

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

Board President – Innocence Project of Texas

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

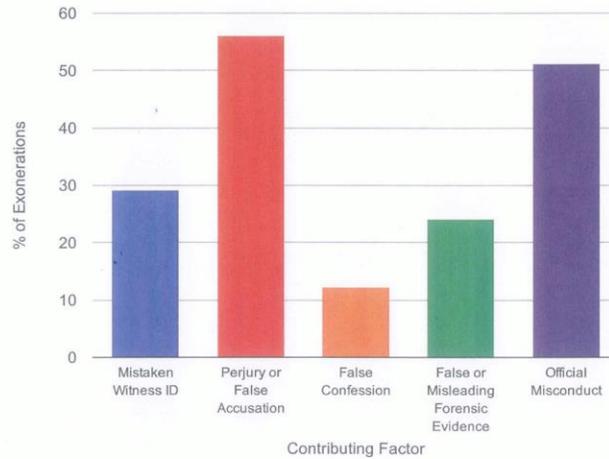


TIM COLE STATUE UNVEILING



% EXONERATIONS BY CONTRIBUTING FACTOR

National Registry of Exonerations
2/14/2017 Total = 1983

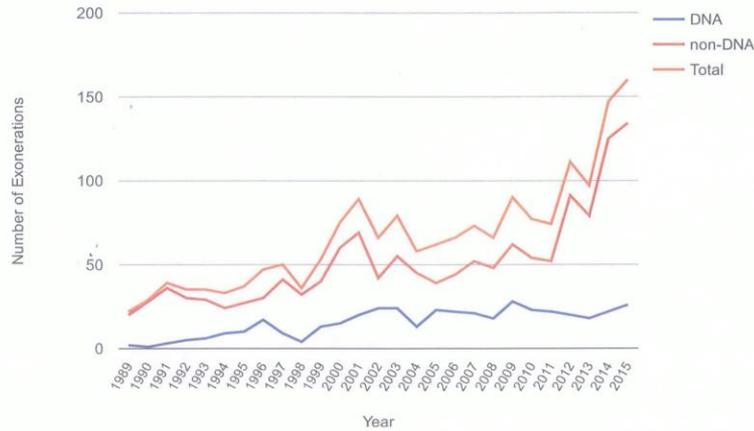


% EXONERATIONS BY CONTRIBUTING FACTOR AND TYPE OF CRIME

National Registry of Exonerations
2/14/2017 Total = 1983

EXONERATIONS BY YEAR: DNA AND NON-DNA

National Registry of Exonerations
2/14/2017 Total = 1983



Roll cursor over the graph to see totals for each year. *National Registry of Exonerations: public use permitted.*

Exonerations Graph By:

- | Year: DNA and Non-DNA | Year and Type of Crime |
- | Conviction Year and Type of Crime | Race and Type of Crime | Contributing Factor and Type of Crime |

TEXAS ACTUAL INNOCENCE STANDARD

Free Standing Actual Innocence Claim:

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

**Applicant must show, by clear and
convincing evidence, that newly
discovered or newly available
evidence of actual innocence
unquestionably established
innocence.**

NEWLY DISCOVERED OR AVAILABLE EVIDENCE

- Newly discovered evidence is evidence that was not known to the applicant at the time of trial and could not have been known to him even with the exercise of due diligence. *Brown, 205 S.W.3d 538*
- Newly available evidence is evidence that may have been known to the applicant but was not available for his use based on factors beyond his control. *Calderon, 309 S.W.3d 64*

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

Recantation affidavit that was presented in motion for new trial was not newly discovered or available when presented again in writ application.

NEWLY DISCOVERED OR NEWLY AVAILABLE EVIDENCE:

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

- **Child victim's recantation was newly available when it was unavailable to applicant at time of no contest plea**
- **Child's recantation was made prior to plea but was not available to applicant at the time of the plea.**

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**
- **New Scientific Evidence**
- **Recantations**
- **New Witnesses**
- **Other New Evidence**

RECANTATIONS

- **Ex Parte Thompson, 153 S.W.3d 416 (2005)**

Complainant, daughter of Applicant, provided affidavit and testimony stating that sexual abuse never occurred.

