

Court of Criminal Appeals

October 28, 2015

State v. Swearingen

NOS. AP-77,043 & AP-77,044

Case Summary written by Jeryn Crabb, Staff Member.

JUDGE KEASLER delivered the opinion of the court.

Capital defendant, Larry Swearingen, filed a fifth motion under Chapter 64 of the Texas Code of Criminal Procedure in which he requested post-conviction DNA testing of several items including: 1) fingernail scrapings from the victim's hand, 2) ligature used to strangle the victim, 3) pantyhose comprising the other half of the ligature, 4) cigarette butts found near the body, 5) the victim's clothing, and 6) hairs collected from the various items. The trial court granted Swearingen's request for post-conviction testing and a conditional order for the release of evidence for preliminary testing to determine whether the evidence contained biological material. The State appealed the decision and also challenged the validity of the conditional order.

Issues: Was the trial courts decision to grant Swearingen's request for post-conviction DNA testing correct? Could the State appeal the validity of the conditional granting of the motion to release evidence?

Under Chapter 64, a convicted person may submit a motion for forensic DNA testing of evidence containing biological manner only if five requirements are met. These conditions include:

- 1) the court finds that the evidence still exists and is in a condition making DNA testing possible,
- 2) the court finds that the evidence has been subjected to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect,
- 3) the court finds that identity was or is an issue in the case,

4) the convicted person establishes by preponderance of the evidence that the person would not have been convicted if exculpatory results had not been obtained through DNA testing, and

5) the convicted person establishes by a preponderance of the evidence that the request for the proposed DNA testing is not made to unreasonably delay the execution of the sentence or administration of justice.

Chapter 64 motions are also subject to the “law of the case” doctrine. This doctrine directs that when facts and legal issues are virtually identical, they should be controlled by an appellate court’s previous resolution.

The court’s previous 2010 and 2014 opinions reversed the granting of review of DNA evidence items one through five. The 2010 opinion the court noted that the evidence of Swearingen’s guilt was overwhelming and that even if the requested motion was granted, he could not have shown by a preponderance of the evidence that he would not have been convicted. In the 2014 opinion, the court determined that the law of the case doctrine ruled and that it was an error to grant the motion. In the 2014 opinion, the court also noted that Swearingen was not entitled to DNA testing of the fingernail scrapings because the judges were not persuaded that if the DNA in the fingernail scrapings belonged to another person, it would overcome the amount of evidence in favor of Swearingen’s guilt. The court determined the law of case doctrine controlled here and that there was no change in facts that would preclude a decision different than reversing the granting of a motion requesting DNA testing.

The trial judge found the 2010 holdings did not apply because Swearingen’s current request included additional probative evidence such as the rape kit, hair evidence, and cigarette butts. The trial judge erred in this decision because Swearingen sought testing of the cigarette butts in both 2010 and 2014. Also, the court determined that even with the presence of the rape kit and hair evidence the current request should not be resolved any differently than the 2010 and 2014 decisions because

Swearingen still could not establish by a preponderance of the evidence that he would not have been convicted. Because of these reasons, the court reversed and remanded the trial court's order granting DNA testing under Chapter 64.

The court dismissed the State's appeal challenging the validity of the conditional order releasing evidence for testing. In a prior decision, *State v. Patrick*, 86 S.W. 3d 592, 594 (Tex. Crim. App. 2002), the court determined that the State could not appeal a judge's order granting testing that was not based on Chapter 64. The proper avenue to contest the order was a writ of mandamus. The State did not request a writ of mandamus in this case, so the court dismissed the appeal.

JUDGE YEARY, concurring and dissenting.

