

LEGAL ISSUES IN TEXAS INNOCENCE CASES

Presented by:

Gary A. Udashen

Sorrels, Udashen & Anton

2311 Cedar Springs Rd., Suite 250

Dallas, Texas 75201

214-468-8100

214-468-8104 fax

gau@sualaw.com

Cory Session of Fort Worth, center, wipes his eyes as Texas Gov. Rick Perry, right, and Texas state Senator Wendy Davis, left, bow their heads in prayer during a ceremony to unveil a Timothy Cole memorial in Lubbock, Wednesday, Sept. 17, 2014. Twenty-eight years to the day after Timothy Cole was falsely convicted of raping a Texas Tech student, Lubbock and state officials unveiled a statue honoring the U. S. Army veteran on a street corner not far from where the student was abducted. AP/Lubbock Avalanche-Journal



TIM COLE STATUE UNVEILING



TIM COLE STATUE UNVEILING





[Support IPTX](#) [About IPTX](#) [Campaigns](#)
[Texas Exonerations](#) [Resources](#)

At A Glance

Texas Exoneration Statistics

Number of DNA Exonerations: 49
Number of non-DNA Exonerations: Unknown
Average Number of Years Incarcerated*: 13.5
Number of DNA Exonerations Prior to 2001+: 7
Number of DNA Exonerations Since 2001+: 41
Leading Cause of Wrongful Convictions: False Eyewitness Identifications
Percentage of Cases involving an Eyewitness ID Error*: 80%

*Statistic based on Texas's first 40 DNA exonerations.

+In 2001, Texas enacted a post-conviction DNA access law (Chapter 64 of the Texas Code of Criminal Procedure), which streamlined the process for defendants to request DNA testing in order to prove their innocence.

Texas DNA Exonerations by County

Collin County: 1
Dallas County: 24

Ellis County: 1
El Paso County: 1
Harris County: 8
Lubbock County: 1
McLennan County: 1
Montgomery County: 2
Navarro: 1
Smith County: 1
Tarrant County: 2
Travis County: 4
Uvalde County: 1
Williamson County: 1

Texas DNA Exonerations by Year

1994: Gilbert Alejandro
1997: Kevin Byrd, Ben Salazar
2000: A.B. Butler, Roy Criner, Carlos Lavernia, Anthony Robinson
2001: David Shawn Pope, Calvin Washington, Mark Webb
2002: Richard Danziger, Christopher Ochoa, Victor Thomas
2003: Wiley Fountain
2004: Donald Wayne Good, Josiah Sutton
2005: Entre Nax Karage, Brandon Moon, George Rodriguez, Keith Turner
2006: Eugene Henton, Billy Miller, Arthur Mumphrey, Billy Smith
2007: Larry Fuller, James Giles, Andrew Gossett, James Waller, Greg Wallis
2008: Michael Blair, Charles Chatman, Thomas McGowan, Steven Phillips, Ronald Taylor, Patrick Waller
2009: Timothy Cole, Jerry Evans, Johnnie Lindsey, Ricardo Rachell, James Woodard
2010: Allen Porter, Michael Green
2011: Comelius Dupree, Johnny Pinchback, Michael Morton
2012: James Williams, Raymond Jackson, David Wiggins
2013: Randolph Arledge

DNA Exonerations in Texas

What We've Learned

- **Average Texas DNA exoneree spent more than 13 years incarcerated on their wrongful convictions.**
- **Majority of DNA exonerations in Texas from Dallas County. Possible reasons:**
 - **Dallas County is a leader in preserving biological evidence**
 - **District Attorney's Conviction Integrity Unit is proactively seeking to identify and correct wrongful convictions**
- **More than 75% of Texas DNA exonerations based on faulty eyewitness identifications.**
- **Other leading causes of wrongful convictions in Texas include prosecutorial misconduct, inadequate defense representation, forensic science misconduct, and false confessions.**

