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Supreme Court of Texas.
In re Billy Frederick Allen.
No. 10-0886.

January 12, 2012.

Appearances:

Kristopher E. Moore of Harrison & Hull, LLP, for Relator.

Philip A. Lionberger of the Office of the Attorney General of Texas, for Respondent-Real Party in Interest.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in the first matter, 10-0886, In re Billy Frederick Allen.

MARSHAL: May it please the Court, Mr. Moore will present argument for the Relator. Relator has reserved five minutes for rebuttal.

ORAL ARGUMENT OF KRISTOPHER E. MOORE ON BEHALF OF THE PETITIONER

ATTORNEY KRISTOPHER E. MOORE: Thank you. Good morning and may it please the Court, the issue before the Court this morning is whether my client, Billy Frederick Allen, has been granted relief on the basis of actual innocence when his writ was granted for habeas corpus by the Texas Court of Criminal Appeals. This is a simple question with a simple answer and the answer I submit to the Court is in my hands. The opinion in Ex parte Allen, the one in which the Court of Criminal Appeals granted Mr. Allen's writ, in the first words written by Justice Holcomb in the opinion, he states, and I will read it for the benefit of the Court, this is a post conviction habeas corpus proceeding brought under Article 1107 of the Texas Code of Criminal Procedure in which applicant, Billy Frederick Allen, presents a Schlup-type claim of actual innocence as a procedural gateway to which to raise his otherwise barred Constitutional claim of ineffective assistance of trial counsel.

JUSTICE NATHAN L. HECHT: But Judge Price writes that the plurality never does find actual innocence and he would and makes a point of it.

ATTORNEY KRISTOPHER E. MOORE: Your Honor, Judge Price states that, he himself agrees that Billy Allen met the standard required for him to establish his actual innocence and therefore, go on and have the ineffec-

tive assistance of counsel question addressed as well.

JUSTICE NATHAN L. HECHT: But he says, he can't join the plurality because they won't go that far.

ATTORNEY KRISTOPHER E. MOORE: Judge Price had a concern with what the plurality was doing as far as relying up Schlup or relying upon the Texas Code of Criminal Procedure. TEX.CODE CRIM.PROC. art 11.07 Section 4(a)(2) is a codification of the Supreme Court's decision in Schlup that states if you've had one writ on a Constitutional claim and you are subsequently barred from re-raising that claim, you must first show actual innocence. In fact, the language in Schlup used by the United States Supreme Court is in order to meet the Schlup standard, you must show it is more likely than not that a Constitutional claim led to the conviction of an innocent man.

JUSTICE DEBRA H. LEHRMANN: So tell us where are you getting the determination of actual innocence? Read that language to us, please.

ATTORNEY KRISTOPHER E. MOORE: First, the court states Billy Allen presents a Schlup-type claim of actual innocence and then goes on to hold in the next sentence, we hold that applicant is entitled to relief. Elsewhere, the court goes on to state in the plurality opinion, the lead opinion, in light of the state of this evidence, it is not surprising that the habeas corpus found, the court found that the newly discovered evidence of innocence was so strong that it could not have confidence in the outcome of the trial. We agree. The court very clearly--

JUSTICE NATHAN L. HECHT: Is it true that if the case had been retried, he could have been convicted again?

ATTORNEY KRISTOPHER E. MOORE: Yes, Your Honor, that is true.

JUSTICE NATHAN L. HECHT: So how is that actual innocence?

ATTORNEY KRISTOPHER E. MOORE: Your Honor, the State has argued that the Herrera-type actual innocence claim is the only one that is convincible. However, a habeas writ is a procedural matter. It does not dismiss somebody from the system. In a Herrera-type writ, that person is returned to the trial court to answer the charges against them.

JUSTICE DAVID M. MEDINA: Can that person be retried under a Herrera-type claim?

ATTORNEY KRISTOPHER E. MOORE: Absolutely, Your Honor. In fact, this Court heard the case of In re Billy James Smith last year in the heard the oral argument in 2010 and made a determination in that case in 2011. The Comptroller did not contest Billy Smith's innocence. However, in the writ granted by the Court of Criminal Appeals in Billy Smith's case, the last line states the judgment in cause number F8690792UL in Criminal District Court #5 of Dallas County is set aside and applicant is remanded to the custody of the sheriff of Dallas County to answer the charges against him.

JUSTICE NATHAN L. HECHT: And so he answers and then what? The question is, Judge Medina's question was can he be retried?

ATTORNEY KRISTOPHER E. MOORE: He can be retried.

JUSTICE NATHAN L. HECHT: Do we have any, are there any examples of that?

ATTORNEY KRISTOPHER E. MOORE: None that, I'm unaware of any instances.

CHIEF JUSTICE WALLACE B. JEFFERSON: But so it would be possible then, under your theory, for there to be a declaration of actual innocence and compensation by the Comptroller and then conviction beyond a rea-

sonable doubt. So somebody who is declared actually innocent, in fact later becomes convicted, finally convicted and yet receives compensation from the State. That seems a little anomalous.

