

March 23, 2013

To: The Texas House Criminal Jurisprudence Committee

From: Scott Henson, Innocence Project of Texas

In support of SB 344 (Whitmire)/HB 967 (Turner) Reforming Texas' habeas corpus statute

Problem to be addressed:

SB 344/HB 967 will create a legal avenue for innocent defendants convicted based on false and discredited forensic testimony to seek relief under Texas' *habeas corpus* statute. It was among the recommendations of the Timothy Cole Advisory Panel on Wrongful Convictions established by the 81st Texas Legislature.

Background: Echoes of Roy Criner

Since before the turn of the century, the issue of new scientific evidence discrediting trial testimony and the lack of an established legal framework for how to handle the situation has confronted Texas courts and the Legislature. The emergence of DNA testing set the stage for a broader reconsideration of forensic methods, but changes to *habeas corpus* statutes have lagged behind.

In 1998, the Court of Criminal Appeals famously denied *habeas* relief to Roy Criner after DNA testing proved he was innocent of the murder for which he'd received a life sentence. After the Court of Criminal Appeals turned down Criner's *habeas* application, the Texas Legislature created Chapter 64 of the Code of Criminal Procedure – Texas' post-conviction DNA testing statute – to allow for testing old evidence and possible *habeas corpus* relief. The Legislature expanded that access in the 82nd session, removing barriers to potentially exonerating DNA tests.

In hindsight, while the Court of Criminal Appeals followed the law and began allowing *habeas corpus* relief based on exonerating DNA testing, Chapter 64 was relatively narrow in that it only applied to one type of forensic testimony: DNA testing that was not available at the time of trial. But neither the courts nor the Legislature ever addressed how to handle post-conviction innocence claims in other situations where science that was unavailable at trial undermined the

certainty of a verdict. This legislation establishes such grounds similar to the way Chapter 64 of the Code of Criminal Procedure established grounds for post-conviction DNA testing.

The issue has arisen with greater frequency as the forensic sciences in recent years have undergone extensive review, correction and updating in a variety of fields, sometimes discrediting forms of forensic testimony like dog-scent lineups or misinterpreted indicators of arson that at one time were commonly applied but did not stand up to scientific scrutiny. Rather than establish a Chapter 65 for arson, Chapter 66 for dog-scent lineups, etc., this bill would establish a single standard for application whenever this scenario arises.

Recent case law: Finality vs. accuracy

In *Ex Parte Robbins* (2011), both the State and defense agreed that erroneous, recanted testimony by a medical examiner established "the sole bases of the State's case as to cause and manner of death, without which the State would not have obtained a conviction." The Texas Court of Criminal Appeals, however, voted 5-4 against granting the defendant a new trial, with the majority finding no path to *habeas* relief for Robbins under current law.

Judge Cathy Cochran, in dissent, framed the issue thusly: "This case raises a novel and difficult issue for the criminal-justice system," which is, "When scientific experts honestly and sincerely thought 'X' was true at the time they testified, but the science has changed or the experts' understanding of the science has changed and their opinions have changed, what cognizance of that change should the criminal justice system take long after a person has been convicted?" The court chose finality over evolving science.

In an order in *Ex Parte Overton* (2012) remanding the case back to the trial judge for further investigation, Judge Cathy Cochran again highlighted the lack of redress under current law, acknowledging that the "disconnect between changing science and reliable verdicts that can stand the test of time has grown in recent years as the speed with which new science and revised scientific methodologies debunk what had formerly been thought of as reliable forensic science has increased. The potential problem of relying on today's science in a criminal trial (especially to determine an essential element such as criminal causation or the identity of the perpetrator) is that tomorrow's science sometimes changes and, based upon that changed science, the former verdict may look inaccurate, if not downright ludicrous. But the convicted person is still imprisoned. Given the facts viewed in the fullness of time, today's public may reasonably perceive that the criminal justice system is sometimes unjust and inaccurate. Finality of judgment is essential in criminal cases, but so is accuracy of the result--an accurate result that will stand the test of time and changes in scientific knowledge."

"These are not easy issues," wrote Judge Cochran, "but fairness both to the applicant who is serving a sentence of life without parole and to the state and the memory of the child victim demands that our verdicts will withstand the test of time such that the guilty are punished and the innocent are not. Further, public support of the American criminal justice system depends upon its confidence that the courts reach accurate verdicts based upon reliable scientific evidence." This case was sent back to the trial judge for further fact finding and the court's decision remains pending.

The issue next came up in *Ex Parte Henderson* (2012), five judges agreed to grant Cathy Lynn Henderson a new trial in a *per curiam* opinion, but no single interpretation of the law could gain more than four votes on the court, meaning *at present there is no clear, agreed upon theory regarding how and why relief may be granted*. Such division on the court speaks to a lack of clarity in the law and requires a legislative solution. *Henderson* is one of a series of recent cases in which a divided court struggled to overcome this glaring gap in Texas *habeas* law. Both Judge Cochran and dissenters in *Henderson* agreed that Texas' current *habeas corpus* statute lacks clarity regarding how to react when critical scientific evidence supporting a conviction has been discredited. Judge Barbara Hervey, a dissenter who was a member of the Timothy Cole Advisory Panel, believes Texas *habeas* law at present simply provides no recourse for such defendants: "Something is missing here," she wrote. "I cannot find a ground upon which relief should be granted." Judge Cochran and four other judges thought the law was clear enough to grant a new trial. But she agreed that the "case does not fit neatly into our *habeas* statute or our actual-innocence jurisprudence."

The Solution

SB 344/HB 967 fills the gap in *habeas corpus* law that Judge Hervey suggested needs filling, establishing a clear process and standard by which such cases will be evaluated and *habeas* relief granted. The bill will not open any floodgate of new post-conviction writs, but it will provide an avenue for relief where false and discredited forensics may have caused a false conviction.

The Timothy Cole Advisory Panel on Wrongful Convictions endorsed similar legislation filed in the 81st and 82nd Legislatures, declaring that it "would provide meaningful access to the courts to those with claims of actual innocence following a conviction based on science that has since been falsified. Creation of a dedicated writ procedure will allow those with claims to be heard without opening all convictions up to scrutiny. The Panel believes this is a valuable reform for the criminal justice system in Texas."