Paper and Presentation By:
GARY A. UDASHEN
SORRELS, UDASHEN & ANTON
2311 Cedar Springs Road
Suite 250
Dallas, Texas 75201
(214) 468-8100 Phone
(214) 468-8104 Fax
gau@sualaw.com

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FREEING THE INNOCENT: ACTUAL INNOCENCE AND THE WRIT OF HABEAS CORPUS

Reasonable minds may disagree on many issues that arise in the criminal justice system. However, the one principle on which everybody would be expected to agree is that prisons are for the guilty and the courts should ensure that the innocent are freed. In fact, this elemental idea is far from universally accepted. See *Ex parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1996), Judge Womack dissent.

> *At the threshold, we must decide whether the Due Process Clause of the United States Constitution forbids, not just the execution, but the incarceration as well of an innocent person. We need not pause long to answer this question. . . . We think it clear . . . that the incarceration of an innocent person is as much a violation of the Due process Clause as is the execution of such a person. It follows that claims of actual innocence are cognizable by this Court in a postconviction habeas corpus proceeding whether the punishment assessed is death or confinement. In either case, such claims raise issues of federal constitutional magnitude.*

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

In a democratic society, two propositions are clear. Truth is the province of the judiciary, and courts, staffed by fallible humans, inevitably err. As a consequence, some means must exist to exonerate those legally guilty but actually innocent, balancing the State's interests in finality and efficiency with its interest in fair play. As the Court of Criminal Appeals has recognized, that means is the writ of habeas corpus.

The "Great Writ" of habeas corpus, "the most celebrated writ in the English Law," 3 William Blackstone, *Commentaries* at 129, offers protection against "illegal restraint or confinement." *Fay v. Noia*, 372 U.S. 391, 400 (1962). Habeas corpus relief is based on the principle "that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release." *Id.* at 402. The Texas Constitution vests in the Courts the power to issue writs of habeas corpus, TEX. CONST. art. 5, § 5, construed to encompass claims raising jurisdictional or fundamental defects or constitutional issues. *Ex parte Tuley*, 109 S.W.3d 388 (Tex.Crim.App. 2002); *Ex parte Graves*, 70 S.W.3d 103, 109 (Tex.Crim.App. 2002). Claims of actual innocence raise issues of constitutional magnitude.

Federal Due Process

A. Introduction: *Herrera* and *Schlup* Claims

Assertions of actual innocence are categorized either as *Herrera*-type claims or *Schlup*-type claims. *Herrera v. Collins,* 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993); *Schlup v. Delo,* 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). *See Elizondo,* 947 S.W.2d at 208; *Ex Parte Franklin*, 72 S.W.3d 671 (Tex.Crim.App. 2002). A *Herrera*-type claim involves a substantive claim in which the applicant asserts a bare claim of innocence based solely on newly discovered evidence. *Schlup,* 513 U.S. at 314, 115 S.Ct. 851. *See also Elizondo,* 947 S.W.2d at 208. A *Schlup*-type claim, on the other hand, is a procedural claim in which the applicant's claim of innocence does not alone provide a basis for relief but is tied to a showing of constitutional error at trial. *Schlup,* 513 U.S. at 314, 115 S.Ct. 851.

The *Herrera* decision serves as sound precedent for recognition of habeas relief when an actual innocence claim alone is raised. In *Herrera*, six members of the Court suggested execution of the innocent was antithetical to our constitutional system. Justice O'Connor, joined by Justice Kennedy, stated that "the execution of a legally and factually innocent person would be a constitutionally intolerable event." 506 U.S. at 420. Justice O'Connor then concluded that the existence of federal relief for such a person need not be addressed in the case before the Court. *Id.* Justice White stated that "a persuasive showing of actual innocence made after trial . . . would render unconstitutional the execution of the petitioner in this case." *Id.* at 429. He also declined to finally decide the issue on the record before the Court. Justice Blackmun, joined in dissent by Justices Souter and Stevens, stated that executing an innocent person is the "ultimate arbitrary imposition" and unquestionably violates both the Eighth and Fourteenth Amendments.[1] *Id.* at 437.

The Court of Criminal Appeals agreed with the "sound and fundamental principle of jurisprudence" that the execution of an innocent person "would surely

[1] Justices Scalia and Thomas, concurring in the judgment of the Court, indicated execution of the innocent would not transgress the Constitution. 506 U.S. at 427-430. The majority of the Court simply assumed violation, without deciding the issue.

constitute a violation of a constitutional or fundamental right." *Holmes v. Honorable Court of Appeals for the Third Dist,* 885 S.W.2d 389, 397 (Tex.Crim.App. 1994). In *Elizondo,* this Court extended its holding, verifying that the Due Process Clause of the Fourteenth Amendment forbids the incarceration of an innocent person. 947 S.W.2d at 204.

This principle is essential in a constitutional system. "After all, the central purpose of any system of criminal justice is to convict the guilty and free the innocent." *Herrera*, 506 U.S. at 399. *See United States v. Nobles*, 422 U.S. 225, 230, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975). Further, in this context, no legally cognizable distinction exists between a prisoner sentenced to death and one sentenced to a term of imprisonment. "It would be a rather strange jurisprudence . . . which held that under our Constitution [the actually innocent] could not be executed, but that he could spend the rest of his life in prison." *Herrera*, 506 U.S. at 405.

Conceptually, relief for the actually innocent arises under the Due Process Clause of the Fourteenth Amendment. In fact, both procedural and substantive due process demand habeas relief under these circumstances.