ATTORNEY KRISTOPHER E. MOORE: Your Honor, that is a potential outcome; however, the Legislature has already written into the statute that if you receive a subsequent conviction, you lose your compensation. So therefore, there is some coverage for a situation like this occurring. However, if we go back to the practical side, instead of looking at what the potential theoretical outcome is here, the practical side is if the Texas Court of Criminal Appeals has looked at a case and they've weighed the facts in the record and they've determined that because newly discovered evidence that was unavailable at trial, this person's evidence of innocence is so strong, they're going to overturn and set aside that conviction.

CHIEF JUSTICE WALLACE B. JEFFERSON: Is the standard preponderance of the evidence for actual innocence?

ATTORNEY KRISTOPHER E. MOORE: For actual innocence on a Schlup-type claim and Your Honor, the reason why there is a preponderance of the evidence standard is because of the extenuating circumstances in a Schlup-type claim.

JUSTICE DALE WAINWRIGHT: Counsel, before you go down that road too far, can Billy Frederick Allen be retried in this case? I understand that DA in Dallas County dismissed the indictments. Was there a case pending in the district court there and if so what did the district court do given the remand order from the CCA?

ATTORNEY KRISTOPHER E. MOORE: The district court upon remand released him on bond and the matter remained pending from March of 2009 until May of 2011 when the district attorney finally decided to dismiss it, stating that they didn't have the evidence to go forward with a trial.

JUSTICE DALE WAINWRIGHT: And what did the court do upon the dismissal of the indictments? I mean the DA cannot dismiss the court proceeding. What did the court do?

ATTORNEY KRISTOPHER E. MOORE: Yes, Your Honor, the court dismissed the charges.

JUSTICE DALE WAINWRIGHT: Is there an order?

ATTORNEY KRISTOPHER E. MOORE: Yes, Your Honor.

JUSTICE DALE WAINWRIGHT: It's not in our record though is it?

ATTORNEY KRISTOPHER E. MOORE: No, Your Honor, and I will make sure that this week I do a post argument submission to get that order into the record.

JUSTICE DALE WAINWRIGHT: What is the difference between actual innocence and innocence? I assume you're proceeding or it looks like you're proceeding under Civil Practice and Remedies Code 103.001(a)(2)(b) only, not a and not c, but only b.

ATTORNEY KRISTOPHER E. MOORE: Yes, Your Honor.

JUSTICE DALE WAINWRIGHT: And it uses the term, actual innocence. What's the difference actual innocence and innocence in this type of a Schlup case?

ATTORNEY KRISTOPHER E. MOORE: Your Honor, actual innocence is a term of art that has been used by the Texas Court of Criminal Appeals as well as the United States Supreme Court and United States Federal Courts to define a claim under a writ of habeas corpus. Now the Texas Court of Criminal Appeals, every time

they've dealt with the idea of actual innocence has stated its standard language in their opinions, Ex parte Tuley, Ex parte Brown, Ex parte Brooks, Schlup v. Delo. There are two types of actual innocence claims, a Herrera-type claim and a Schlup-type claim. That is the standard language every time the Court of Criminal Appeals meets and issues an opinion on the issue of actual innocence.

JUSTICE DON R. WILLETT: Does the modifier actual add anything to the word innocence at all? Does it make it distinct from ordinary innocence as opposed to actual innocence? What does actual actually mean?

ATTORNEY KRISTOPHER E. MOORE: Your Honor, I believe that the term, actual innocence is more theoretical in the concept, the overall judicial concept of once you had a finalized conviction. At that point, it's not a merely insufficiency of the evidence standard, you must show that you are actually factually innocent.

JUSTICE DON R. WILLETT: Do you believe that if somebody says, I have a reasonable doubt as to this person's guilt, does that mean the same thing as saying I find this person actually innocent?

ATTORNEY KRISTOPHER E. MOORE: Insofar as you're talking about an insufficiency of the evidence standard, I have a reasonable doubt that there's enough evidence to show this person is guilty, no, they are not the same. In the United States v. Ratican, the 9th Circuit Court of Appeals in discussing the federal standards said that, in a Schlup-type claim, in order to meet the Schlup standard, you must show actual factual innocence and not merely insufficiency of the evidence. That is what Billy Allen was able to do in Ex parte Allen or else he never would have had the writ granted.

JUSTICE NATHAN L. HECHT: I want to be sure that to the answer to my earlier question, you don't know of a Herrera case that was retried.

ATTORNEY KRISTOPHER E. MOORE: No, Your Honor, because Your Honor, the only Herrera cases are DNA cases. In effect, what the Comptroller's position is here is that if you were exonerated on any other basis, but DNA, then you don't get compensation. There has never been a case, never been a non-DNA case that received Herrera relief. In fact, the United States--

JUSTICE NATHAN L. HECHT: But you could retry a DNA case.

