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IN THE SUPREME COURT OF THE UNITED
STATES

TORRIANO WALPOOL,

Petitioner vs

THE STATE OF TEXAS,

Respondent

On Petition for Writ of Certiorari to the Court of
Criminal Appeals of Texas

PETITION FOR WRIT OF CERTIORARI

John D. Nation
State Bar No. 14819700
4303 N. Central Expwy
Dallas, Texas 75205
nationlawfirm@gmail.com

Counsel for Petitioner

QUESTION PRESENTED

In Texas law, the Texas Court of Criminal Appeals considers the trial court the “eyes and ears” of the Court in making findings to aid the Court in deciding whether to grant relief on postconviction writs of habeas corpus. In this case, the trial court made extensive findings that Petitioner was actually innocent. The Court of Criminal Appeals, without having been present at the hearing, or even seriously considering the trial court’s findings, reversed the findings and denied relief upon the writ application. Did this action by the Court of Criminal Appeals deny Petitioner’s Due Process rights?

PARTIES TO THE PROCEEDINGS

Petitioner: Torriano Walpool

Respondent: The State of Texas

There are no proceedings directly related to this case in this Court.

CITATIONS TO OFFICIAL REPORTS

The trial court findings are unreported.

The Court of Criminal Appeals opinion is reported in *Ex parte Torriano Walpool*, No. WR-87,520-03 (Tex. Crim. App. June 28, 2023) (per curiam-unpublished).

STATEMENT OF JURISDICTION

The date of the Court of Criminal Appeals' opinion is June 28, 2023.

Jurisdiction in this Court is sought under 28 U.S.C. 1257.

CONSTITUTIONAL PROVISIONS

The 14th Amendment, Section 1 to the United States Constitution provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

Torriano Walpool was convicted in 2016 of sexual assault of a child under seventeen years of age and was sentenced to thirty years' confinement. Walpool filed a subsequent habeas corpus writ in which he claimed actual innocence. After a hearing conducted in October 2022, the trial court agreed and on January 3, 2023, and entered findings recommending that Walpool's writ be granted.

On June 28, 2023, the Court of Criminal Appeals rejected the findings and denied relief.

REASONS FOR GRANTING THE WRIT

This Court has said that "[v]irtually every fact finding involves a credibility determination" and has "repeatedly recognized that the fact finder is the exclusive judge of the credibility of the witnesses." *Ex parte Mowbray*, 943 S.W.2d 461, 465 (Tex. Crim. App. 1996). When the trial court's findings of fact in a habeas corpus proceeding are supported by the record, they should be accepted by this Court. *Ex parte Evans*, 964 S.W.2d 643, 648 (Tex. Crim. App. 1998); *Ex parte Jarrett*, 891 S.W.2d 935, 940 (Tex. Crim. App. 1994). This Court "afford[s] almost total deference to a trial court's factual findings in habeas proceedings, especially when those findings are based upon credibility and demeanor." *White*, 160 S.W.3d at 50.

Ex Parte Amezcuita, 223 S.W.3d 363, 367 (Tex. Crim. App. 2006).

Unfortunately, the Court of Criminal Appeals afforded no deference to the trial court's findings. The trial court conducted an extensive evidentiary hearing and following that hearing, entered detailed findings wherein the trial court found that the complainant's recantation was credible, to the extent that Petitioner had met his burden of proof of clear and convincing evidence. The trial court had ample opportunity to observe the complainant's demeanor, which the Court of Criminal Appeals did not.

The Court of Criminal Appeals outright rejected the careful trial court's findings. And the Court made references to the original trial record which allegedly negated the complainant's credibility, without specifying what part of the record was harmful to her.

The Court of Criminal Appeals' resolution of this case violated Petitioner's Due Process rights.

CONCLUSION

Petitioner respectfully requests that the Court grant his petition for certiorari, and on submission of the case, order that the ruling of the Court of Criminal Appeals be reversed and remanded for further proceedings.

Respectfully submitted,

/s/ **John D. Nation**

John D. Nation

State Bar No. 14819700

4303 N. Central Expwy

Dallas, Texas 75205

214-213-5171

nationlawfirm@gmail.com

Counsel for Petitioner

APPENDIX

1. *Ex parte Walpool*, No. W14-76467- J (C)
(Criminal District Court No. 3, Dallas County
January 3, 2023).
2. *Ex parte Walpool*, WR-87,530-03 (Tex. Crim. App.
June 28, 2023).