B. Due Process, Generally

The Due Process Clause of the Fifth Amendment provides that "No person shall ... be deprived of life, liberty, or property, without due process of law" The Due Process Clause of the Fourteenth Amendment states the same as to the action of a State. The Clause protects individuals against two types of government action. "Substantive due process" prevents the government from engaging in conduct that "shocks the conscience," *Rochin v. California,* 342 U.S. 165, 172, 72 S.Ct. 205, 96 L.Ed. 183 (1952), or interferes with rights "implicit in the concept of ordered liberty." *Palko v. Connecticut,* 302 U.S. 319, 325-326, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937). Additionally, even when government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it still must be implemented in a fair manner. *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). This requirement traditionally is denominated "procedural due process." *United States v. Salerno,* 481 U.S. 739, 746, 107 S.Ct. 2095, 2101, 95 L.Ed.2d 697 (1987). Both procedural and substantive due process provide bases for constitutional exoneration of a prisoner with a clear and convincing claim of actual innocence.

C. Procedural Due Process

Criminal process is deficient when it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina v. California*, 505 U.S. 437, 445-446, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992) (quoting *Patterson v. New York*, 432 U.S. 197, 202, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977)). The province and duty of the judiciary is to correct its own errors. Barring a prisoner with a genuine claim of actual innocence without offering a procedure for vindication of that claim by judicial review offends fundamental principles of justice.

A balancing of relevant interests reveals the necessity of recognizing a claim to procedural due process. Certainly, the State's interest in finality is important, but a society that knowingly imprisons the innocent cannot call itself just. The interest to the prisoner is paramount: No price can be placed on freedom. Further, the State has an interest in liberating the innocent: Any democratic society by definition cherishes freedom and abhors imprisoning the innocent. Finally, the cost to the State is slight. The judiciary will confront litigation of only a very few claims that satisfy an extraordinarily high standard.

As the Court noted in *Holmes*, a balance of interests compels the conclusion that due process requires provision of a judicial forum in which to litigate these claims. 885 S.W.2d at 400. This high standard of proof minimizes any burden on the State. In fact, because the presumption of innocence dissolves upon a finding of guilt, the burden of proof can be placed upon the applicant. Consistently adhering to this high standard, the Court holds the habeas court must be "convinced that [the] new facts unquestionably establish [the applicant's innocence." *Elizondo*, 947 S.W.2d at 209 (quoting *Schlup*, 513 U.S. at 317). Specifically, the Court adheres to the views of the Supreme Court, expressed in *Schlup*, that when asserting a *Herrera*-type claim, the applicant must "demonstrate by clear and convincing evidence that no reasonable juror would convict him in light of the new evidence." *Elizondo*, 947 S.W.2d at 209. The Court amplified in *Franklin*, holding the evidence presented must constitute affirmative evidence of the applicant's innocence. 72 S.W.3d at 678.

Simply stated, the procedural component of the Due Process Clause mandates habeas relief for the actually innocent. A society cannot call itself free if it knowingly imprisons the innocent without providing a judicial venue in which to raise solid claims of innocence.

D. Substantive Due Process

Principles of substantive due process compel a like conclusion. "'[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points. . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints. . . .'" *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 848, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (quoting *Poe v. Ullman,* 367 U.S. 497, 543, 81 S.Ct. 1752, 1777, 6 L.Ed.2d 989 (1961) (opinion dissenting from dismissal on jurisdictional grounds)). Knowingly to imprison the innocent is an arbitrary imposition and purposeless restraint. As the Court recognized in *Elizondo*, a constitutional society founded on due process simply cannot tolerate punishing the innocent. *See Elizondo*, 947 S.W.2d at 209.

Concededly, Justice Rehnquist, writing for the Court in *Herrera*, included some language tending to indicate substantive due process did not apply to analysis of the issue of whether federal habeas relief extended to claims of actual innocence. *See* 506 U.S. at 400-01. However, the comments begged the essential question – does imprisonment of the actually innocent violate the Constitution – and were predicated on concerns of federalism and the starkly limited nature of federal habeas corpus, neither of which is extant in state writs under Art. 11.07 or 11.071, Tex. Code Crim. Proc. Thus, Justice Rehnquist's exposition does not preclude recognition on the State level of a substantive due process claim.

Further, the Justice Rhenquist's reasoning is not sound. The Court disclaimed substantive due process as a source of recognition of freestanding innocence claims because a person convicted in a constitutionally fair trial is legally guilty. In other words, the actual innocence construct presupposes legal guilt. Thus, the Court reasoned, no question could arise regarding punishment of an innocent person. *Id.* at 407 n. 6. The very issue was whether the applicant was in fact innocent.

As the *Herrera* dissent underscored, however, and the Court of Criminal Appeals affirmed in *Elizondo*, the habeas applicant does not attack the jury verdict. "Nowhere does [the] applicant claim that the verdict is invalid or should be invalidated. What he wants is a new trial based on newly discovered evidence which he claims proves his innocence." *Elizondo*, 947 S.W.2d at 209. However, the question is not whether the Constitution forbids punishment of a person who is legally guilty but factually innocent but whether it denounces punishing one who would be found legally innocent if tried today. *See* Charles R. Morse, *Habeas Corpus and "Actual Innocence":* Herrera v. Collins, 113 S.Ct. 853 (1993), 16 Harv. J. L. and Pub. Pol'y 848 (1993). The focus is on the present, not on the prior trial. This issue is amenable to substantive due process analysis.

