
Moderato
Verse:
The
mf
B♭
B♭7
E♭
B♭
old home town looks the same as I step down from the train, and there to
old house is still stand - ing, Tho' the paint is cracked and dry, and there's that
(recitation) Then I awake and look around me at four grey walls that surround me
F7
Cm7 F7
meet me is my Ma - ma and Pa - pa; Down the
old oak tree that I used to play on; Down the
and I realize that I was only dreaming For there's
B♭
B♭7
E♭
E♭dim
E♭
Dm7 Cm7
road I look and there runs Ma - ry, hair of gold and lips like cher - ries, it's
lane I walk with my sweet Ma - ry, hair of gold and lips like cher - ries, it's
a guard and there's a sad old padre arm in arm we'll walk at day - break a -

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Clicking a hyperlink (such as a judge's name) will load the linked opinion or document in your web browser.

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Actual Innocence & Newly Discovered / Available Evidence

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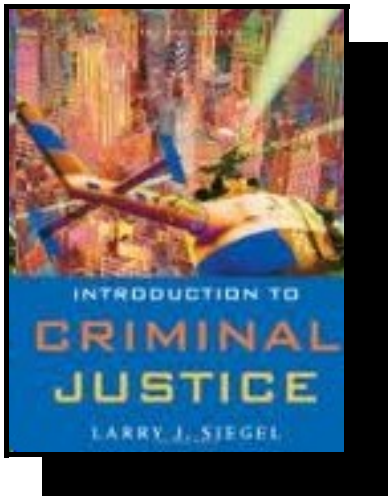

Under the law at the time I began practicing law, in May of 1986, neither of these two types of claims was available to a habeas litigant. Actual innocence based on newly discovered evidence was not the proper subject of habeas corpus review. See Ex parte Binder, 660 S.W.2d 103 (Tex.Cr.App. 1983).

Mr. Binder contended he was entitled to habeas relief based on newly evidence, but the Court of Criminal Appeals denied relief, concluding that "post-conviction habeas corpus has not been and is not now the appropriate remedy for an applicant whose claim for relief is based on newly discovered evidence." At that time, the "mechanisms" available under Texas law for addressing such a claim were inadequate, because a motion for new trial based upon newly discovered evidence was not (and still is not) available more than thirty days after conviction. In short, if evidence became available more than thirty days after a defendant was convicted, he or she was simply out of luck. All this changed in 1994 with the case of "Gary Graham."

Mr. Graham, a death row inmate with an approaching execution date claimed that newly discovered evidence demonstrated his innocence of the crime for which he was condemned. The State claimed that Graham's only remedy was through post-conviction habeas corpus, while Graham argued that the only remedy was through the executive clemency process because of the limitation on newly discovered evidence set out in Binder. Ultimately, in its opinion in Holmes v. Third Court of Appeals, 885 S.W.2d 389, 397 (Tex.Cr.App. 1994), the Court of Criminal Appeals accepted the proposition that the 'execution of an innocent person would

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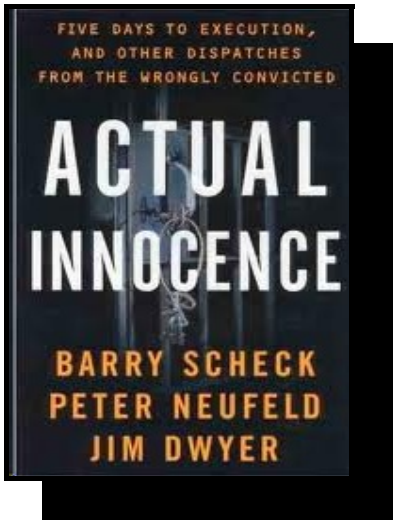
violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and announced that [it] would begin to entertain post-conviction applications for the writ of habeas corpus alleging actual innocence as an independent ground for relief." Note that the procedural history of Holmes is quite different than that of an "actual innocence" case.[1] Nevertheless, it is the gateway for modern "new evidence" law.