Judge Yearly joined in disposing the appeal challenging the validity of the conditional motion to release DNA. The judge also determined that there was no change in the law or facts to preclude the application of the law of the case doctrine to the ligature, cigarette butts, and victim's clothing. However, the Judge determined that the law of case doctrine could not be used in a piecemeal fashion to exclude individual pieces of evidence, namely the fingernail scrapings, rape kit, and hair. The judge said the court should have measured the mountain of evidence against Swearingen against the exculpatory inferences that would flow from DNA testing that could possibly show third party DNA evidence on the fingernail scrapings, rape kit, and hair, considered together. The judge determined that had the fingernail scrapings, rape kit, and hairs been tested for DNA, been used together, and shown the presence of a third person's DNA, at least one juror might have had reasonable doubt as to Swearingen's involvement in the victim's abduction, sexual assault, and murder.

JUDGE ALCALA, dissenting.

Judge Alcala determined that despite the volume of incriminating evidence of Swearingen's guilt, DNA testing on the hair evidence and the rape kit linking a different person to the offense could by a preponderance of the evidence show that Swearingen would not have been convicted. Judge Alcala

determined that because the facts were not virtually identical, the law of case doctrine was not applicable to the pantyhose, the hair evidence, the rape kit, and the cigarette butts. Despite this, the judge determined that the pantyhose and the cigarette butts would not meet the requirements for DNA testing. The motion must be denied on those items because even if exculpatory evidence were obtained from the items, it would not be enough to suggest that the jury would have reached a different verdict. Judge Alcalá determined that new DNA evidence indicating that the rape kit and the hairs found on and near the victim's body containing DNA that is not Swearingen's, particularly when fingernail scrapings also did not match Swearingen's profile, would be particularly compelling and could undermine the mountain of evidence against Swearingen. Because of this, Judge Alcalá held that DNA testing should be conducted on the rape kit and the hair evidence.

Ramsey v. State

PD-0070-15

Case Summary written by Jack Fulgham, Staff Member.

JUDGE HERVEY delivered the opinion of the court in which PRESIDING JUDGE KELLER, JUDGES JOHNSON, KEASLER, RICHARDSON, YEARY, AND NEWELL joined. JUDGE ALCALÁ concurred.

Jimmie and his son Jed Owens founded and operated Owens Motor Machine (Owens), a sole proprietorship located in Texas. During the time period relevant to this appeal, Appellant Donald Ramsey was the only employee of Owens, and had been allowed to live in the business shop. As compensation for his labor, Jimmie wrote checks to Ramsey payable to a checking account for Owens Motor Machine. Jimmie testified that he usually signed the checks "J.E. Owens" but sometimes signed "Jimmie E. Owens" or "Jimmie Owens," and he typically wrote "contract labor" in the memorandum line. Jimmie kept the checkbook in his truck that he usually left unlocked in the business shop overnight.

On June 11, 2013, Ramsey tendered a \$65 check payable to himself at a liquor store located a block and a half from the

business shop. The check was signed “Jim E. Owens” and listed “contract labor” in the memorandum.

After being found guilty of forgery by the district court, the court of appeals reversed the judgment holding that there was a lack of sufficient evidence to prove that Ramsey intentionally defrauded Owens. The court relied on *Stuebgen v. State*, which held that appellant’s access to the victim’s checkbook and the fact that the victim paid his employees personally was not enough “to discharge the State’s burden of showing that appellant acted with intent ‘to defraud or harm another.’” Because the court likened the facts of the case to *Stuebgen*, the court reasoned that any inference that the appellant had knowledge of the check’s forgery was speculative.

In his dissent, Justice Pirtle argued that *Stuebgen* could be distinguished from the case because “there was no memorandum on the check stating the purpose for which the check was given.” Pirtle concluded that *Williams v. State* controlled this case rather than *Stuebgen*. Like Williams, Ramsey attempted to tender the check with a specific purpose by writing “contract labor” into the memorandum. This, along with the fact that Ramsey was an employee with access to the checkbook and had tendered similar checks at the liquor store before, was enough for the state to meet its burden that Ramsey attempted to intentionally defraud Owens Motor Machine. Furthermore, Pirtle argued that *Jackson* had abandoned the reasonable-alternative-hypothesis standard that the *Stuebgen* court relied on, and therefore *Stuebgen* was inapplicable.