In any event, the Court conceded that "a truly persuasive demonstration of 'actual innocence' would make a conviction unconstitutional. *Herrera*, 506 U.S. at 417. A "truly persuasive demonstration of innocence" undermines the construct of legal guilt to the extent that, at some point, it disappears. Application of principles of substantive due process is then invited. *See People v. Washington*, 171 Ill.2d 475, 488-489, 665 N.E.2d 1330 (1996). In the face of extraordinary evidence of actual innocence, denial of a judicial forum eviscerates due process.

This holding does not extend the Due Process Clause to "require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person." *See Patterson v. New York*, 432 U.S. 197, 208, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977). This Court carefully balances the interests of the prisoner in access to a forum to test the most basic justice of a sentence[2] and the interest of the State in finality and efficiency by granting relief in only the most extraordinary cases. Adherence to this standard assures the courts will not be overburdened with frivolous claims.

When the burden is so "exceedingly heavy" that the applicant must "unquestionably establish his innocence," *Ex parte Tuley*, 109 S.W.3d 388, 390 (Tex.Crim.App. 2002), the justice system will not experience any sort of cataclysmic tumult. In fact, experience demonstrates it hardly experiences a whimper. "Claims of actual innocence are rare and the cases in which relief is granted are even more rare." *Id.* at 394. The *Tuley* court empirically noted that, since the *Elizondo* decision, applicants had six years to file claims. No flood materialized. Nor, the court noted, did *Elizondo* encourage inmates or their friends and family to harass victims of crimes to encourage them to recant. *Id.* at 395. The only tangible effect of the ruling was to free the innocent. "The criminal justice system has done justice." *Id.*

Habeas is the essential and the only viable means of

[2] *See Kuhlmann v. Wilson*, 477 U.S. 477 U.S. 436, 452, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986).

vindicating actual innocence claims. "The principal purpose of the writ of habeas corpus is to serve as a bulwark against convictions that violate fundamental fairness." *Engle v. Isaac*, 456 U.S. 107, 126, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982) (quoting *Wainwright v. Sykes*, 433 U.S. 72, 97, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) (Stevens, J., concurring). Habeas corpus is the last judicial inquiry into the validity of a criminal conviction, the final opportunity of the courts to correct their inevitable errors.

The system of executive clemency cannot accomplish this function. While the Court in *Herrera* called executive clemency the "fail safe" in our criminal justice system, 506 U.S. at 391, the Court did not hold that this device satisfies the commands of the Fourteenth Amendment, and the dissent persuasively argued it does not. As the majority concedes, "'A pardon is an act of grace.'" 506 U.S. at 413. The vindication of the actually innocent that is constitutionally commanded cannot be made to turn on the unreviewable discretion of an executive official or administrative tribunal. In *Ford v. Wainwright,* the Court recognized this, explicitly rejecting the argument that executive clemency was adequate to vindicate the Eighth Amendment right not to be executed if one is insane. 477 U.S., at 416, 106 S.Ct. at 2605. The possibility of executive clemency "exists in every case in which a defendant challenges his sentence under the Eighth Amendment. Recognition of such a bare possibility would make judicial review under the Eighth Amendment meaningless." *Solem v. Helm,* 463 U.S. 277, 303, 103 S.Ct. 3001, 3016, 77 L.Ed.2d 637 (1983).

A like result obtains in due process analysis. "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 163, 2 L.Ed. 60 (1803). As the *Herrera* dissent recognized, we no longer live under a government of laws if the exercise of a legal right turns on "an act of grace." 506 U.S. at 440. "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 638, 63 S.Ct. 1178, 1185, 87 L.Ed. 1628 (1943).

The Courts turn the Constitution on its head if it vests in the unreviewable discretion of executive officials the province of correcting the errors of the judiciary. The very concept of constitutional government is undermined. If the judicial system erred in convicting the innocent, the judicial system must correct its error. Habeas corpus stands as the only viable basis for achieving due process relief.

The actual innocence jurisprudence of the State of Texas has developed primarily in the area of recantations on sexual assault and indecency with a child cases. DNA exonerations are an additional area where new evidence establishing actual innocence has resulted in relief being granted based on actual innocence. *See*, *Ex parte Waller*, 2008 WL 4356811 (Tex. Crim. App. 2008). *Ex Parte Chatman*, 2008 WL 217860 (Tex. Crim. App. 2008) (Court of Criminal Appeals held that judgment of conviction would be set aside, where no rational jury would have convicted applicant in light of new DNA evidence indicating that he was excluded from being the perpetrator.)

In *Ex parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1996), the court held that bare claims of actual innocence are cognizable in a habeas hearing. To merit relief, the applicant bears the burden of showing that the newly discovered evidence unquestionably establishes his innocence. The court reviewing the habeas claim must examine the new evidence in light of the evidence presented at trial. In order to grant relief, the reviewing court must believe that no rational juror would have convicted the applicant in light of the newly discovered evidence. In *Elizondo*, the trial evidence was perfunctory testimony by a 10 year old child that his mother and applicant made him and his younger brother watch sexually explicit videotapes and that both adults sexually molested the boys. Both children recanted 13 years after the trial when they were full-grown adults, saying their natural father "relentlessly manipulated and threatened them into making such allegations against the applicant in order to retaliate against the natural mother." They denied that any abuse occurred. The trial court found the recantation credible and the Court of Criminal Appeals granted relief.