According to the case law, Texas recognizes two types of "innocence claims." First, there is a substantive claim under Herrera v. Collins, 506 U.S. 390 (1993). This is a claim in which the person asserts a "bare claim of innocence" based solely on newly discovered evidence. The second type is a claim under Schlup v. Delo, 513 U.S. 298, 314-315 (1995). This is a claim which "does not by itself provide a basis for relief," but is intertwined with constitutional error that renders a person's conviction constitutionally invalid. Ex parte Brown, 205 S.W.3d 538, 544-545 (Tex.Cr.App. 2006)(see ☙, Vol. 14, No. 43; 11/06/2006). I don't think this really reflects the whole picture.

In his majority opinion in Holmes, Judge Baird actually set out two different standards. Initially, the opinion recites that "an applicant seeking habeas relief based on a claim of factual innocence must, as a threshold, demonstrate that the newly discovered evidence, if true, creates a doubt as to the efficacy of the verdict sufficient to undermine confidence in the verdict and that it is probable that the verdict would be different." "Holmes, 885 S.W.2d at 398. If the applicant does that, then "the habeas court must afford the applicant a forum and opportunity to present his evidence." The opinion went on to hold that, having been given that forum, "in order to be entitled to relief on a claim of factual innocence the applicant must show that based on the newly discovered evidence and the entire record before the jury that convicted him, no rational trier of fact could find proof of guilt beyond a reasonable doubt." Holmes, 885 S.W.2d at 399.

Shortly after the Holmes opinion, I suggested to Judge Baird that he had set up an almost impossible standard, since a "reasonable trier of fact" could reject any evidence he / she / it saw fit. Judge Baird told me that he had heard of a case in California in which a man had been

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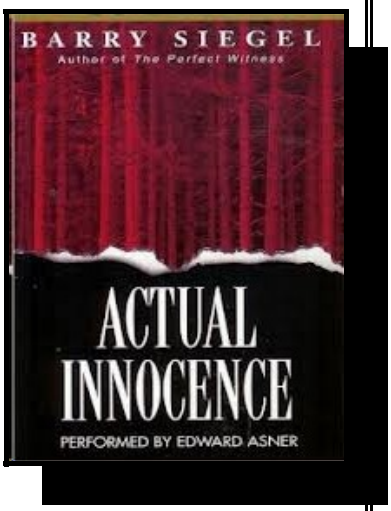
[1] After the trial court set the date, Mr. Graham filed a civil suit in Travis County seeking an order compelling the Board of Pardons and Paroles to hold a hearing on his request for clemency. The district judge entered a temporary injunction requiring the Board to hold a hearing on or before August 10, 1993, or to reschedule Graham's execution until such a hearing could be held. The Board filed notice of appeal to the Third Court of Appeals. On Graham's motion, that court entered a writ of injunction enjoining relators from proceeding with the execution, holding that the injunction was necessary to preserve its jurisdiction over the appeal. John Holmes, then Harris County District Attorney, filed a motion for leave to file petition for writ of mandamus and request for emergency stay, requesting that the Court of Criminal Appeals vacate the injunction. The Court denied Holmes leave to file but stayed Graham's execution on its own motion then filed and set the case for disposition.

convicted of murdering his wife, and she was later determined to be alive. Knowing that she was alive, said his Honor, no trier of fact would convict the defendant of murdering his wife.



I told Judge Baird I thought that he should have pushed the lesser "undermines confidence in the verdict" standard, and, despite his "Pago Pago" case,[2] if it existed (sounds like a movie plot to me) nobody would ever get relief under the Holmes standard. Two and a half years later, I was proven wrong, as, in its last hand down in 1996, the Court granted relief in two cases, in which the applicants presented evidence which was not presented at trial.

In Ex parte Elizondo, 947 S.W.2d 202 (Tex.Cr.App. 1996)(see ☙, Vol. 4, No. 49; 12/18/1996), the first case, the conviction (for aggravated sexual assault) was based solely upon the testimony of his step-son Robert, one of the alleged victims in that case. The newly discovered evidence was Robert's recantation, which the Court held "not only voids his trial testimony which implicated Applicant, but constitutes affirmative evidence of his innocence" Elizondo, 947 S.W.2d at 210.