I.

Trial Court Findings

No. W14-76467-J (C)

EX PARTE TORRIANO

WALPOOL

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The instant writ application advances an actual-innocence claim relative to the trial court's judgment of conviction against Applicant in cause number F14-76467-J. On October 28, 2022, the Court conducted an evidentiary hearing (hereinafter referred to as "writ hearing" or "the writ hearing") on this application and now makes the following findings of fact and conclusions of law.

Findings of Fact

1. Applicant was convicted on January 27, 2016 of the offense of sexual assault of a child under seventeen years of age, which such offense was alleged to have been committed in 2014. The trial court assessed punishment, assessed, enhanced by two prior felony convictions, at confinement in the Texas Department of Criminal Justice-Institutional Division for a period of thirty (30) years. The trial court number was F14-76467-J and the trial judge was the Hon. Gracie Lewis, who has since retired. The judgment was affirmed on direct appeal by the Fifth District Court of

Appeals via an unpublished opinion. See *Walpool v. State*, No. 05-16-00105-CR (Tex. App.—Dallas February 17, 2017, no pet.) (mem. Op., not designated for publication).

2. Applicant's instant writ application is the third such application Applicant has filed in regard to the trial court's judgment of conviction in cause number F14-76467-J. The first such application alleged twelve grounds of ineffective assistance of counsel and was denied by the Texas Court of Criminal Appeals on March 28, 2018 based on the trial court's findings of fact and conclusions of law.

3. P.T. [the complainant] has executed 4 affidavits in regard to the trial court's judgment of conviction in cause number F14-76467-J. All 4 affidavits were admitted during the writ hearing and have been considered by the Court.

In the fourth such affidavit, P.T. established that she had no knowledge of Applicant's first writ application until it had already been denied. P.T. also established that she would not have recanted her allegations if asked to do so prior to the date of March 28, 2018 because she was not mentally ready to do so.

The first such affidavit P.T. executed did recant P.T.'s allegations and was not executed until June 26, 2019, which was after the date of March 28, 2018 upon which Applicant's first writ application was denied. While there are differences among the content of the 4 affidavits, P.T. does recant the allegations against the Applicant in each of the 4 affidavits.

4. Applicant's second writ application did contain a claim of actual innocence based on P.T.'s recantation. Applicant's second writ application was dismissed by the Texas Court of Criminal Appeals on May 25, 2022 based on non-compliance with Tex. R. App. P. 73.1.

5. Applicant was convicted of having committed sexual assault upon his daughter, P. T., who was born on May 20, 1998, and who was 17 years old at the time of trial in January 2016. P.T. testified to the cumulative facts that provided the basis of the criminal offense alleged in the indictment. Applicant testified and denied having committed any sexual assault of P.T., explaining that the allegations had been made up.

6. Shirley Moore, Applicant's mother, testified at the writ hearing that she knows from P.T.'s mother that P.T. was not believable and had made false allegations against her mother's boyfriend in the past.

7. Moore testified in 2019, P.T. told her that the allegations she made against Applicant were fabricated, that she was remorseful about the allegations, and that she wanted to come forward and admit how she lied in her trial testimony and "outcry" statements. P.T. was about 19 or 20 when she made the revelation to Moore.

8. P.T. testified at the writ hearing that she is now 24 years old. P.T. stated that in 2014 she made allegations against Applicant. P. T. admitted that she made allegations because she was upset for multiple reasons. P. T. stated that

she was upset because Applicant had grounded her and her stepmother had been making up stories about her. P.T. explained that Applicant took stepmother's side regarding the stories about P.T. and disciplined P.T. accordingly. P. T. explained further that Applicant took her cell phone, which prevented her from talking to her friends and to a boyfriend with whom she wanted to stay in contact. P.T. admitted that all of these events made her angry and motivated her to make the false allegations.

9. P.T. spoke to a school counselor, who reported her allegations to the police. Since P.T. was only 16 at the time she spoke to the counselor, P.T. did not know that the school authorities would have to inform law enforcement agents of the allegations.

