

# The Case of Gary Graham: After a Procedural Circus, A Pyrrhic Victory

Peter T. Hofer\* and Ryan J. Maierson\*\*

## I. Introduction

In April of 1994, the Texas Court of Criminal Appeals, court of last resort for criminal cases in the state, handed down its opinion in *State ex rel. Holmes v. Honorable Court of Appeals for the Third District*.<sup>1</sup> That the Court of Criminal Appeals took this case away from the Third Court of Appeals on application for writs of mandamus and prohibition represents a fundamental departure from the Texas jurisdictional scheme, one that is inherently precarious because of its bifurcated nature. The Court of Criminal Appeals and the Texas Supreme Court have coequal jurisdiction, with the supreme court the highest court in civil cases. In this case, the Court of Criminal Appeals was confronted with a challenge not only to its jurisdictional power but also to its remedial authority.

The case before the Third Court of Appeals at Austin concerned death row inmate Gary Graham's claim that the executive agency responsible for implementing the clemency process, the Texas Board of Pardons and Paroles, was not acting in accordance with the state constitution; the Court of Criminal Appeals, however, ultimately created a new state habeas corpus mechanism for Graham and others similarly situated under the United States Constitution. Both the jurisdictional and remedial aspects of the case raise serious questions as to the impetus behind the Court of Criminal Appeals' actions. An analysis of the *Graham* opinion reveals that the court's primary motivation was a steadfast desire to define its jurisdiction broadly enough to decide this case, arguably a civil matter, and to create a remedy over which it would have final authority.

## II. The Strange Procedural History of the Case of Gary Graham

Gary Graham was convicted of capital murder on October 28, 1981, in the 182nd Judicial District Court of Harris County. His punishment was assessed at death. The Court of Criminal Appeals affirmed his conviction

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\* Senior staff attorney, Texas Civil Rights Project. B.F.A., Southern Methodist University 1983; J.D., University of Miami School of Law 1988; M.A. History Candidate, The University of Texas at Austin.

\*\* B.S., The Wharton School, University of Pennsylvania 1992; J.D. Candidate 1996, The University of Texas School of Law.

1. 885 S.W.2d 389 (Tex. Crim. App. 1994) (en banc).

on direct appeal.<sup>2</sup> The Court of Criminal Appeals denied Graham's first application for writ of habeas corpus,<sup>3</sup> and the federal courts also refused to grant Graham habeas relief.<sup>4</sup> Graham filed another habeas petition with the federal courts, alleging ineffective assistance of counsel and reasserting his actual innocence<sup>5</sup> claim.<sup>6</sup> This second habeas petition is currently pending before the Fifth Circuit.<sup>7</sup>

Subsequent to Graham's conviction in the trial court, new evidence came to light that supported Graham's claim of actual innocence.<sup>8</sup> In particular, four eyewitnesses to the crime who never appeared at Graham's trial, and two who did appear, had sworn in affidavits that they could not identify Graham as the killer.<sup>9</sup> Five alibi witnesses have also come forward, stating Graham was attending a family gathering and could not have been at the crime scene.<sup>10</sup> The Texas rules of criminal procedure, however, do not permit Graham to use the newly-discovered, post-conviction evidence of his innocence because he did not present the evidence within the thirty-day period before the judgment in his original criminal trial became final.<sup>11</sup> Nor could he present the evidence through state habeas corpus procedures, because *Ex parte Binder*<sup>12</sup> precluded inmates from presenting claims of innocence supported by new evidence through habeas corpus.<sup>13</sup>

Left with no forum in which to have his claim of innocence and new exonerating evidence heard, Graham first sought executive clemency in April 1993.<sup>14</sup> The Texas Board of Pardons and Paroles, without holding an

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2. *Graham v. State*, 671 S.W.2d 529 (Tex. Crim. App. 1984) (per curiam).

3. *Ex parte Graham*, No. 17,568-01 (Tex. Crim. App. Feb. 19, 1988).