The Court of Criminal Appeals only had to decide the issue of whether Ramsey acted with the intent to harm or defraud Owens. The trier of fact only had to “reasonably infer that [Ramsey] knew the instrument was forged beyond a reasonable doubt.” The State argued that a jury could have rationally concluded that circumstantial evidence was enough to prove Ramsey’s guilt. Specifically, the state argued that even if Ramsey did not forge the check himself, because he was the beneficiary and the memorandum noted that the payment was for “contract labor” that he did not complete, he should have known that the check was forged. The State also argued that *Stuebgen* could be

distinguished and was not controlling in this case. *Stuebgen* applied the abandoned alternative-hypothesis construct, “which does not require the same deference to the jury’s resolution of factual issues.” Also, unlike *Stuebgen*, Ramsey’s access to the checkbook was nearly exclusive because he was the only employee of Owens and lived in the same shop where the checkbook was kept. The appellant argued that there was insufficient evidence to show that the check was forged. As an alternative argument, the appellant contended that Jimmie had been taking pain medication and could have forgotten writing the check to Ramsey.

The Court of Criminal Appeals dismissed the appellant’s “pain-medication” argument because a jury had already heard the testimony and reasonably declined to believe the appellant’s contention. The court also found it difficult to accept the argument that a reasonable jury could find that the appellant had no knowledge of the forgery. To find for Ramsey, a jury would have to believe that a third party wrote a check in a manner and handwriting similar to Jimmie Owens, for the same purpose (contract labor) as other checks made out to Ramsey, and payable to Ramsey himself. Then the jury would have to believe that Ramsey cashed the check with no knowledge of these events. The court had trouble believing that a reasonable jury would find this way. The court also agreed with Justice Pirtle in holding that *Stuebgen* was distinguishable and the reasonable-alternative-hypothesis was abandoned by *Jackson* and the incorrect standard to rely on. The court held that proper application of the *Jackson* standard, “which requires that the combined and cumulative force of all the evidence be viewed in the light most favorable to the conviction,” made the evidence sufficient to uphold the appellant’s conviction.

JUDGE MEYERS, dissenting.

Judge Meyers agreed with the majority that the evidence was sufficient to show the appellant’s attempt to intentionally defraud or harm, but believed that Owens Motor Machine was defrauded and not Jimmie Owens himself. This fact was significant because forgery against “elderly individuals” increases the charge from a misdemeanor to a felony. Because the check was

written from the account of Owens Motor Machine and not Jimmie Owens himself, the evidence suggested that Ramsey actually defrauded the business. For this reason, Judge Meyers contended that the conviction should not be upheld, or at the very least Ramsey should be afforded a new punishment hearing.

Nowlin v. State

NO. PD-0840-14

Case Summary written by Jenée Durán, Staff Member.

JUDGE MEYERS delivered the opinion of a unanimous court.

Appellant, Keiona Dashedle Nowlin, was convicted of felony hindering apprehension after allegedly encouraging Demarcus Degrade, her boyfriend, to run away from the United States Marshals who had come to arrest him. She was sentenced to four years in prison; her offense was raised to a third-degree felony because the State alleged that she knew that Degrade was charged with a felony when she encouraged him to escape.

Degrade was charged in federal court with the offense of felon in possession of a firearm, and his indictment was sealed. He was also on bond for state charges. Deputy United States Marshal Kevin Scott went to Degrade's home in order to execute the sealed federal warrant, but Degrade fled and Scott pursued him. Scott testified at trial that he did not hear Nowlin say anything to Degrade, and Scott had not informed either of the two why he was stopping them. United States Marshal Clayton Brown responded to the scene after Degrade began to flee, saw Nowlin, and allegedly heard her shout, "Run baby run! Get away." Deputy United States Marshal Anton Slavich also testified that he saw Nowlin running while in pursuit of Degrade, went after her, and detained her. When she attempted to flee, she was caught and placed under arrest. Slavich testified that Nowlin then told him that when she saw the officers, she told Degrade, "Those are the marshals," or "That's the laws. Run." She also allegedly said to Slavich that she knew the cars the Marshals drove because some of their neighbors had pictures of them and she did not want Degrade to get arrested because he was out on bond for the state charges. Slavich also

stated that Nowlin had “Demarcus Degrade” tattooed across her chest.