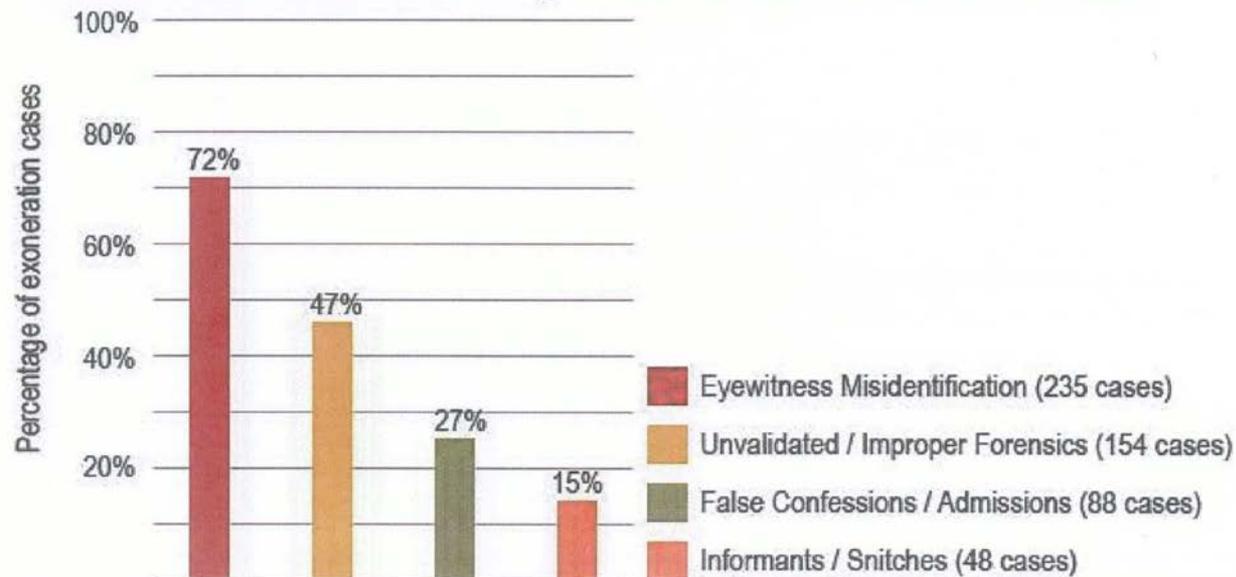
The Causes of Wrongful Conviction

As the pace of DNA exonerations has grown across the country in recent years, wrongful convictions have revealed disturbing fissures and trends in our criminal justice system. Together, these cases show us how the criminal justice system is broken – and how urgently it needs to be fixed.

We should learn from the system's failures. In each case where DNA has proven innocence beyond doubt, an overlapping array of contributing factors has emerged – from mistakes to misconduct to factors of race and class.

Contributing Causes of Wrongful Convictions (first 325 DNA exonerations)

Total is more than 100% because wrongful convictions can have more than one cause.



Contributing causes confirmed through Innocence Project research. Actual numbers may be higher, and other contributing factors to wrongful convictions include government misconduct and bad lawyering.

TEXAS ACTUAL INNOCENCE STANDARD

- **Ex Parte Elizondo, 947 S.W.2d 202 (1996)**

Applicant must show that newly discovered evidence of actual innocence unquestionably established innocence.

ACTUAL INNOCENCE STANDARD

- **Court must examine the new evidence in light of the evidence presented at trial**
- **To grant relief court must believe that no rational juror would have convicted in light of the newly discovered evidence.**

ACTUAL INNOCENCE STANDARD

Applies to:

- **DNA**
- **Recantations**
- **Other New Evidence**

Ex Parte Brown,
205 S.W.3d 538 (2006)

**Establishing a bare claim of
actual innocence is a herculean
task**

**Must make an exceedingly
persuasive case of actual
innocence**

RECANTATIONS

- **Ex Parte Thompson, 153 S.W.3d 416 (2005)**
Complainant, daughter of Applicant, provided affidavit and testimony stating that sexual abuse never occurred.
- **Ex Parte Tuley, 109 S.W.3d 388 (2002)**
Actual innocence claims are not barred by guilty plea.