ATTORNEY KRISTOPHER E. MOORE: You could retry a DNA case, but again, the practical aspect of this is if you're facing a jury and you're the prosecutor and you have DNA exculpating the person you want to retry, are you going to spend the state's resources and your time to try to say forget the scientists. Don't believe what your lying eyes are telling you and go ahead and retry this person. Only DNA cases, in the statute--

JUSTICE NATHAN L. HECHT: But your argument is that retrial in a Herrera case is legally possible; it's just not going to happen because the standard is so high to get the relief in the first place that it won't do any good to retry the case.

ATTORNEY KRISTOPHER E. MOORE: Your Honor, my position is the fact that in any actual innocence case where you've shown that there is, that the newly discovered evidence proves somebody innocent enough to have the Court of Criminal Appeals overturn that conviction, there is a possibility of retrial, but it is likely not going to happen because you have that newly discovered evidence that stands in the way of the State making a case and convincing a jury to put that person back behind bars and that's where it's a Schlup-type claim, whether it's Herrera claim with DNA evidence. And --

JUSTICE NATHAN L. HECHT: It seems like in this case if the jury heard the newly discovered evidence, they still might convict.

ATTORNEY KRISTOPHER E. MOORE: It's possible, Your Honor. Now I've heard speculation, media re-

ports, talking to attorneys that were former district attorneys in the Dallas County District Attorney's office that said, there is no evidence. At that point in time, the State's only evidence was the fact that you had a fingerprint on the car, which was explained by witnesses.

JUSTICE DALE WAINWRIGHT: A palm print.

ATTORNEY KRISTOPHER E. MOORE: A palm print on the victim's car, which was explained by witnesses as being an innocent occurrence and the testimony of the police officer who said, he identified a Billy Allen. That testimony was directly challenged by the testimony of two witnesses who were found to be believable and were apart, separate and apart from the case these two paramedics. Now in this case--

JUSTICE DALE WAINWRIGHT: Although the DA in its Motion to Dismiss in Dallas did indicate that there was a witness that was found that had decided to be uncooperative. So if that witness were cooperative, the retrial might not be as black and white as you say depending on what the witness would have said.

ATTORNEY KRISTOPHER E. MOORE: Yes, Your Honor, there was supposedly and I say supposedly because this witness was supposed to have undergone a lie detector test, but decided that they didn't want to show up for this lie detector test. So this uncooperative was they were never willing to submit themselves to the determination of whether they were telling the truth, this witness that supposedly came forward 26 years after the crime occurred. You stack this witness with the several witnesses that said that, this other Billy Wayne Allen was seen in possession of the goods, was claimed to have committed the murder, but the issue here, Your Honor, in a Chapter 103 claim, in *Abbott v. Young*, the Third Court of Appeals has stated in a Chapter 103 claim, we're not here to determine guilt or innocence. Justice Cochran in her concurring opinion in *Ex parte Allen* says, look, the record's out there. It's irrelevant that a different fact-finder could come to different conclusion. We have weighed the record. The habeas corpus court looked at the record and they determined that he was innocent. We agree.

JUSTICE DEBRA H. LEHRMANN: And let me just ask you about the effect of the higher burden in a Herrera claim. Can you comment on that?

ATTORNEY KRISTOPHER E. MOORE: The higher burden in a Herrera claim is based upon the fact that in a Herrera claim and a DNA claim, there is absolutely no showing of any problem with a procedure. You assume someone got a fair trial at the trial court level. They had a good attorney, a good prosecutor, a good police, a good investigation and a good jury, but still they're innocent. In a Schlup-type claim, the procedure was flawed. That person didn't get fair due process. They did not get the opportunity to put on their case for whatever reason that be, whether the evidence was hidden by the prosecutor, the police or in this case, the defendant's attorney failed to find it. And so the Supreme Court says, we give less deference to that conviction so therefore, that's why we maintain a lower standard of proof. I see my time is about up; if there's no further questions, I'm reserving five minutes for rebuttal.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel. The Court then is ready to hear argument from the Respondent and Real Party in Interest.

MARSHAL: May it please the Court, Mr. Lionberger will present argument for the Respondent.

ORAL ARGUMENT OF PHILIP A. LIONBERGER ON BEHALF OF THE RESPONDENT

ATTORNEY PHILIP A. LIONBERGER: Good morning and may it please the Court, the Texas Legislature intended the phrase "has been granted relief on the basis of actual innocence" to incorporate case law describing a person who has affirmatively proven his actual innocence based on a Herrera-type claim.

JUSTICE EVA M. GUZMAN: If it's DNA though and theoretically you can go back and retry the case what is

the real difference other than it would be a much tougher burden, I'm assuming, if DNA conclusively proves otherwise.

ATTORNEY PHILIP A. LIONBERGER: I'm very glad Your Honor asked that question and I need to clarify the premise here. The premise is false. Opposing Counsel says that, Herrera-type habeas claim is only a claim based on DNA evidence. That's just not true. It's just simply not true. If you look at the Court of Criminal Appeals' adoption of the Herrera-type habeas standard in Texas, as a matter of Texas State habeas jurisprudence, that was a witness recantation case, Elizondo, as well as the Ex parte Franklin is another example of where Herrera-type relief was granted. It wasn't a DNA case.