4. *Graham v. Collins*, 950 F.2d 1009 (5th Cir. 1992) (en banc), *aff'd on other grounds*, *Graham v. Collins*, 113 S. Ct. 892 (1993).

5. An actual innocence claim asserts that the convicted habeas petitioner did not actually commit the crime. Actual innocence is distinct from legal innocence, which disappears upon a final judgment of guilty. *See Herrera v. Collins*, 506 U.S. 390, 399 (1993).

6. *Graham v. Collins*, 829 F. Supp. 204, 209 (S.D. Tex. 1993).

7. *Graham v. Collins*, No. 93-2614 (5th Cir. docketed Aug. 15, 1993).

8. M. Michael Sharlot, Dean and Morrow Professor of Criminal Law at The University of Texas School of Law and a proponent of the death penalty, expressed that he is "deeply concerned because this is the thinnest evidence I have ever seen in a capital case." Molly Ivins, *Capital Injustice Puts Fairness on Death Row*, DETROIT FREE PRESS, August 18, 1993, at A13.

9. *See* Appellant's Brief at Attachment A, *Graham v. Tex. Bd. of Pardons & Paroles*, 913 S.W.2d 745 (Tex. App.—Austin 1996, n.w.h.) (No. 03-95-00050-CV).

10. *See id.*

11. TEX. CRIM. PROC. CODE ANN. §§ 40.03, 40.05 (Vernon 1979) (repealed 1986).

12. 660 S.W.2d 103 (Tex. Crim. App. 1983) (en banc).

13. *See Ex Parte Graham*, 853 S.W.2d 564, 565 (Tex. Crim. App.), *cert. denied*, 113 S. Ct. 2431 (1993) (Baird, J., dissenting) (wishing "to consider the continued vitality" of *Binder*).

14. In *Herrera v. Collins*, 506 U.S. 390, 411 (1993), the United States Supreme Court rejected the use of federal habeas corpus as a means of circumventing Texas' procedural bar to the introduction of new evidence. Rather than opening the door for federal habeas claim of actual innocence, the Court noted that the state clemency procedure is the appropriate forum for bringing post-conviction claims of actual

evidentiary hearing, voted 10-7 against granting a reprieve to Graham and 12-5 against affording him a hearing in which to present his claim, and evidence, of innocence.<sup>15</sup> The Court of Criminal Appeals denied Graham's motion for a remand and evidentiary hearing,<sup>16</sup> and his execution was set for sometime before sunrise on August 17, 1993.<sup>17</sup> Graham then brought a civil<sup>18</sup> suit in the 299th Judicial District Court for declaratory and injunctive relief, seeking to compel the Board of Pardons and Paroles to accord him a full hearing on his claim of innocence.<sup>19</sup> Graham's lawsuit alleged that the procedures employed by the Board denied him rights guaranteed by Article I, sections 13, 19, 27, and 29 of the Texas Constitution.<sup>20</sup> Essentially, Graham argued that he was entitled to a hearing before the Board that complied with the due course of law provisions of the Texas Bill of Rights,<sup>21</sup> and asserted that depriving him of his life and liberty without such a hearing would violate the state's constitutional proscription against cruel or unusual punishment.<sup>22</sup>

On July 27, 1993, the district court held a hearing on Graham's motion for a temporary injunction and a writ of mandamus. Following the hearing, on August 3, 1993, the district court issued a temporary injunction ordering the Board to reschedule Graham's execution for a date after the Board had held a hearing on Graham's innocence claim.<sup>23</sup>

The Board filed notice of appeal to the Third Court of Appeals, which automatically vacated the district court's injunction against Graham's execution.<sup>24</sup> On Graham's motion, the Third Court of Appeals issued a temporary injunction against the execution in order to preserve the subject matter of the case (Gary Graham himself) for appeal.<sup>25</sup> The Board, along

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innocence: "Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice . . . . Executive clemency has provided the 'fail safe' in our criminal justice system . . . ." *Id.* at 411-12.