NEWLY DISCOVERED OR NEWLY AVAILABLE EVIDENCE:

- **Ex Parte Calderon, 309 S.W.3d 64 (2010)**

Evidence of innocence must be newly discovered or newly available.

***Ex Parte Navarajo*, 433
S.W.3d 558 (2014)**

**Complainant's recantation
alone insufficient to prove
actual innocence.**

NON-RECANTATION ACTUAL INNOCENCE CASE

- **Defendant actually innocent of duty to register as a sex offender. *Ex Parte Harbin*, 297 S.W.3d 283 (2009)**

SUPPRESSION OF EXCULPATORY EVIDENCE

Suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

**Brady v. Maryland
373 U.S. 83 (1963)**

THREE PART TEST TO OBTAIN RELIEF BASED ON SUPPRESSION OF EXCULPATORY EVIDENCE

- **The prosecution withheld or suppressed evidence.**
- **The evidence was favorable to the defense.**
- **The evidence was material to either guilt or punishment.**

MATERIALITY TEST

The materiality test is met and a new trial required if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. This reasonable probability is defined as “a probability sufficient to undermine confidence in the outcome.”

***United States v. Bagley,*
473 U.S. 667 (1985)**

Kyles v. Whitley, **514 U.S. 419 (1995)**

- **State failed to disclose conflicting statements by witnesses**
- **This evidence would have made a different result “reasonably probable”**
- **Non-disclosure is *Brady* violation**

Thomas v. State,
841 S.W.2d 399 (1992)

Duty to disclose favorable evidence attaches with or without a request for the evidence. When unsure of whether to disclose the evidence, the prosecutor should submit the evidence to the trial judge for his consideration.

Thomas v. State

Because *Brady* was aimed at ensuring that an accused receives a fair trial rather than punishing the prosecutor for failing to disclose favorable evidence, the prosecution's obligation to disclose is not measured by the moral culpability, or the willfulness, of the prosecutor. In *Brady* cases the good or bad faith of the State is irrelevant for due process purposes.

Ex Parte Richardson, **70 S.W.3d 865 (2002)**

Because we agree that the credibility of the State's only eyewitness, Anita Hanson, was crucial issue in applicant's trial, we conclude that the State had an affirmative constitutional duty under *Brady v. Maryland* to disclose material evidence that impeached her testimony.

Schultz v. Commission on Lawyer Discipline

- **Texas Disciplinary Rules of Professional Conduct 3.09(d) is broader than *Brady***
- **3.09(d) requires prosecutor to turn over any information that tends to negate the guilt or mitigate the offense**
- **There is no materiality requirement**

Jailhouse Informant Testimony

***Giglio v. U. S.*, 405 U.S. 150 (1972)**

Agreement between state and informant for consideration of leniency to informant is *Brady* material

***Napue v. Illinois*, 360 U.S. 264 (1959)**

Prosecutor's failure to correct false testimony from informant that he had no promise of consideration in return for his testimony violates due process

Jailhouse Informant Testimony

Duggan v. State, 778 S.W.2d 465
(1989)

No difference between express agreements and “those agreements which are merely implied, suggested, insinuated or inferred.”

Both are covered under *Brady* and must be revealed.

CHANGING SCIENTIFIC EVIDENCE

- *Ex parte Robbins*, 360 S.W.3d 446 (2011), *cert. denied* May 14, 2012)
- **QUESTION: HOW SHOULD COURTS RESPOND TO CHANGES IN SCIENCE UNDERLYING CONVICTIONS**

Robbins Majority Opinion (5-4 Vote)

- **Majority concluded that because Robbins “failed to prove that the new evidence unquestionably establishes his innocence,” he was not entitled to relief on his claim of actual innocence**

Robbins Majority

- **Despite all experts agreeing that Dr. Moore's findings and testimony were incorrect, majority refused relief because none of the experts affirmatively proved that "Tristen could not have been intentionally asphyxiated." Majority concluded Robbins did not "have a due process right to have a jury hear Moore's re-evaluation."**

Judge Cochran Dissenting

- Discussed her “extremely serious concern” about the increased “disconnect between the worlds of science and of law” that allows a conviction to remain in force when the scientific basis for that conviction has since been rejected by the scientific community.
- Judge Cochran said “[f]inality 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.”