- **Trial court found recantation credible**
- **Expert witness testimony supported the recantation**

RECANTATIONS

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

Stepson recanted testimony that claimed *Elizondo* sexually abused him

Father of child manipulated him and his brother into making allegations

GUILTY PLEAS

Ex Parte Tuley, 109 S.W.3d 388 (2002)

- Recantation after guilty plea.
- Actual innocence claims are not barred by guilty plea.
- 2015 – 68 out of 157 nationwide were cases where defendant pled guilty.

EX PARTE NAVARIJO,
433 S.W.3d 558 (2014)

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

**Court considers entire record in
assessing actual innocence
based on recantation, even if
recantation itself is credible.**

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)
- Defendant not actually innocent of duty to register as a sex offender
Ex parte Wahlgren,
2017 WL 1496966
(*Tex. Crim. App. 2017*)

EX PARTE SONIA CACY, No. WR-85,420-10, (Nov. 2, 2016)

- **Cacy convicted of an arson murder based on false lab report that claimed there was gasoline on her uncle's clothing.**
- **Trial Court finds Cacy is actually innocent.**
- **Court of Criminal Appeals Agrees**

EX PARTE CACY

Judge Yeary concurs

- **Agrees Cacy met the *Elizondo* standard and that no reasonable jury would convict in light of the new evidence.**
- **Questions whether the use of the terminology “actual innocence” is appropriate because; “In many cases, it overstates the criteria under which we are amenable to granting post-conviction habeas corpus relief as a matter of due process.”**



SAN ANTONIO FOUR

- Kristie Mayhugh
- Elizabeth Ramirez
- Cassandra Rivera
- Anna Vasquez

Ex parte Mayhugh,
512 S.W.3d 285
(Tex. Crim. App. 2016)

- Found actually innocent by Court of Criminal Appeals on November 23, 2016

SAN ANTONIO FOUR

- **Two young girls testified that the four women sexually assaulted them**
- **One of the girls, now an adult, recants accusations**
- **Other girl does not recant**
- **Recantation supported by expert testimony**
- **State's medical evidence, that one of the girls had physical signs of abuse, is recanted by doctor based on new science**

SAN ANTONIO FOUR

“We conclude that now, with this clear and convincing evidence establishing innocence combined with the lack of reliable forensic opinion testimony corroborating the fantastical allegations in this case, no rational juror could find any of the four Applicants guilty of any of the charges beyond a reasonable doubt.”

**Court of Criminal Appeals,
November 23, 2016**

SAN ANTONIO FOUR

“It has been suggested that the term ‘actual innocence’ is inappropriate because applicants who are successful when raising a claim of actual innocence never truly prove that they did not commit the offense. But when the presumptions are reversed, the State does not have to prove that a defendant is definitively guilty.

**...
Those defendants have won the right to proclaim to the citizens of Texas that they did not commit a crime. That they are innocent. That they deserve to be exonerated. These women have carried that burden. They are innocent. And they are exonerated. This Court grants them the relief they seek.”**

Court of Criminal Appeals, November 23, 2016



UNCONSTITUTIONAL STATUTE

- Online solicitation of a minor statute declared unconstitutional in *Ex Parte Lo*, 424 S.W.3d 10 (2013)
- Writs granted under *Lo* are not “actual innocence” findings. *Ex Parte Fournier*, 473 S.W.3d 789 (2015)
- *Fournier* actually engaged in the conduct, so no new evidence of innocence.

EX PARTE MABLE,
443 S.W.3d 129 (2014)

- **The term “actual innocence” only applies in circumstances where the accused did not actually commit the charged offense or any possible lesser included offense.**
- **Subsequent lab testing on drug case showing no drugs does not prove actual innocence.**

SCHLUP ACTUAL INNOCENCE CLAIM

Schlup v. Delo, 513 U.S. 298 (1995)

- **Actual innocence itself does not provide basis for relief**
- **Actual innocence is used as a gateway to raise otherwise barred claims**
- **Lower burden on applicant: requires preponderance of the evidence instead of the clear and convincing evidence standard on freestanding actual innocence claim**

TEXAS CONDIFICATION OF *SCHLUP*

**Art. 11.07, Sec. 4(a)(2), C.C.P.
allows subsequent writ when, “by
a preponderance of the evidence,
but for a violation of the United
States Constitution, no rational
juror could have found the
applicant guilty beyond a
reasonable doubt.”**

***EX PARTE BILLY FREDERICK
ALLEN, 2009 WL 282739***

**Allowed subsequent writ raising
an otherwise procedurally barred
ineffective assistance of counsel
claim on basis that Allen proved
he was actually innocent under
Schlup and Art. 11.07, Sec.
4(a)(2)**

DEFINITION OF EXONERATION FROM THE NATIONAL REGISTRY OF EXONERATIONS

A person has been exonerated if he or she was convicted of a crime and later was either (1) declared to be factually innocent by a government official or agency with the authority to make that declaration; or (2) relieved of all the consequences of the criminal conviction by a government official or body with the authority to take that action.