10. Prior to trial, P. T. never told the police or any member of the district attorney's office that her allegations against Applicant were lies.

11. P.T. felt guilty about the allegations. When P.T. eventually had had her own son, she felt that she would not want anyone to lie against him as she had lied against Applicant.

12. When asked why she should be considered credible now, P.T. stated that she was trying to correct her wrongdoings.

13. P.T.'s credibility regarding how her "outcry" against Applicant and her trial testimony against Applicant were lies was not impeached. P.T.'s credibility regarding her

recantation and her reasons for so recanting was credible and was not impeached. The Court is of the opinion, based on the Court's in-person assessment of the credibility of P.T. at the writ hearing, that P.T.'s recantation is wholly and entirely credible.

14. Moore was recalled to the stand by the Applicant. Moore stated that she was present when one of the acts attested to at trial and by P.T.'s stepmother occurred. While Applicant was asleep, P.T. went and sat on Applicant, which caused Applicant to awaken and become angry. Moore and P.T. established that the "sitting on" incident was not sexual assault and that the only person present who attributed any possible nefarious characterization of the "sitting on" incident was P.T.'s stepmother.

15. P.T.'s recantation was eventually sent to the Conviction Integrity Unit of the Dallas County District Attorney's Office, but was so sent well after the trial proceedings had concluded. P.T. was given a polygraph examination, but any results thereof were not admitted during the writ hearing and were not considered by the Court.

16. Defense Exhibit 2, the record of the examining trial in this case, was admitted into evidence during the writ hearing. In the examining trial, the investigating officer, Angel Herring, testified that if P.T. had previously made a false allegation, this would not affect her credibility in the opinion of the officer. Herring further stated that if P.T. had made false allegations, it would not be relevant in the

opinion of the officer.

Conclusions of Law

1. A convicted individual is entitled to postconviction relief on the basis of a due process violation if he or she can establish by “clear and convincing evidence” that “no reasonable juror would have convicted him in light of the new evidence.” *Ex parte Elizondo*, 947 S.W.2d 202, 209 (Tex. Crim. App. 1996); *see also Ex parte Brown*, 205 S.W.3d 538, 544 (Tex. Crim. App. 2006) (stating standard for reviewing actual innocence claims as being proof by “clear and convincing evidence that, despite the evidence of guilt that supports the conviction, no reasonable juror could have found the applying guilty in light of the new evidence”), *quoting Ex part Tuley*, 109 S.W.3d 388, 392 (Tex. Crim. App. 2002)); *Ex parte Thomson*, 153 S.W.3d 416, 417 (Tex. Crim. App. 2005); *Ex parte Harmon*, 116 S.W.3d 778, 779 (Tex. Crim. App. 2002).

2. “Clear and convincing evidence” is an intermediary evidentiary standard that lies between the preponderance of the evidence standard and the reasonable doubt standard. *See, e.g., Fuller v. State*, 363 S.W.3d 583, 587 (Tex. Crim. App. 2012). “Clear and convincing evidence” is that level of evidence that leaves “no substantial doubt” as to the proof of the proposition to be proved. *See Spencer v. State*, 466 S.W.2d 749, 752 (Tex. Crim. App. 1971); *Martinez v. State*, 437 S.W.2d 842, 849 (Tex. Crim. App. 1969).

3. A reviewing court’s inquiry in the

context of an actual innocence writ claim requires making a decision as to “whether the newly discovered evidence would have convinced the jury of applicant’s innocence.” *Ex parte Elizondo*, 947 S.W.2d at 207. To determine whether an applicant has met this standard, the habeas court must “examine the new evidence in light of the evidence presented at trial.” *Ex parte Thompson*. 153 S.W.3d at 417.

4. The recommendation of granting such relief on an actual innocence writ in a sexual assault case has been approved by the Texas Court of Criminal Appeals even in the context involving an applicant’s having previously entered a guilty plea. *See Ex parte Tuley*, 109 S.W.3d 388, 395-397 (Tex. Crim. App. 2002).