Nowlin appealed her conviction, arguing that the evidence was insufficient to show that she “warned” Demarcus Degrade of impending apprehension, or that she had knowledge that Degrade was charged with a felony offense. She also challenged the sufficiency of the evidence enhancing her conviction for hindering apprehension from a misdemeanor to a felony because the federal warrant had been sealed and there was no evidence to show that she knew Degrade was charged with a felony. The court of appeals disagreed on both counts.

ISSUE: Was the evidence presented at trial legally sufficient to prove that Nowlin knew Degrade was charged with a felony offense when she allegedly encouraged him to flee from authorities?

The Court of Criminal Appeals held that they did not concur with the court of appeals that there was sufficient evidence of Nowlin’s knowledge of Degrade’s federal felony charge to justify raising her offense from a misdemeanor to a third-degree felony. The court reasoned that the state offense that Degrade had been on bond for could not be the basis for Nowlin’s conviction. Nothing was presented at trial for the court to determine whether the state offense Degrade was charged with had been a felony, and there was no testimony that Nowlin knew what the state offense was, or whether it was a felony. The court also reasoned that because Degrade’s federal indictment had been sealed, there was no evidence presented that showed that either Degrade or Nowlin knew about the federal indictment prior to the arrest, and none of the officers stated what Degrade was being arrested for. Because Degrade himself could not have know that he was being indicted for felon in possession of a firearm, it would have been impossible for him to have told Nowlin about the indictment or what offense it purported to charge him with. The court ruled that Nowlin’s felony conviction of hindering apprehension could not be upheld.

The Court of Criminal Appeals, however, also held that because the trial court had found that each element of the lesser-included offense of misdemeanor hindering apprehension had been proven sufficient to support a conviction, it would convert

Nowlin's conviction to misdemeanor hindering apprehension and remanded the case to the trial court for a new punishment hearing.

Owens v. State

No. 06-13-00199-CR

Case Summary written by Kayla Hackerott, Staff Member.

JUDGE HERVEY delivered the opinion of the court, joined by PRESIDING JUDGE KELLER, and JUDGES MEYERS, JOHNSON, KEASLER, RICHARDSON, YEARY, and NEWELL.

Police pulled over Appellant, Charles Ray Owens, who had his fourteen-year-old son in the car at the time, for speeding. During the traffic stop, the officer discovered an outstanding arrest warrant for Owens from Michigan. While waiting for confirmation of the warrant, the officer allowed Owens to drive his son home. As Owens approached his residence, he slowed the vehicle, dropping his son off, and sped away at a high rate of speed. The officer engaged in pursuit but slowed his vehicle because of the pedestrians in the residential neighborhood. As Owens approached the highway intersection, the officer observed the vehicle jump into the air as a result of the vehicle hitting something. Owens had run a stop sign, crashing into two vehicles. One of the drivers of the vehicles that Owens hit died at the scene of severe head injuries.

After the State charged Owens with felony murder, the defense filed a motion challenging Owens's competency to stand trial. The defense argued that Owens lacked competency because he suffered from a traumatic brain injury that caused amnesia, preventing him from remembering the car crash. In support of the competency claim, the defense requested to have Dr. Allen Thomas appointed to evaluate Owens and the judge agreed. Allen concluded that even if Owens suffered from amnesia, Owens's competency remained intact because he could rationally understand the consultations with his attorney and the proceedings against him.

