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TIBA's Case of the Week

Case Name: [Ex parte Curtis Fournier & Christopher Toby Dowden](#)

- OFFENSE: Post-Conviction Habeas Corpus (Online Solicitation of a Minor)
- COUNTY: Harris
- CCA. CASE No. WR-82,102-01 ([Fournier](#)) & WR-82,103-01 ([Dowden](#))
- DISPOSITION: Relief Granted DATE OF OPINION: October 28, 2015
- OPINION: [Keasler, J.](#) VOTE: 5-2-2
- TRIAL COURT: 351st D/C; Hon. Mark Ellis
- LAWYERS: [Sarah Wood](#) (Defense); [Roe Wilson](#) (State)

⚖ [563.01 Post-Conviction Habeas Corpus / Sufficiency of Claims for Relief / Actual Innocence](#): After pleading guilty and being conviction of online solicitation of a minor under Penal Code section 33.021(b), Fournier in 2008 and Dowden in 2001, Applicants each filed an application for writ of habeas corpus. In addition to seeking relief based on the Court's opinion in [Ex parte Lo](#), 424 S.W.3d 10 (Tex.Cr.App. 2013)(see ⚖, [Vol. 21, No. 44](#); 11/04/2013), holding the applicable statute unconstitutionally overbroad, Applicants also seek relief under an actual innocence theory. There is no disagreement among the parties that Applicants are entitled to have their judgments set aside under [Ex parte Lo](#). The undecided issue is whether [Ex parte Lo](#) entitles Applicants to relief under an "actual innocence" theory.

Holding: The [State v. Wilson](#) [324 S.W.3d 595 (Tex.Cr.App. 2010)(see ⚖, [Vol. 18, No. 9](#); 03/08/2010)] clarification was at the center of our recent opinion in [Ex parte Mable](#), 443 S.W.3d 129 (Tex.Cr.App. 2014)(see ⚖, [Vol. 22, No. 38](#); 09/22/2014), in which we denied an applicant's actual innocence claim when newly discovered forensic testing revealed that the substances forming the basis of Mable's drug possession conviction contained no illicit substances. *** Applicants' contentions rest solely on a legal basis -- the statute under which they were convicted is unconstitutionally broad in violation of the First Amendment. This claim is much different than pointing to new evidence supporting an argument that Applicants did not commit the conduct for which they were convicted. [Ex parte Lo](#), as matter of law, removed the criminal sanctions once affixed to Applicants' conduct because the statute criminalizing it was unconstitutionally drafted. [Ex parte Lo](#) was decided on the heightened standard we use to measure a statute's language that restricts free speech. Our opinion in [Ex parte Lo](#) is irrelevant to whether Applicants'

conduct was in fact committed. We conclude that Applicants do not assert true claims of actual innocence for which relief may be granted; they are decidedly different.

Concurring / Dissenting Opinions: [Judge Alcalá](#) delivered a concurring opinion, noting that, because “of the interrelationship between the civil compensation for wrongful incarceration and the criminal declaration of actual innocence, it is necessary for this Court to apply the term ‘actual innocence’ strictly and consistently as a term of art, and the defendants “did commit acts that, at the time those acts were committed, were considered criminal under the laws of this State.” [Judge Yeary](#), joined by Presiding Judge Keller, filed a dissenting opinion in which he said he would not give [Ex parte Lo](#) retroactive effect.

Sidebars: ([David A. Schulman](#)) Judge Alcalá’s comments illustrate the real problem with these “wrongful incarceration” cases -- it’s all about the money.