15. Transcript at 34, *Graham v. Tex. Bd. of Pardons & Paroles*, No. 93-08624 (299th Dist. Ct., Travis County, Tex., Oct. 1994).

16. *Ex parte Graham*, 853 S.W.2d 565 (Tex. Crim. App. 1993) (en banc).

17. See Appellant's Brief at 5, *Graham v. Texas Bd. of Pardons & Paroles*, 913 S.W.2d 745 (Tex. App.—Austin 1996, n.w.h.) (No. 03-95-00050-CV).

18. Whether Graham's claim was a civil or criminal matter was crucial to the Court of Criminal Appeals' decision to accept the case for review.

19. *Graham v. Tex. Bd. of Pardons & Paroles*, No. 93-08624 (299th Dist. Ct., Travis County, Tex., filed July 21, 1993).

20. See James C. Harrington, *Does Real Innocence Count in Review of Capital Convictions?*, 1 TEX. F. ON C.L. & C.R. 38 (Spring 1994).

21. TEX. CONST. art. I, §§ 13, 19.

22. TEX. CONST. art. I, § 13.

23. Temporary Injunction (signed August 9, 1993), *Graham v. Tex. Bd. of Pardons & Paroles*, No. 93-08624 (299th Dist. Ct., Travis County, Tex., filed July 21, 1993).

24. TEX. R. APP. P. 40(b)(2).

25. TEX. R. APP. P. 43(c) allows an appeals court to "issue such temporary orders as it finds

with Harris County District Attorney John Holmes, then filed separate motions for leave to file original applications for writs of prohibition and mandamus in the Court of Criminal Appeals, asking it to vacate the injunction and prohibit the Third Court of Appeals from taking any further action on the case. Initially, the Court of Criminal Appeals voted 5-4 to deny the Board and Holmes leave to file, although it issued its own stay of execution while the Third Court of Appeals continued to preside over the case. Nearly three months later, however, on November 9, 1993, the Court of Criminal Appeals reconsidered "on [its] own motion" the applications for leave to file writs of mandamus and prohibition and voted 6-3 to grant them.<sup>26</sup> Judges Miller, Clinton, and Overstreet dissented vigorously, contending that the case was properly before the Third Court of Appeals.<sup>27</sup>

### III. The Opinion by the Court of Criminal Appeals: A Turf War of Constitutional Proportions

Before analyzing the substance of the Court of Criminal Appeals' opinion, one must ask why the court issued an opinion in the case. What motivated a majority of the court to interrupt the normal appellate process and wrest this case away from the Third Court of Appeals, where it already had been briefed and argued?

#### A. *Winning the Jurisdictional Game of "Keep Away"*

The Court of Criminal Appeals' primary objective of preserving, and broadly defining, its own jurisdiction is manifest by three of its actions: (1) its decision to take Graham's case away from the Third Court of Appeals on mandamus, (2) its declaration that the issue in the case was a criminal matter, and (3) its creation of a habeas corpus remedy for Graham.

Because the Court of Criminal Appeals' mandamus power is limited to criminal law matters,<sup>28</sup> the threshold question before the court was whether the Third Court of Appeals' injunction staying Graham's execution constituted a "criminal law matter."<sup>29</sup> The Court of Criminal Appeals

necessary to preserve the rights of the parties until disposition of the appeal." It is notable that the title of Rule 43 is "Orders Pending Interlocutory Appeal in *Civil* Cases" (emphasis added).

26. State *ex rel.* Holmes v. Honorable Court of Appeals for Third Dist., 885 S.W.2d 386, 386 (Tex. Crim. App. 1993) (en banc) (order granting writs). TEX. R. APP. P. 211(c) provides the court with discretion to reconsider, on its own motion, denial of leave to file.

27. Judge Overstreet observed in his dissent, "[A] majority of this court wants to take back that which it refused using Tex. R. App. Pro. Rule 211(c) as the vehicle. I am not inclined to go along for the ride . . ." Holmes, 885 S.W.2d at 389 (Overstreet, J., dissenting from granting of writs). In addition, Judge Clinton woefully wrote, "King Solomon described this whole contretemps well: 'Pride goeth before destruction, and a haughty spirit before a fall.' Proverbs 16:18." *Id.* at 387 (Clinton, J., dissenting from granting of writs).