The recommendation of granting such relief in a sexual assault case has been approved by the Texas Court of Criminal Appeals in other similar cases. *See, e.g., Ex parte Thompson*, 153 S.W.3d 416, 430-421 (Tex. Crim. App. 2005); *see also, e.g., Ex parte Harmon*, 116 S.W.3d 778 (Tex. Crim. App. 2002); *Ex parte Mayhugh, et al.*, Nos. WR84,697-84-84,700 (Tex. Crim. App. 2016) (unpublished); *Ex parte Montgomery*, No. AP-76,146-147 (Tex. Crim. App. 2009) (unpublished); (all granting relief on actual innocence in child sex abuse cases).¹

¹ Section 5 of the Texas Rules of Appellate Procedure pertains to “Proceedings in the Court of Criminal Appeals” and encompasses rules 66 through 79 thereof. See Tex. R. App. P. Section Five. The mandatory, express and direct dictate of the language of the relevant sub-rule 77 of the Texas Rules of Appellate Procedure leaves no doubt that “Unpublished opinions have no precedential value and must not

In *Ex parte Thompson*, Judge Cochran authored a concurring opinion. See *Ex parte Thompson*, 153 S.W.3d at 421-423 (Cochran, J., concurring). In that concurring opinion, Judge Cochran took the time to provide a relevant and salient description of the basis of the typical actual innocence scenario in the context of child sex cases, noting:

Almost all of these cases are convictions for aggravated sexual assault of a child, and the factual scenarios are similar. At trial, a young girl testifies that the defendant, usually a stepfather or other close relative, sexually molested her. The child is frequently a reluctant witness and simply agrees with the leading questions asked her. There is usually a divorce or other family dispute involved. There are generally no medical findings of sexual abuse and no physical evidence that definitely points toward molestation. Usually, a child psychologist or sex abuse therapist testifies that the child's behavior is consistent with that of a sexually molested child. There is frequently an "outcry witness", normally the mother or other female relative, who testifies that the

be cited as authority by counsel or by a court." Tex. R. App. P. 77.3. This Court's inclusion of the unpublished opinions *Ex parte Mayhugh, et al.*, and *Ex parte Montgomery*, is in no way, shape or form relying on those opinions as precedent, but is merely intended to present a recitation of the jurisprudence regarding actual innocence claims in a comprehensive manner. This Court's factual findings that P.T.'s recantation is wholly and completely credible and is un-impeached in any way are not based on the unpublished opinions of *Ex parte Mayhugh, et al.*, and *Ex parte Montgomery* and this Court's conclusion that Applicant is entitled to the relief sought because he has met his burden by at least clear and convincing evidence is made without any reliance on the unpublished opinions of *Ex parte Mayhugh, et al.*, and *Ex parte Montgomery*.

child told her about the abuse. The jury convicts the defendant, and he is sentenced to a long prison term. These are “he said, she said” cases that ultimately rely on the jury’s assessment of the relative credibility of opposing witnesses. In such cases, it is virtually impossible for the jury not to make an occasional credibility mistake. Any parent who has ever attempted to resolve a sibling quarrel based on “he said, she said” versions of a single event knows that even a parent can, from time to time, make a credibility mistake and believe a child’s inaccurate version of the event.

Ex parte Thompson, 153 S.W.3d at 421-423 (Cochran, J., concurring).

6. Regarding this Court’s aforementioned factual finding that P.T.’s recantation is credible and was not impeached during the writ hearing, P.T. admitted in effect that, as someone who was 16 years old when she made her untruthful “outcry” to the counselor, that she did not understand how the allegations would have to be reported by the school authorities to other authorities such as law enforcement and CPS. P.T. additionally admitted in effect that, as someone who was 17 years old when she provided her untruthful testimony before the jury at trial accusing Applicant of the conduct on which the sexual assault charge was based, that she did not understand exactly how wrong what she was doing was. P.T. established that, as someone who was 24 years old at the time of the writ hearing and the parent of her own son, that part of her guilt over her previous lies was based on how she realized that she would never

want anyone to do to her son what she had done to Applicant. P.T.'s failure to appreciate the possible consequences of her actions as a 16 or 17 year old and her ability to appreciate as an adult of 24 years of age the wrong nature of what she had done to Applicant is entirely consistent with what the law recognizes as the inherent characteristics of conduct of someone who is under 18 years of age versus someone who has attained the age of majority. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 569-570 (2005) (discussing how not only common sense of parental experience but also scientific and sociological studies demonstrate juveniles under 18 lack maturity and have underdeveloped senses of responsibility that often result in impetuous and ill-considered actions and decisions and the personal character of juveniles is not as well-formed as that of adults); see also e.g., *Graham v. Florida*, 560 U.S. 48, 68 (2010) (recognizing that developments in psychology and brain science continued to show fundamental differences between juvenile and adult minds and that parts of the brain involved in behavior control continued to mature through the stages of late adolescence).

