IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

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

EX PARTE OTIS MALLET JR., Applicant

ON APPLICANT'S APPLICATIONS FOR A WRIT OF HABEAS CORPUS IN CAUSE NOS. 1164940-A & 1248132-A FROM THE 338TH DISTRICT COURT OF HARRIS COUNTY

YEARY, J., filed a concurring opinion.

CONCURRING OPINION

Applicant was convicted of possession with intent to deliver, and of delivery of, between 4 and 200 grams of a controlled substance listed in Penalty Group I. For both offenses he was sentenced to confinement for eight years. Both of his convictions were also affirmed on appeal. *Mallett v. State*, Nos. 14-11-00094-CR & 14-11-00095-CR (Tex. App.—Houston [14th Dist.] Aug. 30, 2012) (not designated for publication).

I agree with the Court that Applicant is entitled to habeas relief because he has satisfied the criteria set out in *Ex parte Elizondo*, 947 S.W.2d 202, 209 (Tex. Crim. App. 1996). When an applicant meets the heavy burden established by *Elizondo*, he ought to be eligible for relief from his judgment of conviction. I advocate no change to that part of our jurisprudence.

But the Court today goes further than to simply grant relief from a conviction. It declares that Applicant is "actually innocent," even though all that Applicant has truly established is that no jury would convict him based upon all of the facts that the Court now knows.

Even when a defendant comes forward with new evidence that credibly undermines all of the evidence that was presented initially to establish his guilt, as was done in this case, this does not necessarily mean that he has literally shown that he manifestly did not commit the offenses for which he stands convicted. *See Ex parte Cacy*, 543 S.W.3d 802, 803 (Tex. Crim. App. 2016) (Yeary, J., concurring) ("Not every successful *Elizondo* applicant is necessarily literally 'actually innocent.'"). In *Cacy* I cautioned: "Even new evidence that entirely obliterates the State's evidence of guilt does not necessarily definitively establish innocence." *Id*. at 803 n.2. In my view, this is such a case.

The arresting officer in these drug cases testified that he gave $200 to Applicant's brother, who in turn gave the money to Applicant in exchange for the drugs. Since trial it has been discovered that the officer's expense report fails to reflect that he ever made such a payment. In its proposed findings of fact and conclusions of law, the convicting court expressed its profound doubt that the arresting officer would have paid the $200 out of his own pocket. The officer declined to testify at the hearing on Applicant's post-conviction writ application, preferring to invoke the Fifth Amendment, as is his right.

I agree with the Court that the new evidence presented in this case raises substantial doubt about Applicant's guilt. I also agree, as the State concedes, that the new evidence satisfies *Elizondo*'s criteria for obtaining relief, and I agree with the Court's decision to grant him relief from his judgement of conviction on that basis. The *presumption* of innocence that belongs to

every person before a conviction has certainly been restored.[1] But I believe the new evidence falls short of *actually* establishing that Applicant is *actually* innocent.

Ignoring a clear logical gap, the Court declares that applicant is *actually* innocent relying only on a demonstration that a jury, knowing all that the Court knows today, would not convict him. This burden holds the actual innocence claimant to no burden whatsoever with regard to the question it answers: Is the defendant actually innocent? Whether a jury would convict him is a different question altogether.

I agree with my colleagues that Applicant is entitled to relief from his conviction. But for the reasons explained here and at greater length in my concurrence in *Cacy*, I would avoid using the label "actual innocence." With that reiteration, I concur in the Court's opinion granting relief.

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PUBLISH

[1] The new evidence also raises other issues (*Brady*, false evidence), about which the convicting court similarly recommends that we grant relief. *Brady v. Maryland*, 373 U.S. 83 (1963); *Ex parte Chavez*, 371 S.W.3d 200 (Tex. Crim. App. 2012).