In *Ex parte Thompson*, 153 S.W.3d 416 (Tex. Crim. App. 2005), the court granted relief based on the recantation by the applicant's 20 year old daughter of the allegation of sexual assault that was alleged to have occurred when she was 5 years old. In *Thompson*, Judge Cochran, concurring, stated that courts:

> "fail in [their] primary duty of protecting the innocent and punishing the guilty if [the courts] intentionally slam the courthouse door against one who is, in fact, innocent of

> wrongdoing. I believe that if the criminal justice system-even when its procedures were fairly followed-reaches a patently inaccurate result which has caused an innocent person to be wrongly imprisoned for a crime he did not commit, the judicial system has an obligation to set things straight." *See Id*. (concurring opinion) at 421-23.

Other cases where relief was granted have had similar fact patterns. *Ex parte Tuley*, 109 S.W.3d 388 (Tex. Crim. App. 2002) (defendant's guilty plea did not bar relief); *Ex parte Harmon*, 116 S.W.3d 778 (Tex. Crim. App. 2003); *Ex Parte Patrick Logan Montgomery*, 2009 WL 1165499 (Tex. Crim. App. 2009) (recantation by alleged victims found credible).

In *Ex parte Brown*, 205 S.W.3d 538 (Tex. Crim. App. 2006), the court stated that establishing a bare claim of actual innocence in a post-conviction application for writ of habeas corpus is a "Herculean" task. In *Brown*, the court stated that to succeed on a habeas claim of actual innocence based on newly discovered evidence the applicant must show by clear and convincing evidence that, despite the evidence of guilt that supports the conviction, no reasonable juror could have found him guilty in light of the new evidence. This showing must overcome the presumption that the conviction is valid and must unquestionably establish applicant's innocence. The evidence relied upon must be newly discovered or newly available. In *Brown*, the court denied relief because the evidence was not newly discovered. The evidence was the same as that attached to the applicant's motion for new trial two years earlier.

In reviewing a claim of actual innocence based on a recantation, the most important job of the trial court is to assess the credibility of the recantation. If the trial judge hears testimony from the alleged victim who recants her prior testimony and finds it credible, the Court of Criminal Appeals will likely accept that fact finding. Likewise, if the trial court finds the recantation not credible, the Court of Criminal Appeals will almost certainly deny relief.

The United States Supreme Court appears ready to re-enter into the debate concerning actual innocence as a constitutional claim. The following is a summary from the SCOTUS BLOG:

> "On August 17, 2009, the Supreme Court, over two Justices' dissents, on Monday ordered a federal judge in Georgia to consider and rule on the claim of innocence in the murder case against Troy Anthony Davis (*In re Davis*, 08-1443). The Court told the District Court to 'receive testimony and make findings of fact as to whether evidence that could have been obtained at the time of trial clearly establishes [Davis'] innocence.'
> . . .
> The Court did not disclose how each of the Justices had voted, other than the dissents of Justices Scalia and Thomas. Presumably, however, an order of this kind would have required the approval of at least five votes. Justices Breyer, Ginsburg and Stevens presumably voted for the order; their opinion said the case was the type that was exceptional enough to qualify for the action. It is unclear how Chief Justice John G. Roberts, Jr., or Justices Anthony M. Kennedy and Samuel A. Alito, Jr., voted, if they did, but it appears that at least two of them would have had to agree to the step taken.
> Davis was convicted in 1991 of murdering an off-duty Savannah police officer, Mark Allen MacPhail, in 1989. Since his trial, Davis has claimed, seven of the state of Georgia's key witnesses have recanted the testimony they gave at the trial. Several other individuals have implicated another man - the prosecution's key witness against Davis - as the shooter.
> The Court's action set off a sharply-worded exchange - Justice Stevens on one side, Justice Scalia on the other - over the strength of Davis' claim to be innocent, and over whether the Georgia federal judge who will be conducting the new review has any power to rule for Davis.
> The Court has never ruled on whether a credible claim of 'actual innocence' justifies extraordinary remedies in federal court, when a state conviction is involved. Davis' case may well test that issue, as it moves through the federal courts again. Justice Scalia, in fact, said in his opinion Monday that, if there is a genuine issue on that point, the Court itself should decide the issue.
> On the merits of Davis' claim, Justice Scalia dismissed it as 'a sure loser.' He said that the Georgia Supreme Court, the federal Eleventh Circuit, and the Georgia pardon board have all considered the very evidence that Davis now cites, and 'found it lacking.'
> Justice Stevens did not judge finally the merits of the claim, but hinted that he had found it at

> least partly supported, saying that 'the substantial risk of putting an innocent man to death' justified the Court in taking the unusual action it did on Monday.
>
> On the power of a federal judge to rule in Davis' favor at this stage, Scalia argued that the 1996 federal law limiting federal habeas review of state criminal convictions - the Anti-Terrorism and Effective Death Penalty Act (AEDPA) - barred any federal court from hearing Davis' claim because there was no error at his trial that violated any prior Supreme Court decision.
>
> Scalia wrote: 'This Court has *never* held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is 'actually' innocent.' He conceded, though, that the Court has left the issue open.
>
> Stevens said that the District judge may have authority to act, perhaps finding that AEDPA's limits do not apply to 'original' habeas writs of the kind the Justices acted on on Monday, or do not apply to a habeas claim of 'actual innocence.' In addition, Stevens said, there may be an argument that AEDPA's habeas limits are unconstitutional if they barred court review of such a claim. Finally, Stevens said, it can be argued that it would be a federal constitutional violation to execute an innocent person.
>
> All of those issues, presumably, will be canvassed initially by the federal District judge, with further review likely in both the Eleventh Circuit and, potentially, the Supreme Court."