While there are some differences in content of the 4 affidavits P.T. executed, each of the 4 affidavits does assert that P.T. is recanting her allegations against Applicant. This Court has concluded based on observing P.T.'s testimonial demeanor in person during the writ hearing that any differences in content among the affidavits and/or between any of the affidavits P.T.'s testimony at the writ hearing do not render P.T.'s recantation any less credible in any way.

This Court has also concluded based on observing P.T.'s testimonial demeanor in person during the writ hearing that any differences in content of P.T.'s testimony during the writ hearing do not render P.T.'s recantation any less credible. Accordingly, P.T.'s testimony at the writ hearing has convinced this Court of the truth and accuracy of P.T.'s recantation beyond the level of clear and convincing evidence. P.T.'s testimony at the writ hearing has convinced the Court of the falsity of P.T.'s former allegations against Applicant and this Court is convinced at least to the level of clear and convincing evidence of the falsity of P.T.'s former allegations of the criminal conduct P.T. formerly attributed to Applicant, which provided the factual basis for the judgment of conviction.

6. Considering P.T.'s wholly and completely credible recantation from the writ hearing (and from the 4 affidavits) and the evidence presented at trial, this Court concludes that P.T.'s entirely credible and in no way impeached recantation itself more than meets the minimum standard of clear and convincing evidence that the newly-discovered evidence would have convinced the jury of Applicant's innocence. The evidence at trial and the evidence at the writ hearing were virtually the same, especially in the sense that P.T.'s testimony constituted the only proof of any alleged sexual assault.

The record in its entirety leaves no doubt that the conviction of Applicant depended on P.T.'s credibility, as P.T.'s testimony was the only affirmative evidence of any sexual assault

by the Applicant and Applicant himself testified before the jurors and totally and completely denied P.T.'s claims of what P.T. falsely attributed to him. While the proof of Applicant's innocence depends largely on P.T.'s credibility in her recantation, P.T.'s total, complete, and absolute recantation at the writ hearing (and within the 4 affidavits) accrues to support the credibility and truthfulness of Applicant's trial testimony completely denying having committed any sexual assault of P.T.

Therefore, having viewed P.T.'s testimony at the writ hearing in person, and considering that testimony in light of the evidence produced at trial, the Court finds and concludes, by at least the applicable standard of clear and convincing evidence, that this newly discovered evidence would have convinced the jury of Applicant's innocence. In light of the newly discovered evidence of P.T.'s express and unimpeached recantation of her former allegations against Applicant, this Court concludes that Applicant has established by at least clear and convincing evidence that no reasonable juror could have found Applicant guilty in light of the recantation testimony P.T. provided at the writ hearing (as well as in her affidavits). *See Ex parte Brown*, 205 S.W.3d at 544; *Ex parte Tuley*, 109 S.W.3d at 392.

7. Consequently, the Court recommends that the Court of Criminal Appeals grant relief upon the application, vacate the judgment of conviction, and grant Applicant a new trial.

8. This Court further suspends Applicant's duty to register as a sex offender

and recommends that such suspension be approved by the Texas Court of Criminal Appeals.

Signed and entered this 3rd day of January 2023.

/s/ **Audra Riley**

The Hon. Audra Riley,
Judge Presiding
Criminal District Court
No. 3, Dallas, Texas

CONCLUSIONS

1. This Court concludes that Applicant has been denied rights guaranteed to him by either the United States Constitution or the Constitution of the State of Texas.

2. This Court concludes that Applicant is currently unlawfully restrained and Applicant's restraint is unlawful and has not been shown to be otherwise.

3. This Court concludes that the conviction of Applicant on the now-shown-to-be-false trial testimony of P.T. violated rights guaranteed to Applicant by either the United States Constitution or the Constitution of the State of Texas.