JUDGE ALCALA DISSENTING

- **Judge Alcala dissented and said that Robbins “is entitled to relief on his application for a writ of habeas corpus on the ground that he was denied due process of law by the State’s use of false testimony to obtain his conviction.”**

Ex Parte Henderson,
246 S.W.3d 690 (2007)

- **Child dies of head injury. Henderson says she dropped child. Medical Examiner testified that it was impossible for child's brain injuries to have occurred in the way Henderson stated. Medical Examiner says child's injuries resulted from a blow intentionally struck by Henderson.**

Ex Parte Henderson

- **Henderson submits evidence that recent advances in biomechanics suggest that it is possible that Brandon's head injuries could have been caused by an accidental short-distance fall. Additionally, Medical Examiner submitted an affidavit which recanted his testimony.**
- **Court majority held that Medical Examiner's re-evaluation of his opinion is a material exculpatory fact and ordered the trial court to further develop the evidence.**

Ex Parte Henderson,
384 S.W.3d 833 (2012)

- **Court finds new scientific evidence shows that a short distance fall could have caused the head injury.**
- **Court finds new scientific evidence did not establish that Henderson was actually innocent but that it did establish a due process violation.**

New Statute Concerning Writs Based on New Scientific Evidence

- **Art. 11.073. Procedure Related to Certain Scientific Evidence.**
 - (a) **This article applies to relevant scientific evidence that:**
 - (1) **was not available to be offered by a convicted person at the convicted person's trial; or**
 - (2) **contradicts scientific evidence relied on by the state at trial:**
 - (b) **A court may grant relief if . . . :**
 - (A) **relevant scientific evidence is currently available and was not available at the time of the convicted person's trial because the evidence was not ascertainable through the exercise of reasonable diligence by the convicted person before the date of or during the convicted person's trial; and**

(B) the scientific evidence would be admissible under the Texas Rules of Evidence . . . ; and

(2) the court . . . finds that, had the scientific evidence been presented at trial, on the preponderance of the evidence the person would not have been convicted.

(c) For purposes of a subsequent writ, a claim or issue could not have been presented in a previously considered application if the claim or issue is based on relevant scientific evidence that was not ascertainable through the exercise of reasonable diligence by the convicted person on or before the date on which the original application or a previously considered application , as applicable, was filed.

Ex Parte Robbins (Robbins II)
___ S.W.3d ___ (2014)

- **Robbins case reconsidered under Art. 11.073 and relief granted.**

Robbins II Majority Opinion (5-4 Vote)

Majority held Medical Examiner's reconsideration of her opinion was new scientific evidence that contradicted scientific evidence relied upon by the state at trial.

Robbins – Dissenting Opinions

- **Believed 11.073 did not apply to Robbins but recognized that it applied to scientific evidence of false and discredited forensic testimony.**

Dissenting Opinions Examples Of Where 11.073 Applies:

- **Dog Scent lineups**
- **Misinterpreted Indicators of Arson**
- **Infant Trauma**

***Ex Parte Spencer*, 337 S.W.3d 869 (2011)**

- **“We will consider advances in science and technology when determining whether evidence is newly discovered or newly available, but only if the evidence being tested is the same as it was at the time of the offense. Thus, the science or the method of testing can be new, but the evidence must be able to be tested in the same state as it was at the time of the offense.”**

Expert Testimony on Reliability of Eyewitness Identification Procedures

Tillman v. State, 354 S.W.3d 425
(2011)

The court held that psychology is a legitimate field of study and the reliability of eyewitness identification is a legitimate subject within the area of psychology

Dog Scent Discrimination
Winfrey v. State,
323 S.W.3d 875 (2010)

“ . . . scent-discrimination lineups, when used alone or as primary evidence, are legally insufficient to support a conviction.”

“ . . . dangers inherent in the use of dog tracking evidence can only be alleviated by the presence of corroborating evidence.”