An example of a *Schlup* actual innocence claim, where the actual innocence is used as a gateway to raise another constitutional violation in a subsequent writ, is *Ex Parte Billy Frederick Allen*, 2009 WL 282739 (Tex. Crim. App. 2009). In *Allen*, the defendant, who was convicted of murder, was entitled to a new trial on application for writ of habeas corpus, though he made previous applications for habeas relief that were denied, as defendant asserted *Schlup*-type actual innocence claim based on newly discovered evidence intertwined with ineffective assistance claim; trial counsel failed to ask for continuance when he was surprised by officer's testimony that officer heard victim identify defendant as his attacker, counsel failed to raise in motion for new trial newly discovered evidence that ambulance paramedic heard victim tell officer five or six times that attacker had a different middle name than defendant, counsel failed to conduct an investigation that would have revealed that such other person had an actual motive to kill victim, and it was more likely than not that no reasonable juror would have convicted defendant in the light of new evidence.

TEXAS ACTUAL INNOCENCE CASES

Relief Granted on Writ of Habeas Corpus, Conviction Overturned on Actual Innocence Grounds

Ex Parte Blair, 2008 Tex. Crim. App. Unpub. LEXIS 469

Michael Nawee Blair was convicted of capital murder of a four-year-old girl in 1994 based on eyewitness misidentification and invalid forensic science. Eyewitnesses told police they had seen Blair at the park where the victim disappeared, though no one said they saw Blair and the victim together. Microscopic hair and fiber comparisons were central to the case. Post conviction DNA results from skin cells found under the victim's fingernails as well as other DNA evidence discovered on the victim's clothes excluded Blair. No reasonable juror would have convicted, relief was granted in 2008 and the judgment was set aside.

Ex Parte Byars, 176 S.W.3d 841 (Tex. Crim. App. 2005)

Barry Sheen Byars was convicted of first degree felony offense of injury to a child. Following conviction and sentencing the complainant recanted and trial court found recantation credible and that by clear and convincing evidence that no reasonable jury would convict in light of newly discovered evidence. Actual innocence claim established and the judgment vacated.

Ex Parte Calderon, 2010 Tex. Crim. App. Unpub. LEXIS 531

Domingo Calderon pled no contest to indecency with a child (his sister) at the request of his mother and was sentenced to ten years in prison. His sister later recanted saying that she lied out of fear of her step-father and the court found her recantation credible. In light of newly discovered evidence, habeas corpus was granted on actual innocence and verdict set aside.

Ex Parte Cantu, 2005 Tex. Crim. App. Unpub. LEXIS 319

Raul Alfred Cantu plead guilty to possession of cocaine and was sentenced. At the time of the plea, the substance had not been tested and Cantu took the plea deal to avoid a second-degree felony charge. The substance was tested and it was found to contain no controlled substance and Cantu raised a claim of actual innocence in his writ of habeas corpus. The Court of

Criminal Appeals granted relief, no jury would have convicted based on new evidence.

Ex Parte Elizondo, 947 S.W.2d 202 (Tex. Crim. App. 1996)

Joe Rene Elizondo was convicted of aggravated sexual assault, based on the main witness's testimony. The witness later recanted, saying that he gave the false testimony because of manipulation and threats of their natural father and Elizondo filed a writ alleging that newly available evidence shows him to be innocent. There is clear and convincing evidence that no rational jury would convict in light of the new evidence, habeas corpus granted.

Ex Parte Gossett, 2007 Tex. Crim. App. Unpub. LEXIS 885

Andrew Gossett was convicted of aggravated sexual assault in 2001; rape examination after incident was consistent with forced entry, but forensic DNA analyst could not make determination as to the identity of assailant. In 2007 DNA testing excluded Gossett as a possible contributor to the male DNA and Gossett raised claims of actual innocence. Habeas corpus granted, applicant entitled to relief on actual innocence claim based on newly discovered DNA.

Ex Parte Harbin, 297 S.W.3d 283 (Tex. Crim. App. 2009)

Phillip Harbin was convicted of child sexual offenses and incarcerated in California. Upon release he moved to Texas and attempted to, but failed to register as a sex offender and was then arrested for failing to report as a sex offender. Relief was granted, Harbin was not required to register for his offenses, failure to register as a sex offender vacated since applicant was actually innocent.

Ex Parte Harmon, 116 S.W.3d 778 (Tex. Crim. App. 2003)

Ricky Dale Harmon was convicted of aggravated sexual assault based on complainants testimony. Complainant recanted testimony in an affidavit saying that the false testimony was prompted by her natural father's sister and saying that Harmon never sexually assaulted her. Trial court conducted a hearing and found recantation credible. Writ filed, relief was granted and judgment set aside.

Ex Parte Henton, 2006 Tex. Crim. App. Unpub. LEXIS 2532

Eugene Ivory Henton pled guilty and was convicted of a felony offense of sexual assault. Subsequent DNA testing excluded Henton as a possible contributor and he filed a writ claiming actual innocence based on new evidence not available at the time of the trial. Relief was granted, no jury would convict in light of new evidence.

Ex Parte Knipp, 236 S.W.3d 214 (Tex. Crim. App. 2007)

Kenneth Everett Knipp was convicted twice for the same delivery of a controlled substance. State erroneously asserted that applicant made two deliveries and he was subsequently convicted twice and sentenced for two deliveries. Knipp in fact made one delivery and due to a clerical error it was thought he made two. He subsequently filed a writ of habeas corpus claiming actual innocence and relief was granted. Evidence of actual innocence met requirements since applicant could not be guilty and the judgment was set aside.