NATIONAL REGISTRY OF EXONERATIONS

As of November 2, 2016

- **1,913 exonerations nationwide since 1989**
- **296 exonerations in Texas since 1989**
- **Texas has more exonerations than any other state**
- **Exoneration refers to more than just actual innocence finding**

WRONGFUL CONVICTION COMPENSATION (TIM COLE COMPENSATION ACT)

A person is entitled to compensation if:

- He served in whole or in part a sentence in prison, and**
- He has received a full pardon on the basis of innocence for the crime for which he was sentenced, or**
- He has been granted relief in accordance with a writ of habeas corpus that is based on a court finding or determination that the person is actually innocent of the crime for which the person was sentenced, or**

WRONGFUL CONVICTION COMPENSATION (TIM COLE COMPENSATION ACT)

- **He has been granted relief in a writ of habeas corpus and the state district court has issued an order dismissing the charge and the dismissal order is based on a motion to dismiss in which the state's attorney states that no credible evidence exists which inculpatates the defendant, and the state's attorney states that he believes the defendant is innocent.**

**Tex. Civ. Prac. & Rem. Code
§103.001 to 103.154**

WRONGFUL CONVICTION COMPENSATION (TIM COLE COMPENSATION ACT)

The amount of compensation paid to a wrongfully convicted person under this statute is \$80,000.00 per year multiplied by the number of years the person served in prison in a lump sum and the same amount in an annuity for the rest of his life. Tex. Civ. Prac. & Rem. Code §103.052 and 103.053

PARDONS FOR INNOCENCE

The board will recommend the governor grant a pardon on the basis of innocence upon the receipt of:

- (1) a written recommendation of at least two of the current trial officials of the sentencing court, with one trial official submitting documentary evidence of actual innocence; or**
- (2) a certified order or judgment of a court having jurisdiction accompanied by a certified copy of the findings of fact and conclusions of law where the court recommends that the Court of Criminal Appeals grant state habeas relief on the grounds of actual innocence.**

Tex. Admin. Code 37 §143.2

COMMON CAUSES OF WRONGFUL CONVICTIONS

- **Inaccurate Eyewitness Identification**
- **False Informant Testimony**
- **False Confessions**
- **Invalid Scientific Evidence**
- **Ineffective Assistance of Counsel**
- **False Testimony From State Witnesses**

Expert Testimony on Reliability of Eyewitness Identification Procedures

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

The court held that expert testimony on the reliability of eyewitness identification is admissible.

TILLMAN V. STATE

“Nationwide, 190 of the first 250 DNA exonerations involved eyewitnesses who were wrong. BRANDON L. GARRETT, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* 8-9, 279 (2011). In Texas, reports indicate 80 percent of the first 40 DNA exonerations involved an eyewitness identification error. Innocence Project of Texas, *Texas Exonerations-At a Glance* (2011), <http://ipoftexas.org/index.php?action=at-a-glance>.”

Court of Criminal Appeals’ Opinion

DNA EXONERATIONS

EX PARTE PATRICK WALLER, 2008 WL 4356811 (2008)

- Two men and two women kidnapped and taken to abandoned house where the women are sexually assaulted and men pistol whipped.
- Three of the four victims identified Waller as assailant.
- Fourth victim unable to make identification.
- Waller cleared by DNA.
- True assailant identified by DNA and confessed.

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)**

THE DALLAS COUNTY EXPERIENCE

Opening files of old convictions revealed many cases with withheld exculpatory evidence:

- State failed to disclose two police reports that identified two other possible suspects.

Ex Parte Miles,
359 S.W.3d 647 (Tex. Crim. App. 2012)

- State withheld photograph and police report which support defendant's defense of misidentification.