False Testimony on Testing Regarding Sexual Attraction to Children

*In the Matter of M.P.A.,
364 S.W.3d 277 (Tex. 2012)*

**65% accuracy rate not sufficient
reliability for admission in evidence.**

Polygraph Evidence

Leonard v. State, ___ S.W.3d ___, 2012 WL 715981
(2012), rehearing granted.

- Court held that the fact that the defendant failed polygraphs was admissible in probation revocation hearing.
- Dissent argued: “We should not permit or condone ‘trial by polygraph’ or ‘revocation by polygraph’”

Leonard v. State,
385 S.W.3d 570 (2012), on rehearing

- **Evidence of failed polygraphs found inadmissible.**
- **Polygraph exams were not reliable and were not the sort of inadmissible evidence “reasonably relied upon” by experts.**

FBI ADMITS FLAWS IN HAIR ANALYSIS OVER DECADES

“The Justice Department and FBI have acknowledged that nearly every examiner in an elite FBI forensic unit gave flawed testimony in almost all trials in which they offered evidence against criminal defendants over more than a two-decade period before 2000.”

**Washington Post
April 18, 2015**

INEFFECTIVE ASSISTANCE OF COUNSEL

- **Strickland v. Washington, 466 U.S. 668 (1984), test requires Applicant to show:**
 - 1. Counsel's performance was deficient. Requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment.**
 - 2. The deficient performance prejudiced the defendant.**

DUTY TO INVESTIGATE

- Counsel's strategic choices made after less than complete investigation are considered reasonable, on claim of ineffective assistance, precisely to extent that reasonable professional judgments support limitations on investigation. *Wiggins v. Smith*, 539 U.S. 510 (2003)

FAILURE TO INVESTIGATE

- Failure of trial counsel to investigate information that someone else committed the crime is ineffective. *Ex Parte Amezquita*, 223 S.W.3d 363 (2006)

FAILURE TO OBTAIN EXPERT ASSISTANCE

- **Retained counsel performed deficiently in limiting, for economic reasons, his investigation of medical evidence before advising client to plead guilty. *Ex Parte Briggs*, 187 S.W.3d 458 (2005)**

PRESENTATION OF PERJURED TESTIMONY

- Due process violated by state's unknowing presentation of perjured testimony in murder prosecution. *Ex Parte Chabot*, 300 S.W.3d 768 (2009).

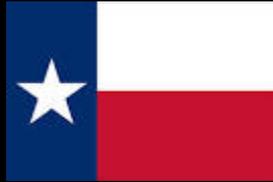
Ex Parte Ghahremani, **332 S.W.3d 470 (2011)**

- **Testimony of child victim's parents regarding victim's behavior after assault by defendant was false**
- **State knew the testimony was false**
- **State's knowing use of false testimony likely resulted in a harsher punishment**
- **Due process violated**



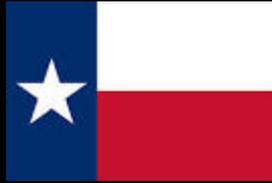
Texas Leads The Country Legislative Actions

- **Chapter 64 – DNA Testing**
- **Art. 39.14 – Michael Morton Act**
- **Art. 38.43 – Retention of Biological Evidence**
- **Art. 38.01 – Forensic Science Commission**
- **Art. 38.20 – Photographic and Live Lineup Procedures**
- **Art. 38.141 – Corroboration of Testimony of Undercover Informant**
- **Art. 11.073 – Writs Based on New Science**
- **Tim Cole Advisory Commission on Wrongful Convictions**
- **Compensation For Wrongfully Imprisoned**



Texas Leads the Country Judicial Actions

- **Texas Criminal Justice Integrity Unit**
- ***Tillman v. State* - expert testimony on eyewitness identification**
- ***Winfrey v. State* – dog sniff lineups**
- ***Ex parte Henderson* – child head injuries**
- ***Ex parte Elizondo* - actual innocence as ground for writ**



Texas Legislature – 2015

- **Taping Interrogations**
- **Innocence Commission**
- **Fix to DNA Statute**
- **Office of Forensic Writ Counsel**

Dallas Exoneration Hearing