Ex Parte Mack, 2006 Tex. Crim. App. Unpub. LEXIS 568

Norman Ervin Mack plead guilty of possession of a controlled substance thought to be cocaine and was convicted. Lab results later showed that the substance was chlorpromazine and Mack filed a writ of habeas corpus claiming actual innocence. No reasonable juror would convict, relief was granted and the judgment was set aside upon actual innocence.

Ex Parte McGowan, 2008 Tex. Crim. App. Unpub. LEXIS 437

Thomas Clifford McGowan was convicted of aggravated sexual assault and burglary of a habitation in 1987 largely because of eyewitness misidentification. Post-conviction DNA testing and investigation exclude McGowan from being the perpetrator and he contends that he is actually innocent and entitled to relief. Habeas corpus granted based on DNA evidence and actual innocence.

Ex Parte Montgomery, 2009 Tex. Crim. App. Unpub. LEXIS 318

Patrick Logan Montgomery was convicted of two offenses of indecency with a child based upon complainant's testimony. Complainants in the cases later provided him with affidavits recanting their trial testimony saying that they were encouraged by their mother and other authoritative persons to falsely testify about abuse which never occurred. The trial judge found no rational jury would have convicted and recantations were credible; relief granted on actual innocence, judgment set aside.

Ex Parte Rivera, 2005 Tex. Crim. App. Unpub. LEXIS 21

Simon Angel Rivera entered a guilty plea to failure to report as a sex offender, involuntarily because of

ineffective counsel and alleges actual innocence. At the time of the alleged failure he was no longer required to report. The judgment was vacated.

Ex Parte Smith, 2006 Tex. Crim. App. Unpub. LEXIS 385

Billy James Smith was convicted of aggravated rape, during trial motion for forensic DNA testing was filed accompanied by affidavit by Smith stating actual innocence. Court denied motion which was confirmed by court of appeals. Later DNA testing would exclude Smith as a contributor and by clear and convincing evidence no reasonable juror would have convicted. Previous judgment set aside, relief granted in light of favorable DNA results.

Ex Parte Thompson, 153 S.W.3d 416 (Tex. Crim. App. 2005)

Stephen Craig Thompson was charged and convicted of aggravated sexual assault of a child (his daughter), evidence at trial was a torn dress, testimony of wife and child and testimony of examining physician who found no evidence of an assault. At habeas hearing, witnesses described a custody dispute, the daughter testified that she had not been assaulted and her mother had coached her to lie and that dress had been torn when she fell off a school bus, and bus driver witnessed girl fall while getting off bus where she tore her dress. Complainant provided an affidavit recanting her testimony and stating that sexual abuse never happened and that her mother had pressured her into making allegations. Habeas corpus granted and conviction set aside; court weighed the newly discovered evidence against the evidence adduced at trial.

Ex Parte Tuley, 109 S.W.3d 388 (Tex. Crim. App. 2002)

Facts: Defendant charged with aggravated sexual assault, jury was deadlocked and defendant plead guilty since he could not afford to retain counsel, was unable to make bail and had already spent ten months in jail and was addicted to drugs. Complainant recanted her allegations before the trial and applicant submitted affidavits and filed a writ under actual innocence. Trial court found recantation credible and habeas corpus was granted; actual innocence claims are not barred because the conviction was the result of a guilty plea.

Ex Parte Waller, 2008 Tex. Crim. App. Unpub. LEXIS 656

Patrick Leondos Waller was convicted of aggravated robbery and pled guilty to aggravated kidnapping. DNA testing showing that another man committed the sexual assault in addition to a confession by another man allowed defendant to raise actual innocence in a writ of habeas, which the court granted.

Relief Granted and Remanded for a New Trial

Ex Parte Zapata, 235 S.W.3d 794 (Tex. Crim. App. 2007)

Mark Anthony Zapata was charged and convicted of aggravated sexual assault of a child (his daughters), pled guilty and offered testimony of committing various offenses against his daughters. His daughters recanted after the plea but before sentencing and defendant testified that he had fabricated the admission and entered a guilty plea to get a more lenient sentencing. The court found the recantations credible and habeas corpus was granted; applicant's plea was not knowingly and voluntarily entered. Writ asserts involuntary guilty plea and an actual innocence claim based on recantations from daughters; court granted based on involuntary guilty plea, innocence discussed in dissent.

Ex Parte Allen, 2009 Tex. Crim. App. Unpub. LEXIS 90

Billy Frederick Allen was convicted of two charges of murder, filed numerous writs (1984-actual innocence, 1993-ineffective trial counsel, 1995-another application challenging conviction as a subsequent application, 2005-) Relief granted based on ineffective assistance; actual innocence discussed, remanded for a new trial.

Ex Parte Briggs, 187 S.W.3d 458 (Tex. Crim. App. 2005)

Brandy Del Briggs was convicted of injury to a child for causing her child's death. Two month old was brought into hospital after lack of oxygen to the brain, emergency room personnel mistakenly inserted an oxygen tube into his stomach instead of lungs. Counsel did not fully investigate medical records or consult experts until fees were paid. Relief granted and judgment vacated based on ineffective counsel and actual innocence, there is sufficient probability that but for the counsel's errors, the defendant would not have plead guilty and to undermine the confidence that the death was the result of a criminal act. Previous judgment vacated and remanded for a new trial.