JUSTICE EVA M. GUZMAN: So how would this actual innocence fit into this witness recantation?

ATTORNEY PHILIP A. LIONBERGER: It works this way, Your Honor. When you have a person asserting a bare claim, a freestanding claim of actual innocence, that means that there's no allegation of Constitutional trial error, that they're saying I have evidence that is clear and convincing and affirmatively proves that I'm actually innocent. And based on that claim and that claim alone, you may get habeas relief because the theory is that that would be a violation of due process to keep that person incarcerated or even worse put that person to death. So -

JUSTICE DALE WAINWRIGHT: Actual innocence.

JUSTICE EVA M. GUZMAN: Excuse me, may I just get that one distinction. Can you just finish that how it works in the context?

ATTORNEY PHILIP A. LIONBERGER: The Texas Court of Criminal Appeals has set forth a very specific procedure for establishing an actual innocence Herrera-type claim. It's a two-prong test. The first prong is that the applicant must affirmatively prove they're actually innocent and what that means is they must bring forth clear and convincing evidence, exculpatory evidence that will void, rebut and nullify the old inculpatory evidence of guilt. If they can meet that burden, clear that hurdle, then the court moves to a wane. And what the court does is the court asks itself is there clear and convincing evidence here that would convince us that a juror acting rationally, hearing and believing both sets of evidence, both the inculpatory and exculpatory evidence, would be compelled to acquit the applicant because the two sets of evidence cannot rationally be reconciled. That is what a Herrera-type actual innocence claim means in Texas.

JUSTICE DEBRA H. LEHRMANN: Are you saying that Herrera-type claimants are the only ones that are entitled to compensation under the Act? Is that the bottom line of your argument?

ATTORNEY PHILIP A. LIONBERGER: That is the bottom line and the reason we're saying this is the Legislature did not intend to grant compensation to a Schlup-type habeas claimant like Mr. Allen who has not affirmatively proven his innocence and who may be found guilty after retrial.

JUSTICE DEBRA H. LEHRMANN: So what's the effect of the amendment 103.001(a)(2)(b)?

ATTORNEY PHILIP A. LIONBERGER: On this case or just in general?

JUSTICE DEBRA H. LEHRMANN: This case.

ATTORNEY PHILIP A. LIONBERGER: There's no effect. It doesn't apply to this case. This case was filed in 2010. The amendment went into effect in 2011.

JUSTICE DEBRA H. LEHRMANN: And what effect generally?

ATTORNEY PHILIP A. LIONBERGER: Generally, there's no, the amendment added more verbiage and the one thing it did clarify is prior to 2011, it just said that, you had to have a, you had to have been granted relief on the basis of actual innocence. It didn't make it clear that we were talking about habeas. And so what the Legislature did was they put in you know the words you know you've been granted relief in a writ of habeas corpus and so that clarified that and because of some things that were going on in the background with the Anthony Graves case, that was all clarified. It's more verbiage, but it really means the same thing and if anything, it only proves what I'm saying here today that the Legislature intends a Herrera-type claimant to get compensation, but not a Schlup-type.

JUSTICE DALE WAINWRIGHT: In a Schlup-type claim, if we move the compensation determination back to after the retrial, would that cause you a problem because then we'd know if the person is going to be found guilty or innocent.

ATTORNEY PHILIP A. LIONBERGER: Yes, it would be a problem for this reason because if you have a retrial, a person is not found innocent. They are found to be not guilty. In other words, the State just hasn't met their Constitutional burden to prove their case beyond a reasonable doubt. So a Schlup-type claimant is never going to be entitled to compensation.

JUSTICE DALE WAINWRIGHT: Here's a bit of tension with your position and maybe you can answer it for me. In Schlup, the U.S. Supreme Court said, and we've kind of hit on this, meaning of actual innocence does not merely require showing reasonable doubt, but rather that no reasonable juror could have found the defendant guilty. So the defendant, the claimant doesn't have to prove his or her innocence, just that no reasonable jury would have found him guilty. As was pointed out earlier, Justice Price in his concurrence says, about preponderance of the evidence, no rational juror could have found this claimant guilty beyond a reasonable doubt. So Price cites the standard. He says, the majority doesn't expressly cite it. Cochran says, they do make that determination, but Womack, as I understand it Judge Womack didn't write, he concurred in the judgment. So it seems that there's only four.

ATTORNEY PHILIP A. LIONBERGER: It's a four-four.

JUSTICE DALE WAINWRIGHT: At most that join the plurality opinion. Is that enough?

ATTORNEY PHILIP A. LIONBERGER: No, may I correct Your Honor on one thing? Only two judges joined the plurality opinion. Judge Price--

JUSTICE DALE WAINWRIGHT: Four total on the plurality opinion.

ATTORNEY PHILIP A. LIONBERGER: Four for granting habeas relief.

JUSTICE DALE WAINWRIGHT: Four total, right, three joined it, four total, right.