28. TEX. CONST. art. V, § 5.

29. Since the writs before the court regarded the lower courts' issuance of injunctions to stay

asserted that the Third Court's injunction, issued to preserve the subject matter of the suit, was indeed a criminal law matter because the injunction "ar[ose] over the enforcement of statutes governed by the Texas Code of Criminal Procedure,' and 'ar[ose] as a result of or incident to a criminal prosecution.'"<sup>30</sup>

The conclusion that this case was a criminal law matter is quite suspect. Indeed, Judge Overstreet devoted most of his opinion to this issue.<sup>31</sup>

Judge Overstreet's opinion noted that the majority relied on an earlier case, *State ex rel. Wilson v. Briggs*,<sup>32</sup> for the proposition that the Court of Criminal Appeals could prohibit lower courts from staying executions.<sup>33</sup> In *Briggs*, the Court of Criminal Appeals held that it can prohibit lower courts from staying executions. *Briggs*, however, is distinguishable. In that case, a district judge repeatedly issued a stay of execution in order to hear an application for a writ of habeas corpus, despite the Court of Criminal Appeals' prior denial of such relief. In *Briggs*, then, the district court assumed jurisdiction to reconsider legal issues already resolved, thereby placing itself in "the position of setting aside final judgments and orders" of the Court of Criminal Appeals.<sup>34</sup>

Graham's case is decidedly different from *Briggs*. Graham's suit against the Board of Pardons and Paroles, an entity of the executive branch, in no way challenged the technical legality of his confinement and therefore could not be characterized as a habeas corpus proceeding. Unlike the district court in *Briggs*, neither the district judge in Graham's suit nor the Third Court of Appeals was interfering with the Court of Criminal Appeals' habeas corpus jurisdiction, nor was either court setting aside final judgments or orders of the high court. The district judge in Graham's case was rather ruling on a "case of first impression in Texas,"<sup>35</sup> deciding if a state constitutional deficiency existed in the Board's clemency procedures. Because this was a new issue that had not been decided before, and it did not involve setting aside a final judgment of the Court of Criminal Appeals, the *Graham* majority's reliance on *Briggs* in taking this case was misplaced. The

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Graham's execution, the question before the court was whether the injunctions, not Graham's constitutional claim, were a criminal law matter. While the court did resolve Graham's claim as well, it never paused to consider the criminal or civil nature of that claim.

30. *Holmes*, 885 S.W.2d at 394 (quoting *Curry v. Wilson*, 853 S.W.2d 40 (Tex. Crim. App. 1993)).

31. *Id.* at 404-06 (Overstreet, J., concurring and dissenting).

32. 351 S.W.2d 892 (Tex. Crim. App. 1961).

33. *Holmes*, 885 S.W.2d at 405.

34. *Briggs*, 351 S.W.2d at 895.

35. Temporary Injunction (signed August 9, 1993).

jurisdiction of the Court of Criminal Appeals in this case is much more tenuous here than it was in *Briggs*.

After the Court of Criminal Appeals concluded that the injunction issued by the Third Court of Appeals was a criminal matter over which the Court of Criminal Appeals had jurisdiction, it made a startling declaration. It announced that the lower court's granting of a stay, even solely to preserve its subject matter jurisdiction, infringed on the Court of Criminal Appeals' authority as the final arbiter in capital cases.<sup>36</sup> This holding has statutory authority<sup>37</sup> but nonetheless directly conflicts with the appellate courts' right to issue injunctions to preserve the status quo, pending resolution of cases.<sup>38</sup> The court's refusal to let a lower court stay an execution in order to hear a prisoner's claim, regardless of the civil nature of the claim, poses a new problem for both lower courts and death row inmates. If a capital felon is a party to a civil suit of any nature (including a dispute over a marital estate or a contract claim), the convict will be forced to resolve such a suit quickly, because every state court other than the Court of Criminal Appeals is henceforth without jurisdiction to keep the plaintiff alive pending resolution of the civil suit.