In Ex parte Mowbray, 943 S.W.2d 461 (Tex.Cr.App. 1996)(see ☙, Vol. 4, No. 49; 12/18/1996), the second case, the defendant was convicted of murdering her husband, and two "blood splatter" experts testified that, because of the high velocity impact bloodstains ("HVIS") on her nightgown, they believed the defendant shot the deceased. The habeas corpus application, the applicant claimed (a) actual innocence; (b) that the State's main witness had given false and misleading testimony; (c) that the State had knowingly used false testimony; and (d) she had been denied the effective assistance of counsel. A blood splatter expert who had not testified at trial had prepared a report which found there were no blood stains on the nightgown, and that the death was probably a suicide. Although the report had been given to defense counsel two weeks before trial, the habeas court determined that trial counsel was not ineffective, but the defendant had been denied due process for several reasons, not the least of which was some subterfuge by the State, and, perhaps more important, one of the State's two experts recanted his trial testimony as to HVIS and admitted his testimony at

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[2] Contributor and Editor-in-Chief, John G. Jasuta, has a theory pertaining to newly discovered evidence in which a man on trial for his wife's murder presents evidence in the form of testimony from his mistress, that she personally saw the defendant's wife board a plane for Pago Pago, the capital of American Samoa. Nevertheless, he is convicted. Following trial, the mistress travels to Samoa, where (lo' and behold) she finds the defendant's wife living on the beach under an assumed name. John questions whether this is actually "newly discovered evidence" . . . but that's a story for another report.

trial was without "scientific validity." The Court held that the habeas court's factual determinations were supported by the record. Because the habeas court determined that her due process rights were violated, Ms. Mowbray got a new trial and she was eventually acquitted of the murder of her husband.

What Elizondo and Mowbray meant to our jurisprudence wasn't clear at the time. In fact, nine days after Elizondo and Mowbray were delivered, the Court provided a supplemental dissenting opinion to Elizondo by Judge White. In his dissent, joined by Judges McCormick and Keller, Judge White chastised the majority for revisiting Herrera, and trying to "resuscitate the burden of proof proposed by Justice Blackmun in his dissent in Herrera, which was rejected by a majority of the members of the Court in Herrera and by a majority of the members of this Court" in Holmes. Judge White "would have concluded applicant has not met his burden to be entitled to relief on his claim of innocence" because the correct burden of proof that a habeas applicant has under Holmes is to show that with the newly discovered evidence "no rational trier of fact could find proof beyond a reasonable doubt."

Later that year, the Court rejected a recantation claim when it went against the habeas court's findings in Ex parte Stevens, 963 S.W.2d 75 (Tex.Cr.App. 1997)(see ֍, Vol. 5, No. 42; 10/27/1997). In that case, the habeas judge found the recantation to be true and recommended that a new trial be granted. The Court, nevertheless, denied relief without a written order. Judge Overstreet and Judge Meyers each filed dissenting opinions, and each was joined by the other and Judge Baird.

Judge Meyers said there were "striking similarities" in Stevens and Elizondo, and he was correct - the cases cannot be distinguished. Clearly, since the habeas judge found that the child was lying at the time of trial but was telling the truth at the habeas hearing, Stevens satisfied the standard announced in Holmes, and implemented in Elizondo.. In my mind, Stevens remains a mystery.

The day we published our report on Stevens, my "actual innocence" client, Ben Salazar, who had been confined in prison for sexual assault, was released from jail on bond. Karyl Krug and I took on the case pro bono in 1994, and, once the "rape kit" was located (it was originally "missing"), it was determined that Mr. Salazar had been confined for more than 5 years for a crime he did not commit[3] He was subsequently pardoned by the Governor.