During the competency trial, the defense called Allen as its first witness. The defense questioned Allen extensively about his

credentials, eventually objecting to Allen as an expert because he failed to meet the statutory requirements for the qualifications of an expert appointed to testify regarding competency. The trial judge overruled the objection because the defense counsel prepared the order appointing Allen as the competency expert. Defense counsel argued, and the judge agreed, that the defense should be able to argue that Allen lacked the qualifications necessary to evaluate Owens. Despite the defenses argument that Allen lacked the proper qualifications for the court to appoint as an expert, the jury found Owens competent to stand trial, convicted Owens of felony murder, and sentenced Owens for forty years in prison.

Owens appealed claiming that the trial court erred by allowing Allen to testify as to Owens's competency and that the error harmed Owens. On appeal, the State argued that Owens should not receive a windfall because the defense failed to review Allen's credential before requesting his appointment. The court of appeals ruled in favor of the defense because the failure to sustain the defense's objection to Allen harmed Owens since the only evidence against Owens's alleged incompetency came from the testimony of Allen. The court rejected the State's invited-error argument reasoning that the defense counsel, being unfamiliar with Allen, prepared the motion appointing Allen as expert only on the recommendation of the prosecution, and that defense counsel timely objected upon discovering that Allen lacked the necessary qualifications. The court of appeals reversed and remanded for a new trial because of the flaw in determination of Owens's competence. Because the court granted a new trial based on the defense's competency claim, the court did not examine Owens's other claim of an alleged evidentiary variance.

The Court of Criminal Appeals granted the State's petition for review to determine if the court of appeals erred in reversing and remanding for a new trial instead of abating the appeal and ordering a new competency trial. The court ruled that the appeals court erred in reversing and remanding for a new trial. The court reasoned that while a subsequent determination of incompetence renders a trial invalid on due process grounds, if, upon remand, the trial court determines that a retrospective competency

evaluation is possible, and the new proceeding finds the defendant competent then the conviction remains, as no due-process violation exists. The court determined that the appeals court erred since it could not have known whether the trial would be rendered invalid because the appeals court failed to abate the appeal and remand to the trial court to determine the feasibility of a retrospective competency proceeding.

The court also ruled, however, that they need not abate the appeal and remand for a new competency determination because the trial court's error was harmless. The Court's examination of the record yielded only one piece of evidence pointing to Owens's incompetence, namely his attorney's testimony that the amnesia affected Owens's ability to rationally communicate about the events. On the other hand, the Court found more illuminating a four-page letter written by Owens to the trial judge expressing remorse, explaining his amnesia, and his belief that a vehicular manslaughter charge would be more appropriate. The court disagreed with the appellate court's determination that that letter did not suffice as evidence that Owens possessed sufficient competency to stand trial. The court determined that Owen's argument in the letter for a vehicular manslaughter charge as opposed to murder provided compelling evidence that he had a rational understanding of the proceedings against him. Additionally, the court found that defense counsel failed to argue that he could not presently and rationally communicate with Owens, only that Owens's incompetence arose from his lack of recollection of the wreck. Despite the defense's claims that the amnesia prevented the preparation of a mens rea defense, the court held that the defense could rely on the circumstances of the offense to develop such a defense.

Ultimately, for the above reasons, the court found that the appellate court erred in reversing the conviction and remanding for a new trial, and that any error by the trial court in allowing Allen to testify was harmless. The court reversed the judgment of the appellate court and remanded to address Owens's additional point of error.

JUDGE ALCALA, dissenting.

Judge Alcala dissented because she did not believe that the letter by Owens, written to the judge who presided over his trial, showed Owens's competency in light of the fact that no qualified expert testified to establish such competency. Judge Alcala believed that the sole question was whether the admission of the unqualified expert testimony harmed Owens because the competency hearing contained flaws—which the majority opinion did not dispute. Judge Alcala believed that without qualified expert testimony the inadequacy of the other evidence precluded a finding of competence.