The court thus announced that it had exclusive authority over staying executions, and the Third Court of Appeals had overstepped its jurisdiction by enjoining Graham's execution while deciding Graham's case.<sup>39</sup>

#### B. *Pressing Forward—Grabbing Graham's Claim, Too*

The basis for the state's application to the Court of Criminal Appeals was the impropriety of the lower court's staying Graham's execution. Having thus taken jurisdiction and declared that the lower courts were without such power, the court should have been finished with its treatment of the case. A mandamus to the lower courts, "stop staying executions," would have sufficed. But the Court of Criminal Appeals broadened the scope of its opinion from the lower courts' power to stay executions to a review of the habeas corpus mechanisms available to death row inmates claiming actual innocence.

The Court of Criminal Appeals never explained why it was hearing the

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36. The inability of the Third Court of Appeals to act in this case is troubling, because the state itself had initiated review in the Third Court. By simply applying to the Court of Criminal Appeals, the state was able to prevent the intermediate appeal that *it had itself initiated* from going forward. The state's maneuvering in and out of the Third Court of Appeals appears to be little more than forum shopping, or perhaps simply a desire to leap-frog the normal process of appeal in an effort to expedite Graham's execution.

37. TEX. CONST. art. V, § 5; TEX. PENAL CODE ANN. § 19.03 (Vernon 1994).

38. TEX. R. APP. P. 43(c).

39. *State ex rel. Holmes*, 885 S.W.2d at 395.

claim of Graham, a real party in interest. The court had assumed jurisdiction initially by declaring that stays of execution were criminal law matters over which the court had jurisdiction.<sup>40</sup> But it then went on to examine Graham's constitutional claims as well. The court never paused to consider whether Graham's claim that the clemency process was unconstitutional was a criminal law matter falling within the purview of the court.

Why couldn't the court have told the lower courts not to stay executions and stopped there, thus allowing Graham's constitutional claim to be heard by the Third Court of Appeals by way of the normal appellate process? Because, as will be discussed below, the court wanted to fashion its own remedy for Graham, and deferring that power to the lower courts might have resulted in a different remedy. The court's desire to reach a predetermined result thus led it to ignore both jurisdictional questions and the scope of the state's mandamus application in its eagerness to resolve Graham's claim.

The mandamus analysis thus pressed on, with the focus now on Graham's claim, rather than the propriety of staying executions. So while the state had applied for mandamus, the remedy was to be created for Graham, the state's opponent in the district court.

Before crafting a remedy for Graham, the court had to show that the exercise of its mandamus power in favor of the state was proper. Mandamus will issue only when no other adequate remedy at law is available, and the act sought to be compelled is ministerial, rather than discretionary.<sup>41</sup> To show that no other adequate remedy at law was available to the Board of Pardons and Paroles, the court subverted the normal appellate process, which, until that moment, had been functioning exactly as designed. The majority held that no adequate remedy at law was available because the case might be appealed to the wrong court, i.e., the Texas Supreme Court, thus depriving the Board and Holmes of their right to go to the proper court, i.e., the Court of Criminal Appeals.<sup>42</sup>

The potential of appeal to the wrong court, however, should hardly constitute the Board's having no other adequate remedy at law. If this case had not been taken from the Third Court of Appeals, there could have been only two possible outcomes following a decision by the Third Court: it would have been appealed to the Court of Criminal Appeals or, alternatively, to the

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40. "Clearly, the entry of an order which stays the execution of a death row inmate is a criminal law matter." *Holmes*, 885 S.W.2d at 394.

41. *See, e.g., State ex rel. Holmes v. Salinas*, 784 S.W.2d 421, 423 (Tex. Crim. App. 1990) (en banc).

42. *Holmes*, 885 S.W.2d at 394.