Ex Parte Mowbray, 943 S.W.2d 461 (Tex. Crim. App. 1996)

Freda S. Mowbray was convicted of murder and contended that State knowingly used false testimony and State's expert witness knowingly gave false and misleading testimony. Relief granted; applicant's due process rights were violated, actual innocence discussed, remanded for new trial.

Ex Parte Rich, 194 S.W.3d 508 (Tex. Crim. App. 2006)

David Allen Rich plead guilty to driving while intoxicated and pleaded true to two enhancements alleging prior convictions for two felony offenses. Sentenced as a habitual offender, he later discovered that one of the priors had been reduced to a misdemeanor. The court found that the sentence was illegal because the prior conviction was reduced and vacated the judgment, allowing Rich to withdraw his plea of guilty and ordered a new trial.

DNA

Exonerated by the Texas Court of Criminal Appeals on Writ of Habeas Corpus

Gilbert Alejandro, 1994 (Opinion Unavailable)

Convicted of aggravated assault based on false DNA testing performed by Fred Zain. Reexamination of the DNA report showed the test had not been completed and new test excluded Alejandro as the depositor. The conviction was overturned and Alejandro was released to stand trial again. The DA declined to prosecute the case, all charges were dismissed and Alejandro was exonerated by the Texas Court of Criminal Appeals in 1994.

Ex Parte Blair, 2008 Tex. Crim. App. Unpub. LEXIS 469

Michael Blair was convicted of capital murder based on misidentification of witness and invalid forensic science. DNA testing of hair and fingernail scrapings from the victim's body excluded Blair as a contributor and analysis used to convict was contradicted by DNA testing. Judgment of guilt and sentence of death are set aside.

Ex Parte Chatman, 2008 Tex. Crim. App. Unpub. LEXIS 46

Charles Chatman was convicted in Dallas of a 1981 rape after he was misidentified in a photo lineup. He served nearly 27 years before DNA testing proved his innocence in 2007, leading to his release on January 3, 2008. Original testing showed that seminal fluid and sperm cells came from a type O secretor. Upon later Y-STR testing, Chatman was proven not to be a contributor. No rational jury would have convicted, judgment is set aside.

Richard Danziger and Christopher Ochoa, 2002 (Opinion Unavailable)

Danziger was convicted of aggravated sexual assault based on the coerced testimony of his friend Christopher Ochoa who was convicted of murder and sexual assault. Evidence from a lab analysis at trial detected similar blood types of Danziger and the victim. Years later, the true perpetrator confessed to the crime and new tests were performed which excluded Danziger and Ochoa, both of whom were exonerated in 2002.

Ex Parte Evans, 2009 Tex. Crim. App. Unpub. LEXIS 696

Jerry Evans was convicted of sexual assault in 1987 when police encouraged the victim to pick Evans out of a photo line-up. Jerry contended that post-conviction DNA testing, which was not available at the time of trial, reflects that he is actually innocent. DNA testing would later prove his innocence and he was exonerated in 2009.

Ex Parte Giles, 2007 Tex. Crim. App. Unpub. LEXIS 1246

James Giles was convicted in 1983 for allegedly raping a victim with two other men. He was released on parole in 1993 but continued to pursue legal action to prove his innocence. The Innocence Project began investigating his case in 2000 and DNA evidence proved that Giles was innocent. He was finally exonerated in 2007.

Ex Parte Good, Court of Criminal Appeals Case No. AP-75,042 Unpub. Locate at: http://www.cca.courts.state.tx.us/opinions/HTMLOpinionInfo.asp?OpinionID=12780

Donald Wayne Good was convicted in 1984 of committing a 1983 rape and burglary. He was sentenced to life in prison. He was paroled in 1993, but his parole was revoked in 2002 (for a minor property crime); he is still serving a five-year sentence for the property crime. In 2004, DNA testing proved that Good could not have been the man who committed the 1983 crimes, and the Texas Court of Criminal Appeals exonerated him in 2004.

The evidence presented at Good's trials included the eyewitness testimony from the victim and her daughter. The rape kit was examined by the Southwestern Institute of Forensic Sciences (SWIFS). The laboratory found spermatozoa in the rape kit, on the victim's jumpsuit, and on a blanket. An analyst testified that blood group markers on the blanket must have come from a Type O secretor, which matched Good's blood type. In 2002, Good filed a handwritten motion requesting DNA testing of the evidence, test results excluded Good as a contributor to the spermatozoa on the vaginal swab. The Texas Court of Criminal Appeals vacated the conviction.

Ex Parte Gossett, 2007 Tex. Crim. App. Unpub. LEXIS 885

In February 2000, Andrew Gossett was convicted of aggravated sexual assault and sentenced to 50 years.

Gossett was finally released on January 4, 2007, after DNA test results proved his innocence.

The victim then identified Gossett from a photo array, no physical evidence linked Gossett to the crime. Initial DNA testing in his case was inconclusive, hair samples retrieved from the victim's vehicle did not match Gossett. The victim testified that her assailant had a state of Texas map ring on his finger, but detectives who searched Gossett's residence did not find a ring. Also, a videotape recovered from a convenience store showed Gossett shortly after the attack, wearing clothing that was inconsistent with the victim's description. However, Gossett was found guilty and spent seven years in prison before DNA testing exonerated him.

Ex Parte Henton, 2006 Tex. Crim. App. Unpub. LEXIS 2532

Eugene Ivory Henton was convicted of sexual assault in 1984 and sentenced to four years. He served 18 months in prison on that charge. DNA testing exculpated Henton in 2005, and he was exonerated the following year.