ATTORNEY PHILIP A. LIONBERGER: And this is an important point, granting habeas relief based on the ineffective assistance of counsel claim. He's not getting habeas relief because he proved he was innocent and this is important because it, and I invite the Court to go look at the Ex parte Brooks' decision in the Court of Criminal Appeals. It's cited in my supplemental brief. It'll lay out the Schlup procedure very clearly for you. And what the court says, is going on in Schlup is you only have to make a prima facie showing. You just need credible evidence that will cast sufficient doubt on the outcome of the trial without additional assurances that there was no harmful Constitutional error. You do not actually prove you're innocent; you just cast some doubt on it.

CHIEF JUSTICE WALLACE B. JEFFERSON: But we won't find in any Schlup-type case a declaration that the defendant is actually innocent.

ATTORNEY PHILIP A. LIONBERGER: What you'll find is that the court will say you've satisfied the Schlup

gateway and, we'll, we're going to go ahead and determine your constitutional claims on their merits. In other words, you've made a prima facie showing. You've convinced us that there's enough evidence there that possibly not giving this person a new trial in light of the Constitutional error might be a miscarriage of justice.

CHIEF JUSTICE WALLACE B. JEFFERSON: The court never says, the court's never saying a Schlup-type case that this defendant is actually innocent.

ATTORNEY PHILIP A. LIONBERGER: Never is a big word. What I can speak to in Texas habeas procedure is all they're showing is you've made a prima facie showing of it.

JUSTICE NATHAN L. HECHT: But it's more than that. You have to show probably to the jury, that a reasonable jury would not find it, would not convict.

ATTORNEY PHILIP A. LIONBERGER: Well, the standard is in Article 11.07 Section 4(a) of the Court of Criminal Procedure and it says, by preponderance of the evidence, but for the Constitutional error, a jury would have to find you not guilty beyond a reasonable doubt.

JUSTICE NATHAN L. HECHT: Preponderance of the evidence is probably.

ATTORNEY PHILIP A. LIONBERGER: Yes, Your Honor.

JUSTICE NATHAN L. HECHT: And that's the same as the Schlup standard?

ATTORNEY PHILIP A. LIONBERGER: Yes, Your Honor.

JUSTICE DALE WAINWRIGHT: What if a Schlup claim were found to have been established by the Court of Criminal Appeals and for some reason, a retrial was impossible. Say limitations was going to expire or something. Would your position still be that a Schlup claim can never, the claimant can never be compensated?

ATTORNEY PHILIP A. LIONBERGER: Yes, Your Honor, that would be my position because what I'm trying to convey to the Court here and hopefully I'm being successful is, you don't, a Schlup claimant doesn't actually prove they're innocent and they're not found to be innocent. And as far as Justice Hecht, the question about probabilities and preponderance of the evidence, yes, that language is there, but if you look at what the Court of Criminal Appeals says, is going on, it's just a prima facie case. That's what they say.

JUSTICE DAVID M. MEDINA: In your theory, no one is ever found to be innocent unless there's some type of DNA evidence that totally clears the person of the charges.

ATTORNEY PHILIP A. LIONBERGER: No, Your Honor, that's not my theory at all.

JUSTICE DAVID M. MEDINA: You just said, a non-guilty verdict doesn't mean you're actually innocent. You said, here a procedural mechanism for ineffective assistance of counsel to try to get this writ granted doesn't mean anything other than there's not enough evidence. So under your theory, only under Herrera-type claim, can you actually have the actual innocence?

ATTORNEY PHILIP A. LIONBERGER: That is my theory. That is my theory. Under Schlup, the Legislature did not intend for Schlup-type claimants to receive that compensation. They did intend for Herrera type.

JUSTICE DAVID M. MEDINA: What other type of procedure or mechanism could this individual have pursued to get the relief that he apparently appears to be entitled to?

ATTORNEY PHILIP A. LIONBERGER: Well, first of all, Your Honor, I disagree that it's apparent that he's

entitled to this relief because just look at the Court of Criminal Appeals' fragmented four-four decision in this case. You read all those opinions and you'll see that there is no way you can look at all of the evidence that was put forward in this case and say this guy has proven that he's innocent. There is a lot of conflicting and contradictory evidence here. And a Herrera, the reason why the Legislature would want a Herrera-type claimant to get compensation and not a Schlup-type, the policy behind that construction is that the Legislature wants to be assured that before handing out money, a person is truly innocent and not that they might possibly be innocent and only a Herrera-type claimant can provide that assurance.

JUSTICE DALE WAINWRIGHT: What's the linguistic basis for your distinction? It sounds like you're drawing a distinction between the U.S. Supreme Court's definition of actual innocence and Schlup and what the Texas statute requires. Schlup doesn't require proof of actual innocence in a layperson's understanding. Schlup requires showing that no reasonable juror could have found guilt. That's not necessarily proving your innocence. Sounds like you're arguing the latter as a state requirement. What's the language that you rely on to draw that distinction?