Over the next five years, the Court worked out the details of its newly discovered and actual innocence analysis in numerous cases, published and unpublished. A milestone was

[3] Click here for a summary of Mr. Salazar's case.

reached in Ex parte Tuley, 109 S.W.3d 388 (Tex.Cr.App. 2002)(see ¶¶, Vol. 10, No. 51; 12/23/2002), however, when the Court granted relief in a recantation case in which the defendant had entered a plea of "guilty."

Although historically, the fact that a defendant pled guilty has not been important in habeas corpus proceedings,[4] Judges Keller, Keasler and Hervey dissented. In her dissenting opinion, Judge Hervey stated that Elizondo. was by its terms limited to cases in which the defendant pled not guilty, and that the remedy for someone in the applicant's position is executive clemency. Despite those dissenting sentiments, it is clear, since Tuley, that habeas cases involving actual innocence claims following a plea of guilty are to be treated no differently than any other habeas claim in which the habeas applicant's conviction was the result of a not guilty plea. The guilty plea, however, is "some evidence" of guilt, and will have to be explained, as it was in Tuley. That explanation will also have to accepted by the trial court.

Since the rationale of Holmes was implemented in Elizondo, the Court has granted relief to numerous applicants presenting a Herrera "bare claim of innocence." It has similarly granted relief to numerous applicants presenting a Schlup claim of innocence "intertwined with constitutional error."

It appears that the law on newly discovered evidence is fairly settled, although the interpretations of the law is often quite varied. What I want to discuss, next, however, is the most recent opinion in the long pending saga of Cathy Lynn Henderson. Details of the Cathy Henderson case are not as headline grabbing as those, for example, in the Michael Morton case, but they are quite compelling.

Ms. Henderson was convicted and sentenced to death for the killing of a eight month old child she was baby sitting, and whether the child's death was an accident or intentional was at the heart of the case. Her conviction and death sentence were affirmed in Henderson v. State, 962 S.W.2d 544 (Tex.Cr.App. 1997)(see ¶¶, Vol. 5, No. 48; 12/08/1997).

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[4] For example, why worry about ineffective assistance of counsel if the defendant pled guilty? The answer is that, very often, the innocent plead guilty out of a recognition of the then hopelessness of their situation, not because of their guilt. That their hopeless situation is later ameliorated by newly discovered evidence (or proof that their lawyer was ineffective) has never been and should not be a bar to obtaining relief.

The defendant's position throughout the proceedings was that the child fell out of her arms as she was carrying him and hit his head on the concrete playroom floor. At the time of trial Dr. Roberto Bayardo, the highly experienced medical examiner for Travis County, testified that it was "impossible" for the child's extensive brain injuries to have occurred in the way that the defendant stated. He testified that her story was false and "incredible." In his opinion (and that of Dr. Sparks Veasay of Lubbock County), the child's injuries had to have resulted from a blow intentionally struck by the defendant.[5]

In 2007, in a subsequent writ application, Henderson presented a claim of newly discovered evidence -- Dr. Bayardo provided an affidavit stating that, based on "new scientific information," he agreed with other professionals providing affidavits to the defense. He stated that, "had the new scientific information been available to me in 1995, I would not have been able to testify the way I did about the degree of force needed to cause [the child]'s head injury. Based on this new information, the Court of Criminal Appeals remanded the case for an evidentiary hearing. Ex parte Henderson, 246 S.W.3d 690 (Tex.Cr.App. 2007)(see 🙞, Vol. 15, No. 23; 06/18/2007).

The habeas court then held an evidentiary hearing at which Henderson's lawyers presented the testimony of six expert witnesses. Relying on new developments in the science of biomechanics, these witnesses testified that the type of injuries that the child suffered could have been caused by an accidental short fall onto concrete. Dr. Roberto Bayardo, the medical examiner who testified at trial that applicant's position that the child's injuries resulted from an accidental fall was false and impossible, testified at the evidentiary hearing that he now believes that there is no way to determine with a reasonable degree of medical certainty whether the child's injuries resulted from an intentional act of abuse or an accidental fall. The State presented five expert witnesses who testified that, notwithstanding the studies cited by applicant's experts, it was very unlikely that the child's injuries were caused by an accidental short fall onto concrete. Following the evidentiary hearing, the trial court recommended granting a new trial.