Carlos Lavernia, 2000 (Opinion Unavailable)

Carlos Lavernia was convicted in 1985 of aggravated rape based on eyewitness misidentification and improper forensic science. In 2000, via DNA testing, Carlos was proven innocent and exonerated.

Ex Parte McGowan, 2008 Tex. Crim. App. Unpub. LEXIS 437

Thomas McGowan was convicted of aggravated sexual assault and burglary of a habitation in 1987 largely because of eyewitness misidentification. After the Innocence Project accepted the case, DNA testing would prove that another man committed the crime and the Texas Court of Criminal Appeals exonerated McGowan in 2008.

Ex Parte Phillips, 2008 Tex. Crim. App. Unpub. LEXIS 714

In two separate trials, Steven Phillips was convicted of burglary in 1982 and rape in 1983. Phillips began to seek post-conviction DNA testing in 2002, but his requests were initially denied. With the help of the Innocence Project, DNA testing was finally conducted in 2006 and proved that Phillips was actually innocent of the rape. In 2008 Phillips was officially exonerated through a writ of habeas corpus from the Texas Court of Criminal Appeals.

Ex Parte Rachell, 2009 Tex. Crim. App. Unpub. LEXIS 24

Ricardo Rachell was convicted of aggravated sexual assault of a minor based on the victim's testimony and his friend who were both eight years old. Rachell offered and provided DNA evidence for testing to prove his innocence prior to trial, but it was never tested because the defense did not ask for it. After conviction, DNA testing provided newly discovered evidence and indicated that Rachell did not commit the crime and was entitled to relief. The Texas Court of Criminal Appeals exonerated him in 2009.

Ex Parte Rodriguez, Court of Criminal Appeals Case Nos. AP-75,225 & AP-75,226, Unpub. Locate at: http://www.cca.courts.state.tx.us/opinions/HTMLOpinionInfo.asp?OpinionID=13172

George Rodriguez was convicted of aggravated sexual assault of a child and aggravated kidnapping in 1987 based on eyewitness misidentification and improper forensic science. Despite the confession of one of the perpetrators and his identifying an accomplice, the police put Rodriguez in a line-up where he was identified by the fourteen-year-old victim. A hair found in the victim's underwear was said to be microscopically similar to Rodriguez and the testing of semen could not exclude Rodriguez. Mitochondrial testing of the hair would later indicate that Rodriguez could not have been the perpetrator. In 2005 his conviction was vacated and in September 2005 the DA moved to dismiss all charges.

Ex Parte Smith, 2006 Tex. Crim. App. Unpub. LEXIS 385

Billy James Smith was convicted of aggravated sexual assault while using and exhibiting a deadly weapon in 1986. He was sentenced to life in prison. Smith was released in July 2006 and officially exonerated in December 2006.

The police who searched Smith's belongings did not find clothing that the victim said the perpetrator wore. The clothes that police confiscated from Smith contained no DNA evidence whatsoever. Also, Smith's sister testified at trial, corroborating his alibi. There was no evidence in the record that the victim had engaged in sex with anyone besides her attacker in the 24 hours prior to her rape. The prosecution used the presence of semen to prove that a rape had occurred, and Smith was convicted. After attempting to secure DNA testing for four years, Billy James Smith was finally granted DNA testing in 2005 which excluded him as the donor, following which he was exonerated.

Ex Parte Waller, 2008 Tex. Crim. App. Unpub. LEXIS 656

Patrick Waller was convicted of robbery and kidnapping in 1992. He spent nearly 16 years in Texas prisons before DNA testing proved his innocence. He

was officially exonerated on September 24, 2008.

Despite alibi testimony at trial, the eyewitness testimony of the four victims, as well as forensic testing of semen from the crime scene which did not exclude Waller, led to him being convicted of all charges and sentenced to life in prison. In late 2007, DNA testing paid for by the Innocence Project of Texas excluded Waller and implicated the real perpetrator. Waller was freed on July 3, 2008 and exonerated a few months later.

Ex Parte Wallis, 2007 Tex. Crim. App. Unpub. LEXIS 1208

Gregory Wallis was convicted in 1989 of burglary of a habitation with intent to commit sexual assault in 1988. He was sentenced to 50 years in prison and served 18 years. He was released in March 2006 and officially exonerated in 2007. At trial, the victim testified that she knew for a fact Wallis was the man who raped her. He was convicted and sentenced to 50 years. In December 2005, results of a first round of DNA testing could not entirely exclude Wallis. He was offered his freedom if he would agree to be a life-time registered sex offender. He declined. In 2006, another (more advanced) DNA test was conducted and the results proved that Wallis was not the perpetrator. He was released from prison in March 2006, and in January 2007, the Texas Court of Criminal Appeals granted his writ of habeas corpus, officially exonerating him.

Pardoned Based on DNA Exoneration

A.B. Butler, 2000
Kevin Byrd, 1997
Timothy Cole, 2009
Roy Criner, 2000
Wiley Fountain, 2003
Larry Fuller, 2007
Entre Nax Karage, 2005
Johnnie Lindsey, 2009
Billy Miller, 2006
Brandon Moon, 2005
Arthur Mumphrey, 2006
David Shawn Pope, 2001
Anthony Robinson, 2000
Ben Salazar, 1997
Josiah Sutton, 2004
Ronald Taylor, 2008
Victor Thomas, 2002
Keith E. Turner, 2005
James Waller, 2007
Calvin Washington, 2001
Mark Webb, 2001
James Woodard, 2009

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