ATTORNEY PHILIP A. LIONBERGER: A state requirement is the requirement that's found in the Code of Criminal Procedure and what Brooks says, is that that language incorporates the concept of Schlup and Schlup is merely a gateway claim. What they're saying in Schlup is not that you're proving that you're innocent. You're only proving--

JUSTICE DALE WAINWRIGHT: I understand that. What's the language in the state statute that allows you to draw that distinction or are you relying on case law reading that from the statute?

ATTORNEY PHILIP A. LIONBERGER: I'm relying on the statute Article 11.07 Section 4(a)(2) and the case law from the Court of Criminal Appeals that has interpreted that language.

JUSTICE DALE WAINWRIGHT: And the statute just says, actual innocence.

ATTORNEY PHILIP A. LIONBERGER: Which statute? I'm afraid. I'm--

JUSTICE DALE WAINWRIGHT: The state statute, the one you just cited. It says, actual innocence.

ATTORNEY PHILIP A. LIONBERGER: Are we talking about the wrongful imprisonment statute or are we talking about the Code of Criminal Procedure?

JUSTICE DALE WAINWRIGHT: The statute you just referred to in the Code of Criminal Procedures.

ATTORNEY PHILIP A. LIONBERGER: That's the Code of Criminal Procedure. It doesn't even use the words actual innocence.

JUSTICE DALE WAINWRIGHT: So how do you draw a distinction from the statute between a Herrera-type claim and a Schlup-type claim? If U.S. Supreme Court has said that, actual innocence doesn't mean proving your innocence, it means what we've talked about several times.

ATTORNEY PHILIP A. LIONBERGER: I'm sorry, Your Honor. I'm afraid I'm not following your question.

JUSTICE DALE WAINWRIGHT: I'm trying to understand the statutory basis for your position that in a Herrera-type claim and you show that you didn't do it.

ATTORNEY PHILIP A. LIONBERGER: Right.

JUSTICE DALE WAINWRIGHT: You're actually innocent in a layperson's understanding of the term, actual

innocence. On a Schlup-type claim, you don't have to prove or show that you didn't do it. You just have to be- cause of a procedural hurdle show that no rational juror could have found guilt. There's a difference between failing to meet a standard of proof and proving that you're innocent. It sounds like you're arguing that in a Her- rera claim, you do more of the latter.

ATTORNEY PHILIP A. LIONBERGER: Yes, you have--

JUSTICE DALE WAINWRIGHT: You don't do that in the Schlup claim; therefore, there's no compensation for it. What's the statutory basis that you're drawing that distinction?

ATTORNEY PHILIP A. LIONBERGER: The statutory basis is the language of the Wrongful Imprisonment Act uses the word has been granted relief on the basis of actual innocence.

JUSTICE DALE WAINWRIGHT: And you think actual innocence only means Herrera-type claims?

ATTORNEY PHILIP A. LIONBERGER: Yes, Your Honor.

JUSTICE DALE WAINWRIGHT: Why?

ATTORNEY PHILIP A. LIONBERGER: Why? Because only Herrera-type claimant is granted relief on the ba- sis, affirmatively proves that their actually innocent and is granted relief on that basis. A Schlup claimant does neither of those things.

JUSTICE EVA M. GUZMAN: But could a court find you actually innocent in a Schlup-type claim like just Judge Price advocated in his separate writing? As we stand here today with the present state of the law, could they make that finding?

ATTORNEY PHILIP A. LIONBERGER: They, when they make that, what Judge Price was doing is he wasn't saying this guy's convinced me that he's actually innocent, he deserves habeas relief. He's just merely saying that you, he's shown me enough that when it's coupled with this allegation of Constitutional trial error, which we find is meritorious, I can't have confidence in the outcome. I'm not find-- Judge Price is not saying I'm find- ing this person innocent.

JUSTICE EVA M. GUZMAN: So if he had gotten more support for that writing and the court would have made a finding of actual innocence, would that be different under your position?

ATTORNEY PHILIP A. LIONBERGER: When you get a finding of a prima facie showing of innocence under Schlup, that doesn't mean you're found innocent. It just means that the court is going to decide your Constitu- tional claims on the merits and if you prevail on that, then you get a new trial and let me speak to this whole re- trial and release thing. There were a lot of questions about this. When you are a Schlup-type claimant, you will only, the most relief you're going to be able to get is a retrial. That is not true of a Herrera-type claimant for many reasons and first of all, let me say that the Code of Criminal Procedure for non-death penalty cases, 1107 Section 5, specifically says that, a court, that the Court of Criminal Appeals may either remand to custody or re- lease. And, in the habeas provision for death penalty cases, there's the same type language. You may remand to custody or there may be a release. We submit that a Herrera-type claimant would be entitled to a release.

JUSTICE NATHAN L. HECHT: Well, then why on the one case was it remanded?

ATTORNEY PHILIP A. LIONBERGER: When someone is remanded to custody, that doesn't mean that they're going to be retried. They could be remanded to custody and then the State can file a Motion to Dismiss and then the person is discharged.