RECOMMENDATION

It is the considered, final, and ultimate position of this Court that the actual innocence contention advanced in Applicant's Application for a Writ of Habeas Corpus is

meritorious as a matter of law. Accordingly, this Court recommends that Applicant's Application for a Writ of Habeas Corpus be GRANTED and that Applicant be GRANTED the relief he has requested via his instant Application for a Writ of Habeas Corpus and that Applicant's conviction be vacated and that Applicant's case be remanded to the trial court for further proceedings.

ORDERS OF THE COURT

By affixing my signature below, this Court not only reiterates having made and entered the Findings of Fact and Conclusions of Law set out herein immediately above, but also recommends that Applicant's request for relief be GRANTED.

In implementing the Court's Findings of Fact and Conclusions of Law, the Clerk is hereby directed to:

1. Prepare a transcript of papers in this cause number and transmit the Court's Order and Findings of Fact and Conclusions of Law, including the judgment of conviction, all filed papers, a copy of the Reporter's Record and exhibits from the writ hearing conducted on October 28, 2022, the State's Writ Response and any attachments thereto or exhibits filed in connection therewith, and any proposed findings and conclusions filed by the parties to the Court of Criminal Appeals of Texas as provided by the terms of Tex. Code Crim. P. Ann. art. 11.07.

2. Send a copy of this Order and the Findings of Fact and Conclusions of Law to Counsel for Applicant, Torriano Walpool, by sending said copy to Attorney Randall Isenberg, 4303 N. Central Expressway, Dallas, Texas, 75205 and counsel for the State, Jessie R. Allen, Assistant District

Attorney for Dallas County, Texas 133 N. Riverfront Blvd., LB-19, Dallas, TX 75207. The Clerk of the Court is hereby directed to send a copy of this order to the attorney appointed to serve as writ master in this matter.

Signed this the 3rd day of January 2023.

/s/ Audra Riley

The Hon. Audra Riley
Judge Presiding
Criminal District Court 3
Dallas, Texas

I.

TEXAS COURT OF CRIMINAL APPEALS
OPINION

[SEAL]

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. WR-87,520-03

EX PARTE TORRIANO WALPOOL,
Applicant

ON APPLICATION FOR A WRIT OF
HABEAS CORPUS CAUSE NO.
W14-76467-J (C) IN THE CRIMINAL
DISTRICT COURT NO. 3
FROM DALLAS COUNTY

Per curiam

ORDER

Applicant was convicted of sexual assault of a child and sentenced to thirty years' imprisonment. The Fifth Court of Appeals affirmed his conviction. *Walpool v. State*, No. 05-16-00105-CR (Tex. App.—Dallas del. Feb. 27, 2017). Applicant, through habeas counsel, filed this application for a writ of habeas corpus in the county of conviction, and the district clerk forwarded it to this Court. See Tex. Code Crim. Proc. art. 11.07.

Applicant contends that he is actually innocent. In support, Applicant relies on the victim's recantation made five years after Applicant's conviction. The victim issued four recantation affidavits in total and testified at the

evidentiary hearing. Following the hearing, the trial court found the victim's recantation to be credible and recommended to this Court that this Court grant Applicant actual-innocence relief from his conviction. *Ex parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1996). The trial court's findings and recommendations, however, are not supported by the habeas and trial records.

First, the victim's four recantation affidavits are not credible because they are internally and externally contradictory to each other, her testimony at trial, and her testimony at the evidentiary hearing. Second, the evidentiary hearing testimony of Applicant's mother is not credible, contrary to the habeas court's finding, because, according to several trial witnesses, the mother was not present to witness what she now claims to have witnessed. Third, the trial witnesses who had the most direct knowledge of the facts (other than the victim), namely, the victim's stepsister and stepmother, never changed their testimony and were not called to testify at the evidentiary hearing. Fourth, the victim's testimony at the evidentiary hearing was far more tentative as compared to her original trial testimony, such that her trial testimony appears much more credible and is factually supported by the other evidence at trial. Thus, after this Court's independent review of the habeas and trial records, this Court disagrees that the victim's recantation is credible and that Applicant has satisfied the demanding *Elizondo* standard. Habeas relief is denied.

Copies of this opinion shall be sent to the Texas Department of Criminal Justice-Correctional Institutions Division and the Board of Pardons and Paroles.

Delivered June 28, 2023.
Do not publish