WR-82,772-02
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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ABEL ACOSTA
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Nos. 82,772-01, 82,772-01 and 82,772-03

RECEIVED
COURT OF CRIMINAL APPEALS
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EX PARTE	§	IN THE COURT OF CRIMINAL
	§	
DONALD LEE GRAY	§	APPEALS OF TEXAS

MOTION FOR REMAND

To the Honorable Judges of the Court of Criminal Appeals:

Donald Gray, petitioner, respectfully asks the Court to remand to the district court for consideration of his affidavit confirming restraint.

As explained in his brief, Gray seeks habeas relief from three convictions for improper photography, Penal Code section 21.15, declared unconstitutional by the Court last year. Gray's continuing restraint affidavit was filed after the district court signed adverse findings and conclusions but before the record was send to the Court.

Remand is appropriate to permit the district court to evaluate the affidavit. The State's answer to the petition recognizes that the Court has held the statute unconstitutional and appears to concede the writ would be granted, but for the affidavit of restraint.

Alternatively, in the interests of judicial economy, the Court can grant the writ on the basis of Gray's affidavit. If denied, Gray would be

permitted to file a successor writ under section 4(a)(2) of article 11.07, the actual innocence provision. Section 4(a)(2) allows a successor writ if the individual is actually innocent of a Penal Code violation, without any other restrictions. Here, the improper photography statute has been declared unconstitutional and therefore any conviction would be void ab initio. It would seem, therefore, that he can satisfy section 4(a)(2). An example appears in *Ex parte Knipp,* 236 S.W.3d 214 (Tex. Crim. App. 2007), in which Court unanimously granted a successor writ under section 4(a)(2) on a double jeopardy claim that rendered the conviction invalid from inception. Gray's position appears identical.

Respectfully submitted this 16 day of March 2015,
/s/ James W. Volberding

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Certificate of Compliance

Pursuant to Rule 73.1(f), I hereby certify that this pleading contains 252 words, measured in MS Word for MAC version 14.3.6.

/s/ James W. Volberding

JAMES W. VOLBERDING

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this pleading has been delivered this 16 day of March 2015 to:

Smith County District Attorney
101 N. Broadway, Fourth Floor
Tyler, TX 75702

by the following means:

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_____	By Fax after 5 p.m.
_X___	By Electronic Filing.

/s/ James W. Volberding

JAMES W. VOLBERDING