JUSTICE NATHAN L. HECHT: Well, but the example is remand to answer the charges. So what's the purpose of answering the charges if there's not going to be a retrial?

ATTORNEY PHILIP A. LIONBERGER: Well, the answering the charges, I think that's just boiler plate that you, we're going to send you back and if the State decides that they're going to proceed against it, they could.

CHIEF JUSTICE WALLACE B. JEFFERSON: Let me try that never question again.

ATTORNEY PHILIP A. LIONBERGER: All right.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are you saying that there is never a case in a Herrera-type claim where there's a retrial?

ATTORNEY PHILIP A. LIONBERGER: I will, I can say this much, Your Honor, I'm not aware of a single one and opposing counsel hasn't shown it.

CHIEF JUSTICE WALLACE B. JEFFERSON: And is it prohibited by law a retrial in a Herrera-type case?

ATTORNEY PHILIP A. LIONBERGER: I would say it this way, Your Honor, that you would have a mighty big Constitutional problem if you attempted to retry that person because think--

CHIEF JUSTICE WALLACE B. JEFFERSON: Unconstitutional to retry in a Herrera-type case?

ATTORNEY PHILIP A. LIONBERGER: I submit that it would be and for this reason because you have the highest criminal appellate court in this State saying based on this evidence, no rational trier of fact could convict in light of this newly discovered exculpatory evidence. You'd have a due process problem.

JUSTICE NATHAN L. HECHT: Let me ask you another question about the, about Chapter 103.

ATTORNEY PHILIP A. LIONBERGER: Yes, Your Honor.

JUSTICE NATHAN L. HECHT: It uses actual innocence and Schlup has been out there along time and Schlup uses actual innocence and knowing that, how, why did, how can we distinguish between the Herrera actual innocence and the Schlup actual innocence when all of the jurisprudence uses the same phrase?

ATTORNEY PHILIP A. LIONBERGER: I think we can distinguish it this way. You have to look at what the two types of claims of innocence are doing and then look at the specific language of the Wrongful Imprisonment Act when it's talking about eligibility. It says, you must have been granted relief on the basis of actual innocence. A Schlup claimant is not granted relief on the basis of actual innocence. They're granted the relief on the basis of Constitutional trial error. Only a Herrera claimant can say that and that and that is why I say that the Legislature when they adopted this actual innocence language, they had in mind Herrera-type claimants only and again, the policy consideration makes that abundantly clear that Legislature wants to be absolutely sure that before we start handing out money that they can feel assured that someone is truly innocent.

JUSTICE DALE WAINWRIGHT: So the actual innocence phrase in 103.001(a)(2)(b) really is a little different from that phr in subsection c?

ATTORNEY PHILIP A. LIONBERGER: In sub section c that's [inaudible].

JUSTICE DALE WAINWRIGHT: That's been ordered, entered by the court that says, actual innocence, etc. But based on your answer to Justice Hecht's question, the use of actual innocence in b actually is a little bit different from its use in c.

ATTORNEY PHILIP A. LIONBERGER: Let's talk about what's going on in c. What's going on in c is that is the Graves' Amendment that was put in in 2011 and what you had in Graves was you had an individual who did now show, could not show, he could not get a certificate of appeal ability based on Schlup. He couldn't get it based on Herrera, but you had this human cry in the State that this guy should be compensated. So what the Legislature did, they took the specifics of Anthony Graves' case and they said, well if you can get a prosecutor to swear out an affidavit and certify that there's no credible inculpatory evidence and the prosecutor believes that you're actually innocent, we'll grant, that's another way of becoming eligible.

JUSTICE DALE WAINWRIGHT: And the state court has to grant it? The district court.

ATTORNEY PHILIP A. LIONBERGER: Yes, the state court would have to grant that. That is a third way, now 2011 and going forward that you can become eligible.

JUSTICE DALE WAINWRIGHT: But again that is proof that this person didn't do it as opposed to there's a procedural hurdle, which is what [inaudible].

ATTORNEY PHILIP A. LIONBERGER: It's proof that the prosecutor thinks that the person is innocent.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you.

REBUTTAL ARGUMENT OF KRISTOPHER E. MOORE ON BEHALF OF PETITIONER

JUSTICE DALE WAINWRIGHT: Counsel, the State says that, before the Comptroller can hand out taxpayer money, the Legislature wanted to be sure that the Claimant is really innocent. We're pretty sure they just didn't do it, not that there's some procedural hurdle to finding them guilty. Before we hand out the taxpayers' money that's what the Legislature wanted.

ATTORNEY KRISTOPHER E. MOORE: Absolutely, Your Honor.

JUSTICE DALE WAINWRIGHT: What's your response?