Texas Supreme Court.

If the decision were appealed to the Court of Criminal Appeals following a decision by the Third Court, the state would retain an adequate remedy. If the appeal after the Third Court decision were to go to the Texas Supreme Court, that court would decide at the outset whether the case was properly before it. If the case did not fall within the Supreme Court's jurisdiction, presumably the Supreme Court would have dismissed the case to allow appeal to the Court of Criminal Appeals. Under either outcome, the Court of Criminal Appeals eventually would have exercised appellate jurisdiction over the case if the case were indeed within its exclusive jurisdiction.

The only way the normal appeals process could fail to provide an adequate remedy is if the Texas Supreme Court were to retain the case on appeal, despite the case's criminal law nature. Even such a strange result could hardly be said to constitute an inadequate remedy, since a high court would still hear and resolve the state's claims. Nevertheless, the Court of Criminal Appeals declared that this remote possibility rendered the appeals process inadequate and warranted the extraordinary writ of mandamus. This holding demonstrates a profound lack of trust in the Texas Supreme Court's ability to properly determine the nature of cases before it.

The analysis that led the court to determine that there was no adequate remedy at law available to the Board of Pardons and Paroles is problematic. Just as it did in this case, the Court of Criminal Appeals could use the very existence of a bifurcated appellate system as an excuse to hear a case that has not timely arrived before it on appeal. If such procedural machinations are permitted, the Court of Criminal Appeals can simply hypothesize that the Texas Supreme Court might improperly keep a case that belongs within the Court of Criminal Appeals' jurisdiction, declare the Supreme Court's keeping such a case to be an inadequate remedy at law, and subvert the normal appellate process by taking the case away from a lower court on mandamus.

Judge Miller observed the difficulty with the court's mode of analysis in finding no adequate remedy at law:

By granting leave to file this mandamus action, the majority has unduly exacerbated the jurisdictional conundrum developing in this case, hindered the resolution of these issues in a constitutionally acceptable manner, and threatened the careful balance of the appellate court system in this state. At best, the decision to hear the mandamus actions is premature. At worst, it could ultimately result in a decision from the Texas Supreme Court holding that *it* has jurisdiction over this matter and a decision by the Texas Court of Criminal Appeals holding that *it*



has the proper jurisdiction. Shall we then mandamus each other?<sup>43</sup>

The Court of Criminal Appeals thus failed to mention whether it had jurisdiction over Graham's claim against the Board, ignored the fact that his claim was not within the scope of the state's mandamus petition, ran roughshod over the propriety of mandamus, and proceeded—without clear power to do so—to fashion a remedy for Graham's constitutional claim.

C. *(Mis)Construing Graham's Constitutional Claim*

Graham had contended before the district court, the Third Court of Appeals, and the Court of Criminal Appeals that the Board was required to hold a hearing on his claim of innocence, in compliance with the due course of law provisions found in the Texas Constitution,<sup>44</sup> and that executing him without a hearing would violate the proscription against cruel or unusual punishment.<sup>45</sup> Graham's claim was based exclusively on the Texas Constitution, and the remedy he sought was a hearing before an entity within the executive branch of the state government.<sup>46</sup> As the judicial process in his *criminal* case was exhausted, Graham did not seek a habeas remedy, because, as is discussed *supra*, Court of Criminal Appeals precedent held that a habeas proceeding would not lie for claims of actual innocence based upon post-conviction evidence.<sup>47</sup> With all avenues of criminal appeal closed to him, Graham had initiated a civil suit against the Board of Pardons and Paroles.<sup>48</sup>

Despite the fact that Graham argued his claim solely in terms of the Texas Constitution, the Court of Criminal Appeals read "Graham's contentions as claiming his execution would violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution."<sup>49</sup> The Court of Criminal Appeals thus restructured Graham's claim under a different constitution with a completely different meaning and then went on

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43. *Holmes*, 885 S.W.2d at 388 (Miller, J., dissenting from granting of writs).