While Judge Alcala agreed with the majority that the letter demonstrated that Owens had a rational understanding of the proceedings, she concluded that the statute requires more, namely, that the “defendant can disclose to counsel pertinent facts, events, and states of mind, and whether he can testify.” Judge Alcala agreed with the court of appeals that the letter could not speak to these factors and that she could not infer that the defendant was competent merely because he can recount what he was shown on a video recording of the events. Discounting the improper testimony of Allen, Judge Alcala believed the letter failed to address all the statutory criteria that must be considered, and as such, could not serve as evidence of the harmlessness of the error.

Additionally, Alcala believed that the court misconstrued Allen's testimony. Judge Alcala interpreted Allen's testimony to be that Owen did not have any knowledge of the facts of the event. Considering the possibility that the majority's opinion was really holding that amnesia is an insufficient basis for finding any defendant incompetent, Judge Alcala suggested that the court should analyze and support that argument while noting that the court has never held such.

Judge Alcala concluded that the presumption of competency is inadequate to maintain a finding of competence where no appointment of a qualified expert occurs, despite a statutory requirement for such appointment, and no other evidence sufficiently establishes the statutory criteria for competence.

Ex Parte Fournier

NO. WR-82, 102-01

Case Summary Written by Austin De Boer, Staff Member.

JUDGE KEASLER delivered the opinion of the court, in which JUDGES MEYER, HERVEY, RICHARDSON, and NEWELL joined. JUDGE ALCALA concurred. JUDGE YEARY dissented, in which PRESIDING JUDGE KELLER joined. JUDGE JOHNSON concurred.

Curtis Fournier (the applicant) was convicted of online solicitation of a minor under Texas Penal Code § 33.021(b). The applicant filed an application for writ of habeas corpus. He sought relief based on the court's recent decision in *Ex Parte Lo*, where it reasoned Texas Penal Code § 33.021 was unconstitutionally broad, and, therefore, a legal nullity. The appellant provided two claims for relief: (1) actual innocence; and (2) post-conviction nullification of his conviction because § 33.021(b) was unconstitutionally overbroad. The court took issue with the applicant's claim of actual innocence, but agreed that he was entitled to relief under his second claim based on *Lo*.

Issue: "Whether *Lo* entitles Applicants to relief under an 'actual innocence' theory."

Principally, the court examined the historical scope of actual innocence jurisprudence, finding the Due Process Clause of the United States Constitution would entitle the applicant to relief if he could prove "by clear and convincing evidence . . . that a jury would acquit him based on this newly discovered evidence."

Furthermore, the court reaffirmed its holding in *Ex Parte Rich*, where it concluded that a post-conviction determination that a conviction was illegal does not render the convict actually innocent. The court referenced its holding in *Wilson v. State*, where it expanded on its rationale in *Rich*, and found that actual innocence claims will only succeed where the convict introduced new evidence to show that he "did not, in fact, commit the offense or any lesser-included offenses."

Here, the applicant did not allege any new evidence that would show, by clear and convincing evidence, that a reasonable jury would not convict him of online solicitation of a minor beyond

a reasonable doubt, especially because the applicant pled guilty to the offense at trial. Therefore, the applicant “d[id] not assert claims of actual innocence for which relief may be granted.” However, the applicant was entitled to relief under *Lo* because § 33.021(b) was unconstitutionally broad. The court set aside the judgment of the applicant’s conviction, and remanded the case to the respective trial court to dismiss the indictment.

JUDGE ALCALA, concurring

Judge Alcala agreed with the majority’s conclusion that the applicant failed to satisfy the requirements of a claim for relief based on actual innocence. The applicant committed the act of online solicitation of a minor, which, prior to *Lo*, was a criminal offense. The applicant introduced no new evidence to suggest he did not commit the offense—there has only been a change in law. A change in the law is wholly inadequate to establish actual innocence and only establishes “legal innocence” because there is no longer authority to enforce an unconstitutional statute. Therefore, such legal innocence, alone, does not establish the factual innocence necessary to sustain relief under a claim of actual innocence.