ATTORNEY KRISTOPHER E. MOORE: My response is the State intended to compensate innocent people that spent time in prison. That's the intent. Remember, this Court last year declared this is a remedial statute. It's not subject to the more stricter rules of interpretation. There's no waiver of sovereign immunity and so this Court is supposed to broadly construe the intent of the Legislature. The Legislature wanted to compensate those that are wrongly convicted. You only have to look at the Graves' case and the comments that were made about Anthony Graves and the fact that he didn't fit into any other mold and so the Legislature actually went back, passed an additional law to make sure that even though he could not satisfy the Schlup standard, but they still wanted to make sure he got compensated because he was innocent. The plain and common language of this statute says, on the basis of actual innocence. The word solely isn't in there. The standard clear and convincing isn't in there. As the Court has seen, the Legislature could have put that in there back in 2011. They didn't. It's not there. They simply state has been granted relief on the basis of actual innocence. In a Schlup-type claim, in *Ex parte Brooks*, which was cited by opposing counsel and the reference here is 219 S.W. 3rd at page 399 the Texas Court of Criminal Appeals Cites to Schlup and adopts this standard. In a Schlup-type claim, you must show it is more likely than not that a Constitutional violation led to the conviction of an innocent person. Now, it didn't say led, a Constitutional violation lead to a conviction. That's the first writ. The second writ requires that it be of an innocent person. I don't see how you could get past Schlup if you haven't shown that you're an innocent person. Not, ah well you may be innocent. It says, you've proven that Constitutional violation led to the conviction of an innocent person. Billy Fredrick Allen proved that. The Court of Criminal Appeals based his, the granting of relief in his case on the fact that he met the Schlup standard.

JUSTICE DALE WAINWRIGHT: What do you say about the argument or the point that we only know the reasoning of four judges, not a majority that the fifth joined the judgment, but we don't know the reason for joining the judgment?

ATTORNEY KRISTOPHER E. MOORE: Your Honor, first, if I could--

JUSTICE DALE WAINWRIGHT: Normally you need five for a majority opinion.

ATTORNEY KRISTOPHER E. MOORE: And if I could correct a misstatement of opposing counsel, this is not a four-four decision. It's a four-three if you don't count Justice Womack. One justice actually abstained and did not participate in the decision. So it was three justices writing dissenting opinions and four justices writing, either joining in the lead opinion or writing concurring opinions four-three. Justice Womack concurred in the result. The result was he was granted relief on the basis of a Schlup-type claim and I've already stated, and this Court should concentrate on the fact that a Schlup-type claim requires a showing of actual innocence.

JUSTICE DALE WAINWRIGHT: Four is only half of eight; it's not a majority.

ATTORNEY KRISTOPHER E. MOORE: But you still have a concurrence in the ultimate outcome and the ultimate outcome could not occur under Texas law, under the Federal jurisprudence on habeas corpus, which has been adopted in the State of Texas by the Court of Criminal Appeals. You have to have a showing of innocence under a Schlup standard before you can grant relief. It is a fallacy to believe that a justice could have concurred in the ultimate finding without having to concur, I mean without concurred in the result without coinciding with Texas law, federal jurisprudence, Texas jurisprudence that states in a Schlup-type claim, it is more likely than not a Constitutional violation led to the conviction of an innocent person.

JUSTICE DAVID M. MEDINA: Are there any other type of procedural cases where a conviction is overturned because of some procedural issue and then it's sent back to the trial court? I mean that happens all the time it seems.

ATTORNEY KRISTOPHER E. MOORE: Yes, Your Honor, all the time. And I believe opposing counsel would have this Court believe that Schlup-type claims happen all the time, but the Schlup opinion states very specifically this is an extremely rare instance.

JUSTICE DAVID M. MEDINA: What happens in that situation, may I finish this, Chief?

CHIEF JUSTICE WALLACE B. JEFFERSON: Yes.

JUSTICE DAVID M. MEDINA: What happens in that situation where it does get sent back and for whatever reason, the State decides not to go forward. I mean that doesn't prove actual innocence. That seems to tie into the State's argument here that you can't have compensation for those type of procedural defects.

ATTORNEY KRISTOPHER E. MOORE: No, Your Honor, and that is the Anthony Graves case. That's why the Legislature amended the law because Anthony Graves had writ of habeas corpus granted on the basis of merely in effect, a Brady claim, I believe it was a Brady claim, I'm sorry. And there was no finding of Schlup and no finding of Herrera, but then he goes back to get his compensation. In that case, yes, he did not have a finding of actual innocence. So what the, what the Legislature did it said, ok there's a hole in the legislation so let's fill that and create a ways for a person in Anthony Graves case to get compensated. If we take what the Comptroller is trying to put forward in this case, then basically what the Legislature did is over, since 1965 when let me remind you that a Herrera claim did not exist and a DNA claim did not exist. Since 1965, over the course of 45 years, the Legislature has continually amended the statute to make sure that its remedial purposes are met and yet now there's this glaring hole where somebody who meets a Herrera claim DNA gets compensated, somebody who can't even meet Schlup claim gets compensated, but this person who meets one of the two

types of actual innocence claims, the Court of Criminal Appeals has said, exists is now, I'm supposed to go tell my client he's poor, he's in poor health, but he's free.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, counsel. The cause is submitted and the Court will take a brief recess.

MARSHAL: All rise.

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