44. TEX. CONST. art. I, §§ 13, 19. Texas' due course of law provisions are analogous to, and indeed extend further than, the due process provisions in the Fifth and Fourteenth Amendments to the United States Constitution. See *Armstrong v. Randle*, 881 S.W.2d 53 (Tex. App.—Texarkana 1994, writ denied); *In re J.W.T.*, 872 S.W.2d 189, 197 (Tex. 1994).

45. TEX. CONST. art. I, § 13.

46. As Judge White pointed out, "I recall Graham's counsel arguing his claim solely, and adamantly, in terms of the Texas Constitution and Art. I, § 19." *Holmes*, 885 S.W.2d at 402 n.1 (White, J., concurring and dissenting).

47. *Ex Parte Binder*, 660 S.W.2d at 106.

48. *Graham v. Tex. Bd. of Pardons & Paroles*, No. 93-08624 (299th Dist. Ct., Travis County, Tex., filed July 21, 1993).

49. *Holmes*, 885 S.W.2d at 397-98.

to create a new state habeas corpus proceeding for claims of actual innocence. That a state constitutional claim to a hearing before an agency of the executive branch could somehow become a federal constitutional claim resulting in a new state habeas proceeding is astounding. Perhaps the court merely recognized Graham's plight in not being able to bring a claim of innocence and wanted to create a remedy to rectify this injustice. On the other hand, perhaps the court wanted to remove all doubt that it has jurisdiction over cases like Graham's in the future, so it reconstructed his claim to create a remedy it would undoubtedly control: state habeas corpus.

*D. The Graham Habeas Remedy*

With this opinion, then, the court created a new state habeas remedy for Graham and other similarly situated death row inmates. The clemency procedures Graham originally sought to challenge, however, still remain. Are death row inmates with new evidence of innocence better off for the existence of the new habeas remedy?

To prevail under the new state habeas rule, "the applicant must show that based on the newly discovered evidence and the entire record before the jury that convicted him, no rational trier of fact could find proof of guilt beyond a reasonable doubt."<sup>50</sup> This burden of proof is simply untenable: according to the court's own precedent, it is literally impossible for Graham or any similarly situated applicant to meet the court's new burden. The new evidence that Graham or someone in his position presents in his habeas petition can only have one of two possible effects. On one hand, any newly discovered evidence of innocence could conflict with the evidence adduced at trial, in which case a jury's guilty verdict remains rational, because the Court of Criminal Appeals will presume that the jury resolved all conflicts in the light most favorable to the verdict.<sup>51</sup> On the other hand, any new evidence could create a reasonable alternative hypothesis; that is, an inference of innocence that is consistent with *all* the evidence, thereby raising the possibility that the evidence will be insufficient to sustain a conviction. The Court of Criminal Appeals, however, has already rejected this second potentiality in *Geesa v. State*.<sup>52</sup>

In *Geesa*,<sup>53</sup> the court rejected the use of the reasonable alternative hypothesis, declaring that as long as there is a rational inference of guilt derived from all the evidence, an equally consistent inference of innocence

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50. *Id.* at 399. This standard was derived from the Supreme Court's standard for federal appellate review of state court convictions. See *Jackson v. Virginia*, 443 U.S. 307, 324 (1979).

51. See *Turro v. State*, 867 S.W.2d 43, 46-47 (Tex. Crim. App. 1993) (en banc).

52. 820 S.W.2d 154 (Tex. Crim. App. 1991) (en banc).

53. *Id.* at 160-61.

will not overturn a conviction. In other words, if the evidence can still rationally support the conviction, the conviction will be upheld.

Under *Geesa*, then, someone in Graham's position has to bring enough new evidence to make his original conviction irrational. But the original conviction must be seen as rational, because the jury convicted Graham, and the Court of Criminal Appeals upheld the verdict on direct appeal. If any convicting evidence remains from the trial and is supplemented only by new exonerating evidence, the conviction will always remain rational. Simply put, under *Geesa*, no amount of new evidence, no matter how compelling, can overcome a rational verdict of guilty. By invalidating the second alternative, *Geesa* thus renders the court's new burden impossible to meet.