The decision at the Court of Criminal Appeals was uncomplicated, with the majority holding that the trial court's findings of fact were supported by the record, so "we accept the court's recommendation to grant relief and remand for a new trial." Ex parte Henderson, 384 S.W.3d 833 (Tex.Cr.App. 2012)(see 🙞, Vol. 20, No. 49; 12/10//2012). The decision, however, is one of the most

[5] As a disclaimer, after Henderson's conviction was affirmed, Karyl Krug was appointed to represent her in the Article 11.071 habeas corpus proceeding. I acted as her co-counsel in the drafting of the application.

unusual ever published by the Court, in that none of the judges joined the "opinion of the Court." Five judges (Alcala, Cochran, Johnson, Price and Womack) concurred with it, three judges (Hervey, Keasler and Keller) dissented, while one judge (Meyers) didn't even weigh in.[6] Henderson is an 0-5-3 opinion.[7]

It is fairly clear that there is no "new evidence" in Henderson, only new ways to look at the evidence based on "new scientific information." The new information does not exclude the possibility that Ms. Henderson is guilty, it only casts doubts on some of the State's evidence.[8] So, now let's go back to Holmes and its two different standards.

However you look at it, the Henderson case does not fit neatly into the Court's "newly discovered" / "actual innocence" case law. When I suggested to Judge Baird that he should have gone with the "undermines confidence in the verdict" standard, I never thought that would come to pass. Now I'm not sure. Looking at these two cases, I think that is exactly why the Court granted relief. Irrespective of the standard employed, the new evidence worked to undermine the Court's confidence in the outcome and its original position. So, maybe Holmes didn't create an impossible standard.

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[6] Judge Price filed a concurring opinion. He noted that Applicant's evidence fell short of satisfying the burden imposed on defendants making a bare claim of actual innocence. However, since the convicting court recommended that the court grant Applicant a new trial, and since the State had declared itself content to go along with that ultimate recommendation, he would grant a new trial based upon the inadvertent use of false evidence, rather than actual innocence. Judge Cochran filed a concurring opinion, and found that Applicant did not receive a fundamentally fair trial based upon reliable scientific evidence, and that she should receive a new trial that was based on scientifically reliable evidence. Judge Alcala filed a concurring opinion and would issue a narrow holding that due process prohibits the execution of a person when faulty science was essential to the State's establishment of an element necessary for conviction-that the victim's cause of death was intentional-and the habeas record shows that today's scientific community reaches a different consensus-that the cause of death was undetermined. Judge Keasler delivered a dissenting opinion, stating that he believed Applicant was being granted relief without identifying a legal basis for that relief. He would deny Applicant's Herrera claim of actual innocence, and remand her Schlup claim of actual innocence for findings of fact and conclusions of law. "It is a travesty to grant this child killer relief on some unknown legal principle while her tiny, defenseless victim lies dead and reburied. Therefore I dissent with all the vigor at my command." Judge Hervey filed a separate dissenting opinion. She does not believe that advances in science necessarily entitled Applicant to relief. She also does not believe that the medical examiner's unreliable testimony had a substantial and injurious effect or influence in determining the jury's verdict.

[7] Henderson involves advances in scientific evidence and testing the same evidence which was used at trial. This should be compared with the result (relief denied) in Ex parte Spencer, 337 S.W.3d 869 (Tex.Cr.App. 2011)(see GG, Vol. 19, No. 16; 04/25/2011), in which the scientific advances were of no importance because the original evidence could not be recreated and, therefore could not be tested.

[8] The evidence presented at the habeas corpus hearing in Henderson was such as to "cast sufficient doubt on reliability of conviction so as to warrant relief." Ex parte Parrott, 396 S.W.3d 531, 535 (Tex.Cr.App. 2013)(see GG, Vol. 21, No. 2; 01/14/2013).