Judge Alcala also agreed that the court should apply the rule in *Lo* retroactively. Because § 33.021(b) is no longer in effect, there exists no authority under the law to continue punishing those convicted under it. The applicant was due relief based on the unconstitutionality of § 33.021(b), but not based on his claim of actual innocence.

JUDGE YEARY, dissenting, in which PRESIDING JUDGE KELLER joined.

The dissent agreed with the majority’s holding that the applicant was not entitled to relief based on his claim of actual innocence. The dissent, however took issue with the court’s application of *Lo* to those previously convicted under § 33.021(b). Traditionally, where a statute is facially unconstitutional, a court may apply relief retroactively. The court, however, nullified § 33.021(b) based on the First Amendment Overbread Doctrine,

which has a lower burden of proof than a traditional facial challenge to the constitutionality of a statute.

As a result, Judge Yeary wanted to take briefing on the issue of “whether the Court should limit post-conviction relief to those applicants who can establish that their conduct did not fall within the plainly legitimate sweep of the overbroad statute.” Because the applicant made no showing that § 33.021(b) was unconstitutional as applied to his conduct, and because the court did not order briefing on this issue, Judge Yeary dissented.

Ex Parte Dowden

No. WR-82, 103-01

Case Summary written by Abigail Drake, Staff Member.

JUDGE KEASLER delivered the opinion of the court, in which JUDGES MEYERS, HERVEY, RICHARDSON, and NEWELL joined. JUDGE JOHNSON concurred.

Convicted and sentenced for online solicitation of a minor, Christopher Dowden filed applications for a writ of habeas corpus. Fournier and Dowden presented claims of actual innocence after the court recently held the statute under which the court convicted him to be unconstitutionally broad. The applicant asserted that because the statute was unconstitutional, he was “actually innocent.”

Issue: Does the unconstitutionality of the statute, as decided in *Ex parte Lo*, entitle the applicants to an actual innocence claim? The court looked to the history of the actual innocence theory, which showed that such claims prevail if the applicant can show that no rational trier of fact could find him guilty beyond a reasonable doubt in light of newly introduced evidence. Furthermore, the applicant must show by clear and convincing evidence that no reasonable juror would have convicted him with the new evidence.

Additionally, the court looked to *Ex parte Rich*, in which the court stated that an illegal sentence does not give rise to an actual innocence claim. Moreover, the court reiterated that actual innocence claims shall only succeed when the accused did not, in fact, commit the charged offense or any lesser-included offense.

Here, the applicant did not provided any additional evidence under which a reasonable juror would refuse to convict beyond a reasonable doubt. In fact, the applicant pleaded guilty of the charged crime. The sole basis for his actual innocence claim rested on the unconstitutionality of the statute. Therefore, while the applicant was entitled to relief due to the unconstitutionality of the statute, his claim of actual innocence failed.

Finally, the majority opinion in *Ex parte Lo* should apply retroactively to Dowden and those convicted of online solicitation of a minor under the now-unconstitutional statute.

JUDGE ALCALA filed a concurring opinion.

There was no new evidence that changed the facts regarding the act that the applicant committed. There was only a change in the law. Although a defendant who is convicted under an unconstitutional statute is actually innocent, “legal innocence” is different from “factual innocence,” the latter of which is required to meet the standard of actual innocence. Moreover, the majority was correct in retroactively applying the decision in *Lo* because, without the statute, there was no authority under which courts could confine Dowden.

JUDGE YEARY filed a dissenting opinion, in which PRESIDING JUDGE KELLER joined.

The majority was correct in deciding that Dowden’s actual innocence claim failed. However, there should be no retroactive effect in *Ex parte Lo* because it is unclear if the unconstitutional breadth of the statute covered the conduct Dowden engaged in, or if his conduct was still illegal under the constitutional portion. The marginal benefit of potentially wrongly-incarcerated citizens is not worth the damage that releasing correctly-convicted citizens back onto the streets will do.