Judge Clinton observed this predicament in dissent:

This is an impossibly high standard of proof. By that I do not mean that as a practical matter precious few applicants will be able to produce new evidence sufficiently compelling to meet the majority's test. By that I mean that it will be impossible *by definition* for any applicant to meet this test, regardless of how compelling his newly discovered evidence . . . .

. . . .

. . . [The standard] sets up an insurmountable obstacle when applied to the habeas applicant trying to establish a claim of actual innocence under the Fourteenth Amendment. [Graham] simply will not be able to show actual innocence, because no amount of newly discovered evidence will overcome the rationality of the jury's verdict of guilt based upon the evidence that was adduced at trial.

I am at a loss to understand why the majority would go to the trouble of . . . recognizing cognizability of a claim of actual innocence in post-conviction habeas corpus, and then announcing a burden that ensures that no applicant can ever obtain relief on the basis of that new claim.<sup>54</sup>

The Court of Criminal Appeals, then, has created a new state court habeas mechanism, but then set the burden of proof so high as to render the remedy meaningless.<sup>55</sup> The new procedure set out by the Court of Criminal

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54. *Holmes*, 885 S.W.2d at 417-18 (Clinton, J., dissenting) (emphasis added).

55. Indeed, the first petitioner to bring a "Graham claim" on state habeas, alleging new exonerating evidence, lost in the Court of Criminal Appeals by a vote of 5-4. *Ex parte Drew*, No. 13,998-05 (Tex. Crim. App. July 30, 1994). Robert Drew was executed on August 2, 1994, despite strong evidence supporting his claim of innocence; Drew was never permitted a hearing on this evidence in eleven years of appeals.

Appeals ultimately provides no greater protection than the former thirty-day rule. Graham may still be executed without a full and fair clemency hearing on his exonerating evidence, and innocent persons may be put to death because their evidence of innocence surfaced too late. Graham's procedural "victory," therefore, was a pyrrhic one indeed.

#### IV. Epilogue

Because the Court of Criminal Appeals did not address the underlying issue of Graham's suit, namely, that the Board of Pardons and Paroles arbitrary clemency procedures are unconstitutional, Graham's trial against the Board proceeded in state district court.<sup>56</sup>

Ironically, the district court held that Graham could not prevail in his suit against the Board because he now had an adequate remedy in the form of the newly created state habeas procedure.<sup>57</sup> Graham appealed this decision to the Third Court of Appeals, which again denied him relief.<sup>58</sup> The Third Court found that the due course of law provision in the Texas Constitution guarantees the right to a hearing on a claim of actual innocence, but that this guarantee is satisfied by the Court of Criminal Appeals' new habeas procedure.<sup>59</sup> The court held that "the Texas Constitution does not require the Board to grant Graham a due course of law hearing where such a hearing is already provided by way of state habeas corpus procedure."<sup>60</sup> Ironically, the remedy that the Court of Criminal Appeals created by misconstruing Graham's claim was ultimately used to preclude the remedy he actually sought in the first place.

Graham's state constitutional claims against the Board thus remain unrelieved, some 19 months and five courts later. A circuitous procedure has brought about a habeas remedy of little, if any, use and has raised concerns about the co-equal jurisdiction of Texas' two highest courts. This latter concern, the tension between the Texas Supreme Court and the Court of Criminal Appeals, still looms large in the Graham case: If the Third Court's opinion is appealed to a state court of last resort, which court will hear it this time?

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56. *Graham v. Tex. Bd. of Pardons & Paroles*, No. 93-08624 (299th Dist. Ct., Travis County, Tex., Oct. 1994).

57. *Id.*

58. *Graham v. Tex. Bd. of Pardons & Paroles*, 913 S.W.2d 745 (Tex. App.—Austin 1996, n.w.h.).

59. *Id.* at 751.

60. *Id.* at 752.