Ex Parte Wyatt,
2012 WL 1647004 (Tex. Crim. App. 2012)

THE DALLAS COUNTY EXPERIENCE

- **Stanley Mozee and Dennis Allen (pending)**
- **Mozee and Allen convicted largely on the basis of jailhouse informants.**
- **Informants testify at trial that they had no deal with state, had not asked for a deal and did not expect a deal.**
- **Letters to prosecutor found in District Attorney's file from informants, written prior to trial, asking when the prosecutor was going to follow through with the deals he had promised them.**

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 received 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.

WEARRY V. CAIN,
136 S.Ct. 1002 (2016)

State failed to disclose that, contrary to the prosecution's assertions at trial, Brown had twice sought a deal to reduce his existing sentence in exchange for testifying against Wearry. The police had told Brown that they would "talk to the D.A. if he told the truth."

FALSE CONFESSIONS

- **False confessions are one of the leading causes of wrongful convictions analyzed in a recent report released by the National Registry of Exonerations**
- **The Registry reports that the primary reason for false confessions is coercion – occurring in at least 60% of the false confession cases analyzed.**
- **According to the Registry, 75% of documented false confessions occurred in homicide cases.**

FALSE CONFESSIONS

**Why do innocent people confess?
Some reasons include:**

- **Duress**
- **Coercion**
- **Diminished Mental Capacity**
- **Mental Impairment**
- **Ignorance of the Law**
- **Fear of Violence**
- **Actual Infliction of Harm**
- **Threat of Harsh Punishment**
- **Promise of Benefit**

FALSE CONFESSIONS

- **Christopher Ochoa, Travis County**
- **Sexual Assault and Murder in Austin**
- **After lengthy interrogation, Ochoa confessed**
- **Another man later confessed**
- **DNA matched the other man**

FALSE CONFESSIONS

- **Stephen Brodie, Dallas County**
- **Five year old girl abducted from her home and molested**
- **Brodie, who was deaf, was interrogated, without a sign language interpreter, for 18 hours over 8 days and confessed**
- **Fingerprint found on the window screen matched a convicted child rapist who was suspected in similar assaults**
- **Dallas County Conviction Integrity Unit agreed Brodie was innocent and conviction vacated**

CHANGING SCIENTIFIC EVIDENCE

**QUESTION: HOW SHOULD
COURTS RESPOND TO
CHANGES IN SCIENCE
UNDERLYING CONVICTIONS**

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.

(d) In making a finding as to whether relevant scientific evidence was not ascertainable through the exercise of reasonable diligence on or before a specific date, the court shall consider whether the field of scientific knowledge, a testifying expert's scientific knowledge, or a scientific method on which the relevant scientific evidence is based has changed since . . .

CHANGING SCIENTIFIC EVIDENCE

- *Ex parte Robbins*, 360 S.W.3d 446 (2011)

Court concluded that Robbins “failed to prove that the new evidence unquestionably establishes his innocence.” Actual innocence claim rejected

ROBBINS I 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."**

EX PARTE ROBBINS (ROBBINS II)
478 S.W.3d 678 (2014)
rehearing denied 2016

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

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

EX PARTE HENDERSON,
384 S.W.3d 833 (2012)

- **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 child's head injuries could have been caused by an accidental short-distance fall. Additionally, Medical Examiner submitted an affidavit which recanted his testimony.**

EX PARTE HENDERSON

- **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.**

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.”**

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.**

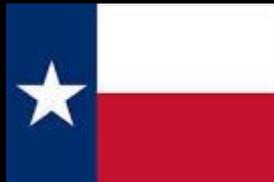
INEFFECTIVE ASSISTANCE OF COUNSEL

- ***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.**

PRESENTATION OF PERJURED TESTIMONY

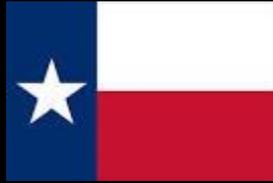
- **Due process violated by state's unknowing presentation of perjured testimony in murder prosecution.**

***Ex Parte Chabot*, 300 S.W.3d 768
(Tex. Crim. App. 2009)**



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**
- **Tim Cole Exoneration Commission**



Texas Leads the Country Judicial Actions

- **Compensation For Wrongfully Imprisoned**
- **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**

Dallas Exoneration Hearing

